5E

Fair Pay Agreements: supporting workers and firms to share the benefits of economic growth

We are starting to put together a draft report to reflect the Panel's discussions. We will update the report's sections as discussions take place, and we can discuss these draft sections at the Panel meetings.

Questions:

- What do you think of the style?
- Would you like the report to be written in a "we recommend" voice, or in the third person, as "the Panel recommends"?

Recommendations from the Fair Pay Agreements Working Group

2018

Contents

Question:

- Are there any other sections or important content you think should be covered?

Conclusion, variation and renewal

Support for bargaining parties

Description of our proposed model

Recommendations

Conclusions and next steps

We have put together a draft problem definition and set of objectives to reflect what you have discussed so far.

Questions:

- Do you agree with the problem definition and objectives?
- Do you agree with the final section, about what we aren't trying to do?
- Is there anything else we should add to reflect the discussions of the group?

Summary

Background

The approach of the FPA Working Group

Problem definition

1. Well-functioning labour markets support sustainable business growth and job creation and, in turn, a more competitive and productive economy.
2. There are significant problems with certain sectors and occupations in New Zealand's labour market. There are occupations and sectors with entrenched low wages and low wage growth, where there are persistent indicators of poor long-term outcomes for firms and workers and our wider economy:
   a) **low pay** – low absolute wages and long-term low wage growth, against higher real price increases in the cost of living
   b) **low skilled work** – with no pathway to a higher skilled future
   c) **low productivity** – low rates of employer investment in new technology, management capability, or skills and training
   d) **precarious work** – high proportions of the workforce are in temporary, part-time, or contractor relationships with firms and high rates of churn
   e) **worker exploitation** – work is being organised and defined outside of regulated standards, accompanied by poor regulatory compliance across employment, immigration and health and safety regulation.
3. No-one is winning in these unproductive sectors and occupations. These are low profit or low productivity firms, mainly competing on the cost of labour, and demonstrating an unproductive use of capital across a sector. There is a lack of choice or pathways out for workers, as distinct from sectors providing secondary or temporary incomes supporting entry into the workforce.
4. Instead of employers and workers coming together to solve these problems, there is a race to the bottom. A race to the bottom happens where some "good" employers are undercut by others who reduce costs through low wages and conditions of employment.

We have a regulatory system to promote effective relationships between employees and employers

5. New Zealand's Employment Relations and Employment Standards (ERES) regulatory system is designed to promote employment relationships that are productive, flexible and benefit both employers and employees. It sets the parameters for the operation of a market for labour hire and reward. The operation of this market is not simply an

exchange of goods and services; it is based on human relationships where mutual trust, confidence and fair dealing are important. There is an emphasis on these relationships being conducted in good faith, and on effective dispute resolution.

6. Collective bargaining system is an important mechanism in the ERES system to bring employers and employees together to agree joint approaches to setting workplace terms and conditions, which can help tackle these problems.

However, our system is failing to deliver better outcomes for these sectors and occupations

3. While our ERES system works for most of the economy, it is not delivering better outcomes in particular sectors and occupations . This may be because of imbalances of power, pervasive business models which define work outside of regulated standards, poor coordination among workers or firms, low management capability among small businesses, and in some sectors, a dominant or principal employer.

4. In the wider economy incentives are also acting on employers and workers to hold back investment in change: Government welfare transfers are subsidising artificially low wages and unsustainable business models, and access to migrant labour is exacerbating this.

New Zealand needs a new collective bargaining tool to effect change in these areas

5. It is common practice in other countries to include a sector or occupational tier of bargaining, enabling firms and workers to negotiate together on wages and conditions. This tool is missing from New Zealand's collective bargaining system.

Objectives

A Fair Pay Agreement system offers an employer and worker-led pathway to move away from a race to the bottom and create a level playing field

6. A new tool in the collective bargaining toolkit may help catalyse real change in these problem occupations and sectors to deliver better outcomes for all New Zealanders – employers, workers, and the wider economy. This will not be Government-imposed, and as such it requires buy in from the whole sector or occupation to the need for change, and to develop the solution together.

7. A Fair Pay Agreement system can achieve this by providing a mechanism for firms and workers to come together and agree to change the working conditions and wages in their sector or occupation, and to drive productivity growth, providing a win-win solution for both sides. It will:

   a) Enable all the firms and workers in a sector or occupation to come forward and commit to making changes at scale that will both grow the productivity of their sector and more equitably share these returns

   b) Require all parties to come to the table, removing the fear of a few firms or workers undercutting these deals, and holding back those who are more forward looking from investing together for the future

   c) Allow flexibility for parties to set wages and conditions at sector/occupation and firm level, so they can strike the right balance for each sector on the terms that

will enable innovation and dynamism in the sector while minimising barriers to entry for new entrants.

d) [any other key design points to add here]

This is not a one-size-fits-all solution

8. A sector or occupation-wide agreement could be an attractive solution for other areas of our economy, that don't experience these extreme problems.

9. However, a FPA system can only be effective if it is designed to specifically target these entrenched poor outcomes, and conditions which mean other levers in our regulatory system are not working:

   a) Entrenched low wages and low wage growth – competition is on the basis of labour cost, not innovation or investment

   b) Low levels of organisation among workers and firms – with low levels of management capability and power imbalances

   c) Work being defined outside of regulated standards as the norm – meaning better enforcement cannot be the only answer

   d) [any other key criteria to add here]

10. Existing collective bargaining or voluntary approaches can already provide effective means to support other sectors or occupations to come together to grow their productivity and better share the gains of economic growth – if they mutually see the benefit of acting through multi-employer or multi-union collective agreements.

7D

Fair Pay Agreements: supporting workers and firms to share the benefits of economic growth

Recommendations from the Fair Pay Agreements Working Group

2018

Contents

[Contents page to be inserted once headings are settled]

Body of report

Question:

- Are there any other sections or important content you think should be covered?

1 Introduction

2 Background

2.1 Terms of Reference

3 The approach of the FPA Working Group

- The FPA Working Group met fortnightly from July 2018 to November 2018. There were 10 meetings in total.
- The FPA Working Group was supported by MBIE as Secretariat. MBIE presented information and data on a range of topics.
- The Group also heard from speakers who provided their expertise. Some of the speakers were on the Working Group, and some were external. These speakers were:
    - Paul Conway, Productivity Commission – "Productivity and wages"
    - John Ryall, E tū – "E tū experience of MECAs"
    - Richard Wagstaff, Council of Trade Unions, and Kirk Hope, Business New Zealand – "Collective bargaining in New Zealand"
    - Stephen Blumenfeld, Centre for Labour, Employment and Work – "Trends in collective bargaining"
    - [to continue to add]

4 Context

4.1 What employment relations models and collective bargaining look like internationally

- Explanation of the different models for employment relations systems and collective bargaining e.g. using the OECD material

4.2 New Zealand's employment relations and employment standards (ERES) regulatory system

- [Description of the wider ERES model, including current arrangements for collective bargaining and statutory minimum standards]
- The purpose of the system, the reasons why we have collective bargaining

4.3 The current state of collective bargaining in New Zealand and trends over time

- Current state of collective bargaining in New Zealand:
    - Private sector – 1600 collective agreements covering 10% of workforce
    - Public sector – 460 collective agreements covering 60% of workforce
- Coverage: Collective bargaining coverage has decreased proportionately – not keeping up with growth in the number of jobs in the economy [insert graph).
- Bargaining structure:

    - There are currently 72 MECAs – the same number as five years ago.
    - MECAs are generally in health and education (excluding tertiary education).
    - MECA bargaining may be frustrated by competitive instincts between firms.
- Term of agreement: over time, collective agreements have become longer in duration. One reason may be the transactions costs for both sides for collective bargaining.
- Productivity/performance payments: salary reviews have become more prevalent, mainly in the public sector. The increase in productivity/performance payments is associated with a movement to a range of rates (because employers have discretion to place employees within the range). However output can be hard to measure, especially on an individual basis.
- Training and skill development provisions: in general, specific mention of training and skill development in private sector collective agreements has decreased over time. These provisions don't tend to link pay to skills development.
- [Add 1-2 'boxes' with brief case studies in to support this section.]

4.4 Collective bargaining experiences

- [Description of what makes for successful collective bargaining conditions, based on Kirk and Richard's presentation].
- [Description of levels of coordination in industry and worker groups in New Zealand]

4.5 Other countries' approaches to collective bargaining

- [Use case studies to explain the main types of sector bargaining]
- Australia: Modern Awards system but state-imposed, not collectively bargained
- Scandinavian countries and Netherlands: national or sectoral agreements define the broad framework but leave large scope for bargaining at the firm level.
- Continental Europe: national or sectoral agreements set terms but allow for improvements on these at firm level ('the favourability principle'), or deviations from
- Discussion of how the New Zealand trends compare to global / OECD country trends for the same.

5 Problem definition

5.1 What is the race to the bottom

- [To be added from Cabinet paper, Terms of Reference, and panel discussions]
- [Add 1-2 case studies in boxes to support this section]

5.2 Summary of problem definition

- [To be added]

6 Objectives

6.1 Objectives for a FPA system

- To be added from Cabinet paper, Terms of Reference and panel discussions
- [You may wish to include a range of potential objectives.]

6.2 Where sectoral collective bargaining would fit into the ERES system

- [Insert stylised diagram from Meeting 5 showing levels of bargaining]

6.3 What a sectoral collective bargaining system looks like

- Key design parameters: degree of coverage, level of bargaining, degree of flexibility, coordination.

- The role of extensions
- The main trade-off is between inclusiveness and flexibility
- OECD concludes that organised decentralisation is the most promising system balancing those two factors, ie, where coordination across sectors is strong, and sector-level agreements play a role but they leave room for details in lower-level agreements or allow for deviations.

6.4 Key success factors

- Both workers and employers will need to see benefits of bargaining for an FPA.
- Trust between parties will be key.
- Inclusion and participation, particularly among small employers.
- A collaborative and efficient bargaining process.

7 Building blocks for a fair pay agreement collective bargaining system

7.1 Trigger

-

7.2 Initiation

-

7.3 Bargaining parties

-

7.4 Scope

- An FPA should cover hours of work, leave, overtime, pay, redundancy, flexible work arrangements, skills and training.
- An FPA may cover other matters if parties choose.

7.5 Coverage

-

7.6 Bargaining process rules

-

7.7 Dispute resolution

-

7.8 Enforcement

-

7.9 Conclusion, variation and renewal

-

7.10 Support for bargaining parties

-

8 Description of our proposed model

9 Recommendations

10 Conclusions and next steps

10C

Fair Pay Agreements:
Supporting workers and firms to drive economic growth and share its benefits

Version 0.5

9 November 2018

How to read this version of the report

- Changes to the previous versions are made in track changes.
- Comment boxes in the right hand border are used to explain our reasoning behind something, or to record why the text was changed/included.

Recommendations from the Fair Pay Agreements Working Group 2018

1. Introduction: Lifting incomes and economic growth in New Zealand for the 21st century

The Government asked the Group to design a new tool to add to the collective bargaining system in New Zealand which will help transition the current employment relations framework to one which can support the transition to a 21st century economy: a highly skilled and innovative economy that provides well-paid, decent jobs, and delivers broad-based gains from economic growth and productivity.

As a starting point, the Government asked us to make recommendations on a new tool which can support a level playing field across a sector or occupation, where good employers are not disadvantaged by offering reasonable, industry-standard wages and conditions.

Our first step was to take a holistic view of our labour market: looking backwards at how our current labour market is operating, and looking ahead to the global megatrends that will shape our labour market over the coming decades.

The Group concluded that a mature 21st century labour market in New Zealand may require stronger dialogue between employers and workers – not just at the enterprise level, but at sector and occupational level. We also recognised the challenges faced by each sector are varied as we transition to the future – with different scales of opportunity to improve productivity, sustainability, or inclusiveness.

There are a wide range of measures the Government has underway or which could be considered to tackle the challenge of just transition in our economy and promoting increased sector level dialogue among employers and workers. Changing our employment relations model and introducing a new way of doing collective bargaining in New Zealand is just one part of this story, alongside interventions to improve coordination and incentives within other regulatory systems, such as taxation and welfare. These issues are highly related, but the subject of ongoing discussion and advice from other Working Groups.

We agreed that a collective bargaining dialogue at sector or occupational level is most likely to gain real traction when it is focussed on problems which are broadly based in the sector, presents real opportunities for both employers and workers to gain from the process, where parties are well represented, and where these are connected to the fundamentals of the employment contract: the exchange of labour and incentives to invest in workplace productivity enhancing measures such as skills and technology.

Bringing this sector dialogue into a regulated mechanism like collective bargaining also provides the critical incentive of an enforceable contract binding the parties. It provides the opportunity for employers to invest and engage without the fear of being undercut by those employers engaged in the race to the bottom. Collective bargaining at scale may enable employers to lift the conditions of New Zealand workers, knowing they will see the benefit directly through improved worker engagement, productivity and better workplaces.

2 The approach of the FPA Working Group

The FPA Working Group has held a series of eleven fortnightly meetings from July 2018 to November 2018. The Group has discussed the employment relations and standards system and

approach to collective bargaining in New Zealand over recent decades, international models, the relationship between wages and productivity, and the design of a new collective bargaining approach on a sectoral basis.

The Group was supported by MBIE as Secretariat, who also provided information and data on a range of topics.

The Group also heard from speakers who provided their expertise from within the Working Group, and some external experts on particular issues:

- Paul Conway, Productivity Commission on productivity in New Zealand
- John Ryall, E tū, on the E tū experience of negotiating multi-employer collective agreements
- Richard Wagstaff, Council of Trade Unions, and Kirk Hope, Business New Zealand, on their experience of what does and does not work under the current model for collective bargaining in New Zealand
- Stephen Blumenfeld, Centre for Labour, Employment and Work at Wellington University on data trends in collective bargaining and collective agreements
- Doug Martin, Martin Jenkins, on a Fair Pay Agreements system
- Vicki Lee, Hospitality NZ, on the small business perspective on the employment relations and standards regulatory system

3 Context

3.1 Productivity, wage growth and incomes in New Zealand

We have looked at the relationship between productivity growth and wage growth in recent decades in New Zealand, and their relationship with overall incomes and inequality.

New Zealand's productivity growth over recent decades has been relatively poor. Since 1970, our GDP per hour worked relative to the high-income OECD average has declined significantly from about equal to about 30 per cent under the average.

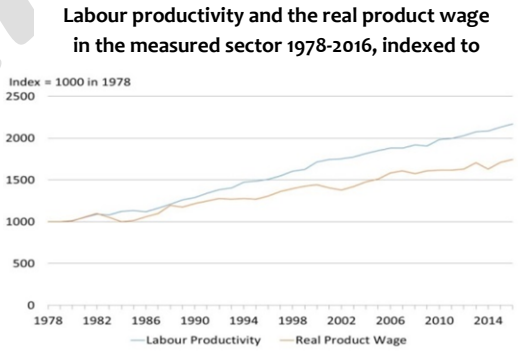


Fig 1. Source: Data from Fraser (2018)

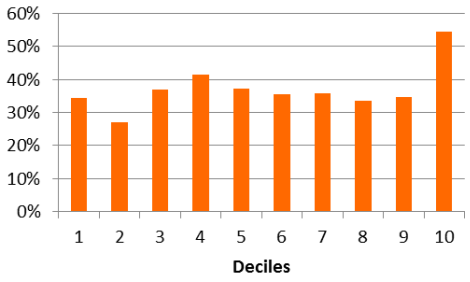
In other words, New Zealanders work for longer hours and produce less per hour worked than those in most OECD countries.

Wages in New Zealand have risen more slowly for employees in deciles 2 to 6 (ie 50% of employees) than those in higher deciles between 1998 and 2015. The exception is decile 1 which is heavily influenced by the minimum wage. Generally, the higher the wage, the faster it increased during this period. This has "hollowed out" the wage scale and increased income inequality among the

majority of employees.

The income support system helps to even out income increases across households (and many low income earners are in high income households – for example, teenagers).

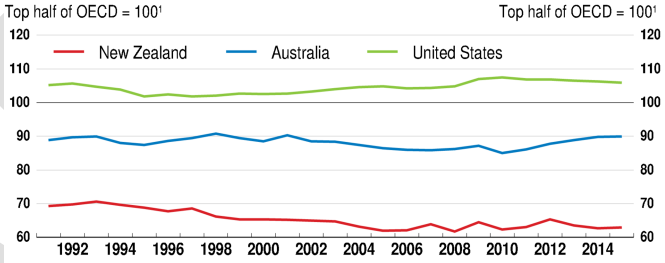
Real increase in mean household disposable (after tax) income 1998-2015



Our recent economic growth has been driven primarily by increased labour force participation rather than labour productivity growth. Our productivity performance is considerably lower than the OECD average, and that of the small advanced economies we compare ourselves with.

We also know that New Zealand has a slightly higher degree of income inequality than the OECD average. While most OECD countries are experiencing increases in income inequality, New Zealand saw one of the largest increases in income equality during the 1980s and 1990s, exceeded only by Sweden.

Hourly labour productivity

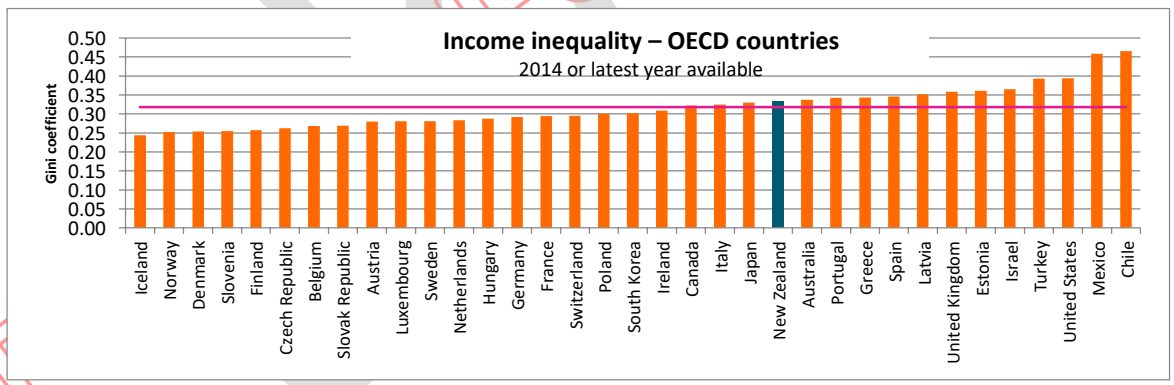


Another measure used globally to describe the level of equality in labour markets is the relative share of national income which is received by labour versus capital.

Despite wages rising in absolute terms, workers' share of the national income in New Zealand has fallen since the 1970s, with a particularly large fall in the 1980s. This reflects wages growing slower than returns to capital, rather than wages falling.

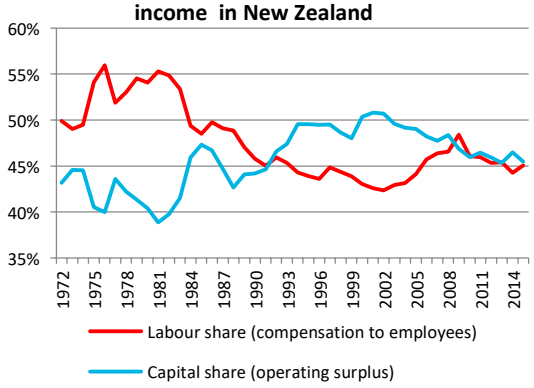
Income inequality – OECD countries

2014 or latest year available



There was some recovery in the 2000s, though the labour income share in New Zealand has fallen again since 2009 and is still well below levels that were seen in the 1970s.

Labour and capital share of national income in New Zealand



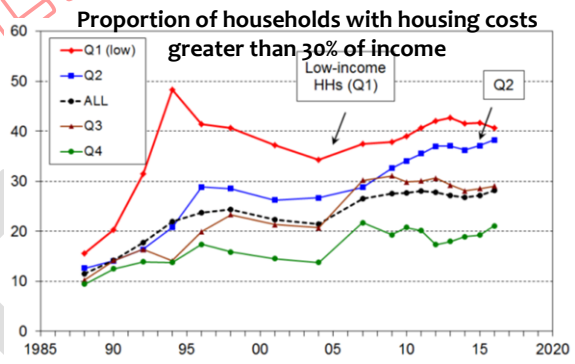
The same trend of a falling share of income going to workers has also been observed in many other countries worldwide, in both developed and emerging economies. The reasons for their divergence are not entirely

clear and are a matter of ongoing and wide debate.

It is important to note that these figures refer to *relative* shares of total income, not absolute incomes rising or falling. Even if the labour income share falls, wages may be rising and workers may be doing well. For example, wage increases for workers could conceivably be higher if the overall income of New Zealand grew, even if the labour income share itself fell.

However, we have observed that since 2004, the change in New Zealand's labour–capital income share has been flatter than in other countries who have continue to see a fall in labour's share.

We have also looked at increases in the cost of living (or inflation) relative to wage growth. In plain terms, this examines whether wages are keeping up with, or exceeding, the increasing cost of living and translating into higher living standards and well-being.

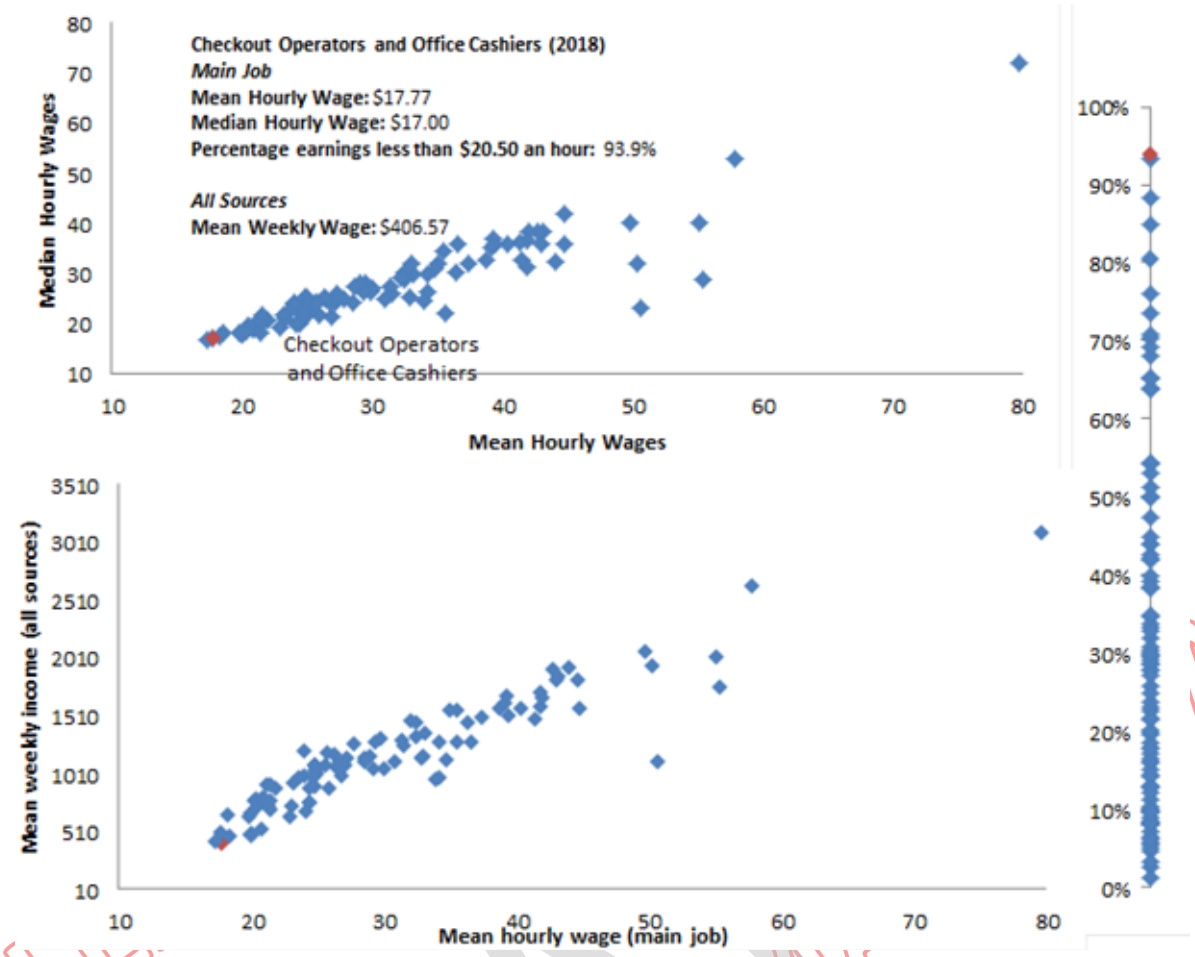


Wages have been rising in recent years, and for most of the last decade, wage increases have exceed inflation, but both have been increasing modestly.

We also know that incomes after housing costs are more unequal than before housing costs are considered, and that this gap has widened since the 1980s. In households with the lowest incomes, around one in four are spending more than half their income on housing.

3.2 Low income earners

The below graphs show the distribution of wages in New Zealand by occupation at the 3-digit ANZSIC code level. The upper graph shows that some occupations have mean and median hourly wages under $20.50 per hour. In most cases those occupations are represented at the top of the spectrum on the right hand side, which describes the proportion of workers in that occupation earning below $20.50. The lower graph shows the mean weekly income from all sources. This indicates that most workers earning under $20.50 per hour also earn under $1000 per week from all sources.



We examined the demographics of those working on or near the minimum wage. The below table shows different demographic groups which are overrepresented in the low income category, defined as those earning between $15.00 and $20.50 per hour.

People earning between $15.75 and $16.50 per hour as of November 2017		
Demographic	**% of minimum wage earners**	**% of total wage earners**
Aged 16 – 24	48.4%	17.1%
Women	60.6%	49.2%
European/Pākehā	50.5%	64.4%
Māori	17.1%	13.0%
Pasifika	9.7%	6.1%
Working part-time	51.4%	18.7%
Working while studying	19.9%	12.0%
Total number of people	164,100	1,965,312

Skills and productivity

The Group noted the mismatch in New Zealand of skills to job requirements, with some skills being underutilised. [Secretariat is investigating what more we can add to this, eg evidence to cite]

[Placeholder: describe current and planned Government interventions to support industry in-work training here]

3.3 The role of collective bargaining in lifting incomes and economic growth

At the outset we note that a country's employment relations system and choice of collective bargaining model are only one factor affecting its economic performance.

In general international research has tended to find a strong link between productivity and both wage growth and wage levels. However, while productivity growth appears to be necessary for wage growth, it is not in itself sufficient.

The OECD has warned against assuming that the form of collective bargaining systems matches perfectly to economic and social outcomes. Outcomes depend on other important factors such as the wider social and economic model, including tax and welfare systems, and the quality and sophistication of social dialogue.

Making changes to a collective bargaining system without considering this wider context could be damaging.

The relationship between collective bargaining and wage growth

One of the objectives of collective bargaining is typically to balance out the bargaining power of each party. Collective bargaining has been associated with lower levels of inequality, for example through limiting wage increases for mid- and high-earners to allow for low-earners' incomes to rise.[1] Across the OECD, workers tend to be paid more when they are covered by an enterprise-level collective agreement. Sector-level bargaining is not associated with relatively higher pay on average.

This finding by the OECD is not surprising, as typically most regulatory frameworks at national level rule out the possibility of enterprise-level negotiations offering worse terms than a sector-level collective agreement or national statutory minimum standards. This 'favourability principle' means an individual or enterprise-level collective agreement can only *raise* wages relative to sector-level agreements or minimum standards.

The difference in wages found by the OECD may also signal higher productivity in companies with enterprise-level bargaining than those in a context with a high degree of coverage of centralised bargaining. Where a firm is not constrained by centralised bargaining, the firm's overall performance forms the context for pay increases, and a highly productive firm could choose to

[1] OECD, Employment Outlook 2018, p 83

pay its workers more, or to pay its highly-productive workers more. We concluded, therefore that there could be a tension between reducing wage inequality and strengthening the productivity-wage link.

The relationship between collective bargaining and productivity

Research globally on collective bargaining and productivity growth similarly suggests that the relationship between these factors is not clear cut, and is highly dependent on wider labour market systems, and the social and economic model of individual countries.

The Group looked to other countries' experience in introducing productivity related measures to their collective bargaining systems, in particular recent changes in Singapore to introduce a Progressive Wage Model. We observe that a positive collective bargaining experience would have the potential to increase aggregate productivity by setting higher wage floors and better conditions; forcing unproductive firms to exit the market; and lifting overall productivity of the sector.

At the same time, collective bargaining may result in a more compressed wage structure between firms, which in turn could have adverse consequences in reducing incentives for workers to shift to more productive firms, and in the long term impact on firm productivity and the efficient reallocation of human capital in an economy.

The evidence in the research literature suggests that wages tend to be less aligned with labour productivity in countries where collective bargaining institutions have a more important role. This research tends to be based on sector-level data and examination of the relationship between wages and productivity across sectors.

We do note that raising wage floors may make capital investments relatively more attractive for firms; that is, some jobs may be replaced by automation.

3.4 The role of collective bargaining in an inclusive and flexible labour market

The Group looked at the role of collective bargaining more generally in labour markets internationally. Collective bargaining remains the predominant model for labour negotiations world-wide. It enables employers and employees to enter into a collective dialogue to negotiate the terms for their employment relationship in the form of a collective agreement.

The International Labour Organisation names collective bargaining as a fundamental right endorsed by all Member States in the ILO Constitution[2] and reaffirmed this in 1998 in the ILO Declaration on Fundamental Principles and Rights at Work. The ILO recognises the role of collective bargaining in improving inclusivity, equalising wage distribution, and stabilising labour relations.[3]

New Zealand is bound by ILO Convention No 98 (Right to Organise and Collective Bargaining) to "encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a

[2] New Zealand was a founding member of the ILO, has signed the 1998 Declaration, and is bound by the primary ILO Convention on collective bargaining No 98 (Right to Organise and Collective Bargaining 1949).
[3] ILO 'Collective Bargaining: A Policy Guide', Foreword

view to the regulation of terms and conditions of employment by means of collective agreements."

As a group we recognised that there can be value in the process of collective bargaining as a participatory mechanism to provide collective voice for both employers and employees. It can encourage participation and engagement by employers and employees in actively setting the terms of their relationship. In contrast to minimum standards set in legislation at the national level, which apply across the entire workforce uniformly and are imposed by a third party (the Government), collective bargaining may enable the parties who know their particular circumstances best to set the terms that work for them.

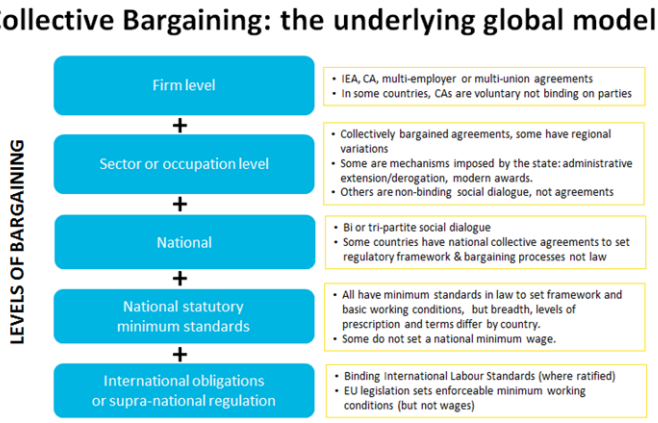
We noted that a shared dialogue between employees and employers across a sector or occupation lead to wider benefits and other forms of collaboration between firms or workers. This is possible when bargaining involves groups of employers or unions with a common interest or shared problem to solve, although we recognise this will not always be the case.[4]

Parties may also save in transaction costs by working together on collective bargaining. They can access the expertise of other players in their sector and other scale benefits (for example, arranging for investment in skills or technology for the benefit of the sector).

In countries where trade union density is low, collective bargaining tends to be concentrated in larger employers, whether public or private sector. Small businesses can therefore find it difficult to access the potential benefits of collective bargaining in an enterprise-level collective bargaining system, although that may also help them avoid unnecessary costs .

3.5 The relationship between minimum standards and collective bargaining

Despite having a century-old international labour standards framework, which provides common principles and rules binding states at a high level, the nature and extent of state encouragement for collective bargaining differs significantly between countries. We found the below diagram useful to describe the basic model of how employment relations systems are structured globally.



The sharpest delineation between different state models for collective bargaining systems is whether a country has chosen to rely on collective bargaining to provide basic floors for their employment standards (such as a minimum wage, annual leave, redundancy), or whether they

[4] In New Zealand, this is known as Multi-Enterprise Collective Agreement (MECA) and Multi-Union Collective Agreement (MUCA) bargaining under the Employment Relations Act.

rely on statutory minimum employment standards set at a national level which are then supplemented by more favourable terms offered through collective bargaining at a sector or enterprise level.

This choice of whether to set a country's minimum employment standards primarily through legislation or collective agreement, along with a country's legal and social traditions, result in the markedly different detailed design of countries' collective bargaining systems. This manifests in the variations in the levels at which collective bargaining takes place and in the mechanisms for determining representativeness, dispute resolution and enforcement. There is no one size fits all model that can be picked up and deployed in another country without significant adaptation for local circumstances.

In New Zealand we have an employment relations and standards system which is based on setting minimum standards in statute, and we also provide a legal framework that sets the rules for collective bargaining at enterprise level. Through a series of primary legislation, the Government sets the minimum standards for workers include a statutory minimum wage, and rights to flexible working, leave, etc. Under our system, collective bargaining can only take place at the enterprise level and these agreements reached may equal or add to this statutory floor, not detract from it.

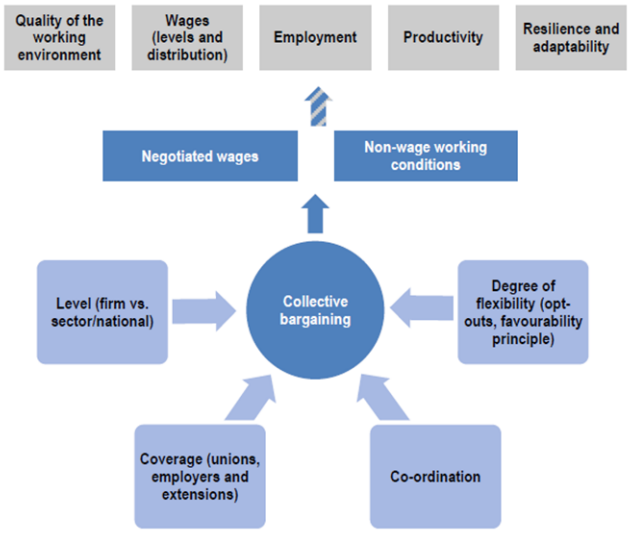
In comparison, many other countries rely more heavily on collective bargaining to set these minima. Variations in their employment relations and standards systems may mean a country:

- Has no statutory minimum wage, and often only a basic framework for minimum conditions, set in law. These countries use collective bargaining to provide the same minimum floors which we presently regulate for at national level.
- Sets only a framework enabling collective bargaining in the law, and allows the representative organisations for employers and employees to agree a national level collective agreement on the bargaining process rules that we have set in law.
- Does not provide for collective bargaining to be binding, meaning collective agreements are voluntary and cannot be enforced in court as they can be in New Zealand.
- Provides for multiple levels of collective bargaining, with a hierarchy of agreements at national, sectoral and enterprise levels – where we only provide for enterprise level.

3.6 Key features of collective bargaining systems

The OECD characterises collective bargaining systems by the following key features:

- degree of coverage,
- level of bargaining,
- degree of flexibility, and
- coordination



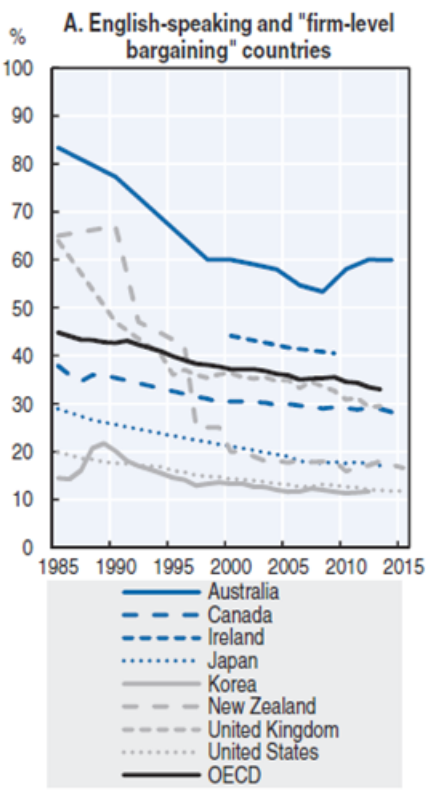
1 Source: OECD Employment Outlook 2018, p.78

Degree of coverage

The degree of coverage refers to the proportion of workers who are covered by a collective agreement. This should not be confused with the proportion of workers who are members of a trade union. A system with wide collective agreement coverage can have a more sizeable macroeconomic effect—positive or negative—on employment, wages and other outcomes of interest rather than agreements confined to a few firms.

The share of employees covered by collective agreements has declined significantly over the past 25 years across the OECD. On average, collective bargaining coverage shrunk from 45 per cent in 1985 to 33 per cent in 2013. As of 2016, New Zealand's collective bargaining coverage is 15.9 per cent.

Percentage of workers with the right to bargain
Source: OECD Employment Outlook 2017, p138



The evidence we have seen suggests that collective bargaining coverage tends to be high and stable in countries where multi-employer agreements (either sectoral or national) are negotiated – even where trade union density is quite low – and where employer organisations are willing to negotiate.

Some countries also provide for the extension of coverage of collective agreements beyond the initial signatories. This explains why collective bargaining coverage is higher than trade union density across the OECD, where sector level extensions are commonly used in two-thirds of countries. In countries where collective agreements are generally at the enterprise level – such as New Zealand – coverage tends to match trade union density.

Across the OECD, about 17 per cent of employees are members of a union. In 2015, New Zealand's equivalent rate was 17.9 per cent. This rate varies considerably across countries. Union membership density has been declining

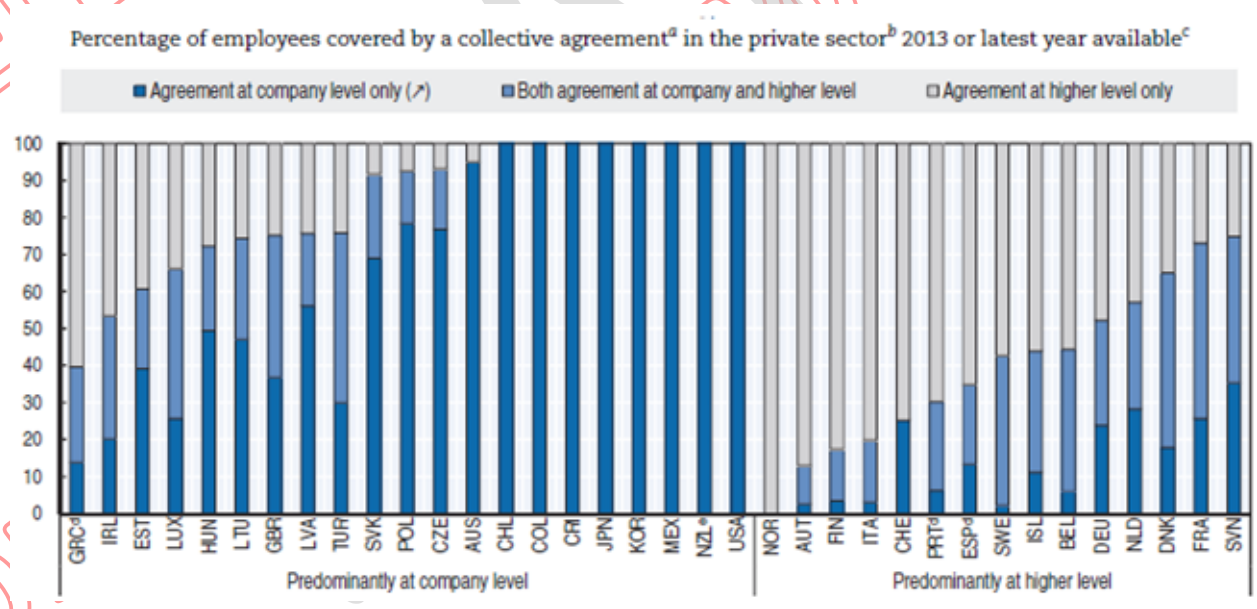
steadily in most OECD countries over the last three decades.

Data on employer organisation density (that is, what percentage of firms belong to employer organisations) is patchy, and can be difficult to calculate on given the absence of common metrics and reliable data. Across OECD countries it is 51 per cent on average. Although it varies considerably across countries, this figure has been quite stable in recent decades. There is no national level statistical information gathered on New Zealand's employer organization density.

Level of bargaining

The level of bargaining refers to where parties negotiate, which (as described in the diagram in section 3.4) could be at the enterprise, sector or national level. Centralised bargaining systems are ones in which bargaining tends to happen at the national level; highly decentralised systems are ones in which bargaining tends to be at the enterprise level. New Zealand is part of the trend in the OECD towards decentralisation, as all our bargaining is at the enterprise-level, although occasionally among groups of enterprises (through a MECA).

According to the OECD, centralised bargaining systems can be expected to have less wage inequality relative to systems with mostly firm-level agreements. This is because centralized systems tend to experience smaller wage differences, within firms, across firms, or even across sectors. Enterprise-level agreements, by contrast, allow more attention to be paid to enterprise-specific conditions and individual performance, and allow for more variation in wages.



2 Source: OECD Employment Outlook 2017,

Degree of flexibility

In systems with higher-level collective agreements (e.g. at the sector or national level), the degree of flexibility refers to the extent to which firms can modify or depart from those higher-level agreements. The possibility of opt-outs can increase the flexibility of a system and allow for a stronger link between wages and firm performance, for example in economic downturns. This

may bolster employment and productivity on the upside, but increase wage inequality on the downside.

New Zealand does not allow firm-level agreements to depart from minimum standards. Collective agreements, including MECAs, are binding on the parties who agreed them, but this would not be characterised as a limitation on flexibility as there is no extension mechanism in New Zealand, so each party to a MECA has chosen to be bound by it..

Coordination

Coordination refers to the degree to which minor players deliberately follow what major players decide, and to which common targets (e.g. wage levels) are pursued through bargaining. Coordination can happen between bargaining units at different levels (e.g. when an enterprise-level agreement follows guidelines fixed by peak-level organisations), or at the same level (e.g. when some sectors follow standards set in another sector).

In New Zealand, as bargaining is confined to the enterprise level, there is no coordination between parties at various levels or across sectors, and the government does not exert influence beyond establishing the bargaining framework and minimum standards. Relative to other OECD countries' approaches to collective bargaining, New Zealand is on the uncoordinated end of the spectrum.

International best practice

Overall the OECD has concluded that the main trade-off in collective bargaining is between inclusiveness and flexibility. In other words, collective bargaining can generate benefits for employment and inclusiveness (wage inequality is lower and employment for vulnerable groups is higher) but can also have drawbacks in reducing the flexibility for firms to adjust wages and conditions when their situation requires it.

The OECD and the ILO recommend that countries should consider adopting a model with sector-level bargaining, combined with the flexibility to undertake firm-level bargaining to tailor higher-level agreements to each workplace's particular circumstances. The OECD has found this model delivers good employment performance, better productivity outcomes and higher wages for covered workers compared to fully decentralised systems.

3.7 Other countries' approaches to collective bargaining

As there is currently no sectoral bargaining mechanism in New Zealand, the Working Group looked to other countries for examples of sectoral level collective bargaining.

Given New Zealand's own social and economic context, any Fair Pay Agreement system design will need to be bespoke; however, it is worth examining how other countries approach the concept of sector level bargaining.

There are four main models of sector level bargaining that the Working Group looked at when researching collective bargaining:

- Australian Modern Awards system
- The Scandinavian model

- The Continental European model
- Singapore's progressive wage model.

These models are discussed more fully below. It is worth noting that the comparator countries have different societal factors that influence how they approach the question of collective bargaining. For example there is a high level of government intervention in the Singaporean Progressive Wage Model compared with a high level of social dialogue and cooperation in Nordic countries such as Denmark.

Australia – Modern Awards system

In 2009, Australia introduced a system of Modern Awards, which are industry-wide regulations that provide a fair and relevant minimum safety net of terms and conditions such as pay, hours of work and breaks, on top of National Employment Standards. Awards are not bargained for; rather they are determined by the Fair Work Commission following submissions from unions and employer representative groups. The Fair Work Commission must review all Modern Awards every four years.

A Modern Award will not apply to an employee when an enterprise agreement (i.e. a firm level collectively bargained agreement) applies to them. If the enterprise agreement ceases to exist, the appropriate Modern Award will then usually apply again. Enterprise agreements cannot provide entitlements that are less than those provided by the relevant modern award and must meet a 'Better Off Overall Test' as determined by the Fair Work Commission.[5]

Broadly speaking, Modern Awards provide the equivalent function of worker protection to New Zealand's existing national statutory minimum employment standards, but in Australia the Modern Awards system provides the ability for the Government to impose differentiated minimum standards by occupation.

Sector-level bargaining does not exist in Australia in the form that is envisaged by the Fair Pay Agreement system. Collective bargaining in Australia is at enterprise level. Australian law does provide for multi-enterprise collective agreements in limited circumstances. One of these circumstances is when the Fair Work Commission makes a Low-Paid Authorisation to "encourage bargaining for and making an enterprise agreement for low-paid employees who have not historically had the benefits of collective bargaining with their employers and assisting those parties through multi enterprise bargaining to identify improvements in productivity and service delivery and which also takes account of the needs of individual enterprises".[6] The private security sector appears to be one of the more frequent users of the low-paid provisions.

The Nordic model

Under the Nordic model of collective bargaining, national legislation only provides a broad legal framework for collective bargaining. The rules are set at national level through basic agreements between the employee and employer organisations. Sectoral collective agreements define the broad framework but often leave significant scope for further bargaining at the enterprise level.

[5] https://www.fwc.gov.au/awards-and-agreements/agreements
[6] Fair Work Act 2009

None of the Nordic countries has a statutory minimum wage. Collective agreements therefore provide the function of setting basic floors for wages and conditions in each sector or occupation. Denmark and Sweden use collective agreements as their only mechanism for setting minimum wages, meaning that there is no floor for wages for workers outside of collective agreements. Finland, Iceland and Norway have all started to use extension mechanisms to cover all workers at industry level, to provide those minimum floors.[7]

These countries tend to have historically high levels of organisation in both employer and employee sides, with continuing high union density and a strong social dialogue and cooperation around collective bargaining and in their wider economic model.

Due to the high level of union coverage in these countries, it is generally unnecessary to extend sector level collective agreements to all employees in an industry but agreements can be extended through application agreements. For example, in Sweden, there is no bargaining extension mechanism in statute or otherwise. A voluntary approach to extension is also made easier due to high union membership.

For example, a trade union may enter into "application agreements" with employers who are not signatories to a collective agreement, with the effect of making that collective agreement also apply to a non-signatory company. Non-union employees can also enter into "application agreements" with trade unions.

Countries that generally follow this model are Denmark, Germany, the Netherlands, Norway and Sweden.

The Continental Europe model

Under the Continental model, the legal framework provides statutory minimum standards for wages and conditions, along with the rules for collective bargaining.

National or sectoral collective agreements set terms and conditions for employees but allow for improvements on these at enterprise level ('the favourability principle'), or opt outs from the sector agreement (although these derogations are usually limited).

Under this model, collective bargaining is conducted at three levels - national, industry and enterprise:

- At national level, negotiations cover a much wider range of topics than normal pay and conditions issues, including job creation measures, training and childcare provision. Pay rates are normally dealt with at industry and company level, but the framework for pay increases could be set at national level.
- At industry level, negotiations are carried on by unions and employers' organisations often meeting in 'joint committees' (binding on all employers in the industries they cover)
- At enterprise level, the trade union delegations together with the local union organisations negotiate with individual employers.

[7] https://www.ilo.org/global/topics/wages/minimum-wages/setting-machinery/WCMS_460934/lang--en/index.htm

Collective bargaining is hierarchical and structured such that an agreement concluded at one level cannot be less favourable than agreements reached at a broader level. Industry agreements are therefore subject to minimum terms set out in national agreements. Firm-level agreements can be more favourable than industry agreements. There is, however, large variation among industries in terms of the relative importance of industry-level and firm-level agreements.

Extension mechanisms are more widely used under this model of collective bargaining. Criteria for extension can be a public interest test or often a threshold. For example in Latvia if the organisation concluding an agreement employs over 50% of the employees or generates over 60% of the turnover in a sector, a general agreement is binding for all employers of the relevant sector and applies to all of their employees. In Belgium or France, however, extensions are issued by Royal Decree or the Labour Ministry respectively upon a formal request from the social partners that concluded the agreement.

Countries that generally follow this model of collective bargaining are Belgium, France, Iceland, Italy, Portugal, Slovenia, Spain and Switzerland.

Singapore – the Progressive Wage Model

Singapore has similar levels of collective bargaining and union density to New Zealand. The legal framework does not provide for a statutory minimum wage.

Singapore undertakes sector level bargaining in specific sectors in the form of the Progressive Wage Model (PWM). The PWM is a productivity-based wage progression pathway that helps to increase wages of workers through upgrading skills and improving productivity. It is mandatory for workers in the cleaning, security and landscape sectors which are mostly outsourced services. The PWM benefits workers by mapping out a clear career pathway for their wages to rise along with training and improvements in productivity and standards.

The PWM also offers an incentive to employers, for example, in order to get a licence a cleaning company must implement the PWM. At the same time, higher productivity improves business profits for employers.

The PWM is mandatory for Singaporeans and Singapore permanent residents in the cleaning, security and landscape sectors. It is not mandatory for foreign workers but employers are encouraged to use these principles of progressive wage for foreign cleaners, landscape workers and security officers.

3.8 New Zealand's employment relations and employment standards (ERES) regulatory system

Any Fair Pay Agreements system will need to complement and support the existing parts of New Zealand's regulatory system for employment relationships. Therefore, it is worth setting out our understanding of that system.

The Employment Relations and Employment Standards (ERES) regulatory system aims to promote productive and mutually beneficial employment relationships, and by doing so it:

- supports and fosters benefits to society that are associated with work, labour market flexibility, and efficient markets

- enables employees and employers to enter and leave employment relationships and to agree Terms and Conditions to apply in their relationships
- provides a means to address market failures such as power and information asymmetries which can lead to exploitation of workers.

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

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

Employment relationships are regulated for a number of reasons:

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

The system therefore provides:

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

The ERES system can be a key driver for innovation and growth in our labour market and wider economy

The effective use of knowledge, skills and human capital in firms is a key driver of innovation and growth. This can increase wages, lifts firms' competitiveness and profitability, and lead to better social and economic outcomes.

The ERES regulatory system sets the boundaries for the operation of a market for labour hire, risk and reward. The operation of this market is not simply an employment contract for the exchange of goods and services, it is based on human relationships where mutual trust, confidence and fair dealing are important.

The ERES system is also important for New Zealanders, as employment is a primary source of income that is then used to purchase goods and services, and is a source of investment and insurance. There is an emphasis on these relationships being conducted in good faith, and on effective dispute resolution.

Institutions

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

- Mediation Services
- the Employment Relations Authority
- the Employment Court
- Labour Inspectors
- the Registrar of Unions

3.9 The current state of collective bargaining in New Zealand and trends over time

The legal framework for collective bargaining in New Zealand

The Employment Relations Act sets out the rules for and supports collective bargaining in New Zealand. As in individual employment relations, the duty of good faith underpins collective bargaining in New Zealand.

The Act contains mechanisms for multi-employer collective bargaining but no specific mechanisms for industry or occupation wide collective bargaining (other than some parts of the public sector, e.g. education). There are also rules around 'passing on' of collectively bargained terms and conditions to non-union members. While employers can't automatically pass on terms which have been collectively bargained for, around 11% of CEAs extend coverage to all employees of the employer(s). Often this is done through non-union members paying a bargaining fee, or union members voting to allow terms to be passed on. Informally, many employers 'pass on' many collective terms through 'mirror' individual employment agreements.

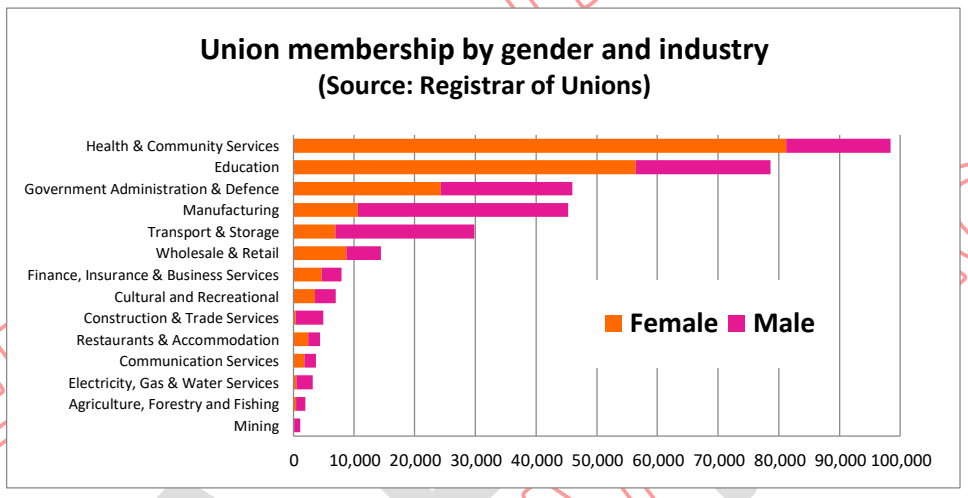
A collective employment agreement expires on the earlier of its stated expiry date or 3 years after it takes effect, with some exceptions. Over time, collective agreements have become longer in duration. One reason for this may be the transactions costs for both sides for collective bargaining.

Data on collective bargaining in New Zealand

New Zealand has low collective bargaining coverage compared with many OECD countries. Collective agreements are more significant in the public sector while private sector coverage is low, and is mainly concentrated in certain industries and large firms. The concentration of

collective agreements in the public sector is consistent with many other OECD countries including Australia, the United Kingdom, United States and Canada.[8]

Union membership in New Zealand is voluntary and membership and collective agreement coverage is around 17% of all employees. Union member numbers as a percentage of the workforce have declined from over 20% in 2012 to 17.2% in 2017. Union membership has declined by 1.28% on average over the past 5 years. Most union members are women and are concentrated in particular sectors.

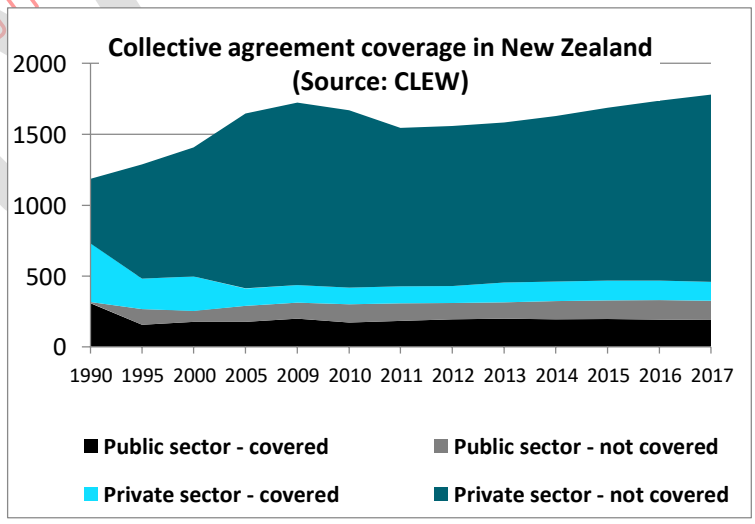


Currently there are 1600 collective agreements covering 10% of workforce in the private sector, and 456 collective agreements covering 60% of workforce in the public sector.

Collective bargaining coverage has decreased proportionately and is not keeping up with growth in the number of jobs in the economy.

While the number of employees covered by a collective agreement is stable, the total labour force is growing as illustrated in the graph below.

Coverage of multi-employer collective agreements (MECAs) is low outside the public sector (as is coverage of single employer collective agreements). MECAs are generally found in the health and education sectors (excluding tertiary education). There were 37 private sector MECAs in 2004, when the duty to conclude was added to the Employment Relations Act, and 37 in 2015, when the employer opt out was added. There are currently 72 MECAs which is the same number as five years ago.



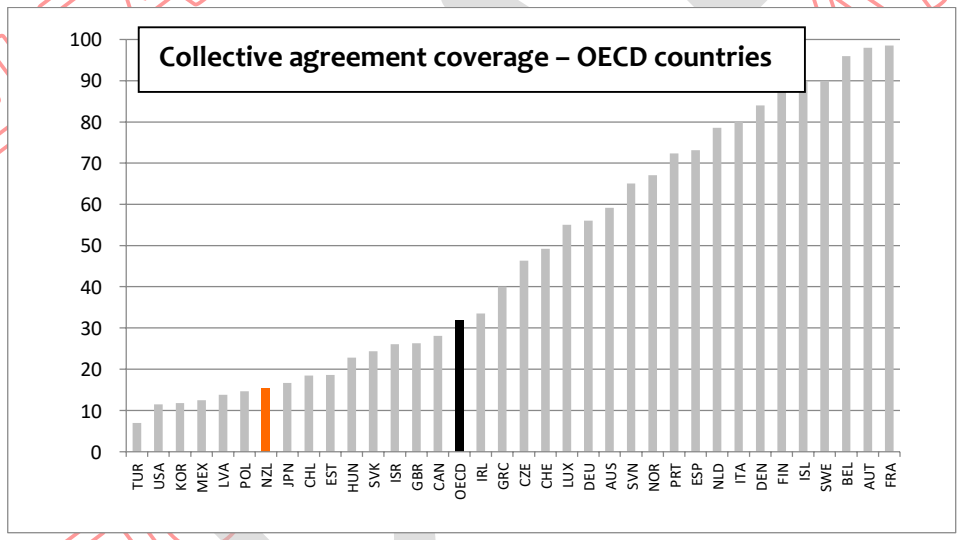
MECA bargaining may be frustrated by competitive instincts between firms, as well as a general disinclination to bargain with unions or collectively. These competitive pressures do not, for the most part, exist in the public sector, where bargaining is undertaken by centralised authorities (e.g. District

[8] https://www.victoria.ac.nz/__data/assets/pdf_file/0006/1235562/New-Zealand-Union-Membership-Survey-report-2016FINAL.pdf

Health Board Shared Services and the Ministry of Education) on behalf of what are technically separate employers (e.g. the independent District Health Boards and school Boards of Trustees).

In practice, MECAs only exist where the employer parties all agree prior to the commencement of bargaining - or early thereafter - to engage together in multi-employer collective bargaining. This was the case even before 2015, when the Employment Relations Act was amended to allow employers to opt out of MECA bargaining. Salary reviews have become more prevalent, mainly in the public sector. The increase in productivity or performance payments is associated with a movement to a range of rates (because employers have discretion to place employees within the range). However output can be hard to measure, especially on an individual basis. In contrast to this, specific mention of training and skill development in private sector collective agreements has decreased over time. These provisions don't tend to link pay to skills development. It appears employers move towards providing for training and skills development in company policy instead – this does not necessarily mean less training and skills development is taking place, in fact the Survey of Working Life indicates it is increasing.

It's rare to see wages being indexed to inflation in Collective Agreements. This may partly reflect parties' preference for certainty, to know exactly what wages will be. However, another factor may be that inflation has been low in the last decade and parties may feel reasonable certainty that it will not exceed 3% per annum, in line with the Reserve Bank's policy.



Case study: NZ Plastics Industry Multi-Employer Collective Agreement

This agreement dates from 1992, with many of the standard conditions from the previous system of awards (eg hours of work, overtime rates, shift payments etc) carrying over from then.

The Plastics MECA moved away from multi-classification pay rates and service pay to a skill-based pay system linked to qualifications very early in its development. Training was, and has been, a central part of the Plastics MECA pay scheme, although training was not mandatory for either the employers or the employees. One of the agreed objectives of the Plastics MECA is "the improvement of productivity, efficiency and competitiveness of the industry through a commitment to qualifications."

The Metals MECA has similar commitments to productivity and skill development although the minimum wage rates are generally based on work classifications. The negotiations for both MECAs normally take place with a key group of employers and the unions. The unions then go around other employers and get them to sign on as a "subsequent party" to the MECA.

While the MECAs have been good for setting the base industry employment conditions, if an employer does not want to accept the industry standards created in the MECA then there is little the union can do to force the issue, especially in small enterprises. Even the subsequent industry parties have lists of conditions from the MECA that they opt out of.

3.10 Collective bargaining experiences

What makes for good bargaining process?

In our experience, a good bargaining process will lead to a good outcome. By good outcome we mean one that both parties support, with real improvements over the status quo. In our experience, the elements of effective collective bargaining come down to three sets of factors: attitude/commitment, skills and process.

The attitude or commitment of parties to collective bargaining is important. Good collective bargaining requires good faith and a genuine willingness to engage and negotiate. Collective agreements are forward-looking documents, and to reflect this, good collective bargaining involves a conversation about where both the business and workers are going in the next few years. Bargaining works best for employers when they can see it is transformational not transactional, i.e. it affects the whole business, not just higher wages. A good attitude when approaching bargaining can also be self-reinforcing: bargaining allows for intense discussions about real issues, which ultimately adds value to the entire employment relationship.

Good bargaining also typically involves having skilled people in the room, and strategic leadership that takes a long-term perspective.

In terms of the process, it should be respectful and efficient. The capacity and capability of bargaining parties will support an efficient process and lead to timely outcomes. It can also be useful to involve trained third-party facilitators, mediators or other forms of support.

What makes for a bad process?

A bad or ineffective process can lead to a worsening of employment relationships. Employment relationships are ongoing and long-term; ending a bargaining episode with a 'winner' and a 'loser'

does not bode well for this ongoing relationship. A bad process can also lead to protracted negotiations, industrial disputes and impatience on both sides.

Barriers to good outcomes can take a number of forms. This may involve bad faith, where one or both parties are making no real effort to honestly engage. If the approach to bargaining is transactional, it's harder to get all parties to the bargaining table. Likewise if one party feels like it is being forced to the negotiating table, or there is a lack of bargaining skills, it can lead to an ineffective process.

In the case of MECAs, if one party is unwilling to come to the table – or wants to withdraw from an established MECA when it is being revised – that is enough to put an end to negotiations. We have heard that this can be frustrating for workers and unions who have attempted to maintain a MECA, such as in the cleaning and manufacturing industries.

Bargaining can be quite different depending on the scale of the parties or the characteristics of the industry. The bargaining process can impose higher relative transaction costs on small businesses, who can have quite different needs. It can also be harder in industries or occupations with higher turnover.

It is important to note that while collective bargaining can encourage innovation and lift productivity in the workplace, this may not always be better for the worker. Some innovation may result in workers being replaced by machinery, or work rosters being reorganised in a way which leaves workers worse off.

Coordination

Notwithstanding some MECAs, the vast majority of collective agreements negotiated in New Zealand are for single employers. In contrast, Fair Pay Agreements would require a high degree of coordination to work effectively, and could require multiple representative groups to be involved.

We note that levels of coordination can vary significantly across industries and occupations in New Zealand: some industries have well-established industry groups and unions, whereas others do not. Even where industry groups do exist, they tend to be focused on representing the interests of the industry and sharing best practice, and do not typically have a role in collective bargaining.

The process of collective bargaining and the problem of coordination can also be more difficult where SMEs are predominant in a sector.

4 The role of Fair Pay Agreements in our economy

4.1 Where Fair Pay Agreements would fit into the ERES system

- A FPA system would build on minimum standards, and individual or firm-level agreements could then improve further on the terms and conditions.
- In the diagram on page 7, sectoral bargaining would fit in the second row.
- agreements play a role but they leave room for details in lower-level agreements or allow for deviations.

4.2 Purpose of introducing a Fair Pay Agreement system

The Government asked us to make independent recommendations to the Government on the scope and design of a legislative system of industry or occupation-wide bargaining, which would support their vision for:

- A highly skilled and innovative economy that delivers good jobs, decent work conditions and fair wages while boosting economic growth and productivity.
- Lifting the conditions of New Zealand workers, businesses benefit through improved worker engagement, productivity and better workplaces.
- An employment relations framework that creates a level playing field where good employers are not disadvantaged by paying reasonable, industry-standard wages.
- A highly skilled and innovative economy that provides well-paid, decent jobs, and delivers broad-based gains from economic growth and productivity.
- Meeting New Zealand's obligation to promote and encourage the setting of terms and conditions of employment by way of collective bargaining between workers, worker's representatives, employers and their representatives.

In designing this system, the Government also mandated us to manage and where possible mitigate the following risks:

- slower productivity growth if a Fair Pay Agreement locks in inefficient or anti-competitive businesses models or market structures
- a "two-speed" labour market structure with a greater disparity in terms and conditions and job security between workers covered by Fair Pay Agreements and those who are not
- unreasonable price rises for some goods and services if increased labour costs are not offset by productivity gains and profit margins are held at existing levels
- undermining of union membership through the reduction of the value of enterprise bargaining by way of the pass on of collectively negotiated terms and conditions to non-union members, and
- possible job losses, particularly in industries exposed to international competition which are unable to pass on higher labour costs to consumers of those goods and services.

5 Summary of proposed FPA model and key features

- [Summary of final model to go here once individual bargaining blocks are settled]

6 Detailed design of a fair pay agreement collective bargaining system

6.1 Initiation

The Government asked us to recommend a process and criteria for initiating Fair Pay Agreement bargaining, including bargaining thresholds or public interest tests.

The Government mandated that it will be up to the workers and employers in each industry to make use of the system to improve the productivity and working conditions in the industry.

The FPA bargaining process should only be initiated by workers

We recommend that the group initiating the process must be workers, and that they must nominate the sector or occupation they seek to cover through a FPA. How they define the proposed boundaries of the sector or occupation may be narrow or broad.

There are two circumstances where a FPA bargaining process may be initiated

The Group envisages two circumstances where employers and workers in a sector or occupation may see benefit in bargaining an FPA.

On the one hand, there may be an opportunity for employers and workers to improve productivity and wage growth in their sector or occupation through the dialogue and enforceable commitments that collective bargaining provides.

On the other hand, there may be harmful labour market conditions in that sector or occupation which they wish to address through employer-worker collective bargaining, to reach a shared and enforceable collective agreement on setting wages, terms and conditions across the sector or occupation which will help tackle those harmful conditions.

The Group can therefore see two routes for a Fair Pay Agreement bargaining process to be initiated:

- In any sector or occupation, workers should be able to initiate a FPA bargaining process if they can meet a minimum threshold of number of workers in the nominated sector or occupation ("representativeness trigger").
- Where the representativeness test is not met, a FPA may still be triggered if specific harmful labour market conditions exist in the nominated sector or occupation ("public interest trigger"). The Government may wish to consider several options under this trigger. The independent body could be designed to:
    - initiate FPA bargaining itself under this route,
    - give workers more time to reach the representativeness threshold, or
    - facilitate a conversation between parties to discuss a FPA process and see if they can reach the representativeness threshold.

The representativeness threshold should cover both union and non-union workers

Where workers wish to initiate a FPA process, we recommend that a minimum representativeness threshold should apply across all workers in the nominated sector or occupation. This should cover both union members and non-union workers.

We recommend that at least 10 per cent or 1,000 (whichever is lower) of workers in the sector or occupation (as defined by the workers) must have indicated their wish to trigger FPA bargaining.

This representativeness threshold is intended to ensure that there is sufficient demand for bargaining within the sector or occupation. There would be no equivalent employer representation test.

The conditions to be met under the public interest trigger should be set in legislation

To provide certainty for all parties, if the option of a 'public interest trigger' is progressed, we recommend that the conditions to be met of harmful labour market conditions should be set in legislation and an independent third party should .

These conditions, or criteria, would be designed so they assess whether there was some overriding public interest reason to justify a veto of FPA bargaining in that particular sector or

occupation. An independent third party should adjudicate this and invite comments from affected parties within a set time period.

An independent body is needed to verify these conditions are met

Under either route, there is a need for an independent body to verify that the trigger conditions have been met before the bargaining process is initiated:

- Under the public interest trigger, the body would verify the claim that the harmful conditions are evidenced.
- Under the representativeness trigger, where the number of workers requesting the process is lower than 1,000, the body would verify the baseline number of workers in the nominated sector or occupation and confirm the threshold of 10% has been met.

There should be time limits set for the body to complete the verification process to provide certainty for all parties on whether the bargaining process may proceed.

Once verified, the body would inform all affected parties (workers and employers) that the process had been initiated. This provides an opportunity for any party who considers they do not fall within the proposed coverage to confirm this with

Once initiation is complete, the bargaining process would be the same under either trigger circumstance.

The Group considered that such an independent body would have quasi-judicial functions, for example, in circumstances where the coverage or representativeness test need to be adjudicated, rather than agreed by consensus. The body would need to interpret the legislation and hold determinative functions requiring analytical skills. We suggest the body could be a statutory body, similar to a Commission, at arm's length from the Government of the day.

The Government will need to consider how to assess and mitigate potential negative effects

We acknowledge that there could be negative effects on competition or consumer prices from FPA bargaining. For example, agreements could have the effect of shutting out new entrants to an industry, or higher wage costs passed on through product price increases. We invite the Government to consider how existing competition law mechanisms may need to be adapted to mitigate the risk of such effects.

6.2 Coverage

The Government asked us to make recommendations on:

- how to determine the scope of agreement coverage, including demarcating the boundaries of the industry or occupation and whether the Fair Pay Agreement system would apply to employees only, or a broader class of workers;
- whether there are circumstances in which an employer can seek an exemption from a relevant agreement and the process for doing so; and
- whether Fair Pay Agreements should apply to industries or occupations, or both.

The occupation or sector to be covered should be defined by the parties

We recommend that Parties should be able to negotiate the boundaries of coverage, within limits set in the legislation. The workers initiating the bargaining process must propose the intended boundaries of the sector or occupation to be covered by the agreement. We recognised that labour markets can vary significantly across New Zealand (e.g. on a geographic basis). Therefore, the Group considered that parties should also be able to define coverage using additional parameters, including providing for variations in terms for geographic regions.

It is important for FPAs to cover all workers (not just employees) to avoid perverse incentives

The Group considered that the parties covered by the FPA should include all workers in the defined sector or occupation, subject to any exemptions (see below). It is necessary for FPAs to cover all workers, as otherwise the system may create a perverse incentive to define work outside employment (regulatory arbitrage). We acknowledge the issue of defining workers as contractors to avoid minimum standards is a broader issue, and Government may wish to give effect to our recommendation through other work directly on that issue.

All employers in the defined sector or occupation should be covered by the agreement

The Group noted that the premise of the Fair Pay Agreement was that it should cover all employers in the defined sector or occupation, if it was desired to avoid incentives for under-cutting the provisions of the FPA. This approach, if adopted, should also extend coverage under the FPA to any new employers or workers in that sector or occupation after the FPA has been signed.

Some of us considered that individual employers, particularly small employers, should be able to elect whether to be covered by the proposed FPA.

We also noted it would be important for employers to be able to achieve certainty and avoid incurring unnecessary transaction costs. If an employer does not believe they are within the coverage of the initiation of a particular FPA they should be able to apply to the independent body for a declaration of whether their business falls within the coverage and is required to be involved in the FPA process.

There may be a case for limited flexibility for exemptions from FPAs in some circumstances

We consider that some flexibility should be permissible in FPAs so that particular circumstances where exemptions are allowed may be set in legislation or agreed on by parties in the bargaining process.

The existence of a FPA should not deter employers from offering more favourable terms to their workers. The Group also considered it may be possible to exempt employers from some or all provisions of the FPA where they agreed an enterprise level agreement that offered more favourable terms than those in the FPA.

The Group noted that lifting standards may force some employers out of the industry, if they can neither absorb costs nor raise prices and remain competitive in the market. We considered that parties could either include defined circumstances for exemptions for employers or workers in the FPA, or include administrative procedures for the parties or a third party to approve requests

for an exemption after the FPA is ratified. Some exemptions we considered were temporary exemptions for small employers; for new entrants to the workforce or those returning after extended period out of the workforce.

As a general rule, the Group considered that any exemptions should be limited and typically temporary in nature (e.g. up to 12 months), as the more exemptions provided for will increase complexity and uncertainty. There would be merit in including exemptions in law or sample/guideline exemptions for FPA clauses for parties to use as a basis.

6.3 Scope

The Government asked us to make recommendations on the scope of matters that may be included in an agreement, including whether regional variations are permitted.

The legislation should set the minimum content that must be included in a FPA

We recommend that the minimum content for FPAs should be set in legislation. This is a similar approach to the current enterprise level collective bargaining system under the Employment Relations Act. The Group considered that FPAs must be a written agreement and must include provisions on:

- The objectives of the FPA
- Coverage
- Wages and how pay increases will be determined
- Terms & conditions, including working hours, overtime and/or penal rates, leave, redundancy, and flexible working arrangements
- Skills and training
- Duration, eg expiry date
- Governance arrangements to manage the operation of the FPA and ongoing dialogue between the signatory parties, for example, if administrative arrangements are needed for exemptions

We considered that it will be useful for parties to be able to discuss other matters, such as other productivity-related enhancements or actions, even if they do not reach agreement on provisions to insert in the FPA.

We also considered that FPAs may need to be designed to take account of regional differences within industries or occupations.

The Group also considered that the duration of agreements should be up to the parties to agree, but with a maximum of 5 years.

Parties may wish to bargain on additional terms to be included in FPAs

The Group considered that if parties mutually agreed, additional provisions should be able to be included by negotiation in the FPA, so long as they were compliant with minimum employment standards and other law.

Parties should be able to determine how prescriptive the terms of the FPAs should be

For any of the above topics, the Group considered that parties should be able to agree a FPA that agreed terms at a high level, although binding.

Relationship with enterprise level agreements

The Group recommends that employers and employees could agree a enterprise-level collective agreement in addition to the FPA, and if so, that the principle of favourability should apply. This would mean that any enterprise level collective agreements must equal or exceed the terms of the relevant FPA. They may offer additional provisions not within the scope of the FPA that is agreed for that sector or occupation.

The Group considered there would be value in requiring parties to discuss and agree each of the minimum provisions within the scope of the FPA, even if the terms agreed were very broad. We concluded that parties should be able to decide how prescriptive to set terms under the provisions of the FPA. For example, the terms could be very detailed, or set a framework or range within which employers and workers can negotiate at enterprise level final terms. A combination of highly prescriptive or broad terms could be seen across the different provisions of the FPA (such as wages, working hours, leave).

FPA content can allow for variations in labour market conditions, such as regional differences

We recognised that labour markets can vary significantly across New Zealand (e.g. on a geographic basis). Therefore, the Group considered that parties should also be able to offer different terms within FPAs for different groups by using additional parameters, including providing for variations in terms for geographic regions.

6.4 Bargaining parties

The Government asked us to make recommendations on the identification and selection of bargaining participants including any mechanisms for managing the views of workers without union representation.

Parties should nominate a bargaining representative to bargain on their behalf

To be workable, we consider that the bargaining parties on both sides should be represented by incorporated entities. Workers should be represented by unions. Employers may be represented by employer organisations. We note that different groups of both workers and employers may wish to have their own representatives – for example, small employers may wish to be represented independently from large. We recommend the system be designed to accommodate this. The Group also considered that any representatives should be required to meet minimum requirements relating to expertise and skills.

There should be a role for the national representative bodies

Both employers and workers should elect a lead advocate to ensure there is an orderly process and who can be responsible for communication between the parties including the independent body. The Group considers that there will need to be a role for national-level social partners, for

example, Business New Zealand and the New Zealand Council of Trade Unions, to coordinate bargaining representatives.

If there is disagreement within a party about who their representative is (or are, if plural) the first step would be mediation. If mediation was unsuccessful, parties could then refer to the independent third party to decide who the representative(s) should be.

Parties should be encouraged to coordinate

In thinking about coordination, the Group recognised the fundamental principle of freedom of association. The Group noted there would be wider benefits for both employers and workers from belonging to representative organisations. For example, industry organisations can offer peer networks, human resources support, and training opportunities for workers and management. All of these could contribute to raising firm productivity. Unions can offer group benefits, representation, advice and support for members when dealing with employers. This could take the form of greater participation in existing representative groups or forming new ones, particularly in sectors or occupations with low existing levels of coordination.

Representative bodies must represent non-members in good faith

As a Group, we recognise that representative bodies will not be perfectly representative – not every worker is a member of a union, and not every employer will belong to an industry organisation.

Therefore, we consider that it is important that non-members of representative bodies should have the right to be represented during the bargaining process. It is a normal practice in collective bargaining internationally for the 'most representative bodies' to conduct bargaining processes. We think that in New Zealand this can be achieved by placing, for example, duties on the representative bodies at the bargaining table to represent non-members, to do so in good faith, and to consult those non-members throughout the process.

Workers need to be allowed to attend paid meetings to elect and instruct their representatives

the Group considered that there will need to be legislated rights for workers covered by FPA bargaining to be able to attend paid meetings (similar to the union meetings provision in the Employment Relations Act) to elect their bargaining team and to exercise their rights to endorse the provisions they wish their advocate to advance in the FPA process .]

There is currently no provision for costs to be covered under the Employment Relations Act. Where bargaining is at enterprise level, meetings will typically be on site. For FPA bargaining, inevitably negotiations will require travel for some parties. The Group concluded that the Government should consider how these costs should be funded – through Government financial support, a levy, or fee.

6.5 Bargaining process rules

We recommend that as a default, existing bargaining processes as currently defined in the Employment Relations Act (as amended by ERA Bill) should apply, including the duty of good faith.

Clear timelines are needed to prevent lengthy processes creating excessive uncertainty or cost

There should be clear timelines set for the FPA initiation process, including for the third party to verify whether bargaining may proceed after receiving notification from an initiating party. This will give certainty to all parties.

Notification of parties will be a critical element of the process

Once a FPA process is initiated, it will be critical that all affected employers and workers are notified, have an opportunity to be represented, and are informed throughout the bargaining progress. Minimum requirements for notifying affected parties should be set in law.

Facilitation will be an important part of the process, with a stronger role than currently

The Group considered that in many cases, structured facilitation is also likely to be needed. This would in particular be needed where there were multiple representative bargaining parties, and in sectors or occupations where either or both employers or workers had low levels of existing coordination and organisation.

The Government or independent body should provide materials to reduce time and transaction costs, for example, templates for the bargaining process and agreement, similar to that currently provided on Employment New Zealand website.

6.6 Dispute resolution during bargaining

The Government asked us to make recommendations on the rules or third party intervention to resolve disputes, including whether the third party's role is facilitative, determinative or both.

No recourse to industrial action during bargaining

We note that the Government has already stated that no industrial action – such as strikes or lock outs – will be permitted, during bargaining. It will be critically important that dispute resolution mechanisms work effectively. We consider this to be a relational, not a temporal, ban – it is only strikes and lockouts related to FPA bargaining which are prohibited, not strikes about other matters which coincide with FPA bargaining.

Mediation and facilitation should be the starting point for dispute resolution

We recommend that mediation and facilitation should continue to be the starting point to resolve FPA bargaining disputes, and that the bargaining rules should provide that one or both parties may refer bargaining to mediation, in relation to one or more provisions of the proposed agreement.

If mediation fails to resolve the dispute, parties must refer the process to arbitration

[Placeholder]

Where agreement cannot be reached, arbitration should apply

The Group considered that there will be a need for arbitration if mediation or facilitation failed to resolve disputes after a specified timeframe.

We recommend that if mediation and facilitation are ultimately unsuccessful in enabling parties to reach agreement, the negotiating parties should be required to enter final offer arbitration with an independent third party. The third party should be able to make determinations about the content of the FPA.] [This arbitration could result in an FPA with narrower coverage or scope than desired by one of the parties, depending on the final offers proposed by each side. We have recommended this as a means to incentivise the parties to reach an agreement, as the Government has ruled out industrial action during FPA bargaining.

There should be some flexibility available to the arbitrator to direct the parties to allow more time for mediation if it may result in a breakthrough and agreement between the parties.

6.7 Conclusion, variation and renewal

The Government asked us to make recommendations on the mechanism for giving effect to an agreement, including any ratification process for employers and workers within the coverage of an agreement.

The Government also asked for recommendations on the duration and process for renewing or varying an agreement.

Where parties reach agreement, conclusion should require ratification by a simple majority of both employers and workers

Where bargaining has concluded in parties reaching an agreement we recommend that the agreement must not be signed until a simple majority of both employers and workers covered by the agreement have ratified it.

Where bargaining is referred to arbitration, the arbitrated final agreement should not need ratification

The Group considered that when the independent third party determines a final agreement, this should then become a FPA without further ratification process. There should only be an appeals mechanism on the grounds of a breach of process or seeking a declaration as to coverage.

The procedure for ratification must be set in law

We recommend the procedure for ratification be set in law. This differs from the current requirements under the Employment Relations Act where parties may decide how to ratify an agreement. We have recommended this departure from the existing law because, under a FPA, all affected parties in the industry or occupation will need to be given an opportunity to ratify.

The law should clarify that workers are entitled to paid meetings for the purposes of ratifying the agreement.

Before an agreement expires, either party should be able to initiate a renewal of the agreement, or for variation of some or all terms.

The Group considered that any variation or renewal of the agreement that is agreed between the bargaining parties must meet the same initiation and ratification thresholds.

An expiring FPA should be able to be renewed easily, for example employers and workers may be able to vote for a renewal with wages increased in line with CPI.

6.8 Enforcement

The Government asked us to consider how the terms of an agreement should be enforced.

Overall, we consider the existing collective bargaining dispute resolution and enforcement mechanisms should be applied to the new FPA system. This would provide for parties who believe there has been a breach of a FPA to turn first to dispute resolution services including mediation, before looking to the Court system.

The Government will need to consider whether additional resources for bodies involved in dispute resolution and enforcement are needed during the detailed design and implementation of the overall system.

We suggest that unions, employers and employee representative organisations should (where possible and appropriate) play a role in supporting compliance, to identify breaches of FPAs, and address implementation problems.

6.9 Support to make the bargaining process work well

The Group considers that a number of conditions need to be present to support a positive outcome to a collective bargaining process:

- Both workers and employers will need to see potential benefits of bargaining for an FPA, with a real improvement over the status quo
- There needs to be a genuine willingness to engage and confidence in the good faith approach of both parties
- Capability and capacity in both parties to support the bargaining process, with the skills and expertise to manage a respectful, efficient dialogue that leads to timely outcomes
- Strategic leadership on both sides that takes a long-term perspective, supporting a transformational not transactional conversation, i.e. it affects the whole business, not just higher wages.
- High levels of inclusion and participation in the dialogue, particularly among small employers, both through direct involvement at the bargaining table and consultation.
- In a process likely to require involvement of multiple representative groups, a high degree of coordination to work effectively and efficiently
- The involvement of trained third-party facilitators, mediators or other forms of support.

Resourcing levels for support services will need to be considered

The existing functions provided by Government to support the collective bargaining process are fit for purpose and should still apply, including the provision of:

- provision of general information and education about rights and obligations
- provision of information about services available to support the bargaining process and the resolution of employment relationship problems
- facilitation and mediation services
- compliance and enforcement through the Employment Relations Authority and Courts.
- reporting and monitoring of the employment relations system

However, the Government should consider the level of resources available as part of the detailed design and implementation of the overall system. In particular, we consider that a dedicated conciliator should work with the parties at all stages of bargaining.

[Placeholder for possible text about supporting FPA employers to invest in skills training. MBIE is investigating what is currently available and will report back before Meeting 10 (22 November)]

Support to build capability and capacity of the parties and to facilitate the process is needed

In order to facilitate effective bargaining, a good level of information will need to be provided to parties, and capability building will be important to build up the skills of those around the negotiating table, and maximise the potential for constructive bargaining.

The Government will also need to consider the role and resourcing required for the third party body to support the various elements of the bargaining process described above, including verification of the trigger tests being met, notifications to parties, and facilitation of the bargaining process where appropriate.

The Group considered that a different facilitation role would be needed than currently provided under the Employment Relations Act. A proactive role will also be needed to provide notifications, information and education on their obligations to employers and workers following the ratification and coming into force of a Fair Pay Agreement. In particular, where employers and workers transition in or out of coverage of the agreement.

7 Recommendations

[add these once agreed – drawing on the bold headings in section 6, plus any additional recommendations agreed]

8 Conclusions and next steps

Annex 1 – Terms of Reference

Fair Pay Agreements:
Supporting workers and firms to drive economic growth and share its benefits

Version 0.6

19 November 2018

How to read this version of the report

- Changes to the previous versions are made in track changes.
- Comment boxes in the right hand border are used to explain our reasoning behind something, or to record why the text was changed/included.

Recommendations from the Fair Pay Agreements Working Group 2018

1. Introduction: Lifting incomes and economic growth in New Zealand for the 21st century

The Government asked the Group to design a new tool to complement the collective bargaining system in New Zealand which will help transition the current employment relations framework to one which can support the transition to a 21st century economy: a highly skilled and innovative economy that provides well-paid, decent jobs, and delivers broad-based gains from economic growth and productivity.

As a starting point, the Government asked us to make recommendations on a new tool which can support a level playing field across a sector or occupation, where good employers are not disadvantaged by offering reasonable, industry-standard wages and conditions.

Our first step was to take a holistic view of our labour market: looking backwards at how our current labour market is operating, and looking ahead to the global megatrends that will shape our labour market over the coming decades.

The Group concluded that a mature 21st century labour market in New Zealand may require stronger dialogue between employers and workers – not just at the enterprise level, but at sectoral and occupational level. We also recognised the challenges faced by each sector are varied as we transition to the future – with different scales of opportunity to improve productivity, sustainability, and inclusiveness.

There are a wide range of measures the Government has underway or which could be considered to tackle the challenge of just transition in our economy and promoting increased sector level dialogue among employers and workers. Changing our employment relations model and introducing a new way of doing collective bargaining, while maintaining the essential elements of the current system, in New Zealand is just one part of this story, alongside interventions to improve coordination and incentives within other regulatory systems, such as taxation and welfare. These issues are highly related, but the subject of ongoing discussion and advice from other Working Groups.

We agreed that a collective bargaining dialogue at sectoral or occupational level is most likely to gain real traction when:

- it is focussed on problems which are broadly based in the sector,
- it presents real opportunities for both employers and workers to gain from the process
- where parties are well represented, and where
- it is connected to the fundamentals of the employment relationship: the exchange of labour and incentives to invest in workplace productivity enhancing measures such as skills and technology.

The Group considered that this measure could be most useful in sectors or occupations where particular issues with the competitive outcome are identified, or employees/employers in the sector identify scope to improve sector outcomes via an FPA. In many sectors or occupations, FPAs may not be a necessary or useful tool.

Bringing this sector dialogue into a regulated mechanism like collective bargaining also provides the critical incentive of an enforceable contract binding the parties. It provides the opportunity

for employers to invest and engage without the fear of being undercut by those employers engaged in the race to the bottom. Collective bargaining at scale may enable employers to lift the conditions of New Zealand workers, knowing they will see the benefit directly through improved worker engagement, productivity and better workplaces.

2 The approach of the FPA Working Group

The FPA Working Group has held a series of eleven fortnightly meetings from July 2018 to November 2018. The Group has discussed the employment relations and standards system and approach to collective bargaining in New Zealand over recent decades, international models, the relationship between wages and productivity, and the design of a new collective bargaining approach on a sectoral basis.

The Group was supported by MBIE as Secretariat, who also provided information and data on a range of topics.

The Group also heard from speakers who provided their expertise from within the Working Group, and some external experts on particular issues:

- Paul Conway, Productivity Commission on productivity in New Zealand
- John Ryall, E tū, on the E tū experience of negotiating multi-employer collective agreements
- Richard Wagstaff, Council of Trade Unions, and Kirk Hope, Business New Zealand, on their experience of what does and does not work under the current model for collective bargaining in New Zealand
- Stephen Blumenfeld, Centre for Labour, Employment and Work at Victoria University of Wellington on data trends in collective bargaining and collective agreements
- Doug Martin, Martin Jenkins, on a Fair Pay Agreements system
- Vicki Lee, Hospitality NZ, on the small business perspective on the employment relations and standards regulatory system

3 Context

3.1 Productivity, wage growth and incomes in New Zealand

We looked at the relationship between productivity growth and wage growth in recent decades in New Zealand, and their relationship with overall incomes and inequality.

New Zealand's productivity growth over recent decades has been relatively poor. Since 1970, our GDP per hour worked has declined significantly relative to the high-income OECD average: it fell from about equal to the OECD average to about 30 per cent under it.

In other words, New Zealanders work for longer

Labour productivity and the real product wage in the measured sector 1978-2016, indexed to

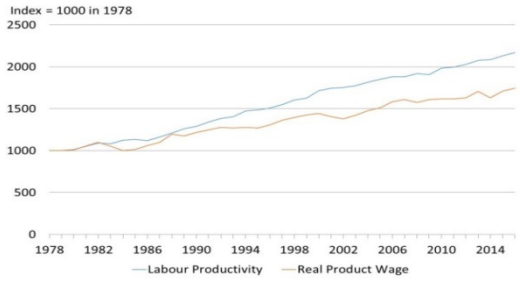
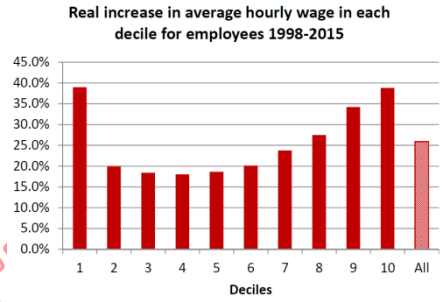


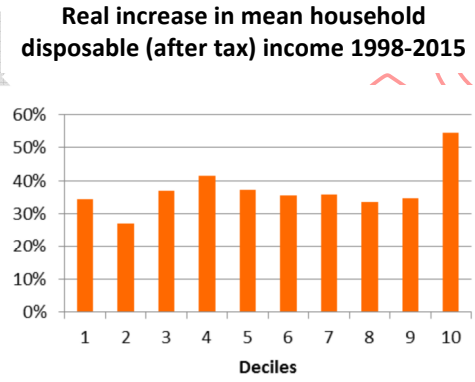
Fig 1. Source: Data from Fraser (2018)

hours and produce less per hour worked than those in most OECD countries.



Wages in New Zealand have risen more slowly for employees in deciles 2 to 6 (ie 50% of employees) than those in higher deciles between 1998 and 2015. The exception is decile 1 which is heavily influenced by the minimum wage. Generally, the higher the wage, the faster it increased during this period. This has "hollowed out" the wage scale and increased income inequality among the majority of employees.

The income support system helps to even out income increases across households (and many low income earners are in high income households – for example, teenagers or students).



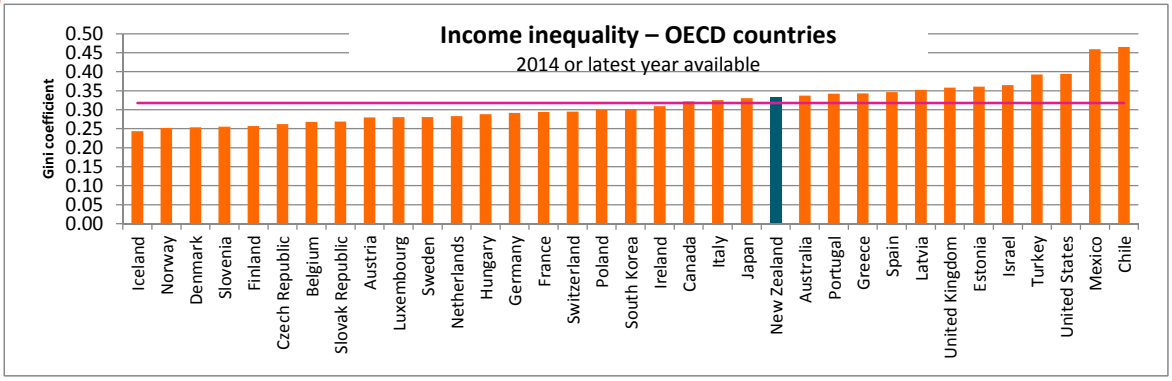
Our recent economic growth has been driven primarily by increased labour force participation rather than labour productivity growth. Our productivity performance is considerably lower than the OECD average, and that of the small advanced economies we compare ourselves with.

We also know that New Zealand has a slightly higher degree of income inequality than the OECD average. While most OECD countries are experiencing increases in income inequality, New Zealand saw one of the largest increases in income equality during the 1980s and 1990s, exceeded only by Sweden.

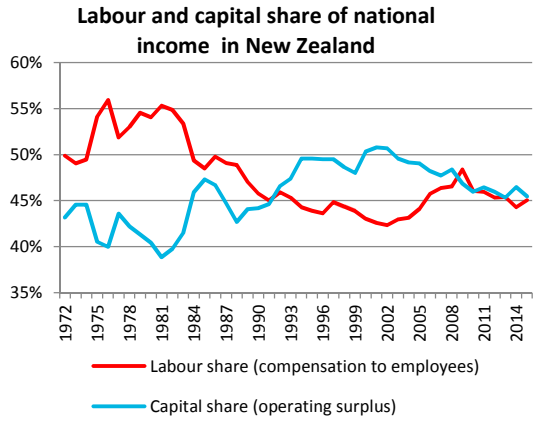
Another measure used globally to describe the level of equality in labour markets is the relative share of national income which is received by labour versus capital.

Despite wages rising in absolute terms, workers' share of the national income in New Zealand has fallen since the 1970s, with a particularly large fall in the 1980s. This reflects wages growing slower than returns to capital, rather than wages falling.

There was some recovery in the 2000s, though the labour income share in New Zealand has fallen



again since 2009 and is still well below levels that were seen in the 1970s.

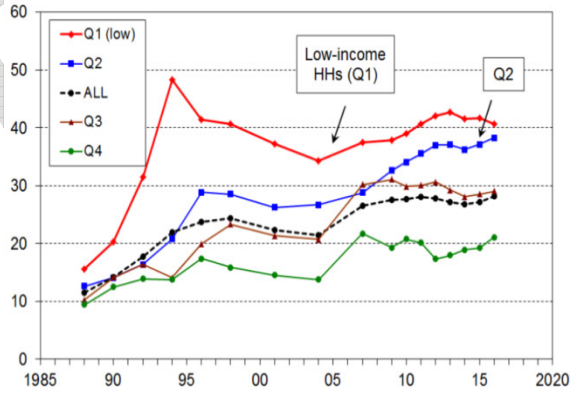


The same trend of a falling share of income going to workers has also been observed in many other countries worldwide, in both developed and emerging economies. The reasons for their divergence are not entirely clear and are a matter of ongoing and wide debate. One potential driver of a rising capital share is higher investment in capital and the use of more capital and technology-intensive production processes. This is what we would expect as technology becomes increasingly advanced, and it does not necessarily indicate anything either bad for workers or unfair on them.

It is important to note that these figures refer to *relative* shares of total income, not absolute incomes rising or falling. Even if the labour income share falls, wages may be rising and workers may be doing well. For example, wage increases for workers could conceivably be higher if the overall income of New Zealand grew, even if the labour income share itself fell.

However, the Group observed that since 2004, the change in New Zealand's labour–capital income share has been flatter than in other countries who have continue to see a fall in labour's share. This could be an indication that New Zealand is not investing enough in capital, or not as much as other countries.

We also looked at increases in the cost of living (or inflation) relative to wage growth. In plain terms, this examines whether wages are keeping up with, or exceeding, the increasing cost of living and translating into higher living standards.

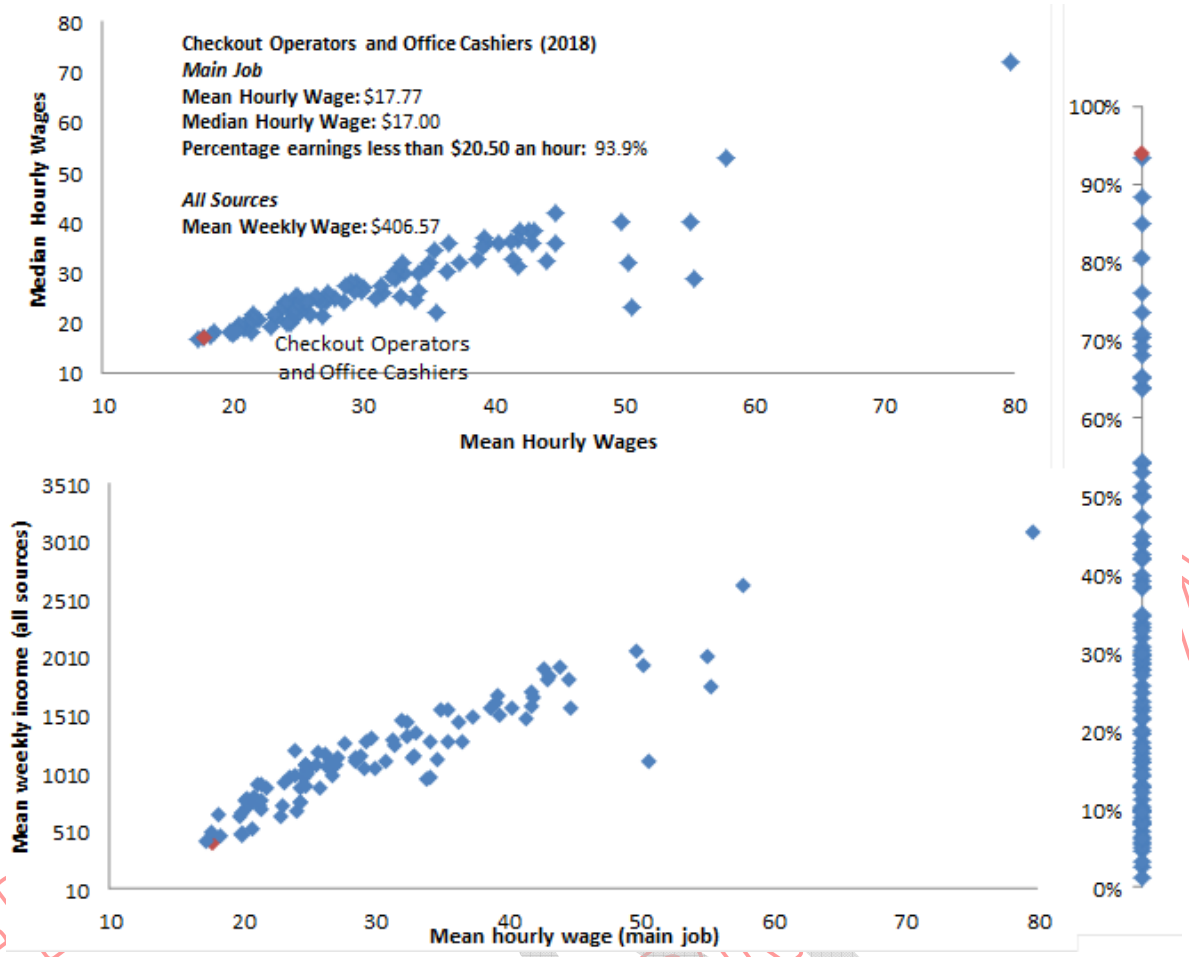


Wages have been rising in recent years, and for most of the last decade, wage increases have exceeded inflation, but both have been increasing modestly.

We also know that incomes after housing costs are more unequal than before housing costs are considered, and that this gap has widened since the 1980s. In households with the lowest incomes, around one in four is spending more than half their income on housing.

3.2 Low income earners

The below graphs show the distribution of wages in New Zealand by occupation at the 3-digit ANZSIC code level. The upper graph shows that some occupations have mean and median hourly wages under $20.50 per hour. In most cases those occupations are represented at the top of the spectrum on the right hand side, which describes the proportion of workers in that occupation earning below $20.50. The lower graph shows the mean weekly income from all sources. This indicates that most workers earning under $20.50 per hour also earn under $1000 per week from all sources.



We examined the demographics of those working on or near the minimum wage. The below table shows different demographic groups which are overrepresented in the low income category, defined as those earning between $15.00 and $20.50 per hour.

People earning between $15.75 and $16.50 per hour as of November 2017		
Demographic	**% of minimum wage earners**	**% of total wage earners**
Aged 16 – 24	48.4%	17.1%
Women	60.6%	49.2%
European/Pākehā	50.5%	64.4%
Māori	17.1%	13.0%
Pasifika	9.7%	6.1%
Working part-time	51.4%	18.7%

Working while studying	19.9%	12.0%
Total number of people	164,100	1,965,312

Skills and productivity

The Group noted the mismatch in New Zealand of skills to job requirements, with some skills being underutilised. [Secretariat is investigating what more we can add to this, eg evidence to cite]

[Placeholder: describe current and planned Government interventions to support industry in-work training here]

The future of work

We expect technology, globalisation, demographic change and climate change to continue to change the demand for labour and skills. This process is likely to be uneven, gradual, and its impact uncertain. NZ has absorbed big changes in labour market over the last 30-40 years. While we do need to be prepared for a faster rate of job loss and skill obsolescence, in the short run, the evidence does not show that change accelerating.

3.3 The role of collective bargaining in lifting incomes and economic growth

At the outset we note that a country's employment relations system and choice of collective bargaining model are not the only factors affecting its economic performance.

In general international research has tended to find a strong link between productivity and both wage growth and wage levels. However, while productivity growth appears to be necessary for wage growth, it is not in itself sufficient. There is also a body of research in labour economics, however, that supports the 'efficiency wage' hypothesis. Researchers argue that higher wages can increase the productivity of workers (and profits of the firm) through various means, such as reducing costs associated with turnover or providing employees with incentives to work rather than shirk.

The OECD has warned against assuming that the form of collective bargaining systems matches perfectly to economic and social outcomes. Outcomes depend on other important factors such as the wider social and economic model, including tax and welfare systems, and the quality and sophistication of social dialogue.

Making changes to a collective bargaining system without considering this wider context could be damaging.

The relationship between collective bargaining and wage growth

One of the objectives of collective bargaining is typically to balance out the bargaining power of each party. Collective bargaining has been associated with lower levels of inequality, for example through limiting wage increases for mid- and high-earners to allow for low-earners' incomes to

rise.[1] Across the OECD, workers with an enterprise-level collective agreement tend to be paid more than those without a collective agreement. Sector-level bargaining is not associated with relatively higher pay on average across the OECD than workers without a collective agreement.

This finding by the OECD is not surprising, as typically most regulatory frameworks at national level rule out the possibility of enterprise-level negotiations offering worse terms than a sector-level collective agreement or national statutory minimum standards. This 'favourability principle' means an individual or enterprise-level collective agreement can only *raise* wages relative to sector-level agreements or minimum standards.

The difference in wages found by the OECD may also signal higher productivity in companies with enterprise-level bargaining than those in a context with a high degree of coverage of centralised bargaining. Where a firm is not constrained by centralised bargaining, the firm's overall performance forms the context for pay increases, and a highly productive firm could choose to pay its workers more, or to pay its highly-productive workers more. A firm offering its workers greater rewards for productivity could induce higher effort and therefore productivity among its workers. We concluded, therefore that there could be a tension between reducing wage inequality and strengthening the link between individual productivity and wage.

The relationship between collective bargaining and productivity

Research globally on collective bargaining and productivity growth similarly suggests that the relationship between these factors is not clear cut, and is highly dependent on wider labour market systems, and the social and economic model of individual countries.

The Group looked to other countries' experience in introducing productivity related measures to their collective bargaining systems, in particular recent changes in Singapore to introduce a Progressive Wage Model. We observe that a positive collective bargaining experience would have the potential to increase aggregate productivity by setting higher wage floors and better conditions; forcing unproductive firms to exit the market; and lifting overall productivity of the sector.

At the same time, collective bargaining may result in a more compressed wage structure between firms, which in turn could have adverse consequences in reducing incentives for workers to increase their efforts or to shift to more productive firms, and in the long term impact on firm productivity and the efficient reallocation of human capital in an economy.

The evidence in the research literature suggests that wages tend to be less aligned with labour productivity in countries where collective bargaining institutions have a more important role. This research tends to be based on sector-level data and examination of the relationship between wages and productivity across sectors.

We do note that raising wage floors may make capital investments relatively more attractive for firms; that is, some jobs may be replaced by automation.

[1] OECD, Employment Outlook 2018, p 83

3.4 The role of collective bargaining in an inclusive and flexible labour market

The Group looked at the role of collective bargaining more generally in labour markets internationally. Collective bargaining remains the predominant model for labour negotiations world-wide. It enables employers and employees to enter into a collective dialogue to negotiate the terms for their employment relationship in the form of a collective agreement.

The International Labour Organisation names collective bargaining as a fundamental human right endorsed by all Member States in the ILO Constitution[2] and reaffirmed this in 1998 in the ILO Declaration on Fundamental Principles and Rights at Work. The ILO recognises the role of collective bargaining in improving inclusivity, equalising wage distribution, and stabilising labour relations.[3]

New Zealand is bound by ILO Convention No 98 (Right to Organise and Collective Bargaining) to "encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."

As a group we recognised that there can be value in the process of collective bargaining as a participatory mechanism to provide collective voice for both employers and employees. It can encourage participation and engagement by employers and employees in actively setting the terms of their relationship. In contrast to minimum standards set in legislation at the national level, which apply across the entire workforce uniformly and are imposed by a third party (the Government), collective bargaining may enable the parties who know their particular circumstances best to set the terms that work for them.

We noted that shared dialogue between employees and employers across a sector or occupation leads to wider benefits and other forms of collaboration between firms or workers. This is possible when bargaining involves groups of employers or unions with a common interest or shared problem to solve, although we recognise this will not always be the case.[4]

Parties may also save in transaction costs by working together on collective bargaining. They can access the expertise of other players in their sector and other scale benefits (for example, arranging for investment in skills or technology for the benefit of the sector).

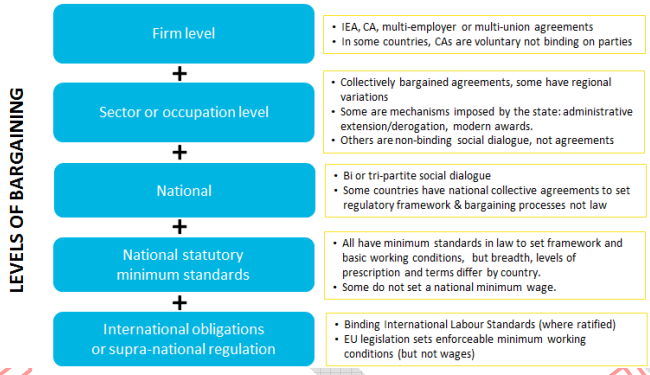
In countries where trade union density is low, collective bargaining tends to be concentrated in larger employers, whether public or private sector. Small businesses can therefore find it difficult to access the potential benefits of collective bargaining in an enterprise-level collective bargaining system, although that may also help them avoid unnecessary costs.

[2] New Zealand was a founding member of the ILO, has signed the 1998 Declaration, and is bound by the primary ILO Convention on collective bargaining No 98 (Right to Organise and Collective Bargaining 1949).
[3] ILO 'Collective Bargaining: A Policy Guide', Foreword
[4] In New Zealand, this is known as Multi-Enterprise Collective Agreement (MECA) and Multi-Union Collective Agreement (MUCA) bargaining under the Employment Relations Act.

3.5 The relationship between minimum standards and collective bargaining

Despite having a century-old international labour standards framework, which provides common principles and rules binding states at a high level, the nature and extent of state encouragement for collective bargaining differs significantly between countries. We found the below diagram useful to describe the basic model of how employment relations systems are structured globally.

Collective Bargaining: the underlying global model



The sharpest delineation between different state models for collective bargaining systems is whether a country has chosen to rely on collective bargaining to provide basic floors for their employment standards (such as a minimum wage, annual leave, redundancy), or whether they rely on statutory minimum employment standards set at a national level which are then supplemented by more favourable terms offered through collective bargaining at a sector or enterprise level.

This choice of whether to set a country's minimum employment standards primarily through legislation or collective agreement, along with a country's legal and social traditions, result in the markedly different detailed design of countries' collective bargaining systems. This manifests in the variations in the levels at which collective bargaining takes place and in the mechanisms for determining representativeness, dispute resolution and enforcement. There is no one size fits all model that can be picked up and deployed in another country without significant adaptation for local circumstances.

In New Zealand, we have an employment relations and standards system which is based on setting minimum standards in statute, and we also provide a legal framework that sets the rules for collective bargaining. Through a series of primary legislation, the Government sets the minimum standards for workers include a statutory minimum wage, and rights to flexible working, leave, etc. at enterprise, multi-employer or multi-union level.

There is nothing in these rules which limits collective bargaining to the enterprise level; the rules allow voluntary bargaining at a sectoral or occupational level. Agreements reached through collective bargaining may equal or add to the statutory floor, not detract from it.

In comparison, some other countries rely more heavily on collective bargaining to set these minimum standards, mainly in Europe. Under the Award system which preceded New Zealand's current employment relations and standards system, we too relied mostly on collective bargaining and awards to set minimum standards. It is largely due to that 97-year legacy and the fact that that system promptly disappeared in 1991 (fewer than 30 years ago) that New Zealand's

legislated minimum standards are less extensive than those in most other OECD countries which don't rely on collective bargaining to set those minima.

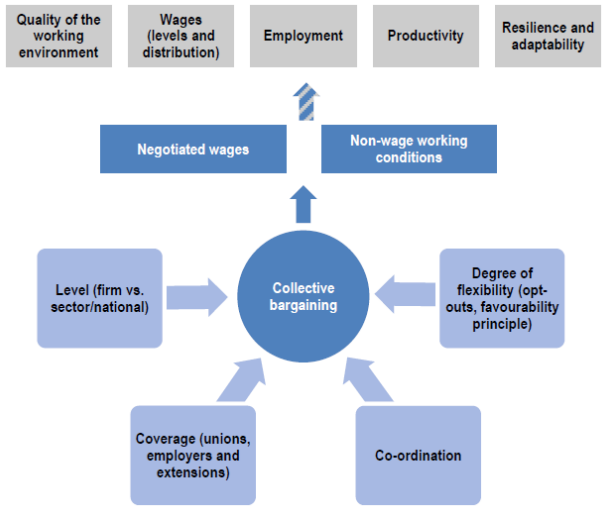
Variations in their employment relations and standards systems may mean some other countries:

- Have no statutory minimum wage, and often only a basic framework for minimum conditions, set in law. These countries use collective bargaining to provide the same minimum floors which we presently regulate for at national level.
- Set only a framework enabling collective bargaining in the law, and allows the representative organisations for employers and employees to agree a national level collective agreement on the bargaining process rules that we have set in law.
- Do not provide for collective bargaining to be binding, meaning collective agreements are voluntary and cannot be enforced in court as they can be in New Zealand and most countries.
- Provide for multiple levels of collective bargaining, with a hierarchy of agreements at national, sectoral and enterprise levels – where we only provide for enterprise level.

3.6 Key features of collective bargaining systems

The OECD characterises collective bargaining systems by the following key features:

- degree of coverage,
- level of bargaining,
- degree of flexibility, and
- coordination



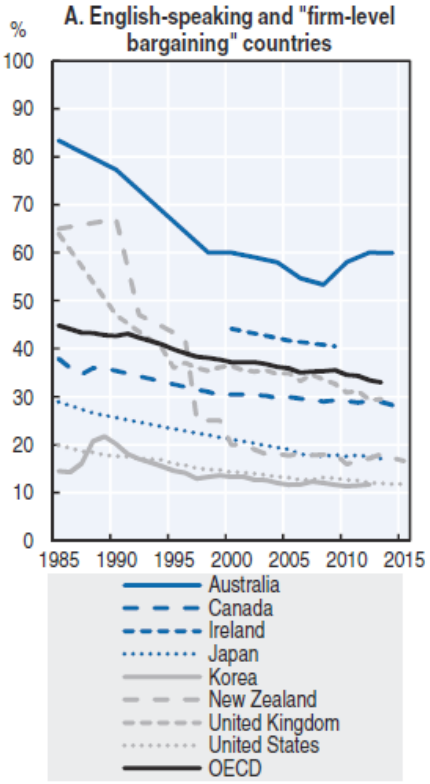
1 Source: OECD Employment Outlook 2018, p 78

Degree of coverage

The degree of coverage refers to the proportion of workers who are covered by a collective agreement. This should not be confused with the proportion of workers who are members of a trade union. A system with wide collective agreement coverage can have a more sizeable macroeconomic effect—positive or negative—on employment, wages and other outcomes of interest rather than agreements confined to a few firms.

The share of employees covered by collective agreements has declined significantly over the past 25 years across the OECD. On average, collective bargaining coverage shrunk from 45 per cent in 1985 to 33 per cent in 2013. As of 2016, New Zealand's collective bargaining coverage is 15.9 per cent.

Percentage of workers covered by collective agreements



The evidence we saw suggests that collective bargaining coverage tends to be high and stable in countries where multi-employer agreements (either sectoral or national) are negotiated – even where trade union density is quite low – and where employer organisations are willing to negotiate.

Some countries also provide for the extension of coverage of collective agreements beyond the initial signatories. This explains why collective bargaining coverage is higher than trade union density across the OECD, where sector level extensions are commonly used in two-thirds of countries.

In countries where collective agreements are generally at the enterprise level – such as New Zealand – coverage tends to match trade union density. However, it should be noted that not all union members are covered by collective agreements. In addition, data on New Zealand union membership and collective bargaining coverage suggest a significant share (perhaps as high as 30%) of those who claim to be covered by a collective agreement are not union members. In addition, many New Zealand collective agreements extend coverage (by agreement between the union and employer) to all or parts of the employer's non-union workforce. One thing which affects this is the negotiation of bargaining fees for non-union workers, although these clauses are relatively rare.

Across the OECD, about 17 per cent of employees are members of a union. In 2015, New Zealand's equivalent rate was 17.9 per cent. This rate varies considerably across countries. Union membership density has been declining steadily in most OECD countries over the last three decades. It should be noted that union density in New Zealand declined sharply from around 46% to 21% in the 4 years following enactment of the Employment Contracts Act 1991, and has declined gradually since that time.

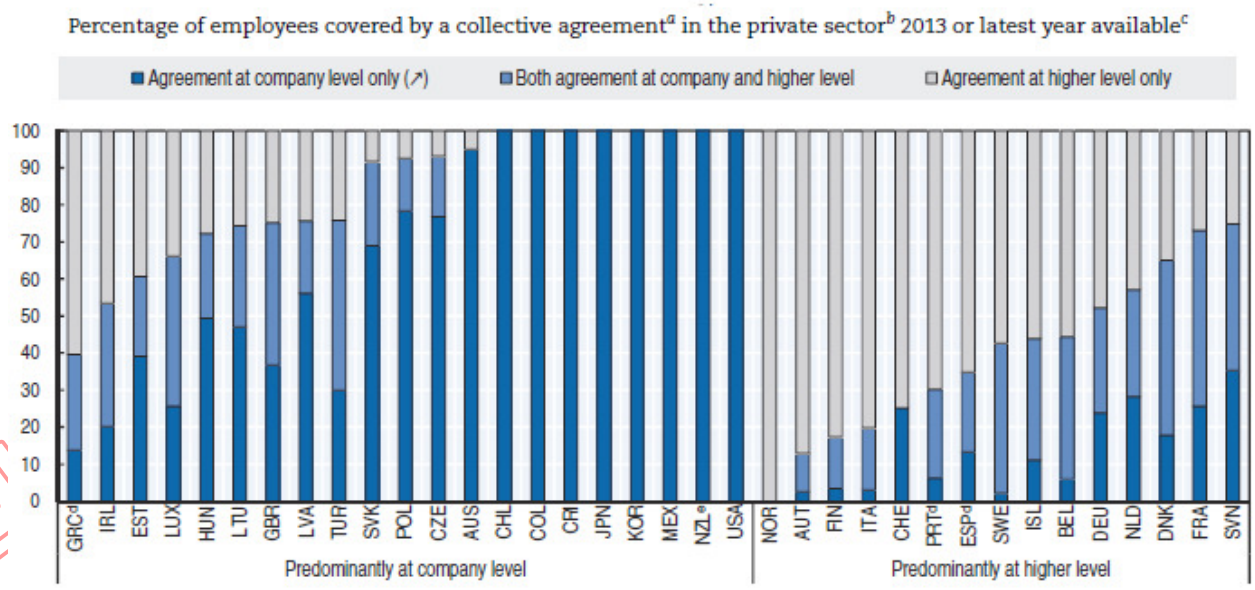
Data on employer organisation density (that is, the percentage of firms that belong to employer organisations) is patchy, and comparisons can be difficult to draw between countries given the absence of common metrics and reliable data. Across those OECD countries that do collect this data, employer organisation density is 51 per cent on average. Although it varies considerably across countries, this figure has been quite stable in recent decades. There is no national level statistical information gathered on New Zealand's employer organization density.

Level of bargaining

The level of bargaining refers to where parties negotiate, which (as described in the diagram in section 3.4) could be at the enterprise, sector or national level. Centralised bargaining systems are ones in which bargaining tends to happen at the national level; highly decentralised systems

are ones in which collective bargaining tends to be at the enterprise level. New Zealand is part of the trend in the OECD towards decentralisation, as all our bargaining is at the enterprise-level, although occasionally among groups of enterprises (through a MECA).

According to the OECD, centralised bargaining systems can be expected to have less wage inequality relative to systems with mostly firm-level agreements. Centralized systems tend to experience smaller wage differences, within firms, across firms, or even across sectors. Enterprise-level agreements, by contrast, allow more attention to be paid to enterprise-specific conditions and individual performance, and allow for more variation in wages.



2 Source: OECD Employment Outlook 2017,

Degree of flexibility

In systems with higher-level collective agreements (e.g. at the sector or national level), the degree of flexibility refers to the extent to which firms can modify or depart from those higher-level agreements. The possibility of opt-outs can increase the flexibility of a system and allow for a stronger link between wages and firm performance, for example in economic downturns. This may bolster employment and productivity on the upside, but increase wage inequality on the downside.

New Zealand does not allow firm-level agreements to depart from minimum standards. Collective agreements, including MECAs, are binding on the parties who agreed them, but this would not be characterised as a limitation on flexibility as there is no extension mechanism in New Zealand, so each party to a MECA has chosen to be bound by it.

Coordination

Coordination refers to the degree to which minor players deliberately follow what major players decide, and to which common targets (e.g. wage levels) are pursued through bargaining. Coordination can happen between bargaining units at different levels (e.g. when an enterprise-

level agreement follows guidelines fixed by peak-level organisations), or at the same level (e.g. when some sectors follow standards set in another sector).

In New Zealand, as bargaining is confined to the enterprise level, there is no coordination between parties at various levels or across sectors, and the government does not exert influence beyond establishing the bargaining framework and minimum standards. Relative to other OECD countries' approaches to collective bargaining, New Zealand is on the uncoordinated end of the spectrum.

International best practice

Overall the OECD has concluded that the main trade-off in collective bargaining is between inclusiveness and flexibility. In other words, collective bargaining can generate benefits for employment and inclusiveness (wage inequality is lower and employment for vulnerable groups is higher) but can also have drawbacks in reducing the flexibility for firms to adjust wages and conditions when their situation requires it.

The OECD and the ILO recommend that countries should consider adopting a model with sector-level bargaining, combined with the flexibility to undertake firm-level bargaining to tailor higher-level agreements to each workplace's particular circumstances. The OECD has found this model delivers good employment performance, better productivity outcomes and higher wages for covered workers compared to fully decentralised systems.

3.7 Other countries' approaches to collective bargaining

New Zealand currently provides a voluntary mechanism for employers and employees to bargain at a sector level, through MECAs. The Working Group therefore looked to other countries for examples of other ways to support sector level collective bargaining.

Given New Zealand's own social and economic context, any Fair Pay Agreement system design will need to be bespoke; however, it is worth examining how other countries approach the concept of sector level bargaining.

There are four main models of sector level bargaining that the Working Group looked at when researching collective bargaining:

- Australian Modern Awards system
- The Scandinavian model
- The Continental European model
- Singapore's progressive wage model.

These models are discussed more fully below. It is worth noting that the comparator countries have different societal factors that influence how they approach the question of collective bargaining. For example there is a high level of government intervention in the Singaporean Progressive Wage Model compared with a high level of social dialogue and cooperation in Nordic countries such as Denmark.

Australia – Modern Awards system

In 2009, Australia introduced a system of Modern Awards, which are industry-wide regulations that provide a fair and relevant minimum safety net of terms and conditions such as pay, hours of work and breaks, on top of National Employment Standards. Awards are not bargained for; rather they are determined by the Fair Work Commission following submissions from unions and employer representative groups. The Fair Work Commission must review all Modern Awards every four years.

A Modern Award will not apply to an employee when an enterprise agreement (i.e. a firm level collectively bargained agreement) applies to them. If the enterprise agreement ceases to exist, the appropriate Modern Award will then usually apply again. Enterprise agreements cannot provide entitlements that are less than those provided by the relevant modern award and must meet a 'Better Off Overall Test' as determined by the Fair Work Commission.[5]

Broadly speaking, the statutory minima in Australia – the National Employment Standards - coupled with Modern Awards provide the equivalent function of worker protection to New Zealand's existing national statutory minimum employment standards, but in Australia the Modern Awards system provides the ability for the Government to impose differentiated minimum standards by occupation.

Sector-level bargaining does not exist in Australia in the form that is envisaged by the Fair Pay Agreement system. Collective bargaining in Australia is at enterprise level. Australian law does provide for multi-enterprise collective agreements in limited circumstances. One of these circumstances is when the Fair Work Commission makes a Low-Paid Authorisation to "encourage bargaining for and making an enterprise agreement for low-paid employees who have not historically had the benefits of collective bargaining with their employers and assisting those parties through multi enterprise bargaining to identify improvements in productivity and service delivery and which also takes account of the needs of individual enterprises".[6] The private security sector appears to be one of the more frequent users of the low-paid provisions.

The Nordic model

Under the Nordic model of collective bargaining, national legislation only provides a broad legal framework for collective bargaining. The rules are set at national level through basic agreements between the employee and employer organisations. Sectoral collective agreements define the broad framework but often leave significant scope for further bargaining at the enterprise level.

None of the Nordic countries has a statutory minimum wage. Collective agreements therefore provide the function of setting basic floors for wages and conditions in each sector or occupation. Denmark and Sweden use collective agreements as their only mechanism for setting minimum wages, meaning that there is no floor for wages for workers outside of collective

[5] https://www.fwc.gov.au/awards-and-agreements/agreements
[6] Fair Work Act 2009

agreements. Finland, Iceland and Norway have all started to use extension mechanisms to cover all workers at industry level, to provide those minimum floors.[7]

These countries tend to have historically high levels of organisation in both employer and employee sides, with continuing high union density and a strong social dialogue and cooperation around collective bargaining and in their wider economic model.

Due to the high level of union coverage in these countries, it is generally unnecessary to extend sector level collective agreements to all employees in an industry but agreements can be extended through application agreements. For example, in Sweden, there is no bargaining extension mechanism in statute or otherwise. A voluntary approach to extension is also made easier due to high union membership.

For example, a trade union may enter into "application agreements" with employers who are not signatories to a collective agreement, with the effect of making that collective agreement also apply to a non-signatory company. Non-union employees can also enter into "application agreements" with trade unions.

Countries that generally follow this model are Denmark, Germany, the Netherlands, Norway and Sweden.

The Continental Europe model

Under the Continental model, the legal framework provides statutory minimum standards for wages and conditions, along with the rules for collective bargaining.

National or sectoral collective agreements set terms and conditions for employees but allow for improvements on these at enterprise level ('the favourability principle'), or opt outs from the sector agreement (although these derogations are usually limited).

Under this model, collective bargaining is conducted at three levels - national, industry and enterprise:

- At national level, negotiations cover a much wider range of topics than normal pay and conditions issues, including job creation measures, training and childcare provision. Pay rates are normally dealt with at industry and company level, but the framework for pay increases could be set at national level.
- At industry level, negotiations are carried on by unions and employers' organisations often meeting in 'joint committees' (binding on all employers in the industries they cover)
- At enterprise level, the trade union delegations together with the local union organisations negotiate with individual employers.

Collective bargaining is hierarchical and structured such that an agreement concluded at one level cannot be less favourable than agreements reached at a broader level. Industry agreements are therefore subject to minimum terms set out in national agreements. Firm-level agreements

[7] https://www.ilo.org/global/topics/wages/minimum-wages/setting-machinery/WCMS_460934/lang--en/index.htm

can be more favourable than industry agreements. There is, however, large variation among industries in terms of the relative importance of industry-level and firm-level agreements.

Extension mechanisms are more widely used under this model of collective bargaining. Criteria for extension can be a public interest test or often a threshold. For example in Latvia if the organisation concluding an agreement employs over 50% of the employees or generates over 60% of the turnover in a sector, a general agreement is binding for all employers of the relevant sector and applies to all of their employees. In Belgium or France, however, extensions are issued by Royal Decree or the Labour Ministry respectively upon a formal request from the social partners that concluded the agreement.

Countries that generally follow this model of collective bargaining are Belgium, France, Iceland, Italy, Portugal, Slovenia, Spain and Switzerland.

Singapore – the Progressive Wage Model

Singapore has similar levels of collective bargaining and union density to New Zealand. The legal framework does not provide for a statutory minimum wage.

Singapore undertakes sector level bargaining in specific sectors in the form of the Progressive Wage Model (PWM). The PWM is a productivity-based wage progression pathway that helps to increase wages of workers through upgrading skills and improving productivity. It is mandatory for workers in the cleaning, security and landscape sectors which are mostly outsourced services. The PWM benefits workers by mapping out a clear career pathway for their wages to rise along with training and improvements in productivity and standards.

The PWM also offers an incentive to employers, for example, in order to get a licence a cleaning company must implement the PWM. At the same time, higher productivity improves business profits for employers.

The PWM is mandatory for Singaporeans and Singapore permanent residents in the cleaning, security and landscape sectors. It is not mandatory for foreign workers but employers are encouraged to use these principles of progressive wage for foreign cleaners, landscape workers and security officers.

3.8 New Zealand's employment relations and employment standards (ERES) regulatory system

Any Fair Pay Agreements system will need to complement and support the existing parts of New Zealand's regulatory system for employment relationships. Therefore, it is worth setting out our understanding of that system.

The Employment Relations and Employment Standards (ERES) regulatory system aims to promote productive and mutually beneficial employment relationships, and by doing so it:

- supports and fosters benefits to society that are associated with work, labour market flexibility, and efficient markets
- enables employees and employers to enter and leave employment relationships and to agree Terms and Conditions to apply in their relationships

- provides a means to address market failures such as power and information asymmetries which can lead to exploitation of workers.

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

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

Employment relationships are regulated for a number of reasons:

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

The system therefore provides:

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

The ERES system can be a key driver for innovation and growth in our labour market and wider economy

The effective use of knowledge, skills and human capital in firms is a key driver of innovation and growth. This can increase wages, lifts firms' competitiveness and profitability, and lead to better social and economic outcomes.

The ERES regulatory system sets the boundaries for the operation of a market for labour hire, risk and reward. The operation of this market is not simply an employment contract for the exchange of goods and services, it is based on human relationships where mutual trust, confidence and fair dealing are important.

The ERES system is also important for New Zealanders, as employment is a primary source of income that is then used to purchase goods and services, and is a source of investment and

insurance. There is an emphasis on these relationships being conducted in good faith, and on effective dispute resolution.

Institutions

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

- Mediation Services
- the Employment Relations Authority
- the Employment Court
- Labour Inspectors
- the Registrar of Unions

3.9 The current state of collective bargaining in New Zealand and trends over time

The legal framework for collective bargaining in New Zealand

The Employment Relations Act sets out the rules for engaging and at least in its objectives promotes collective bargaining in New Zealand. As in individual employment relations, the duty of good faith underpins collective bargaining in New Zealand.

The Act contains mechanisms for multi-employer collective bargaining but no specific mechanisms for industry or occupation wide collective bargaining (other than some parts of the public sector, e.g. education). There are also rules around 'passing on' of collectively bargained terms and conditions to non-union members. While employers can't automatically pass on terms which have been collectively bargained for, around 11% of CEAs extend coverage to all employees of the employer(s). Often this is done through non-union members paying a bargaining fee, or union members voting to allow terms to be passed on. Informally, many employers 'pass on' many collective terms through 'mirror' individual employment agreements.

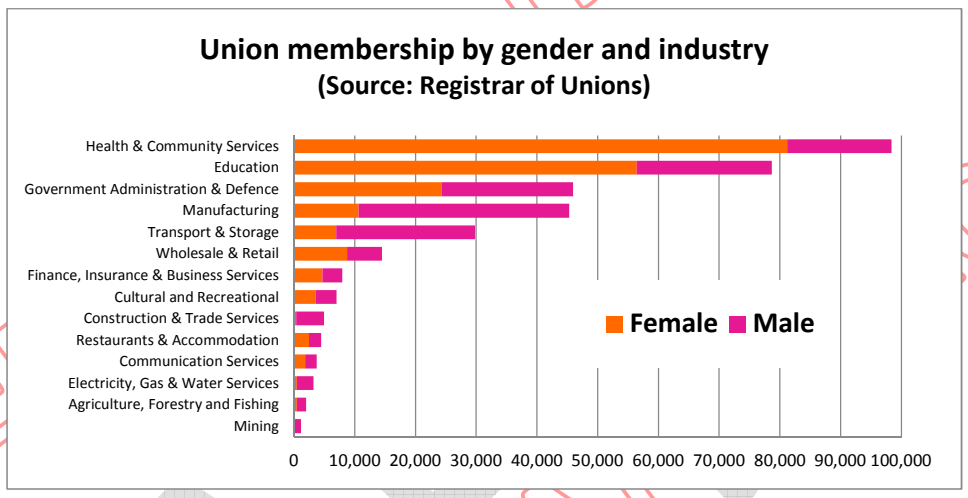
A collective employment agreement expires on the earlier of its stated expiry date or 3 years after it takes effect, with some exceptions. Over time, collective agreements have become longer in duration. One reason for this may be the transactions costs for both sides for collective bargaining incentivising longer duration for efficiency reasons. Another explanation may be that inflation has been low and stable for an increasing length of time.

Data on collective bargaining in New Zealand

New Zealand has low collective bargaining coverage compared with many OECD countries. It should be noted that this varies considerably and New Zealand is close to the middle of the pack in this regard. Collective agreements are more significant in the public sector while private sector coverage is low, and is mainly concentrated in certain industries and large firms. The

concentration of collective agreements in the public sector is consistent with many other OECD countries including Australia, the United Kingdom, United States and Canada.[8]

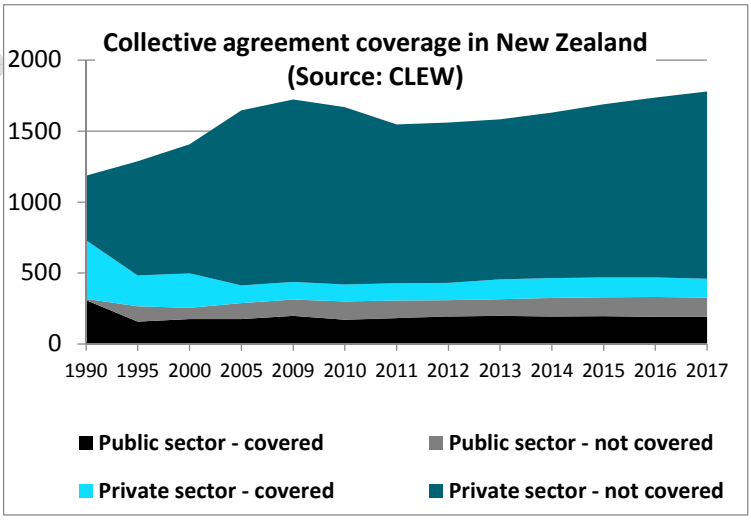
Union membership in New Zealand is voluntary and membership and collective agreement coverage are around 17% of all employees. It should be noted that not all union members are covered by collective agreements. Union members as a percentage of the workforce have declined from over 20% in 2012 to 17.2% in 2017. Union membership has declined by 1.28% on average over the past 5 years. The majority of union members are women and are concentrated in particular sectors.



Currently there are 1600 collective agreements covering 10% of workforce in the private sector, and 456 collective agreements covering 60% of workforce in the public sector.

Collective bargaining coverage has decreased proportionately and is not keeping up with growth in the number of jobs in the economy. This is largely due to the difficulties faced by workers in accessing the collective bargaining system. This means workers on small worksites being able to organise their fellow workers, finding a union that is willing to spend the extensive time to negotiate a collective agreement, and voluntarily concluding an agreement before the union members on the site have left their employment.

While the number of employees covered by a collective agreement is stable, the total labour force is growing as illustrated in the graph below.



Coverage of multi-employer collective agreements (MECAs) is low outside the public sector (as is coverage of single employer collective agreements). MECAs are generally found in the health and education sectors (excluding tertiary education). There were 37 private sector MECAs in 2004, when the duty to conclude was added to the Employment Relations Act, and 37 private sector MECAs in 2015, when the employer opt

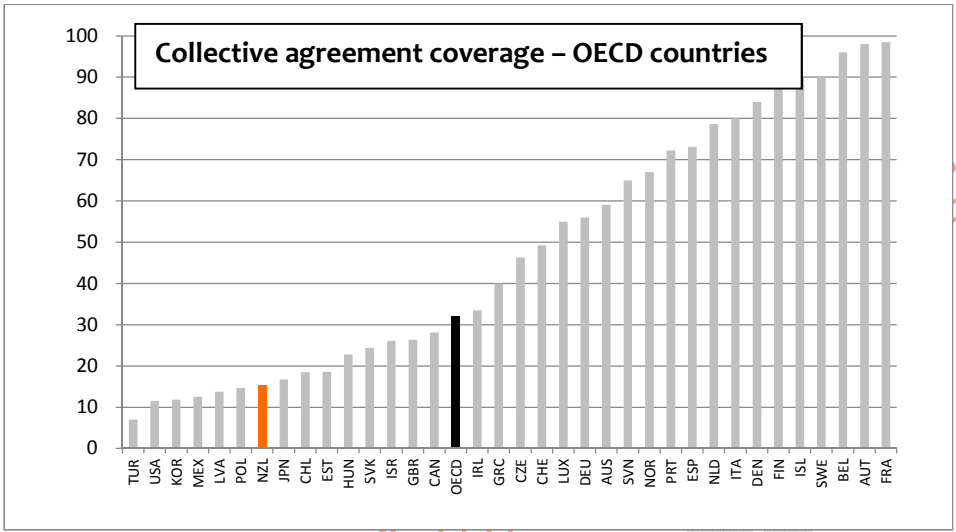
[8] https://www.victoria.ac.nz/__data/assets/pdf_file/0006/1235562/New-Zealand-Union-Membership-Survey-report-2016FINAL.pdf

out was added. There are currently 72 MECAs which is the same number as five years ago.

MECA bargaining may be frustrated by competitive instincts between firms, as well as a general disinclination to bargain with unions or collectively. These competitive pressures do not, for the most part, exist in the public sector, where bargaining is undertaken by centralised authorities (e.g. District Health Board Shared Services and the Ministry of Education) on behalf of what are technically separate employers (e.g. the independent District Health Boards and school Boards of Trustees).

In practice, MECAs only exist where the employer parties all agree prior to the commencement of bargaining - or early thereafter - to engage together in multi-employer collective bargaining. This was the case even before 2015, when the Employment Relations Act was amended to allow employers to opt out of MECA bargaining. Salary reviews have become more prevalent, mainly in the public sector. The increase in productivity or performance payments is associated with a movement to a range of rates (because employers have discretion to place employees within the range). However output can be hard to measure, especially on an individual basis. In contrast to this, specific mention of training and skill development in private sector collective agreements has decreased over time. These provisions don't tend to link pay to skills development. It appears employers move towards providing for training and skills development in company policy instead – this does not necessarily mean less training and skills development is taking place, in fact the Survey of Working Life indicates it is increasing.

It's rare to see wages being indexed to inflation in Collective Agreements. This may partly reflect parties' preference for certainty, to know exactly what wages will be. However, another factor may be that inflation has been low in the last decade and parties may feel reasonable certainty that it will not exceed 3% per annum, in line with the Reserve Bank's policy.



Case study: NZ Plastics Industry Multi-Employer Collective Agreement

This agreement dates from 1992, with many of the standard conditions from the previous system of awards (eg hours of work, overtime rates, shift payments etc) carrying over from then.

The Plastics MECA moved away from multi-classification pay rates and service pay to a skill-based pay system linked to qualifications very early in its development. Training was, and has been, a central part of the Plastics MECA pay scheme, although training was not mandatory for either the employers or the employees. One of the agreed objectives of the Plastics MECA is "the improvement of productivity, efficiency and competitiveness of the industry through a commitment to qualifications."

The Metals MECA has similar commitments to productivity and skill development although the minimum wage rates are generally based on work classifications. The negotiations for both MECAs normally take place with a key group of employers and the unions. The unions then go around other employers and get them to sign on as a "subsequent party" to the MECA.

While the MECAs have been good for setting the base industry employment conditions, if an employer does not want to accept the industry standards created in the MECA then there is little the union can do to force the issue, especially in small enterprises. Even the subsequent industry parties have lists of conditions from the MECA that they opt out of.

3.10 Collective bargaining experiences

What makes for good bargaining process?

In our experience, a good bargaining process underpinned by a strong rules-based system that addresses the inherent inequality of bargaining power in employment relationships will lead to a good outcome. By good outcome we mean one that both parties support, with real improvements over the status quo. In our experience, the elements of effective collective bargaining come down to three sets of factors: attitude/commitment, skills and process.

The attitude or commitment of parties to collective bargaining is important. Good collective bargaining requires good faith and a genuine willingness to engage and negotiate. Collective agreements are forward-looking documents and, to reflect this, good collective bargaining involves a conversation about where both the business and workers are going in the next few years. Bargaining works best for employers when they can see it is transformational not transactional, i.e. it affects the whole business, not just higher wages. A good attitude when approaching bargaining can also be self-reinforcing: bargaining allows for intense discussions about real issues, which ultimately adds value to the entire employment relationship.

Good bargaining also typically involves having skilled people in the room, and strategic leadership that takes a long-term perspective.

In terms of the process, it must be built around a strong rules-based process that addresses the inherent inequality of bargaining power in employment relationships. This includes employers not interfering in the choice of workers to join a union, respecting the workers' right to meet in the workplace to formulate their bargaining position, elect their own bargaining team and to conduct bargaining in an efficient manner. This also includes the ability of the parties to access statutory processes for the resolution or determination of the terms of such an agreement if bargaining becomes protracted or difficult. The capacity and capability of bargaining parties will also support an efficient process and lead to timely outcomes. It can also be useful to involve trained third-party facilitators, mediators or other forms of support.

What makes for a bad process?

A bad or ineffective process can lead to a worsening of employment relationships. Employment relationships are ongoing and long-term; ending a bargaining episode with a 'winner' and a 'loser' does not bode well for this ongoing relationship. A bad process can also lead to protracted negotiations, impatience on both sides and even industrial disputes.

Barriers to good outcomes can take a number of forms. This may involve bad faith, where one or both parties are making no real effort to honestly engage. If the approach to bargaining is transactional, it's harder to get all parties to the bargaining table. Likewise if one party feels like it is being forced to the negotiating table, or there is a lack of bargaining skills, it can lead to an ineffective process.

In the case of MECAs, if one party is unwilling to come to the table – or wants to withdraw from an established MECA when it is being revised – that is enough to put an end to negotiations. We have heard that this can be frustrating for workers and unions who have attempted to maintain a MECA, such as in the cleaning and manufacturing industries.

Bargaining can be quite different depending on the scale of the parties or the characteristics of the industry. The bargaining process can impose higher relative transaction costs on small businesses, who can have quite different needs. It can also be harder in industries or occupations with higher turnover.

Coordination

Notwithstanding some MECAs, the vast majority of collective agreements negotiated in New Zealand are for single employers. In contrast, Fair Pay Agreements would require a high degree

of coordination to work effectively, and could require multiple representative groups to be involved.

We note that levels of coordination can vary significantly across industries and occupations in New Zealand: some industries have well-established industry groups and unions, whereas others do not. Even where industry groups do exist, they tend to be focused on representing the interests of the industry and sharing best practice, and do not typically have a role in collective bargaining.

The process of collective bargaining and the problem of coordination can also be more difficult where SMEs are predominant in a sector.

3.11 The Relationship between Pay Equity and Collective Bargaining

Since the *Terranova* case there has been significant work around redesigning the Equal Pay Act 1972 to allow for a pay equity settlement process that is very similar to collective bargaining, although has a judicial backstop for determination if agreement cannot be reached.

The settlement of Kristine Bartlett's claim against her employer took the form of an industry-negotiated pay equity settlement that involved three employer groups, the Government, three unions and 55,000 workers.

Behind the negotiations was the Employment Court, who had adjourned their decision-making process in order for the negotiations to reach conclusion.

The settlement was ratified by a majority of workers in the industry, but the dilemma for the parties was the form by which it would become binding on employers and enforceable by workers.

There is nothing in the current legislative framework that allows for a 4-year-long pay equity settlement to be applied to all employers and workers in the industry without each employer voluntarily agreeing to becoming party to an industry MECA and at least one of the unions having at least one member employed by each employer to ensure it could be completed.

Given the difficulties with this option, the Government chose to legislate the Care and Support Workers Pay Equity Settlement Act 2017 to effectively impose a set of wage rates, qualification and skill development commitments on every employer and worker (current and new) for the five years of the settlement agreement. After this time the legislation will expire.

Unless the Government wants to legislate for every pay equity settlement and extend such legislation to cover the end-of-term settlement review, a mechanism needs to be found within the collective bargaining framework to allow for such agreements to be enforceable beyond the parties who concluded them at the time or else pay equity will be undermined.

4 The role of Fair Pay Agreements in our economy

4.1 Where Fair Pay Agreements would fit into the ERES system

In the diagram in section 3.4, a Fair Pay Agreements system would comprise the second row. A FPA system will allow for sector- or occupation-wide collective agreements which build on, rather than replace, existing minimum standards. Minimum standards will continue to operate as a 'floor', and terms in an FPA agreement may match or improve on those standards. If minimum standards overtake those in the FPA over time, the minimum standards would apply.

Workers and firms would also be able to negotiate firm-level agreements (whether MECAs, MUCAs, other collective agreements, or individual employment agreements) within the sector or occupation. These agreements would be able to, as appropriate to the circumstances:

- further improve on the terms and conditions in the FPA,
- clarify the specific terms which apply at the firm level (for example, when the FPA sets a range),
- set terms and conditions for firms or workers which are exempt from the FPA, and/or
- set terms and conditions on matters where the FPA is silent.

4.2 Purpose of introducing a Fair Pay Agreement system

The Government asked us to make independent recommendations to the Government on the scope and design of a legislative system of industry or occupation-wide bargaining, which would support their vision for:

- A highly skilled and innovative economy that delivers good jobs, decent work conditions and fair wages while boosting economic growth and productivity.
- Lifting the conditions of New Zealand workers, businesses benefit through improved worker engagement, productivity and better workplaces.
- An employment relations framework that creates a level playing field where good employers are not disadvantaged by paying reasonable, industry-standard wages.
- A highly skilled and innovative economy that provides well-paid, decent jobs, and delivers broad-based gains from economic growth and productivity.
- Meeting New Zealand's obligation to promote and encourage the setting of terms and conditions of employment by way of collective bargaining between workers, worker's representatives, employers and their representatives.

In designing this system, the Government also mandated us to manage and where possible mitigate the following risks:

- slower productivity growth if a Fair Pay Agreement locks in inefficient or anti-competitive businesses models or market structures
- a "two-speed" labour market structure with a greater disparity in terms and conditions and job security between workers covered by Fair Pay Agreements and those who are not
- unreasonable price rises for some goods and services if increased labour costs are not offset by productivity gains and profit margins are held at existing levels
- undermining of union membership through the reduction of the value of enterprise bargaining by way of the pass on of collectively negotiated terms and conditions to non-union members, and

- possible job losses, particularly in industries exposed to international competition which are unable to pass on higher labour costs to consumers of those goods and services.

5 Summary of proposed FPA model and key features

- [Summary of final model to go here once individual building blocks are settled]

6 Detailed design of a FPA collective bargaining system

6.1 Initiation

The Government asked us to recommend a process and criteria for initiating air Pay Agreement (FPA) collective bargaining, including bargaining thresholds or public interest tests.

The Government mandated that it will be up to the workers and their union representatives and employers in each industry to make use of the system to improve the productivity and working conditions in the industry.

The FPA collective bargaining process should be initiated by only workers and their union representatives

We recommend that the group initiating the process must be workers' union representatives, and that they must nominate the sector or occupation they seek to cover through a FPA. How they define the proposed boundaries of the sector or occupation may be narrow or broad.

There are two circumstances where a FPA collective bargaining process may be initiated

The Group envisages two circumstances where employers and/or workers' union representatives in a sector or occupation may see benefit in bargaining an FPA.

On the one hand there may be an opportunity for employers and workers to improve productivity and wage growth in their sector or occupation through the dialogue and enforceable commitments that FPA collective bargaining provides.

On the other hand, there may be harmful labour market conditions in that sector or occupation which can be addressed through employer-worker collective bargaining, to reach a shared and enforceable FPA that sets wages and terms and conditions across the sector or occupation which will help tackle those harmful conditions and set a level playing field where good employers are not disadvantaged by paying reasonable industry-standard wages

The Group can therefore see two routes for a FPA collective bargaining process to be initiated:

- **Representativeness trigger**: In any sector or occupation, workers, via their union representatives, should be able to initiate a FPA collective bargaining process if they can meet a minimum threshold of number of workers in the nominated sector or occupation.

- **Public interest trigger**: Where the representativeness test is not met, a FPA may still be triggered where there are harmful labour market conditions exist in the nominated sector or occupation. The Government may wish to consider several options under this trigger.

The representativeness threshold should cover both union and non-union workers

Where workers through their union representatives wish to initiate a FPA process, we recommend that a minimum representativeness threshold should apply across all workers in the nominated sector or occupation. This should cover both union members and non-union workers.

We recommend that at least 10 per cent or 1,000 (whichever is lower) of workers in the sector or occupation (as defined by the workers) must have indicated their wish to trigger FPA bargaining.

This representativeness threshold is intended to ensure that there is sufficient demand for bargaining within the sector or occupation. There would be no equivalent employer representation test.

The conditions to be met under the public interest trigger should be set in legislation

To provide certainty for all parties, if the option of a 'public interest trigger' is progressed, we recommend that the conditions to be met of harmful labour market conditions should be set in legislation and an independent third party should consider the following:

- historical lack of access to collective bargaining; and/or
- high proportion of temporary and precarious work; and/or
- poor compliance with minimum standards; and/or
- high fragmentation and contracting out rates; and/or
- poor health and safety records.

These conditions, or criteria, would be designed so they assess whether there was an overriding public interest reason for FPA bargaining to be initiated in that particular sector or occupation. An independent third party should adjudicate this and invite comments from affected parties within a set time period.

An independent body is needed to determine these conditions are met

Under either route, there is a need for an independent body to determine that the trigger conditions have been met before the bargaining process commences :

- Under the public interest trigger, the body would determine the claim that the harmful conditions are evidenced.

- Under the representativeness trigger, where the number of workers requesting the process is lower than 1,000, the body would determine the baseline number of workers in the nominated sector or occupation and confirm the threshold of 10% has been met.

There should be time limits set for the body to complete the determination process to provide certainty for all parties on whether the bargaining process may proceed.

Once determined, the body would inform all affected parties (workers and employers) that bargaining will commence. This provides an opportunity for any party who considers they do not fall within the proposed coverage to contest whether they fall within the coverage.

Once initiation is complete, the bargaining process would be the same under either trigger circumstance.

The Group considered that such an independent body would have quasi-judicial functions, for example, in circumstances where the coverage or representativeness test need to be

adjudicated, rather than agreed by consensus. The body would need to interpret the legislation and exercise determinative functions.. We suggest the body could be a statutory body, similar to a Commission, at arm's length from the Government of the day. The Commission must be a costs free jurisdiction.

The Government will need to consider how to assess and mitigate potential negative effects

We acknowledge that some sectors perceive there could be negative effects on competition or consumer prices from FPA bargaining. For example, agreements could have the effect of shutting out new entrants to an industry, or higher wage costs passed on through product price increases. We invite the Government to consider how existing competition law mechanisms may need to be adapted to mitigate the risk of such effects.

6.2 Coverage

The Government asked us to make recommendations on:

- how to determine agreement coverage, including demarcating the boundaries of the industry or occupation and whether the FPA system would apply to employees only, or a broader class of workers;
- whether there are circumstances in which an employer can seek an exemption from a relevant agreement and the process for doing so; and
- whether FPAs should apply to industries or occupations, or both.

The occupation or sector to be covered should be defined and negotiated by the parties

We recommend that Parties should be able to negotiate the boundaries of coverage, within limits set in the legislation. The workers and their representatives initiating the bargaining process must propose the intended boundaries of the sector or occupation to be covered by the agreement. We recognise that labour markets can vary significantly across New Zealand (e.g. on a geographic basis). Therefore, the Group considered that parties should also be able to define coverage using additional parameters, including providing for variations in terms for geographic regions if they so wish.

It is important for FPAs to cover all workers (not just employees) to avoid perverse incentives

The Group considered that the parties covered by the FPA should include all workers in the defined sector or occupation, subject to any exemptions (see below). It is necessary for FPAs to cover all workers, as otherwise the system may create a perverse incentive to define work outside employment (regulatory arbitrage). We acknowledge the issue of defining workers as contractors to avoid minimum standards is a broader issue, and Government may wish to give effect to our recommendation through other work directly on that issue.

All employers in the defined sector or occupation should be covered by the agreement

The Group noted that the premise of the Fair Pay Agreement was that it should cover all employers in the defined sector or occupation, if it was desired to avoid incentives for under-cutting the provisions of the FPA. This approach, if adopted, should also extend coverage under

the FPA to any new employers or workers in that sector or occupation after the FPA has been signed.

Some of us considered that individual employers, particularly small employers, should be able to elect whether to be covered by the proposed FPA. Others opposed such exemptions except in exceptional and time-limited circumstances.We also noted it would be important for employers to be able to achieve certainty and avoid incurring unnecessary transaction costs. If an employer does not believe they are within the coverage of the initiation of a particular FPA they should be able to apply to the independent body for a declaration of whether their business falls within the coverage and is required to be involved in the FPA process.

There may be a case for limited flexibility for exemptions from FPAs in some circumstances

We consider that some flexibility should be permissible in FPAs so that particular circumstances where exemptions are allowed may be set in legislation and agreed on by parties in the bargaining process.

The existence of a FPA should not deter employers from offering more favourable terms to their workers. The Group also considered it may be possible to exempt employers from some or all provisions of the FPA where they agreed an enterprise level agreement that offered more favourable terms than those in the FPA.

The Group noted that lifting standards may force some employers out of the industry, if they can neither absorb costs nor raise prices and remain competitive in the market. We considered that parties could include defined circumstances for temporary exemptions for employers or workers in the FPA., or include administrative procedures for the parties or a third party to approve requests for an exemption after the FPA is ratified. Some exemptions we agreed would be appropriate were temporary exemptions for small employers; for young workers, or long-term beneficiaries in their first year back in employment. Some members considered it may be appropriate to exempt workers such as these from minimum wages specified in an FPA, but not non-wage conditions.

As a general rule, the Group considered that any exemptions should be limited and typically temporary in nature (e.g. up to 12 months), as the more exemptions provided for will increase complexity, uncertainty, perverse incentives (e.g. incentivising small firms not to grow), and misallocation of resources in the affected sector. There would be merit in including exemptions in law or sample/guideline exemptions for FPA clauses for parties to use as a basis.

6.3 Scope

The Government asked us to make recommendations on the scope of matters that may be included in an agreement, including whether regional variations are permitted.

The legislation should set the minimum content that must be included in a FPA

We recommend that the minimum content for FPAs should be set in legislation. This is a similar approach to the current enterprise level collective bargaining system under the Employment

Relations Act. The Group considered that FPAs must be a written agreement and must include provisions on:

- The objectives of the FPA
- Coverage
- Wages and how pay increases will be determined
- Terms & conditions, namely working hours, overtime and/or penal rates, leave, redundancy, and flexible working arrangements
- Skills and training
- Duration, eg expiry date
- Governance arrangements to manage the operation of the FPA and ongoing dialogue between the signatory parties,

We considered that it will be useful for parties to be able to discuss other matters, such as other productivity-related enhancements or actions, even if they do not reach agreement on provisions to insert in the FPA.

We also considered that FPAs may need to be designed to take account of regional differences within industries or occupations.

The Group also considered that the duration of agreements should be up to the parties to agree, but with a maximum of 5 years.

Parties may wish to bargain on additional terms to be included in FPAs

The Group considered , additional industry relevant provisions should be able to be included by negotiation in the FPA, so long as they were compliant with minimum employment standards and other law.

binding

Relationship with enterprise level agreements

The Group recommends that employers and workers and their representatives could agree an enterprise-level collective agreement in addition to the FPA, and if so, that the principle of favourability should apply. This would mean that any enterprise level collective agreements must equal or exceed the terms of the relevant FPA. They may offer additional provisions not within the scope of the FPA that is agreed for that sector or occupation.

6.4 Bargaining parties

The Government asked us to make recommendations on the identification and selection of bargaining participants including any mechanisms for managing the views of workers without union representation.

Parties should nominate a bargaining representative to bargain on their behalf

To be workable, we consider that the bargaining parties on both sides should be represented by incorporated entities. Workers should be represented by unions. Employers may be represented

by employer organisations. We note that different groups of both workers and employers may wish to have their own representatives – for example, small employers may wish to be represented independently from large. Workers may also wish to have their own representatives. We recommend the system be designed to accommodate this. The Group also considered that any representatives should have relevant expertise and skills.

There should be a role for the national representative bodies

Both employers and workers should elect a lead advocate to ensure there is an orderly process and to be responsible for communication between the parties including the independent body. The Group considers that there will need to be a role for national-level social partners, for example, Business New Zealand and the New Zealand Council of Trade Unions, to coordinate bargaining representatives.

If there is disagreement within a party about who their representative is (or are, if plural) the first step would be mediation. If mediation was unsuccessful, parties could then refer to the independent third party to decide who the representative(s) should be.

Parties should be encouraged to coordinate

In thinking about coordination, the Group recognised the fundamental principle of freedom of association. The Group noted there would be wider benefits for both employers and workers from belonging to representative organisations. For example, industry organisations can offer peer networks, human resources support, and training opportunities for workers and management. All of these could contribute to raising firm productivity. Unions offer representation, advice and support to members and membership benefits epres. This could take the form of greater participation in existing representative groups or forming new ones, particularly in sectors or occupations with low existing levels of coordination.

Representative bodies must represent non-members in good faith

As a Group, we recognise that representative bodies will not be perfectly representative – not every worker is a member of a union, and not every employer will belong to an industry organisation.

. It is important, for instance, that all workers potentially covered by an FPA are able to vote on their bargaining team representatives whether they are union members or not. The same principle should apply for the employer bargaining group. It is a normal practice in collective bargaining internationally for the 'most representative bodies' to conduct bargaining processes. We think that in New Zealand this can be achieved by placing, for example, duties on the representative bodies at the bargaining table to represent non-members, to do so in good faith, and to consult those non-members throughout the process.

Workers need to be allowed to attend paid meetings to elect and instruct their representatives

The Group considered that there will need to be legislated rights for workers covered by FPA bargaining to be able to attend paid meetings (similar to the union meetings provision in the

Employment Relations Act) to elect their bargaining team and to exercise their rights to endorse the provisions they wish their advocate to advance in the FPA process .

There is currently no provision for costs to be covered under the Employment Relations Act. Where bargaining is at enterprise level, meetings will typically be on site. For FPA bargaining, inevitably negotiations will require travel for some parties. The Group concluded that the Government should consider how these costs should be funded – through Government financial support, a levy, or fee. The Group considered that the parties chosen to represent the sides in negotiations should not disproportionately bear these costs.

6.5 Bargaining process rules

We recommend that as a default, existing bargaining processes as currently defined in the Employment Relations Act (as amended by ERA Bill) should apply, including the duty of good faith.

Clear timelines are needed to prevent lengthy processes creating excessive uncertainty or cost

There should be clear timelines set for the FPA initiation process, including for the third party to determine y whether bargaining may commence after receiving notification from an initiating party. This will give certainty to all parties.

Notification of parties will be a critical element of the process

Once a FPA process is initiated, it will be critical that all affected employers and workers and their respective representatives are notified, have an opportunity to be represented, and are informed throughout the bargaining progress. Minimum requirements for notifying affected parties should be set in law.

Conciliation will be an important part of the process, with a stronger role than the current mediation process

The Group considered that in many cases, structured conciliation is also likely to be needed. This would in particular be needed where there were multiple representative bargaining parties, and in sectors or occupations where either or both employers or workers had low levels of existing coordination and organisation.

The Employment Relations Authority needs to be properly skilled and resourced to conduct this conciliation role.

The Government or independent body should provide materials to reduce time and transaction costs, for example, templates for the bargaining process and agreement, similar to that currently provided on Employment New Zealand website.

6.6 Dispute resolution during bargaining

The Government asked us to make recommendations on the rules or third party intervention to resolve disputes, including whether the third party's role is facilitative, determinative or both.

No recourse to industrial action during bargaining

We note that the Government has already stated that no industrial action – such as strikes or lock outs – will be permitted, during bargaining. It will be critically important that dispute resolution mechanisms work effectively.

We consider this to be a relational, not a temporal, ban – it is only strikes and lockouts related to FPA bargaining which are prohibited, not strikes about other matters which coincide with FPA bargaining.

We acknowledge that this may be perceived by some as conflicting with New Zealand's obligations under ILO Convention 87, but this prohibition of strikes during bargaining for FPAs does not preclude striking during collective bargaining over the same matters. In other words, FPAs complement the terms of collective agreements in the same manner as employment standards.

Conciliation should be the starting point for dispute resolution

We recommend thatconciliation should be the starting point to resolve FPA bargaining disputes, and that the bargaining rules should provide that one or both parties may refer bargaining to conciliation, in relation to one or more provisions of the proposed agreement.

If conciliation fails to resolve the dispute, parties must refer the process to arbitration

[Text to be added following discussion in Item 3 of 22 November meeting]

Where agreement cannot be reached, arbitration should apply

The Group considered that there will be a need for arbitration if bargaining and mediation or conciliation fails to resolve disputes after a specified timeframe.

We recommend that if mediation or conciliation is ultimately unsuccessful in enabling parties to reach agreement, the negotiating parties should be required to enter arbitration with an independent third party. Suitable mechanisms and options for the approach to arbitration need to be investigated and considered, including the option of final offer arbitration. The third party should be able to make determinations about the content of the FPA.This arbitration could result in an FPA with narrower coverage or scope than desired by one of the parties...

There should be some flexibility available to the arbitrator to direct the parties to allow more time for conciliation if it may result in a breakthrough and agreement between the parties.

6.7 Conclusion, variation and renewal

The Government asked us to make recommendations on the mechanism for giving effect to a FPA, including any ratification process for employers and workers within the coverage of an agreement.

The Government also asked for recommendations on the duration and process for renewing or varying an agreement.

Where parties reach agreement, conclusion should require ratification by a simple majority of both employers and workers

Where bargaining has concluded in parties reaching an agreement we recommend that the agreement must not be signed until a simple majority of both employers and workers covered by the agreement have ratified it.

Where bargaining is referred to arbitration, the arbitrated final agreement should not need ratification

The Group considered that when the independent third party determines a final agreement, this should then become a FPA without further ratification process. There should only be an appeals mechanism on the grounds of a breach of process or seeking a declaration as to coverage.

The procedure for ratification must be set in law

We recommend the procedure for ratification be set in law. This differs from the current requirements under the Employment Relations Act where parties may decide how to ratify an agreement. We have recommended this departure from the existing law because, under a FPA, all affected parties in the industry or occupation will need to be given an opportunity to ratify...

The law should clarify that workers are entitled to paid meetings for the purposes of ratifying the agreement.

Before an agreement expires, either party should be able to initiate a renewal of the agreement, or for variation of some or all terms

The Group considered that any variation or renewal of the agreement that is agreed between the bargaining parties must meet the same initiation and ratification thresholds.

An expiring FPA should be able to be renewed easily, for example employers and workers may be able to vote for a renewal with wages increased in line with CPI or some other indicator

6.8 Enforcement

The Government asked us to consider how the terms of an agreement should be enforced.

Overall, we consider the existing collective bargaining dispute resolution and enforcement mechanisms should be applied to the new FPA system This would provide for parties who believe there has been a breach of a FPA to turn first to dispute resolution services including mediation, before looking to enforcement options including the Labour Inspectorate and the Court system.

The Government will need to consider whether additional resources for bodies involved in dispute resolution and enforcement are needed during the detailed design and implementation of the overall system.

We suggest that unions and employers and should (where possible and appropriate) also play a role in supporting compliance, to identify breaches of FPAs, and address implementation problems.

6.9 Support to make the bargaining process work well

The Group considers that a number of conditions need to be present to support a positive outcome to a FPA collective bargaining process:

- Both workers and employers will need to see potential benefits of bargaining for an FPA, with a real improvement over the status quo
- There needs to be a genuine willingness to engage and confidence in the good faith approach of both parties
- Capability and capacity in both parties to support the bargaining process, with the skills and expertise to manage a respectful, efficient dialogue that leads to timely outcomes
- Strategic leadership on both sides that takes a long-term perspective, supporting a transformational not transactional conversation, i.e. it affects the whole sector or occupation , not just higher wages.
- High levels of inclusion and participation in the dialogue, particularly among small employers, both through direct involvement at the bargaining table and consultation.
- In a process likely to require involvement of multiple representative groups, a high degree of coordination to work effectively and efficiently
- The involvement of trained third-party conciliators or other forms of support.

Resourcing levels for support services will need to be considered

The existing functions provided by Government to support the collective bargaining process are fit for purpose and should still apply, including the provision of:

- provision of general information and education about rights and obligations
- provision of information about services available to support the bargaining process and the resolution of employment relationship problems
- facilitation and mediation services
- arbitration services
- compliance and enforcement through the Employment Relations Authority and Courts.
- reporting and monitoring of the employment relations system

However, the Government should consider the level of resources available as part of the detailed design and implementation of the overall system. In particular, we consider that a dedicated facilitator should work with the parties at all stages of bargaining.

[Placeholder for possible text about supporting FPA employers to invest in skills training.]

Support to build capability and capacity of the parties and to facilitate the process is needed

In order to facilitate effective bargaining, a good level of information will need to be provided to parties, and capability building will be important to build up the skills of those around the negotiating table, and maximise the potential for constructive bargaining.

The Government will also need to consider the role and resourcing required for the third party body to support the various elements of the bargaining process described above, including the process for determination of the trigger tests, notifications to parties, and conciliation and arbitration of the bargaining process where appropriate.

The Group considered that a different conciliation role would be needed than the facilitation and mediation currently provided under the Employment Relations Act. A proactive role will also be needed to provide notifications, information and education on their obligations to employers and workers following the ratification and coming into force of a FPA. In particular,

7 Recommendations

[add these once agreed – drawing on the bold headings in section 6, plus any additional recommendations agreed]

8 Conclusions and next steps

Annex 1 – Terms of Reference

Fair Pay Agreements:
Supporting workers and firms to drive productivity growth and share its benefits

Version 0.7

26 November 2018

Recommendations from the Fair Pay Agreements Working Group 2018

1. Introduction: Lifting incomes and economic growth in New Zealand for the 21st century

The Government asked the Group to design a new tool to complement the collective bargaining system in New Zealand which will help transition the current employment relations framework to one which can support the transition to a 21st century economy: a highly skilled and innovative economy that provides well-paid, decent jobs, and delivers broad-based gains from economic growth and productivity.

As a starting point, the Government asked us to make recommendations on a new tool which can support a level playing field across a sector or occupation, where good employers are not disadvantaged by offering reasonable, industry-standard wages and conditions.

Our first step was to take a holistic view of our labour market: looking backwards at how our current labour market is operating, and looking ahead to the global megatrends that will shape our labour market over the coming decades.

New Zealand's labour market has seen big changes over the last 30-40 years. Over the coming decades, technological change, globalisation, demographic change and climate change will continue to change the demand for labour and skills.

This process is likely to be uneven, and its impact on society and our labour market is uncertain. We cannot predict exactly how these changes will manifest themselves, or when, but we know that globalisation and skills-biased technological change have also been drivers of growing inequalities world-wide.

While the evidence doesn't yet show the pace of change accelerating today, we need to prepare in New Zealand for a faster rate of job loss and skill obsolescence. We also know that certain groups, such as young or low-skilled workers, are likely to be more at risk when these changes happen.

We recognise the challenges faced by each sector are varied as we transition to the future – with different scales of opportunity to improve productivity, sustainability, and inclusiveness.

The Group concluded that a mature 21st century labour market in New Zealand will require stronger dialogue between employers and workers. There are a wide range of measures the Government has underway or which could be considered to tackle the challenge of just transition in our economy and promoting increased sector level dialogue among employers and workers. Changing our employment relations model and introducing a new way of doing collective bargaining, while maintaining the essential elements of the current system, in New Zealand is just one part of this story, alongside interventions to improve coordination and incentives within other regulatory systems, such as taxation and welfare. These issues are highly related, but the subject of ongoing discussion and advice from other Working Groups.

We agreed that a collective bargaining dialogue at sectoral or occupational level is most likely to gain real traction when:

- it is focussed on problems which are broadly based in the sector,
- it presents real opportunities for both employers and workers to gain from the process

- where parties are well represented, and where
- it is connected to the fundamentals of the employment relationship: the exchange of labour and incentives to invest in workplace productivity enhancing measures such as skills and technology.

The Group considered that this measure could be most useful in sectors or occupations where particular issues with competitive outcomes are identified – for example, where competition is based on ever-decreasing labour costs rather than quality or productivity. It could also be useful more generally where workers and employers identify scope to improve outcomes across a sector or occupation via sectoral or occupational collective bargaining. We also considered that in many sectors or occupations, this may not be a necessary or useful tool.

Bringing this sector dialogue into a regulated mechanism like collective bargaining provides the critical incentive of an enforceable contract binding the parties. It provides the opportunity for employers to invest and engage without the fear of being undercut by those employers engaged in the race to the bottom. There may also be mutual benefits for workers and employers through improved worker engagement, productivity and better workplaces.

2. The approach of the FPA Working Group

The FPA Working Group has held a series of eleven fortnightly meetings from July 2018 to November 2018. The Government asked the Group to report by November 2018, and this report forms the Group's final recommendations.

The Group has discussed the employment relations and standards system and approach to collective bargaining in New Zealand over recent decades, international models, the relationship between wages and productivity, and the design of an additional sectoral or occupational approach to collective bargaining for New Zealand.

The Group was supported by the Ministry of Business Innovation and Employment as Secretariat, who also provided information and data on a range of topics.

The Group also heard from speakers who provided their expertise from within the Working Group, and some external experts on particular issues:

- Paul Conway, Productivity Commission on productivity in New Zealand
- John Ryall, E tū, on the E tū experience of negotiating multi-employer collective agreements
- Richard Wagstaff, Council of Trade Unions, and Kirk Hope, Business New Zealand, on their experience of what does and does not work under the current model for collective bargaining in New Zealand
- Stephen Blumenfeld, Centre for Labour, Employment and Work at Victoria University of Wellington on data trends in collective bargaining and collective agreements
- Doug Martin, Martin Jenkins, on a Fair Pay Agreements system
- Vicki Lee, Hospitality NZ, on the small business perspective on the employment relations and standards regulatory system

3. Context

We looked at the relationship between productivity growth and wage growth in recent decades in New Zealand, and their relationship with overall incomes and inequality.

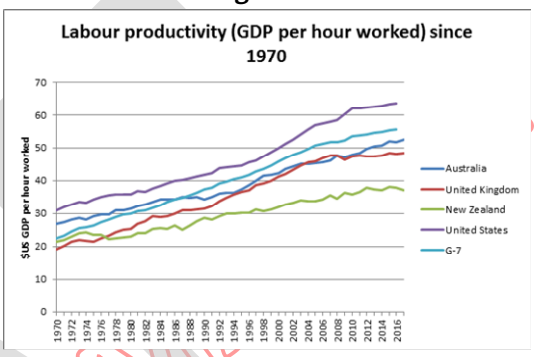
3.1 Productivity and wage growth, incomes and inequality in New Zealand

Productivity growth in New Zealand

New Zealand's productivity growth over recent decades has been relatively poor. Since 1970, our GDP per hour worked has declined significantly relative to the high-income OECD average: it fell from about equal to the OECD average to about 30 per cent under it.

Our productivity performance is also considerably lower than the OECD average, the G-7 and that of the small advanced economies we compare ourselves with. Figure 1 shows New Zealand's slower rate of labour productivity growth since 1970.

Figure 1



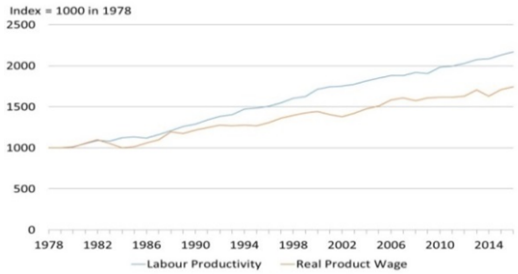
In other words, New Zealanders work for longer hours and produce less per hour worked than those in most OECD countries.

Our recent economic growth has been driven primarily by increased labour force participation rather than labour productivity growth.

Wage growth in New Zealand

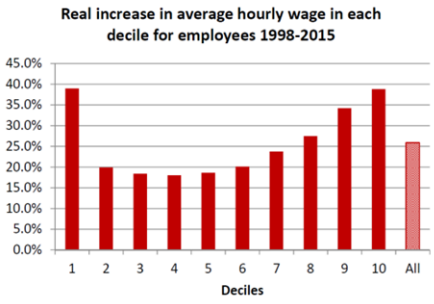
Real wages in New Zealand have increased since the 1970s, but not as fast as labour productivity. Figure 1 shows this divergence between labour productivity and wage growth over the last four decades.

Figure 2 - Labour productivity and the real product wage in the measured sector 1978-2016, indexed to 1978



Over the last two decades, wages in New Zealand have risen more slowly for employees in deciles 2 to 6 (50% of employees) than for those in higher deciles. Figure 3 shows real increases in hourly wage for employees over the last two decades, broken down by decile.

Figure 3



The exception is decile 1, where rising wages have been heavily influenced by increases to the minimum wage.

This has "hollowed out" the wage scale and increased wage inequality among the majority of employees.

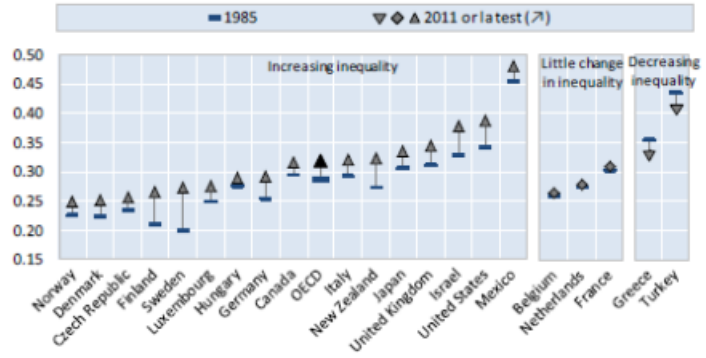
Incomes and inequality in New Zealand

Income inequality has been rising in many developed countries in recent decades. According to the OECD, the gap between rich and poor is at its highest for 30 years[1]. As the OECD points out, the drivers of these growing income gaps are complex and reflect both economic and social changes. The evidence increasingly suggests that high inequality has a negative and statistically significant impact on a country's medium-term economic growth.

According to the OECD, New Zealand has a slightly higher degree of income inequality than the OECD average. But while most OECD countries are experiencing increases in income inequality, New Zealand saw one of the largest increases in income equality during the 1980s and 1990s, with our rate of increase in inequality exceeded only by Sweden and Finland. Figure 4 shows the change in income inequality across selected OECD countries between the 1980s and 2011/12, measured by the Gini coefficient[2].

Figure 4 **1. Income inequality increased in most OECD countries**

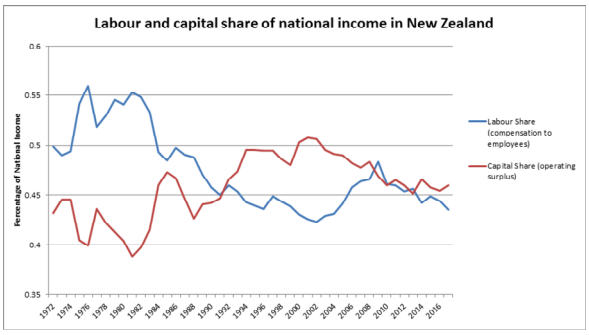
Gini coefficients of income inequality, mid-1980s and 2011/12



Note: Incomes refer to household disposable income, adjusted for household size.
Source: OECD Income Distribution Database (http://oe.cd/idd).

Despite wages rising in absolute terms in New Zealand, workers' share of the national income has fallen since the 1970s, with a particularly large fall in the 1980s (see Figure 5). This reflects wages growing slower than returns to capital, rather than wages falling.

Figure 5



There was some recovery in the 2000s, though the labour income share in New Zealand has fallen again since 2009 and is still well below levels that were seen in the 1970s.

The same trend of a falling share of income going to workers has also been observed in many other countries worldwide, in both developed and emerging economies.

[1] http://www.oecd.org/els/soc/Focus-Inequality-and-Growth-2014.pdf
[2] The Gini coefficient is a broader measure of inequality which ranges from zero, where everybody has identical incomes, to 1 where all income goes to only one person.

The reasons for their divergence are not entirely clear and are a matter of ongoing and wide debate. The Group observed that since 2004, the change in New Zealand's labour–capital income share has been flatter than in other countries who have continue to see a fall in labour's share of national income.

Like many countries, our income support system in New Zealand helps to even out income increases across households through transfers from the state through taxes and benefits. Many low income earners are in high income households – for example, teenagers or students.

Figure 6

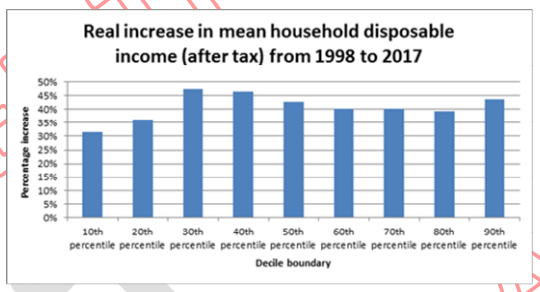
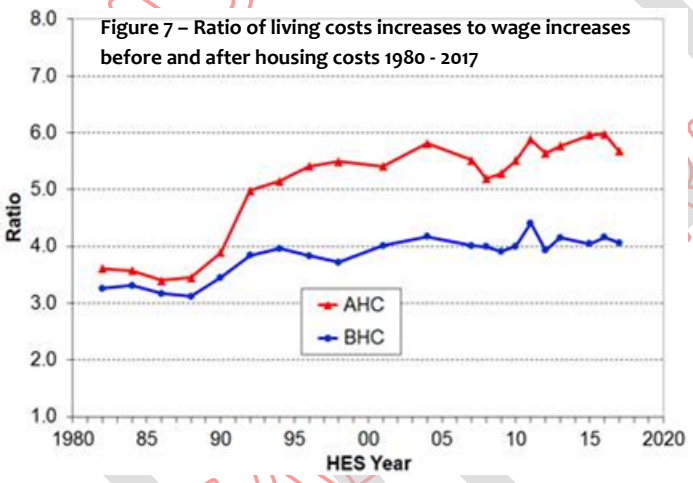


Figure 6 shows how the 'hollowing out' of wages changes when looked at as part of overall household income.

The Group also looked at increases in the cost of living (or inflation) relative to wage growth in New Zealand.



In plain terms, this examines whether wages are keeping up with, or exceeding, the increasing cost of living and translating into higher living standards. Wages have been rising in recent years, and for most of the last decade, wage increases have exceeded inflation, but both have been increasing modestly.

We know that incomes after housing costs are more unequal in New Zealand than before housing costs are considered, and this gap has widened since the 1980s (see Figure 7).

Low income earners

The Group looked at the distribution of wages within sectors and occupations across New Zealand, to identify where there was a high proportion of low-wage and low-income earners.

The tables in Annex 2 set out the latest data available for workers in all occupations in New Zealand, ranked by highest proportion of those paid under $20 per hour.

We also examined the demographics of those working on or near the minimum wage – under $20 per hour. Figure 8 shows the different demographic groups which are either over or under represented in this low income category compared to their proportion of total wage earners in our economy.

Figure 8 - People earning between $15.75 and $16.50 per hour as of November 2017

Demographic	% of minimum wage earners	% of total wage earners
Aged 16 – 24	48.4%	17.1%
Women	60.6%	49.2%
European/Pākehā	50.5%	64.4%
Māori	17.1%	13.0%
Pasifika	9.7%	6.1%
Working part-time	51.4%	18.7%
Working while studying	19.9%	12.0%
Total number of people	164,100	1,965,312

In addition to transfers through taxation and benefits, there are a number of interventions the Government makes to address wage and income inequality. This includes statutory mechanisms to provide basic worker protections (such as the minimum wage and conditions), as well as other interventions targeting particular problems. For example, where there is systemic undervaluation of wages based on discrimination, this is addressed through the Equal Pay Act.

The Group noted the Equal Pay Act is being amended to introduce a bargaining framework for addressing pay equity issues, and that a number of other changes are being considered or made to minimum standards, the tax and benefit systems. The Group considered that as the Government develops Fair Pay Agreements, it will need to carefully consider the interface between FPAs and these other interventions.

3.2 Skills and productivity in New Zealand

New Zealand has a relatively high mismatch between the skills in our workforce and the jobs that they do, when we are compared to the OECD average.[3] This mismatch may affect productivity, as it may make it difficult for firms to successfully adopt new ideas or technology. Addressing this

[3] Ministry of Education and the Ministry of Business Innovation and Employment, "Skills at Work: Survey of Adult Skills (PIACC)", November 2016, https://www.educationcounts.govt.nz/publications/series/survey_of_adult_skills/skills-at-work-survey-of-adult-skills

skills mismatch will be a major challenge for New Zealand's skills system as our labour market – and the skills in demand – change in the future.[4]

We noted the range of initiatives underway in New Zealand to match employers with workers with relevant skills, and to support in-work upskilling. We noted the Vocational Education and Training system is under review and suggest this review should consider that one barrier to higher participation is the opportunity cost faced by workers and employers in prioritising training, especially where a significant time commitment is required, or where the benefits are longer term, or spread across the industry.

The Group saw evidence that some collective agreements (including MECAs) in New Zealand explicitly provide for training pathways and corresponding wage increases, and we considered this should be encouraged, including through FPAs.

3.3 The role of collective bargaining in lifting incomes and economic growth

At the outset we note that a country's employment relations system and choice of collective bargaining model are not the only factors affecting its economic performance.

In general, international research has tended to find a strong link between productivity and both wage growth and wage levels. However, while productivity growth appears to be necessary for wage growth, it is not in itself sufficient. There is also a body of research in labour economics; however, that supports the 'efficiency wage' hypothesis. These researchers argue that higher wages can increase the productivity of workers (and profits of the firm) through various means, such as reducing costs associated with turnover or providing employees with incentives to work.

The OECD has warned against assuming that the form of collective bargaining systems matches perfectly to economic and social outcomes. Outcomes depend on other important factors such as the wider social and economic model, including tax and welfare systems, and the quality and sophistication of social dialogue.

Making changes to a collective bargaining system without considering this wider context could be damaging.

The relationship between collective bargaining and wage growth

One of the objectives of collective bargaining is typically to balance out the uneven bargaining power between parties. The OECD has found that collective bargaining is associated with lower levels of inequality, for example through limiting wage increases for mid- and high-earners to allow for low-earners' incomes to rise.[5] Across the OECD, workers with an enterprise-level collective agreement tend to be paid more than those without a collective agreement.

Typically most regulatory frameworks at national level rule out the possibility of enterprise-level negotiations offering worse terms than a sector-level collective agreement or national statutory minimum standards. This 'favourability principle' means an individual or enterprise-level collective

[4] Paul Conway, "Can the Kiwi Fly? Achieving Productivity Lift-off in New Zealand", *International Productivity Monitor* (34), Spring 2018
[5] OECD, Employment Outlook 2018, p 83

agreement can only *raise* wages relative to sector-level collective agreements or minimum standards.

The difference in wages found by the OECD may also signal higher productivity in companies with enterprise-level bargaining than those in a context with a high degree of coverage of centralised bargaining. Where a firm is not constrained by centralised bargaining, the firm's overall performance forms the context for pay increases, and a highly productive firm could choose to pay its workers more, or to pay its highly-productive workers more. A firm offering its workers greater rewards for productivity could induce higher effort and therefore productivity among its workers.

The relationship between collective bargaining and productivity

Research globally on collective bargaining and productivity growth similarly suggests that the relationship between these factors is not clear cut, and is highly dependent on wider labour market systems, and the social and economic model of individual countries.

The Group looked to other countries' experience in introducing productivity related measures to their collective bargaining systems, in particular recent changes in Singapore to introduce a Progressive Wage Model. We observe that a positive collective bargaining experience would have the potential to increase aggregate productivity by setting higher wage floors and better conditions; forcing unproductive firms to exit the market; and lifting overall productivity of the sector.

The evidence in the research literature suggests that wages tend to be less aligned with labour productivity in countries where collective bargaining institutions have a more important role. This research tends to be based on sector-level data and examination of the relationship between wages and productivity across sectors.

We do note that raising wage floors may make capital investments relatively more attractive for firms; that is, it may speed up employer decisions to replace some jobs with automation.

3.4 The role of collective bargaining in an inclusive and flexible labour market

The Group looked at the role of collective bargaining more generally in labour markets internationally. Collective bargaining remains the predominant model for labour negotiations world-wide. It enables employers and employees to enter into a collective dialogue to negotiate the terms for their employment relationship in the form of a collective agreement.

The International Labour Organisation (ILO) names collective bargaining as a fundamental right endorsed by all Member States in the ILO Constitution[6] and reaffirmed this in 1998 in the ILO Declaration on Fundamental Principles and Rights at Work. The ILO recognises the role of collective bargaining in improving inclusivity, equalising wage distribution, and stabilising labour relations.[7]

[6] New Zealand was a founding member of the ILO, has signed the 1998 Declaration, and is bound by the primary ILO Convention on collective bargaining No 98 (Right to Organise and Collective Bargaining 1949).
[7] ILO 'Collective Bargaining: A Policy Guide', Foreword

New Zealand is bound by ILO Convention No 98 (Right to Organise and Collective Bargaining) to "encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."

As a group we recognised that there can be value in the process of collective bargaining as a participatory mechanism to provide collective voice for both employers and employees. It can encourage participation and engagement by employers and employees in actively setting the terms of their relationship. In contrast to minimum standards set in legislation at the national level, which apply across the entire workforce uniformly and are imposed by a third party (the Government), collective bargaining may enable the parties who know their particular circumstances best to set the terms that work for them.

We noted that shared dialogue between employees and employers across a sector or occupation leads to wider benefits and other forms of collaboration between firms or workers. This is possible when bargaining involves groups of employers or unions with a common interest or shared problem to solve, although we recognise this will not always be the case.[8]

Parties may also save in transaction costs by working together on collective bargaining. They can access the expertise of other players in their sector and other scale benefits (for example, arranging for investment in skills or technology for the benefit of the sector).

In countries where union density is low, collective bargaining tends to be concentrated in larger employers, whether public or private sector. Small businesses can therefore find it difficult to access the potential benefits of collective bargaining in an enterprise-level collective bargaining system, although that may also help them avoid unnecessary costs.

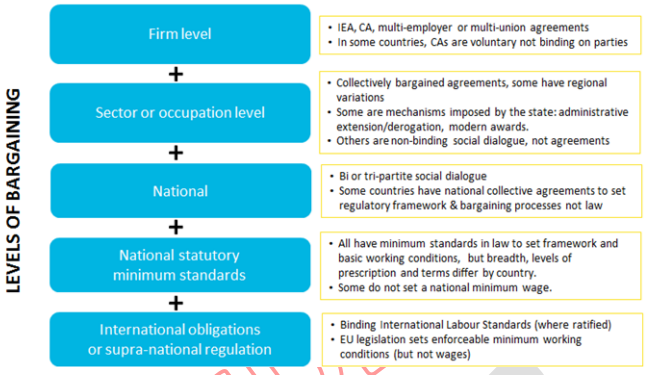
3.5 The relationship between minimum standards and collective bargaining

Despite having a century-old international labour standards framework, which provides common principles and rules binding states at a high level, the nature and extent of state encouragement for collective bargaining differs significantly between countries. We found the diagram in Figure 9 useful to describe the basic model of how employment relations systems are structured globally.

Figure 9

[8] In New Zealand, this is known as Multi-Enterprise Collective Agreement (MECA) and Multi-Union Collective Agreement (MUCA) bargaining under the Employment Relations Act.

Collective Bargaining: the underlying global model



The sharpest delineation between different state models for collective bargaining systems is whether a country has chosen to rely on collective bargaining to provide basic floors for their employment standards (such as a minimum wage, annual leave, redundancy), or whether they rely on statutory minimum employment standards set at a national level which are then supplemented by more favourable terms offered through collective bargaining at a sector or enterprise level.

This choice of whether to set a country's minimum employment standards primarily through legislation or collective agreement, along with a country's legal and social traditions, result in the markedly different detailed design of countries' collective bargaining systems. This manifests in the variations in the levels at which collective bargaining takes place and in the mechanisms for determining representativeness, dispute resolution and enforcement. There is no one size fits all model that can be picked up and deployed in another country without significant adaptation for local circumstances.

Variations in their employment relations and standards systems may mean some other countries:

- Have no statutory minimum wage, and often only a basic framework for minimum conditions, set in law. These countries use collective bargaining to provide the same minimum floors which we presently regulate for at national level.
- Set only a framework enabling collective bargaining in the law, and allows the representative organisations for employers and employees to agree a national level collective agreement on the bargaining process rules that we have set in law.
- Do not provide for collective bargaining to be binding, meaning collective agreements are voluntary and cannot be enforced in court as they can be in New Zealand and most countries.
- Provide for multiple levels of collective bargaining, with a hierarchy of agreements at national, sectoral and enterprise levels – where we only provide for enterprise level.

In New Zealand, we have an employment relations and standards system which is based on setting minimum standards for employment in statute (including a statutory minimum wage, and rights to flexible working, and leave) and a legal framework that sets the rules for collective bargaining. Agreements reached through collective bargaining may equal or add to the statutory floor, not detract from it. There is nothing in these rules which limits collective bargaining to the enterprise, multi-employer or multi-union levels. The rules allow for voluntary bargaining at a sectoral or occupational level.

Some other countries rely more heavily on collective bargaining to set these minimum standards, mainly in Europe. Under the Award system which preceded New Zealand's current employment relations and standards system, we too relied mostly on collective bargaining and awards to set minimum standards.

3.6 International good practice in designing collective bargaining systems

We looked at how collective bargaining systems are designed internationally, and what different models we may be able to learn from.

Overall the OECD has concluded that the main trade-off in designing collective bargaining systems is between inclusiveness and flexibility. In other words, collective bargaining can generate benefits for employment and inclusiveness (wage inequality is lower and employment for vulnerable groups is higher) but can also have drawbacks in reducing the flexibility for firms to adjust wages and conditions when their situation requires it.

The OECD recommends that countries should consider adopting a model with sector-level bargaining, combined with the flexibility to undertake firm-level bargaining to tailor higher-level agreements to each workplace's particular circumstances.

The OECD has found this model delivers good employment performance, better productivity outcomes and higher wages for covered workers compared to fully decentralised systems[9].

> "Co-ordinated collective bargaining systems are associated with higher employment, lower unemployment, a better integration of vulnerable groups and less wage inequality than fully decentralised systems... these systems help strengthen the resilience of the economy against business-cycle downturns."
>
> -- OECD

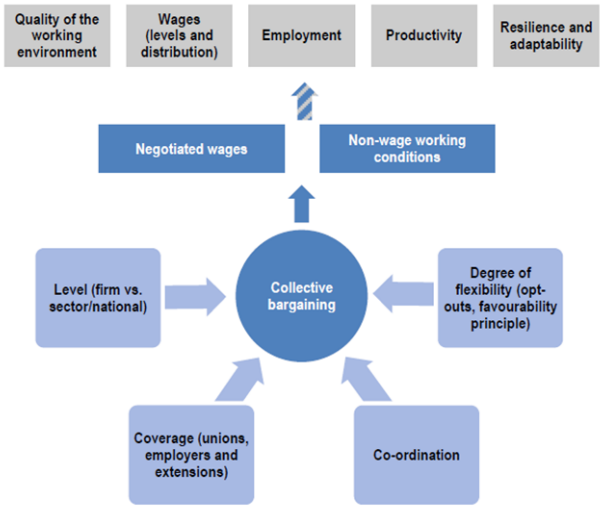
Key features of a bargaining system

The OECD characterises collective bargaining systems as set out in Figure 10, including the following key features:

- degree of coverage,
- level of bargaining,
- degree of flexibility, and
- coordination

Figure 10

[9] The role of collective bargaining systems for good labour market performance', 2018



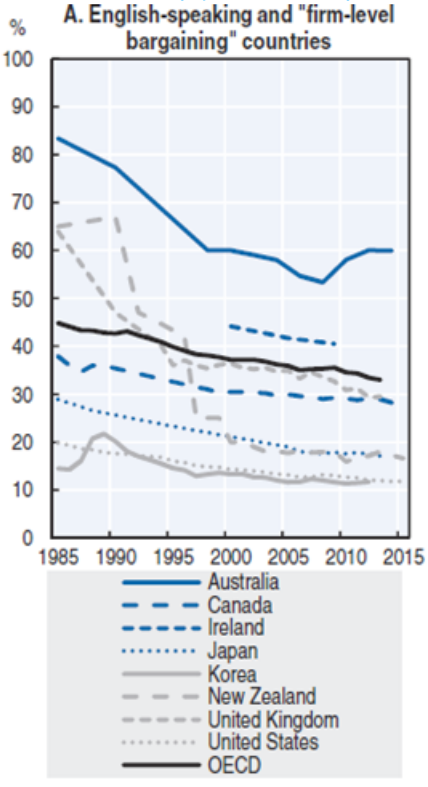
We have looked at the OECD's four characterisations, and how New Zealand compares to other OECD countries on each feature.

Degree of coverage

The degree of coverage refers to the proportion of employees who are covered by a collective agreement. This should not be confused with the proportion of employees who are members of a union. Wide collective agreement coverage can have a more sizeable macroeconomic effect—positive or negative—on employment, wages and other outcomes of interest than agreements confined to a few firms.

The share of employees covered by collective agreements has declined significantly over the past 25 years across the OECD. On average, collective bargaining coverage shrank in OECD countries from 45 per cent in 1985 to 33 per cent in 2013. As of 2016, New Zealand's collective bargaining coverage is 15.9 per cent. Figure 11 shows the most recent data from the OECD's Employment Outlook, showing the overall trend over the last three decades of decline in the percentage of workers covered by collective agreements in countries the OECD considers to be similar to New Zealand (either because they are English-speaking or have predominantly enterprise-level collective bargaining).

Figure 11 Percentage of workers covered by collective agreements
Source: OECD Employment Outlook 2017, p138



The evidence we saw from the OECD suggests that collective bargaining coverage tends to be high and stable in countries where multi-employer agreements (either sectoral or national) are the norm – even where union density is quite low – and where employer organisations are willing to negotiate.

Some countries also provide for the extension of coverage of collective agreements beyond the initial signatories. This explains why collective bargaining coverage is higher than

union density across the OECD, where sector level extensions are commonly used in two-thirds of countries.

In countries where collective agreements are generally at the enterprise level coverage tends to match union density. However, it should be noted that not all union members are covered by collective agreements.

Data on New Zealand union membership and collective bargaining coverage suggests a notable minority (approximately 10%) of those who claim to be covered by a collective agreement are not union members.[10] Many collective agreements in New Zealand permit employers to offer the same terms (by agreement between the union and employer) to all or parts of the employer's non-union workforce. This is known as 'passing on' of terms. One thing which affects this is the negotiation of bargaining fees for non-union workers, although these clauses are relatively rare.[11]

Across the OECD, about 17 per cent of employees are members of a union. In 2015, New Zealand's equivalent rate was 17.9 per cent. This rate varies considerably across countries. Union membership density has been declining steadily in most OECD countries over the last three decades. It should be noted that union density in New Zealand declined sharply from around 46% to 21% in the four years following enactment of the Employment Contracts Act 1991, and has declined gradually since that time. Data on employer organisation density (that is, the percentage of firms that belong to employer organisations) is patchy, and comparisons can be difficult to draw between countries given the absence of common metrics and reliable data. Across those OECD countries that do collect this data, employer organisation density is 51 per cent on average. Although it varies considerably across countries, this figure has been quite stable in recent decades. There is no national level statistical information gathered on New Zealand's employer organization density.

Level of bargaining

The level of bargaining refers to whether parties negotiate at the enterprise, sector or national level. Centralised bargaining systems are ones in which bargaining tends to happen at the national level, although may be supplemented by enterprise-level agreements. Highly decentralised systems are ones in which collective bargaining tends to be primarily at the enterprise level.

New Zealand sits at the far end of this centralised to decentralised spectrum. Although our current system permits voluntary sector bargaining, in practice most bargaining takes place at the enterprise level, although there is some bargaining among groups of employers within a sector (through a MECA).

According to the OECD, centralised bargaining systems can be expected to have less wage inequality relative to systems with mostly enterprise-level agreements. Centralised systems tend to experience smaller wage differences, within firms, across firms, or even across sectors. Enterprise-level agreements, by contrast, allow more attention to be paid to enterprise-specific conditions and individual performance, and allow for more variation in wages. Figure 12 shows

[10] Stats NZ March quarter HLFS
[11] CLEW 2017/18 Collective Agreements Handbook – [add page number]

where different OECD countries sit on this spectrum. That graph groups countries by those which have predominantly enterprise level agreements, both enterprise and higher (sector or national) level agreements, and those countries which predominantly have only higher level agreements.

Figure 12

Degree of flexibility

In systems with sector or national level collective agreements, the degree of flexibility refers to the extent to which employers can modify or depart from those higher-level agreements through an enterprise level agreement, or exemptions.

The possibility of exemptions can increase the flexibility of a system and allow for a stronger link between wages and firm performance, for example in economic downturns. This may bolster employment and productivity on the upside, but increase wage inequality on the downside.

New Zealand, like most countries, does not allow collective agreements to offer less favourable terms than statutory minimum standards. Collective agreements, including MECAs, are binding on the parties who agreed them, but this would not be characterised as a limitation on flexibility as each party to the agreement has chosen to be bound by it.

1 Source: OECD Employment Outlook 2017,

Coordination

Coordination refers to the degree to which minor players deliberately follow what major players decide, and to which common targets (e.g. wage levels) are pursued through bargaining. Coordination can happen between bargaining units at different levels, for example when an enterprise-level agreement follows guidelines fixed by peak-level organisations. Or it can happen at the same level, for example when some sectors follow terms set in another sector).

According to the OECD's definition of coordination, and relative to other countries, our collective bargaining system in New Zealand does not feature coordination between bargaining units. This is because bargaining is typically at the enterprise level, and the Government does not exert influence beyond establishing the bargaining framework and minimum standards.

However, the Group noted that we have unions which represent workers in several sectors or occupations, and this could allow similar bargaining objectives to be pursued in collective bargaining across various sectors or occupations.

3.7 Other countries' approaches to sectoral or occupational bargaining

New Zealand currently provides a voluntary mechanism for employers and employees to bargain at a sector level, through MECAs, but this mechanism is not used widely, particularly in the private sector.

We noted that any Fair Pay Agreement system design will need to be bespoke to suit New Zealand's own social and economic context, but we looked to other countries to understand how they approached the design and concept of sector level bargaining.

There are four main models of sector level bargaining we looked at:

- Australian Modern Awards system
- The Nordic model
- The Continental European model
- Singapore's progressive wage model.

These models are discussed more fully below. It is worth noting that the comparator countries have different societal factors that influence how they approach the question of collective bargaining. For example there is a high level of government intervention in the Singaporean Progressive Wage Model compared with a high level of social dialogue and cooperation in Nordic countries such as Denmark.

Australia – Modern Awards system

In 2009, Australia introduced a system of Modern Awards: industry-wide regulations that provide a fair and relevant minimum safety net of terms and conditions such as pay, hours of work and breaks, on top of National Employment Standards.

Awards are not bargained for. They are determined by the Fair Work Commission following submissions from unions and employer representative groups. The Fair Work Commission must review all Modern Awards every four years.

A Modern Award does not apply to an employee when an enterprise level collective agreement applies to them. If the enterprise agreement ceases to exist, the appropriate Modern Award will then usually apply again. Enterprise agreements cannot provide entitlements that are less than those provided by the relevant Modern Award and must meet a 'Better Off Overall Test' as determined by the Fair Work Commission.[12]

Broadly speaking, the statutory minima in Australia – the National Employment Standards - coupled with Modern Awards provide the equivalent function of worker protection to New Zealand's existing national statutory minimum employment standards. However, a key difference is that in Australia the Modern Awards system provides the ability for the Government to impose differentiated minimum standards by occupation.

Collective bargaining in Australia is predominantly at enterprise level. Sector-level bargaining does not exist in Australia in the form that is envisaged by the Fair Pay Agreement system. Australian law does provide for multi-enterprise collective agreements in limited circumstances. One of these circumstances is when the Fair Work Commission makes a Low-Paid Authorisation to "encourage bargaining for and making an enterprise agreement for low-paid employees who have not historically had the benefits of collective bargaining with their employers and assisting those parties through multi enterprise bargaining to identify improvements in productivity and service delivery and which also takes account of the needs of individual enterprises."[13] The private security sector appears to be one of the more frequent users of the low-paid provisions.

[12] https://www.fwc.gov.au/awards-and-agreements/agreements
[13] Fair Work Act 2009

The Nordic model

Under the Nordic model of collective bargaining, national legislation only provides a broad legal framework for collective bargaining. The rules are set at national level through 'basic agreements' between the employee and employer representative organisations. Sectoral collective agreements then define the broad framework for terms, but often leave significant scope for further bargaining at the enterprise level.

None of the Nordic countries has a statutory minimum wage. Collective agreements therefore provide the function of setting minimum floors for wages and conditions in each sector or occupation, rather than these being set in statute. Denmark and Sweden use collective agreements as their only mechanism for setting minimum wages, meaning that there is no floor for wages for workers outside of collective agreements.

Due to the high level of union density in these countries, it is generally unusual to extend sector level collective agreements to all employees in an industry but agreements can be extended through application agreements. A union may enter into "application agreements" with employers who are not signatories to a collective agreement, with the effect of making that collective agreement also apply to a non-signatory company. Non-union employees can also enter into "application agreements" with unions.

For example, in Sweden, there is no bargaining extension mechanism in statute or otherwise. A voluntary approach to extension is also made easier due to high union membership. Finland, Iceland and Norway however have all started to use extension mechanisms to cover all employees at industry level, to provide those minimum floors.[14]

These countries tend to have historically high levels of organisation on both the employer and employee sides, with continuing high union density and a strong social dialogue and cooperation around collective bargaining and in their wider economic model.

Countries that generally follow this model are Iceland, Denmark, Germany, the Netherlands, Norway and Sweden.

The Continental Europe model

Under the Continental model, the legal framework provides statutory minimum standards for wages and conditions, along with the rules for collective bargaining.

National or sectoral collective agreements set terms and conditions for employees but allow for improvements on these at enterprise level ('the favourability principle'), or opt outs from the sector agreement (although these derogations are usually limited).

Under this model, collective bargaining is conducted at three levels - national, industry and enterprise:

- At national level, negotiations cover a much wider range of topics than normal pay and conditions issues, including job creation measures, training and childcare provision. Pay

[14] https://www.ilo.org/global/topics/wages/minimum-wages/setting-machinery/WCMS_460934/lang--en/index.htm

rates are normally dealt with at sector and enterprise level, but the framework for pay increases could be set at national level.

- At sector level, negotiations are carried on by unions and employers' organisations often meeting in 'joint committees' (binding on all employers in the sectors or occupations they cover)
- At enterprise level, the union delegations together with the local union organisations negotiate with individual employers.

Collective bargaining is typically hierarchical and structured such that an agreement concluded at one level cannot be less favourable than agreements reached at a broader level. Sector agreements are therefore subject to minimum terms set out in national agreements. Enterprise-level agreements can be more favourable than industry agreements. There is, however, large variation among sectors in terms of the relative importance of sector-level and enterprise-level agreements.

Extension mechanisms are more widely used under this model of collective bargaining. Criteria for extension can be a public interest test or often a threshold of coverage. For example in Latvia if the organisations concluding an agreement employ over 50% of the employees or generates over 60% of the turnover in a sector, a general agreement is binding for all employers of the relevant sector and applies to all of their employees. In Belgium or France, however, extensions are issued by Royal Decree or the Labour Ministry respectively upon a formal request from the employer and employee representative organisations that concluded the agreement. This can result in relatively high collective bargaining coverage, even if union density is not high. For example, Belgium and France have collective bargaining coverage over 90%, despite union density rates of 55% (Belgium) and 11% (France).

Countries that generally follow this model of collective bargaining are Belgium, France, Italy, Portugal, Slovenia, Spain and Switzerland.

Singapore – the Progressive Wage Model

Singapore has similar levels of collective bargaining and union density to New Zealand. The legal framework does not provide for a statutory minimum wage.

Singapore undertakes sector level bargaining in specific sectors in the form of the Progressive Wage Model (PWM) introduced in 2015. The PWM is a productivity-based wage progression pathway that helps to increase wages of workers through upgrading skills and improving productivity. It is mandatory for workers in the cleaning, security and landscape sectors which are mostly outsourced services. The PWM benefits workers by mapping out a clear career pathway for their wages to rise along with training and improvements in productivity and standards.

The PWM also offers an incentive to employers, for example, in order to get a licence a cleaning company must implement the PWM. At the same time, higher productivity improves business profits for employers.

The PWM is mandatory for Singaporeans and Singapore permanent residents in the cleaning, security and landscape sectors. It is not mandatory for foreign workers but employers are encouraged to use these principles of progressive wage for foreign cleaners, landscape workers and security officers.

3.8 New Zealand's employment relations and employment standards regulatory system

Any Fair Pay Agreements system will need to complement and support the existing parts of New Zealand's regulatory system for employment relationships and standards. Therefore, it is worth setting out our understanding of that system.

The Employment Relations and Employment Standards (ERES) regulatory system aims to promote productive and mutually beneficial employment relationships, and by doing so it:

- supports and fosters benefits to society that are associated with work, labour market flexibility, and efficient markets
- enables employees and employers to enter and leave employment relationships and to agree terms and conditions to apply in their relationships
- provides a means to address market failures such as power and information asymmetries which can lead to exploitation of workers.

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

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

Employment relationships are regulated for a number of reasons:

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

The system therefore provides:

- a voluntary contracting regime for employers and employees emphasising a duty of good faith (including both individual employment agreements and collective bargaining at the enterprise level);
- minimum employment standards, including minimum hourly wage, minimum entitlements to holidays, leave (for sickness, bereavement, parenting, volunteering for

military service, serving on a jury), rest and meal breaks, expectations on entering and exiting employment relationships, and resolving disputes;
- a dispute resolution framework encouraging low level, and less costly, intervention; and
- a risk-based approach to enforcement activity.

The system can be a key driver for innovation and growth in our labour market and wider economy

The effective use of knowledge, skills and human capital in firms is a key driver of innovation and growth. This can increase wages, lifts firms' competitiveness and profitability, and lead to better social and economic outcomes.

The ERES system sets the boundaries for the operation of a market for labour hire, risk and reward. The operation of this market is not simply an employment contract for the exchange of goods and services, it is based on human relationships where mutual trust, confidence and fair dealing are important.

The ERES system is also important for New Zealanders, as employment is a primary source of income that is then used to purchase goods and services, and is a source of investment and insurance. There is an emphasis on these relationships being conducted in good faith, and on effective dispute resolution.

Institutions support the functioning of this system

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

- Mediation Services
- the Employment Relations Authority
- the Employment Court
- Labour Inspectors
- the Registrar of Unions

3.9 The current state of collective bargaining in New Zealand and trends over time

The legal framework for collective bargaining in New Zealand

The Employment Relations Act 2000 (the ER Act) sets out the rules for engaging and, at least in its objectives, promotes collective bargaining in New Zealand. As in individual employment relations, the duty of good faith underpins collective bargaining in New Zealand.

The ER Act contains mechanisms for multi-employer collective bargaining but no specific mechanisms for industry or occupation-wide collective bargaining.

There are also rules around 'passing on' of collectively bargained terms and conditions to non-union members. While employers can't automatically pass on terms which have been collectively bargained for, around 11% of collective agreements extend coverage to all employees of the

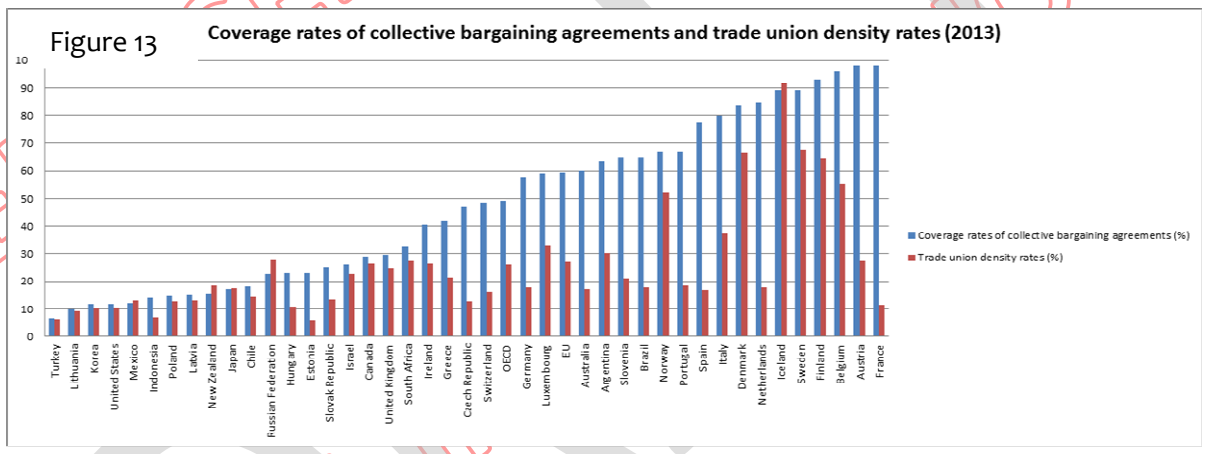
employers. Often this is done through non-union members paying a bargaining fee, or union members voting to allow terms to be passed on. Informally, many employers 'pass on' many collective terms through 'mirror' individual employment agreements.

A collective employment agreement expires on the earlier of its stated expiry date or 3 years after it takes effect, with some exceptions. Over time, collective agreements have become longer in duration. One reason for this may be the transactions costs for both sides for collective bargaining incentivising longer duration for efficiency reasons. Another explanation may be that inflation has been low and stable for an increasing length of time.

Data on collective bargaining in New Zealand

Over the last few decades, changes to our employment relations and standards system have resulted in a decrease in coverage. New Zealand has low collective bargaining coverage compared with many OECD countries (see Figure 13). It should be noted that collective bargaining coverage varies considerably between countries, and there has been a decline in collective bargaining coverage in most countries over that time.

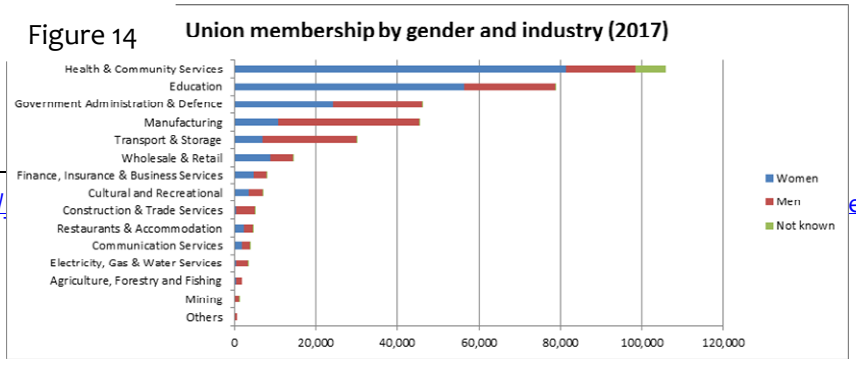
Figure 13 **Coverage rates of collective bargaining agreements and trade union density rates (2013)**



Collective agreements are more significant in the public sector in New Zealand while private sector coverage is low, and is mainly concentrated in certain industries and large firms. The concentration of collective agreements in the public sector is consistent with many other OECD countries including Australia, the United Kingdom, United States and Canada.[15]

Union membership in New Zealand is voluntary and membership and collective agreement coverage are around 17% of all employees. It should be noted that not all union members are covered by collective agreements. Union members as a percentage of the workforce have declined from over 20% in 2012 to 17.2% in 2017 (a 6.2% decline), although according to the Household Labour Force Survey, union membership numbers may have risen slightly over the past year. The majority of union members are women and are

Figure 14 **Union membership by gender and industry (2017)**



[15] https://www.victoria.ac.nz/... ey-report-2016FINAL.pdf

concentrated in particular sectors (see Figure 14).

Collective bargaining coverage has decreased proportionately and is not keeping up with growth in the number of jobs in the economy. The Group considered this was in part due to the difficulties faced by workers in accessing the collective bargaining system. This means workers on small worksites being able to organise their fellow workers, finding a union that is willing to spend the extensive time to negotiate a collective agreement, and voluntarily concluding an agreement before the union members on the site have left their employment. We considered that the lack of coordination in small workplaces is another factor.

Currently in New Zealand there are 1600 collective agreements, covering 10% of workforce in the private sector. There are also 456 collective agreements covering 60% of workforce in the public sector. While the number of employees covered by a collective agreement is stable, the total labour force is growing as illustrated in Figure 15.

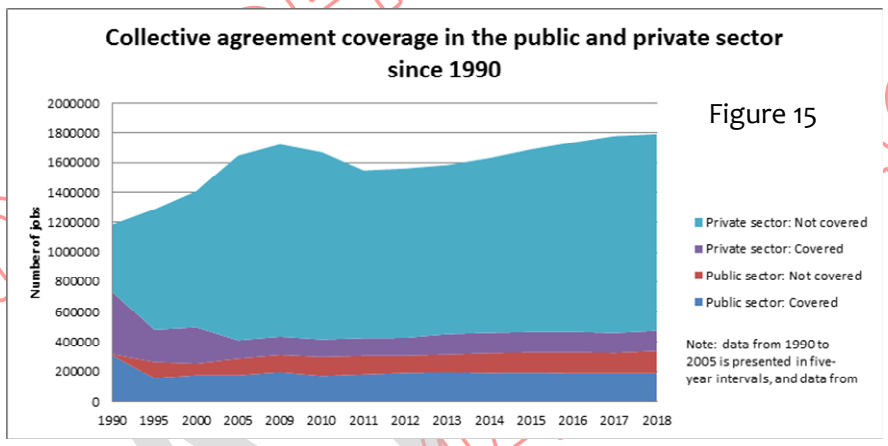


Figure 15

Coverage under multi-employer collective agreements (MECAs) is low outside the public sector, as is coverage of single employer collective agreements. MECAs are generally found in the health and education sectors (excluding tertiary education). There were 37 private sector MECAs in 2004, when the duty to conclude was added to the Employment Relations Act, and 37 private sector MECAs in 2015, when the employer opt out was added. There are currently 72 MECAs which is the same number as five years ago.

MECA bargaining may be frustrated by competitive instincts between firms, as well as a general disinclination to bargain with unions or collectively. These competitive pressures do not, for the most part, exist in the public sector, where bargaining is undertaken by centralised authorities (e.g. District Health Board Shared Services and the Ministry of Education) on behalf of what are technically separate employers (e.g. the independent District Health Boards and school Boards of Trustees).

In practice, MECAs only exist where the employer parties all agree prior to the commencement of bargaining - or early thereafter - to engage together in multi-employer collective bargaining. This was the case even before 2015, when the Employment Relations Act was amended to allow employers to opt out of MECA bargaining. Salary reviews have become more prevalent, mainly in the public sector. The increase in productivity or performance payments is associated with a movement to a range of rates (because employers have discretion to place employees within the range). However output can be hard to measure, especially on an individual basis. In contrast to this, specific mention of training and skill development in private sector collective agreements has decreased over time. These provisions do not tend to link pay to skills development. It appears employers move towards providing for training and skills development in company

policy instead – this does not necessarily mean less training and skills development is taking place, in fact the Survey of Working Life indicates it is increasing.

It is rare to see wages being indexed to inflation in Collective Agreements. This may partly reflect parties' preference for certainty, to know exactly what wages will be. However, another factor may be that inflation has been low in the last decade and parties may feel reasonable certainty that it will not exceed 3% per annum, in line with the Reserve Bank's policy.

Case study: NZ Plastics Industry Multi-Employer Collective Agreement

This agreement dates from 1992, with many of the standard conditions from the previous system of awards (eg hours of work, overtime rates, shift payments etc) carrying over from then.

The Plastics MECA moved away from multi-classification pay rates and service pay to a skill-based pay system linked to qualifications very early in its development. Training was, and has been, a central part of the Plastics MECA pay scheme, although training was not mandatory for either the employers or the employees. One of the agreed objectives of the Plastics MECA is "the improvement of productivity, efficiency and competitiveness of the industry through a commitment to qualifications."

The Metals MECA has similar commitments to productivity and skill development although the minimum wage rates are generally based on work classifications. The negotiations for both MECAs normally take place with a key group of employers and the unions. The unions then go around other employers and get them to sign on as a "subsequent party" to the MECA.

While the MECAs have been good for setting the base industry employment conditions, if an employer does not want to accept the industry standards created in the MECA then there is little the union can do to force the issue, especially in small enterprises. Even the subsequent industry parties have lists of conditions from the MECA that they opt out of.

3.10 Collective bargaining experiences in New Zealand

What makes for good bargaining process?

In our experience, a good bargaining process underpinned by a strong rules-based system that addresses the inherent inequality of bargaining power in employment relationships will lead to a good outcome. By good outcome we mean one that both parties support, with real improvements over the status quo. In our experience, the elements of effective collective bargaining come down to three sets of factors: attitude/commitment, skills and process.

The attitude or commitment of parties to collective bargaining is important. Good collective bargaining requires good faith and a genuine willingness to engage and negotiate. Collective agreements are forward-looking documents and, to reflect this, good collective bargaining involves a conversation about where both the business and workers are going in the next few years. Bargaining works best for employers when they can see it is transformational not transactional, i.e. it affects the whole business, not just higher wages. A good attitude when approaching bargaining can also be self-reinforcing: bargaining allows for intense discussions about real issues, which ultimately adds value to the entire employment relationship.

Good bargaining also typically involves having skilled people in the room, and strategic leadership that takes a long-term perspective.

In terms of the process, it must be built around a strong rules-based process that addresses the inherent inequality of bargaining power in employment relationships. This includes employers not interfering in the choice of workers to join a union, respecting the workers' right to meet in the workplace to formulate their bargaining position, elect their own bargaining team and to conduct bargaining in an efficient manner. This also includes the ability of the parties to access statutory processes for the resolution or determination of the terms of such an agreement if bargaining becomes protracted or difficult. The capacity and capability of bargaining parties will also support an efficient process and lead to timely outcomes. It can also be useful to involve trained third-party facilitators, mediators or other forms of support.

What makes for a bad process?

A bad or ineffective process can lead to a worsening of employment relationships. Employment relationships are ongoing and long-term; ending a bargaining episode with a 'winner' and a 'loser' does not bode well for this ongoing relationship. A bad process can also lead to protracted negotiations, impatience on both sides and industrial disputes.

Barriers to good outcomes can take a number of forms. This may involve bad faith, where one or both parties are making no real effort to honestly engage. If the approach to bargaining is transactional, it's harder to get all parties to the bargaining table. Likewise if one party feels like it is being forced to the negotiating table, or there is a lack of bargaining skills, it can lead to an ineffective process.

In the case of MECAs, if one party is unwilling to come to the table – or wants to withdraw from an established MECA when it is being revised – that is enough to put an end to negotiations. However, it can be in the interests of one or more parties to do so.

Bargaining can be quite different depending on the scale of the parties or the characteristics of the industry. The bargaining process can impose higher relative transaction costs on small businesses, who can have quite different needs. It can also be harder in industries or occupations with higher turnover.

Coordination

Notwithstanding the existence of some MECAs, the vast majority of collective agreements negotiated in New Zealand are for single employers. In contrast, Fair Pay Agreements would require a high degree of coordination to work effectively, and could require multiple representative groups to be involved.

We note that levels of coordination can vary significantly across industries and occupations in New Zealand: some industries have well-established industry groups and unions, whereas others do not. Even where industry groups do exist, they tend to be focused on representing the interests of the industry and sharing best practice, and do not typically have a role in collective bargaining.

The process of collective bargaining and the problem of coordination can also be more difficult where SMEs are predominant in a sector, as is common in New Zealand.

4 The role of Fair Pay Agreements in our economy

4.1 Purpose of introducing a Fair Pay Agreement system

The Government asked us to make independent recommendations to the Government on the scope and design of a legislative system of industry or occupation-wide bargaining, which would support their vision for:

- A highly skilled and innovative economy that delivers good jobs, decent work conditions and fair wages while boosting economic growth and productivity.
- Lifting the conditions of New Zealand workers, businesses benefit through improved worker engagement, productivity and better workplaces.
- An employment relations framework that creates a level playing field where good employers are not disadvantaged by paying reasonable, industry-standard wages.
- A highly skilled and innovative economy that provides well-paid, decent jobs, and delivers broad-based gains from economic growth and productivity.
- Meeting New Zealand's obligation to promote and encourage the setting of terms and conditions of employment by way of collective bargaining between workers, worker's representatives, employers and their representatives.

The Government mandated that it will be up to the workers and employers in each industry to make use of the system to improve the productivity and working conditions in the industry.

In designing this system, the Government also mandated us to manage and where possible mitigate the following risks:

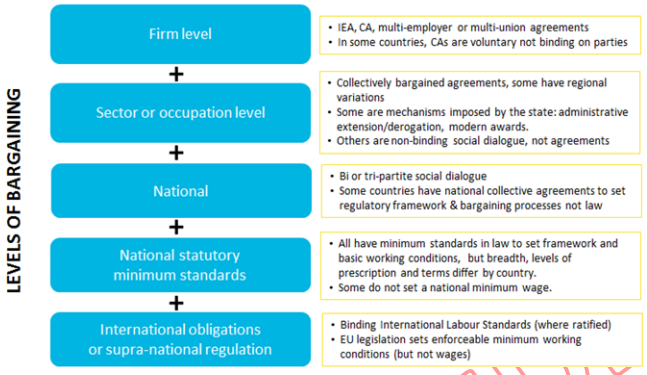
- slower productivity growth if a Fair Pay Agreement locks in inefficient or anti-competitive businesses models or market structures
- a "two-speed" labour market structure with a greater disparity in terms and conditions and job security between workers covered by Fair Pay Agreements and those who are not
- unreasonable price rises for some goods and services if increased labour costs are not offset by productivity gains and profit margins are held at existing levels
- undermining of union membership through the reduction of the value of enterprise bargaining by way of the pass on of collectively negotiated terms and conditions to non-union members, and
- possible job losses, particularly in industries exposed to international competition which are unable to pass on higher labour costs to consumers of those goods and services.

4.2 Where Fair Pay Agreements would fit into the ERES system

As mandated by the Government in our terms of reference, Fair Pay Agreements would provide a collective bargaining mechanism which complements the existing ERES system, rather than replacing it. FPAs would strengthen sector or occupational level bargaining, providing a new collective bargaining tool for workers and employers to use, as shown in the diagram below.

Diagram 16

Collective Bargaining: the underlying global model



Relationship with minimum employment standards

A FPA system will allow for collective agreements which bind a sector- or occupation. These will build on, rather than replace, existing minimum standards. Minimum standards will continue to operate as a 'floor', and terms in an FPA agreement may match or improve on those standards. If minimum standards overtake those in the FPA over time, the minimum standards would apply.

Relationship with enterprise level collective agreements

Workers and firms would also be able to negotiate enterprise level agreements (whether MECAs, MUCAs, single employer collective agreements, or individual employment agreements) within that sector or occupation. These agreements would be able to, as appropriate to the circumstances:

- further improve on the terms and conditions in the FPA,
- clarify the specific terms which apply at the enterprise level (for example, when the FPA sets a range),
- set terms and conditions for employers or workers which are exempt from the FPA, and/or
- set terms and conditions on matters where the FPA is silent.

5 Summary of proposed FPA model and key features

In developing the design of a FPA system, we have examined several options, including how to apply the use of extension bargaining (Continental Europe) and a more coordinated approach (Nordic model) in New Zealand.

The Group agrees with the OECD's advice that there is no single international model for collective bargaining or employment relations that can be applied in another country, without being adapted to suit that country's social and economic context.

We recognise that we are not designing a system from a blank sheet, and that certain characteristics of our current state need to be considered in the pragmatism of our design:

- the existence of statutory minimum standards
- low levels of organisation among workers and employers

- low levels of take up of voluntary approaches to sector or occupational bargaining in New Zealand, particularly in private sector and among small businesses

Further, we took into account that a FPA system is intended to complement, and not replace or standalone from the existing employment relations and standards system, and where the existing system works this can be adapted for FPAs.

Nevertheless, the group agreed that New Zealand could benefit from stronger employer – worker dialogue and that if a collective bargaining dialogue at sectoral or occupational level is introduced, then it is most likely to gain real traction when:

- it is focussed on problems which are broadly based in the sector,
- it presents real opportunities for both employers and workers to gain from the process
- parties are well represented, and where
- it is connected to the fundamentals of the employment relationship: the exchange of labour and incentives to invest in workplace productivity enhancing measures such as skills and technology.

The Group considered that this measure could be most useful in sectors or occupations where particular issues with competitive outcomes are identified – for example, where competition is based on ever-decreasing labour costs rather than quality or productivity. It could also be useful more generally where workers and employers identify scope to improve outcomes across a sector or occupation via sectoral or occupational collective bargaining.

We also considered that in many sectors or occupations, this may not be a necessary or useful tool.

6 [placeholder for summary diagram of key design elements from section 6]Detailed design of a FPA collective bargaining system

6.1 Initiation

The Government asked us to recommend a process and criteria for initiating Fair Pay Agreement (FPA) collective bargaining, including bargaining thresholds or public interest tests.

The FPA collective bargaining process should be initiated by only workers and their union representatives

We recommend that the group initiating the process must be workers' union representatives, and that they must nominate the sector or occupation they seek to cover through a FPA. How they define the proposed boundaries of the sector or occupation may be narrow or broad.

There are two circumstances where a FPA collective bargaining process may be initiated

The Group envisages two circumstances where employers and/or workers' union representatives in a sector or occupation may see benefit in bargaining a FPA.

On the one hand there may be an opportunity for employers and workers to improve productivity and wage growth in their sector or occupation through the dialogue and enforceable commitments that FPA collective bargaining provides.

On the other hand, there may be harmful labour market conditions in that sector or occupation which can be addressed through employer-worker collective bargaining. This would enable them to reach a shared and enforceable FPA that sets wages and terms and conditions across the sector or occupation, to tackle those harmful conditions and to set a level playing field where good employers are not disadvantaged by paying reasonable industry-standard wages

The Group can therefore see two routes for a FPA collective bargaining process to be initiated:

- **Representativeness trigger**: In any sector or occupation, workers, via their union representatives, should be able to initiate a FPA collective bargaining process if they can meet a minimum threshold of number of workers in the nominated sector or occupation.

- **Public interest trigger**: Where the representativeness test is not met, a FPA may still be triggered where there are harmful labour market conditions in the nominated sector or occupation.

The representativeness threshold should cover both union and non-union workers

Where workers through their union representatives wish to initiate a FPA process, we recommend that a minimum representativeness threshold should apply across all workers in the nominated sector or occupation. This should cover both union members and non-union workers.

We recommend that at least 10 per cent or 1,000 (whichever is lower) of workers in the sector or occupation (as defined by the workers) must have indicated their wish to trigger FPA bargaining.

This representativeness threshold is intended to ensure that there is sufficient demand for bargaining within the sector or occupation. There would be no equivalent employer representation test.

The conditions to be met under the public interest trigger should be set in legislation

To provide certainty for all parties, if the option of a 'public interest trigger' is progressed, we recommend that the conditions to be met of harmful labour market conditions should be set in legislation and should be assessed by an independent third party.

In developing the conditions for this test, Government should consider including some or all of the following:

- historical lack of access to collective bargaining
- high proportion of temporary and precarious work
- poor compliance with minimum standards
- high fragmentation and contracting out rates
- poor health and safety records
- migrant exploitation
- lack of career progression
- occupations where a high proportion of workers suffer 'unjust' conditions and have poor information about their rights or low ability to bargain for better conditions
- occupations with a high potential for disruption by automation

These conditions, or criteria, should be designed so they assess whether there is an overriding public interest reason for FPA bargaining to be initiated in that particular sector or occupation.

An independent body is needed to determine these conditions are met

Under either route, there is a need for an independent body to determine that the trigger conditions have been met before the bargaining process commences:

- Under the representativeness trigger, where the number of workers requesting the process is lower than 1,000, the body would determine the baseline number of workers in the nominated sector or occupation and confirm the threshold of 10 per cent has been met.

- Under the public interest trigger, the body would determine the claim that the harmful conditions are evidenced, and invite comments from affected parties within a set time period.

There should be time limits set for the body to complete the determination process to provide certainty for all parties on whether the bargaining process may proceed.

Once determined, the body would inform all affected parties (workers and employers) that bargaining will commence. This provides an opportunity for any party who considers they do not fall within the proposed coverage to contest whether they fall within the coverage.

Once initiation is complete, the bargaining process would be the same under either trigger circumstance.

The Group considered that such an independent body would have quasi-judicial functions, for example, in circumstances where the coverage or representativeness test need to be adjudicated, rather than agreed by consensus. The body would need to interpret the legislation and exercise determinative functions. We suggest the body could be a statutory body, similar to a Commission, at arm's length from the Government of the day. The independent body must be a costs free jurisdiction.

The Government will need to consider how to assess and mitigate potential negative effects

We acknowledge that some sectors perceive there could be negative effects on competition or consumer prices from FPA bargaining. For example, agreements could have the effect of shutting out new entrants to an industry, or higher wage costs passed on through product price increases. We invite the Government to consider how existing competition law mechanisms may need to be adapted to mitigate the risk of such effects.

6.2 Coverage

The Government asked us to make recommendations on:

- how to determine the scope of agreement coverage, including demarcating the boundaries of the industry or occupation and whether the FPA system would apply to employees only, or a broader class of workers;
- whether there are circumstances in which an employer can seek an exemption from a relevant agreement and the process for doing so; and
- whether FPAs should apply to industries or occupations, or both.

The occupation or sector to be covered should be defined and negotiated by the parties

We recommend that Parties should be able to negotiate the boundaries of coverage, within limits set in the legislation. The workers and their representatives initiating the bargaining process

must propose the intended boundaries of the sector or occupation to be covered by the agreement.

It is important for FPAs to cover all workers (not just employees) to avoid perverse incentives

The majority of the Group considered that the parties covered by the FPA should include all workers in the defined sector or occupation, subject to any exemptions (see below). We consider it is necessary for FPAs to cover all workers, as otherwise the system may create a perverse incentive to define work outside employment (regulatory arbitrage).

However, some members felt this would be a significant change to the current employment relations model, and noted that contractors operate under a business, rather than employment, model.

We acknowledge the issue of defining workers as contractors to avoid minimum standards is a broader issue, and Government may wish to give effect to our recommendation through other work directly on that issue across the ERES system.

All employers in the defined sector or occupation should be covered by the agreement

The Group noted that the premise of the Fair Pay Agreement was that it should cover all employers in the defined sector or occupation, if it was desired to avoid incentives for under-cutting the provisions of the FPA. This approach, if adopted, should also extend coverage under the FPA to any new employers or workers in that sector or occupation after the FPA has been signed.

Some members of the Group considered that individual employers, particularly small employers, should be able to elect whether to be covered by the proposed FPA. Others opposed this.

We all agreed it would be important for employers to be able to achieve certainty and avoid incurring unnecessary transaction costs. If an employer does not believe they are within the coverage of the initiation of a particular FPA they should be able to apply to the independent body for a determination of whether they fall within the coverage and are required to be involved in the FPA process.

There may be a case for limited flexibility for exemptions from FPAs in some circumstances

The Group noted that lifting standards may force some employers out of the industry, if they can neither absorb costs nor raise prices and remain competitive in the market. A higher floor for wages or conditions may also discourage employers from hiring some workers with perceived risk factors, such as young or old workers, or long-term beneficiaries in their first year back in employment.

We consider that some flexibility should be permissible in FPAs so that particular circumstances where exemptions are allowed may be set in legislation and agreed on by parties in the bargaining process.

We consider that parties could include defined circumstances for temporary exemptions for employers or workers in the FPA, or include administrative procedures for the parties or a third party to approve requests for an exemption after the FPA is ratified.

Some exemptions we looked at were temporary exemptions for small employers; for young workers; or for long-term beneficiaries in their first year back in employment. Some members considered it may be appropriate to exempt workers such as these from wage floors specified in an FPA, but not non-wage conditions.

As a general rule, the Group considered that any exemptions should be limited and typically time bound (e.g. up to 12 months), as the more exemptions provided for will increase complexity, uncertainty, perverse incentives (e.g. incentivising small firms not to grow), and misallocation of resources in the affected sector. There would be merit in including exemptions in law or sample/guideline exemptions for FPA clauses for parties to use as a basis.

The existence of a FPA should not deter employers from offering more favourable terms to their workers.

6.3 Scope

The Government asked us to make recommendations on the scope of matters that may be included in an agreement, including whether regional variations are permitted.

The legislation should set the minimum content that must be included in a FPA

We recommend that the minimum content for FPAs should be set in legislation. This is a similar approach to the current collective bargaining system under the Employment Relations Act. The Group considered that FPAs must be a written agreement and must include provisions on:

- The objectives of the FPA
- Coverage
- Wages and how pay increases will be determined
- Terms & conditions, namely working hours, overtime and/or penal rates, leave, redundancy, and flexible working arrangements
- Skills and training
- Duration, eg expiry date
- Governance arrangements to manage the operation of the FPA and ongoing dialogue between the signatory parties

We considered that it will be useful for parties to be able to discuss other matters, such as other productivity-related enhancements or actions, even if they do not reach agreement on provisions to insert in the FPA.

We recognise that labour markets can vary significantly across New Zealand (e.g. on a geographic basis). Therefore, the Group considered that parties should also be able to include provisions for regional differences within industries or occupations.

The Group also considered that the duration of agreements should be up to the parties to agree, but with a maximum of 5 years.

Parties may wish to bargain on additional terms to be included in FPAs

The Group considered additional industry-relevant provisions should be able to be included by negotiation in the FPA, so long as they were compliant with minimum employment standards and other law.

Relationship with enterprise level agreements

The Group recommends that employers and employees could agree an enterprise-level collective agreement in addition to the FPA, and if so, that the principle of favourability should apply. This would mean that any enterprise level collective agreements must equal or exceed the terms of the relevant FPA. They may offer additional provisions not within the scope of the FPA that is agreed for that sector or occupation.

6.4 Bargaining parties

The Government asked us to make recommendations on the identification and selection of bargaining participants including any mechanisms for managing the views of workers without union representation.

Parties should nominate a bargaining representative to bargain on their behalf

To be workable, we consider that the bargaining parties on both sides should be represented by incorporated entities.

Workers should be represented by unions, and employers may be represented by employer organisations.

We note that different groups of both workers and employers may wish to have their own representatives and the system should accommodate this within reason – for example, small employers may wish to be represented independently from large, or there may be multiple representative organisations involved. Parties could also set up their own union or employer organisation if they wish to do so.

The Group also considered that any representatives should have relevant expertise and skills.

There should be a role for the national representative bodies

Both employers and workers should elect a lead advocate to ensure there is an orderly process and to be responsible for communication between the parties including the independent body. The Group considers that there will need to be a role for national-level social partners, for example, Business New Zealand and the New Zealand Council of Trade Unions, to coordinate bargaining representatives.

If there is disagreement within a party about who their representative is (or are, if plural) the first step would be mediation. If mediation was unsuccessful, parties could then refer to the independent third party to determine who the representative(s) should be.

Parties should be encouraged to coordinate

In thinking about coordination, the Group recognised the fundamental principle of freedom of association. The Group noted there would be wider benefits for both employers and workers from belonging to representative organisations. For example, industry organisations can offer peer networks, human resources support, and training opportunities for workers and management. All of these could contribute to raising firm productivity. Unions offer representation, advice and support to members and membership benefits. This could take the form of greater participation in existing representative groups or forming new ones, particularly in sectors or occupations with low existing levels of coordination.

Representative bodies must represent non-members in good faith

As a Group, we recognise that representative bodies will not be perfectly representative – not every worker is a member of a union, and not every employer will belong to an industry organisation.

It is important, for instance, that all workers potentially covered by an FPA are able to vote on their bargaining team representatives whether they are union members or not. The same principle should apply for the employer bargaining group.

It is a normal practice in collective bargaining internationally for the 'most representative bodies' to conduct bargaining processes. We think that in New Zealand this can be achieved by placing, for example, duties on the representative bodies at the bargaining table to represent non-members, to do so in good faith, and to consult those non-members throughout the process. We note that there may be challenges in undertaking this wide consultation in some sectors or occupations, but we do not think this is insurmountable, given modern communication technologies.

Workers need to be allowed to attend paid meetings to elect and instruct their representatives

The Group considered that there will need to be legislated rights for workers covered by FPA bargaining to be able to attend paid meetings (similar to the union meetings provision in the Employment Relations Act) to elect their bargaining team and to exercise their rights to endorse the provisions they wish their advocate to advance in the FPA process.

Costs should not fall disproportionately on the groups directly involved in bargaining

There is currently no provision for costs to be covered under the Employment Relations Act. Where bargaining is at enterprise level, meetings will typically be on site and costs currently often fall on unions and employers.

For FPA bargaining, inevitably negotiations will require travel for some bargaining parties. The Group considered that the parties chosen to represent the sides in negotiations should not disproportionately bear these costs. The Group concluded that the Government should consider how these costs should be funded – for example, through Government financial support, a levy, or bargaining fee.

6.5 Bargaining process rules

We recommend that as a default, existing bargaining processes as currently defined in the Employment Relations Act (as amended by Employment Relations Act Amendment Bill) should apply, including the duty of good faith.

Clear timelines are needed to prevent lengthy processes creating excessive uncertainty or cost

There should be clear timelines set for the FPA initiation process, including for the third party to determine y whether bargaining may commence after receiving notification from an initiating party. This will give certainty to all parties.

Notification of parties will be a critical element of the process

Once a FPA process is initiated, it will be critical that all affected employers and workers and their respective representatives are notified, have an opportunity to be represented, and are informed throughout the bargaining progress. Minimum requirements for notifying affected parties should be set in law.

Bargaining should be supported through facilitation

Once bargaining has been initiated, we recommend that a neutral expert facilitator be available to support parties during the bargaining process. This facilitator could make recommendations on either the process the parties should follow to reach agreement, or the provisions of the collective agreement. These recommendations would be non-binding, however, the parties would need to consider the recommendation before deciding whether to accept it or not.

There should not be any threshold test for the parties to access this facilitation service (there is currently a test for facilitation services under the Employment Relations Act), rather, any party may ask for a facilitator to be appointed.

This facilitation function will support an efficient and effective bargaining process and minimise the risk of disputes occurring.

The Government or independent body should also provide materials to reduce time and transaction costs, for example, templates for the bargaining process and agreement, similar to that currently provided on Employment New Zealand website.

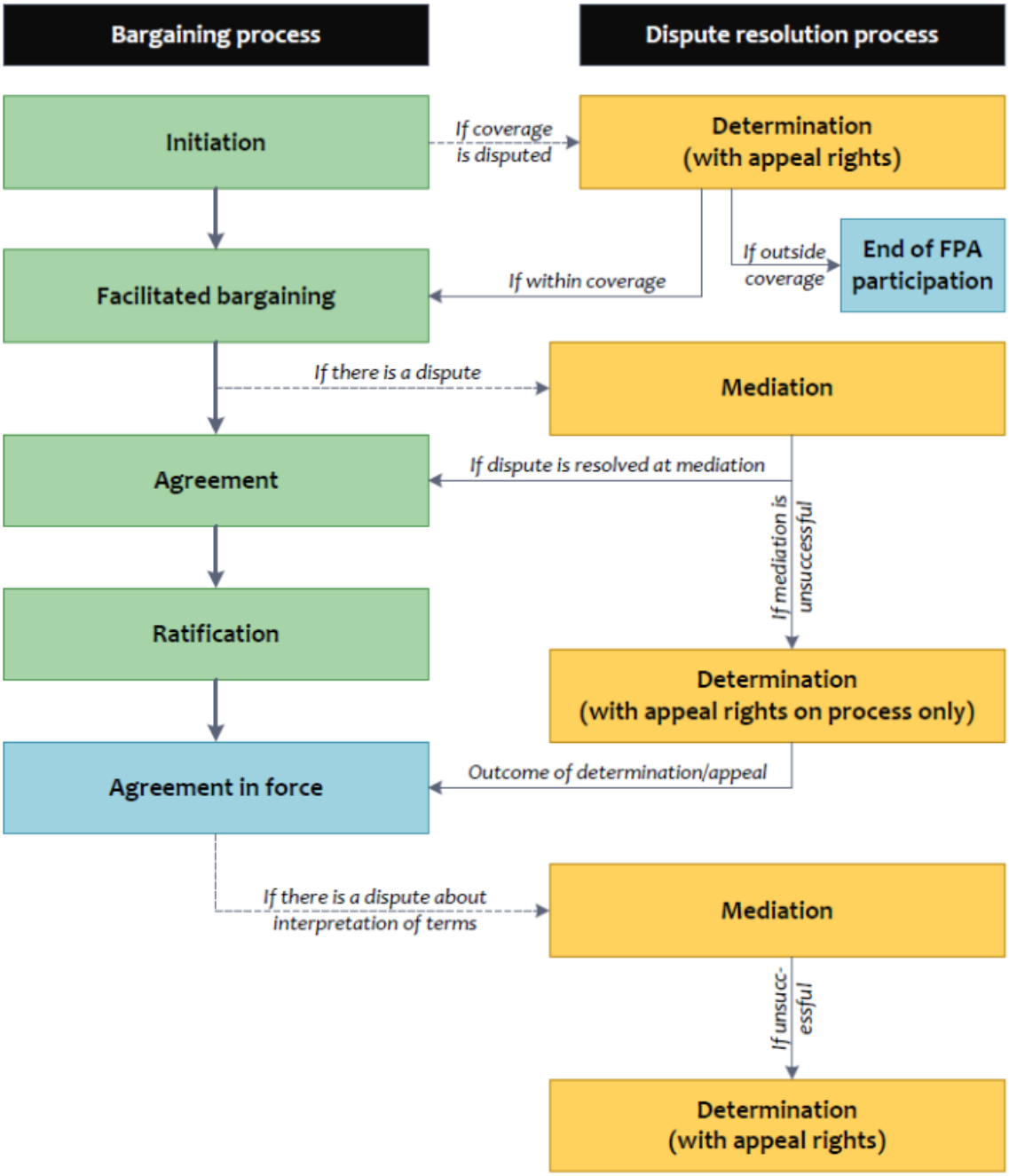
6.6 Dispute resolution during bargaining

The Government asked us to make recommendations on the rules or third party intervention to resolve disputes, including whether the third party's role is facilitative, determinative or both.

The principle guiding the Group's recommendation on dispute resolution has been to maintain, as far as possible, the existing processes under the Employment Relations Act, with additions or simplifications to be suitable for sector-wide bargaining.

Diagram xx outlines the key features of our proposed approach to dispute resolution.

Diagram 17: Dispute resolution process



No recourse to industrial action during bargaining

The Group notes that the Government has already stated that no industrial action – such as strikes or lock outs – will be permitted, during bargaining. It will therefore be critically important that dispute resolution mechanisms work effectively.

We have interpreted this to be a relational, not a temporal, ban – it is only strikes and lockouts related to FPA bargaining which are prohibited, not strikes about other matters which coincide with FPA bargaining.

We acknowledge that this may be perceived by some as conflicting with New Zealand's obligations under ILO Convention 87, but this prohibition of strikes during bargaining for FPAs does not preclude striking during enterprise level collective bargaining over the same matters. In other words, FPAs complement the terms of collective agreements in the same manner as employment standards.

After initiation, disputes over coverage may be determined by the Employment Relations Authority

If a party, who has received an initiation notice for an FPA, disputes that they are covered by the process, we recommend that they may apply to the Employment Relations Authority for a determination on the matter. The aim is to provide an efficient mechanism for determining those that should be included, to minimise the risk of excluding relevant parties or parties incurring costs by participating unnecessarily.

Where parties disagree with the determination, we recommend that the existing appeals process applies.

When disputes arise during facilitated bargaining, parties may attend mediation

If disputes arise during facilitated bargaining, we recommend that either party may refer the process to mediation to resolve disputes concerning either substantive matters or procedure. A neutral expert mediator will play an active role in supporting the parties to resolve the dispute.

Where the dispute cannot be resolved through mediation, parties can apply to have the matter determined

Where mediation does not resolve the dispute, we recommend that either party can then apply to a deciding body, to have the matter finally determined. We suggest the body could be the Employment Relations Authority or Employment Court. The deciding body may then either issue a determination including terms for settlement in the agreement or refer the matter back to mediation where appropriate.

The Group considers that the deciding body should be independent with the requisite specialist skills and experience in collective bargaining matters. This may mean, where necessary, having the support of expert advice or a panel to assist the deciding body to make a determination on the matter.

Parties may only appeal the determination on limited procedural grounds

In order to avoid costly and lengthy litigation processes, we recommend that either party may only appeal a Determination on limited procedural grounds. Appeals should be heard through the court system.

Disputed terms of an agreed FPA will use the standard dispute resolution process

Once the FPA has been agreed and is in force, if parties disagree about how the terms should be interpreted, we recommend that either party may seek to resolve the dispute through mediation.

Where mediation is unsuccessful, either party may seek a determination from the Employment Relations Authority, with appeal rights to the Employment Court. This is the current process for parties who have a dispute about the terms of a collective agreement under the Employment Relations Act.

6.7 Conclusion, variation and renewal

The Government asked us to make recommendations on the mechanism for giving effect to a FPA, including any ratification process for employers and workers within the coverage of an agreement.

The Government also asked for recommendations on the duration and process for renewing or varying an agreement.

Where parties reach agreement, conclusion should require ratification by a simple majority of both employers and workers

Where bargaining has concluded in parties reaching an agreement we recommend that the agreement must not be signed until a simple majority of both employers and workers covered by the agreement have ratified it.

Where bargaining is referred for a determination of the terms of the agreement, the final agreement should not need ratification

In circumstances where mediation fails to resolve the disputes, and the parties refer the bargaining process to determination, the Group considered that this determination should then become a FPA without a further ratification process. There should only be an appeals mechanism on the grounds of a breach of process or seeking a determination as to coverage.

The procedure for ratification must be set in law

We recommend the procedure for ratification be set in law. This differs from the current requirements under the Employment Relations Act where parties may decide how to ratify an agreement. We have recommended this departure from the existing law because, under a bargained FPA, all affected parties in the sector or occupation will need to be given an opportunity to ratify.

The law should clarify that workers are entitled to paid meetings for the purposes of ratifying the agreement.

Before an agreement expires, either party should be able to initiate a renewal of the agreement, or for variation of some or all terms

The Group considered that any variation or renewal of the agreement that is agreed between the bargaining parties must meet the same initiation and ratification thresholds.

An expiring FPA should be able to be renewed easily, for example employers and workers may be able to vote for a renewal with wages increased in line with CPI or some other indicator.

6.8 Enforcement

The Government asked us to consider how the terms of an agreement should be enforced.

The Employment Relations Act approach to enforcement should be applied

Overall, we consider the existing dispute resolution and enforcement mechanisms under the Employment Relations Act should be applied to the new FPA system, with the changes noted above to dispute resolution during bargaining.

This would provide for parties who believe there has been a breach of a FPA to turn first to dispute resolution services including mediation, before looking to enforcement options including the Labour Inspectorate and the Court system.

The Government will need to consider whether additional resources for bodies involved in dispute resolution and enforcement are needed during the detailed design and implementation of the overall system.

We suggest that unions and employers and employers organisations should (where possible and appropriate) also play a role in supporting compliance, to identify breaches of FPAs, and address implementation problems.

6.9 Support to make the bargaining process work well

The Group considers that a number of conditions need to be present to support a positive outcome to a FPA collective bargaining process:

- Capability and capacity in both parties to support the bargaining process, with the skills and expertise to manage a respectful, efficient dialogue that leads to timely outcomes
- Strategic leadership on both sides that takes a long-term perspective, supporting a transformational not transactional conversation, i.e. it affects the whole sector or occupation, not just higher wages.
- High levels of inclusion and participation in the dialogue, particularly among small employers, both through direct involvement at the bargaining table and consultation.
- In a process likely to require involvement of multiple representative groups, a high degree of coordination to work effectively and efficiently.
- The involvement of trained third-party facilitators to support the parties through the process.

In addition, both workers and employers will need to see potential benefits of bargaining for an FPA, with a real improvement over the status quo. There also needs to be a genuine willingness to engage and confidence in the good faith approach of both parties

Resourcing levels for support services will need to be considered

The existing functions provided by Government to support the collective bargaining process are fit for purpose and should still apply, including the provision of:

- general information and education about rights and obligations

- information about services available to support the bargaining process and the resolution of employment relationship problems
- facilitation, mediation and determination services
- compliance and enforcement through the Employment Relations Authority, Labour Inspectorate and Courts
- reporting and monitoring of the employment relations system

However, the Government should consider the level of resources available as part of the detailed design and implementation of the overall system. In particular, we consider that resources will be needed for the dedicated facilitator to work with the parties at all stages of bargaining.

Support to build capability and capacity of the parties and to facilitate the process is needed

In order to facilitate effective bargaining, a good level of information will need to be provided to parties, and capability building will be important to build up the skills of those around the negotiating table, and maximise the potential for constructive bargaining.

The Government will also need to consider the role and resourcing required for the third party body to support the various elements of the bargaining process described above including the processes for determination of the trigger tests, notifications to parties, and facilitation of the bargaining process.

A proactive role will also be needed to provide notifications, information and education on their obligations to employers and workers following the ratification and coming into force of a FPA.

7 Recommendations

[add these once agreed – drawing on the bold headings in section 6, plus any additional recommendations agreed]

Annex 1 – Terms of ReferenceFair Pay Agreement Working Group

Purpose

1 The Fair Pay Agreement Working Group has been established to make independent recommendations to the Government on the scope and design of a system of bargaining to set minimum terms and conditions of employment across industries or occupations.

Background

2 This Government has a vision for a highly skilled and innovative economy that delivers good jobs, decent work conditions and fair wages while boosting economic growth and productivity. When we lift the conditions of New Zealand workers, businesses benefit through improved worker engagement, productivity and better workplaces.

3 The Government's vision of the employment relations framework is a level playing field where good employers are not disadvantaged by paying reasonable, industry-standard wages. New Zealand must have a highly skilled and innovative economy that provides well-paid, decent jobs, and delivers broad-based gains from economic growth and productivity.

4 In addition, the Government intends to promote the setting of terms and conditions of employment by way of collective bargaining between workers, worker's representatives, employers and their representatives.

Objectives

5 The objective of the Fair Pay Working Group is to make independent recommendations to the Government on the scope and design of a legislative system of industry or occupation-wide bargaining.

6 In achieving these objectives, it will be important to ensure that the Working Group's recommendations manage and where possible mitigate the following risks:

6.1 slower productivity growth if a Fair Pay Agreement locks in inefficient or anti-competitive businesses models or market structures

6.2 a "two-speed" labour market structure with a greater disparity in terms and conditions and job security between workers covered by Fair Pay Agreements and those who are not

6.3 unreasonable price rises for some goods and services if increased labour costs are not offset by productivity gains and profit margins are held at existing levels

6.4 undermining of union membership through the reduction of the value of enterprise bargaining by way of the pass on of collectively negotiated terms and conditions to non-union members, and

6.5 possible job losses, particularly in industries exposed to international competition which are unable to pass on higher labour costs to consumers of those goods and services.

Parameters and scope

7 The Fair Pay Agreement Working Group's recommendations must address:

7.1 the process and criteria for initiating Fair Pay Agreement bargaining (including bargaining thresholds or public interest tests)

7.2 identification and selection of bargaining participants including any mechanisms for managing the views of workers without union representation

7.3 how to determine the scope of agreement coverage, including demarcating the boundaries of the industry or occupation and whether the Fair Pay Agreement system would apply to employees only, or a broader class of workers

7.4 whether Fair Pay Agreements should apply to industries or occupations, or both

7.5 the scope of matters that may be included in an agreement, including whether regional variations are permitted

7.6 rules or third party intervention to resolve disputes, including whether the third party's role is facilitative, determinative or both

7.7 the mechanism for giving effect to an agreement, including any ratification process for employers and workers within the coverage of an agreement

7.8 how the terms of an agreement should be enforced

7.9 duration and process for renewing or varying an agreement

7.10 whether there are circumstances in which an employer can seek an exemption from a relevant agreement and the process for doing so

8 Any model proposed by the Fair Pay Agreement Working Group must:

8.1 operate effectively as a component part of the overall employment relations and standards system, including existing single- and multi-employer collective bargaining and minimum employment standards, and

8.2 manage and where possible mitigate the risks in paragraph 6.

9 The Fair Pay Agreement Working Group's recommendations must be within the following parameters:

9.1 Industrial action is not permitted as part of bargaining over a Fair Pay Agreement.

9.2 It will be up to the workers and employers in each in each industry to make use of the system to improve the productivity and working conditions in the industry.

Membership

10 The Fair Pay Agreement Working Group will be chaired by the Rt Hon Jim Bolger.

11 The Fair Pay Agreement Working Group will comprise the following members:

Dr Stephen Blumenfeld	Director, Centre for Labour, Employment and Work at Victoria University
Steph Dyhrberg	Partner, Dyhrberg Drayton Employment Law
Tony Hargood	Chief Executive, Wairarapa-Bush Rugby Union
Kirk Hope	Chief Executive, BusinessNZ
Vicki Lee	Chief Executive, Hospitality NZ
Caroline Mareko	Senior Manager, Communities & Participation, Wellington Region Free Kindergarten Association
John Ryall	National Secretary, E tū
Dr Isabelle Sin	Fellow, MOTU Economic and Public Policy Research
Richard Wagstaff	President, New Zealand Council of Trade Unions

12 The chair and members of the Fair Pay Agreement Working Group will be entitled to a fee in accordance with the Cabinet fees framework for members appointed to bodies in which the Crown has an interest.

13 Officials from the Ministry of Business, Innovation and Employment will support the Working Group as secretariat. The Working Group will be able to seek independent advice and analysis on any matter within the scope of these terms of reference.

Timeframes

14 It is anticipated that the Fair Pay Agreement Working Group will:

14.1 commence discussions in June 2018

14.2 make recommendations to the Minister for Workplace Relations and Safety by November 2018.

15 These dates may be varied with the consent of the Minister for Workplace Relations and Safety.

Annex 2 - Occupations ranked according to proportion of workers earning under $20 per hour

This table was created by obtaining wage information for all occupations in New Zealand at the three-digit level (minor groups) under the Australian and New Zealand Standard Classification of Occupations (ANZSCO). We then arranged these occupations according to the proportion of workers earning under $20.00 an hour.

Occupation	Regular hourly rate (main job)		% below $20	Weekly income (all sources)	Total workers (000s)
Three-digit occupation	**Mean**	**Median**	**Percent**	**Mean**	
Checkout Operators and Office Cashiers	17.77	17	93.90%	406.57	15.6
Food Preparation Assistants	17.33	16.5	93.30%	412.07	21.9
Hospitality Workers	17.79	17	88.20%	487.59	39.2
Packers and Product Assemblers	18.32	17.26	84.80%	640.76	17.2
Child Carers	18.5	18	80.50%	462.04	12.8
Cleaners and Laundry Workers	20.01	17.5	79.60%	479.78	44.9
Sales Assistants and Salespersons	19.98	18	76.00%	655.99	107
Hairdressers	19.85	18.22	73.60%	630.05	9.9
Delivery Drivers	20.43	19.36	70.70%	702.71	6.5
Freight Handlers and Shelf Fillers	21.41	18	70.30%	716.11	8.6
Food Trades Workers	20.44	19	69.20%	774.54	40.1
Miscellaneous Sales Support Workers	23	19.18	68.10%	624.5	8.3
Education Aides	20.8	19.21	65.40%	511.57	15.5
Miscellaneous Labourers	20.34	18.5	65.10%	763.92	40.1
Clerical and Office Support Workers	21.11	19.5	63.90%	754.89	13
Farm, Forestry and Garden Workers	20.93	18.7	63.80%	794.71	41.4
Sports and Fitness Workers	24.19	20	54.30%	668.39	15
Arts Professionals	24.41	20	54.20%	753.7	7.8
Storepersons	21.3	20	53.00%	900.62	25.9
Machine Operators	21.52	20.2	51.20%	902.38	18.9
Automobile, Bus and Rail Drivers	21.95	20.45	50.10%	870.24	16.3
Personal Service and Travel Workers	24.49	20.62	49.80%	873.51	20.3
Personal Carers and Assistants	21.46	21	47.30%	688.28	54.8
Receptionists	23.19	21.58	44.90%	713.52	24.1
Accommodation and Hospitality Managers	26.93	21.37	43.90%	973.61	19.6
Horticultural Trades Workers	24.54	22	43.90%	755.25	17.2
Farmers and Farm Managers	35.62	22	42.60%	1272.73	54.5
Food Process Workers	23.67	22.38	42.20%	965.91	27
Textile, Clothing and Footwear Trades Workers	25.13	22	41.80%	1036.31	2.5

Occupation	Regular hourly rate (main job)		% below $20	Weekly income (all sources)	Total workers (000s)
Three-digit occupation	Mean	Median	Percent	Mean	
Call or Contact Centre Information Clerks	23.3	21	39.90%	911.61	6.7
Retail Managers	24.86	21.31	39.20%	1077.04	36.6
Keyboard Operators	21.55	21.58	38.50%	768.33	5.9
Animal Attendants and Trainers, and Shearers	25.97	21.6	38.20%	870.54	7.6
Floor Finishers and Painting Trades Workers	24.73	23	34.90%	957.82	15.7
Miscellaneous Factory Process Workers	24.9	22.8	34.60%	1031.12	9
Insurance Agents and Sales Representatives	25.04	22.54	33.80%	986.1	48.3
Construction and Mining Labourers	50.75	23	33.30%	1094.88	22.9
Automotive Electricians and Mechanics	24.9	25	32.90%	1074.62	21.3
Prison and Security Officers	27.25	26	31.90%	1130.81	15.4
ICT and Telecommunications Technicians	27.18	23.97	30.70%	1066.63	8.8
Miscellaneous Technicians and Trades Workers	28.6	24	30.30%	1136.1	11.7
Panelbeaters, and Vehicle Body Builders, Trimmers and Painters	24.05	24	29.90%	979.11	4.7
Chief Executives, General Managers and Legislators	50.4	31.97	29.60%	1922.54	148.6
Mobile Plant Operators	25.79	23.98	29.60%	1176.93	27.2
Bricklayers, Carpenters and Joiners	24.93	25	29.10%	1066.64	19.7
Fabrication Engineering Trades Workers	26.29	25	28.70%	1167.9	13.9
Printing Trades Workers	29.04	27.9	28.50%	1148.29	5.3
Plumbers	30.94	24.93	27.80%	1107.35	12.5
Glaziers, Plasterers and Tilers	26.79	23.97	27.80%	1096.99	11.9
Health and Welfare Support Workers	24.89	23.5	27.10%	884.46	21.6
Real Estate Sales Agents	55.47	28.77	25.70%	1741.83	16.6
Logistics Clerks	25.69	23.97	24.90%	1070.98	26.6
Stationary Plant Operators	27.87	24.93	23.70%	1249.98	13.2
Electricians	31.41	27.2	23.00%	1290.76	18.1
General Clerks	34.07	24.29	22.60%	954.96	64.8
Truck Drivers	24.05	23.61	21.60%	1195.82	31
Agricultural, Medical and Science Technicians	26.45	24.69	21.50%	1051.22	17.1
Miscellaneous Clerical and Administrative Workers	31.54	25.89	20.10%	1238.82	17.6
Architects, Designers, Planners and	41.98	31.17	19.60%	1572.76	28.6

Occupation	Regular hourly rate (main job)		% below $20	Weekly income (all sources)	Total workers (000s)
Three-digit occupation	Mean	Median	Percent	Mean	
Surveyors					
Construction, Distribution and Production Managers	32.17	29	19.60%	1454.33	61.5
Media Professionals	40.4	35.96	18.50%	1562.61	7.7
Mechanical Engineering Trades Workers	32.51	30	17.70%	1432.54	17.5
School Teachers	28.69	27.24	17.70%	1097.53	101.3
Social and Welfare Professionals	29.31	26.15	17.10%	1040.55	35.2
Wood Trades Workers	29.86	26.37	16.40%	1293.12	5
Office and Practice Managers	32.97	25.21	16.00%	1125.24	35.9
Health Therapy Professionals	41.58	32.6	15.90%	1475.11	16.9
Database and Systems Administrators, and ICT Security Specialists	38.83	32.5	15.10%	1559.42	6.2
Personal Assistants and Secretaries	30.11	27	14.50%	1035.7	20.4
Accounting Clerks and Bookkeepers	34.29	26.37	14.10%	966.58	35.7
Air and Marine Transport Professionals	55.22	40	13.10%	2002.36	8.4
Miscellaneous Education Professionals	34.79	30.69	12.70%	1119.05	12.3
Building and Engineering Technicians	33.21	29.73	12.70%	1348.28	21.4
Electronics and Telecommunications Trades Workers	29.49	28	12.20%	1274.34	13.8
Information and Organisation Professionals	44.82	35.8	11.10%	1564.73	34.6
Financial Brokers and Dealers, and Investment Advisers	44.06	32.32	10.40%	1917.98	9.8
Medical Practitioners	79.83	71.92	9.90%	3076.52	14.6
Sales, Marketing and Public Relations Professionals	36.42	30	9.90%	1431.97	23.5
Tertiary Education Teachers	39.54	35.96	9.80%	1494.3	22.7
ICT Network and Support Professionals	39.22	35	9.70%	1606.92	9.3
Contract, Program and Project Administrators	34.31	29.92	9.50%	1268.59	20.1
Business Administration Managers	43.08	35.96	8.90%	1813.23	70.2
Health Diagnostic and Promotion Professionals	36.64	35.96	8.40%	1265.62	14.7
Advertising, Public Relations and Sales Managers	42.8	38.36	8.20%	1896.85	34.3
Defence Force Members, Fire Fighters and Police	35.08	31.84	8.20%	1540.19	21.8
Miscellaneous Specialist Managers	39.38	36.76	8.10%	1669.84	8.7
Miscellaneous Hospitality, Retail and Service Managers	35.55	34.52	8.00%	1548.15	18.9
Accountants, Auditors and Company	42.11	38.36	7.00%	1652.86	45.6

Occupation	Regular hourly rate (main job)		% below $20	Weekly income (all sources)	Total workers (000s)
Three-digit occupation	**Mean**	**Median**	**Percent**	**Mean**	
Secretaries					
Natural and Physical Science Professionals	41.89	36.44	6.50%	1705.59	16.6
Financial and Insurance Clerks	32.47	28.77	6.30%	1314.62	18.7
Engineering Professionals	43.23	38.36	5.80%	1843.23	40.7
Business and Systems Analysts, and Programmers	44.78	41.94	5.60%	1803.22	52.4
Human Resource and Training Professionals	37.48	31.97	5.10%	1492.07	14.6
Legal Professionals	49.81	40	4.60%	2046.89	19.2
Midwifery and Nursing Professionals	33.12	32	3.20%	1139.91	57.7
ICT Managers	57.95	52.74	2.60%	2624.76	10.2
Education, Health and Welfare Services Managers	41.44	36.23	1.30%	1808.82	14.5

12B

Fair Pay Agreements:

Supporting workers and firms to drive productivity growth and share its benefits

Version 0.8

27 November 2018

Recommendations from the

Fair Pay Agreements Working Group 2018

Summary

New Zealanders work longer hours and produce less per hour than in most OCED countries. Our productivity growth over recent decades has been poor, and our economic 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.

The Government's vision is to use the employment relations framework to create a level playing field where good employers are not disadvantaged by paying reasonable, industry-standard wages. New Zealand must have a highly skilled and innovative economy that provides well-paid, decent jobs, and delivers broad-based gains from economic growth and productivity.

The Government asked us to make independent recommendations on the scope and design of a system of sector or occupation wide bargaining to set minimum terms and conditions of employment and achieve these goals.

Many other countries, especially in Europe, use sector-wide collective agreements as the core of their employment relations systems. The OECD recommends this model of combined sector and enterprise-level collective bargaining, because it is associated with higher employment, lower unemployment, a better integration of vulnerable groups and less wage inequality than fully decentralised systems like ours. Some systems also link wage increases to skills and training pathways, with the aim of increasing productivity and sharing its benefits.

The Group considered that introducing this kind of bargaining system could be most useful in sectors or occupations where particular issues with competitive outcomes are identified, for example, where competition is based on ever-decreasing labour costs rather than quality or productivity. It could be useful more generally where workers and employers identify scope to improve outcomes across a sector or occupation. We also considered that this may not be a necessary or useful tool in some sectors or occupations.

We have therefore designed a system where workers can initiate sector- or occupation-wide collective bargaining, if they meet a representativeness threshold or a public interest test.

We all agreed that if a collective bargaining dialogue at sectoral or occupational level is introduced, it is most likely to gain real traction when:

- it is focussed on problems which are broadly based in the sector,
- it presents real opportunities for both employers and workers to gain from the process
- parties are well represented, and

- it is connected to the fundamentals of the employment relationship: the exchange of labour and incentives to invest in workplace productivity-enhancing measures such as skills and technology.

We have designed this system with these principles in mind. Another fundamental design principle was to minimise cost and complexity for all parties, and this has led us to build on the existing mechanisms in the employment relations and standards system where possible.

Most of the Group agreed that to achieve the Government's objectives, all employers in the sector or occupation should be covered by a Fair Pay Agreement if it was triggered. Business New Zealand was of the view that [placeholder].

We all agreed, however, that if such a system is introduced, this is the best design for it.

Recommendations

Designing a Fair Pay Agreement System

The Group concluded that:

- There is no international model for collective bargaining that can be applied to New Zealand, without being adapted to suit our social and economic context.
- A Fair Pay Agreement system cannot be designed from a blank sheet. Certain characteristics of our current state need to be considered pragmatically:
  - the existence of statutory minimum standards,
  - low levels of organisation among workers and employers, and
  - low levels of take up of voluntary approaches to sector or occupational collective bargaining in New Zealand, particularly in the private sector and among small businesses.
- This system is intended to complement, not replace, the existing employment relations and standards system. Where possible Fair Pay Agreements system should be designed to build on and adapt existing provisions to minimise cost and complexity.
- New Zealand could benefit from stronger employer – worker dialogue.
- Fair Pay Agreements could be most useful in sectors or occupations where particular issues with competitive outcomes are identified. For example, where competition is based on ever-decreasing labour costs rather than on increased quality or productivity.
- They could also be useful more generally where workers and employers identify scope to improve outcomes across a sector or occupation. However, they may not be a necessary or useful tool in some sectors or occupations.
- [Placeholder for BusinessNZ text here]
- All members of the Group agreed that if the Government decided to introduce this system, then this was the best way to design it.

- Fair Pay Agreements are most likely to gain real traction where:
  - they are focussed on problems which are broadly based in the sector,
  - there are real opportunities for both employers and workers to gain from the process,
  - parties are well represented, and
  - agreements are connected to the fundamentals of the employment relationship: the exchange of labour and incentives to invest in workplace productivity-enhancing measures such as skills and technology.

- Training and skills provisions should be encouraged as a key feature of collective agreements.

- The Government should seek advice from officials and the ILO on the compatibility of the proposed system with New Zealand's international obligations.

Detailed design of a Fair Pay Agreement system

The Group agreed the following recommendations on how to design each of the key features of the Fair Pay Agreement collective bargaining system.

Initiation

- A Fair Pay Agreement 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:

  Representativeness trigger. In any sector or occupation, workers, via their union representatives, should be able to initiate a Fair Pay Agreement bargaining process if they can meet a minimum threshold of number of workers in the nominated sector or occupation.

  Public interest trigger. Where the representativeness test is not met, a Fair Pay Agreement may still be triggered where there are harmful labour market conditions in the nominated sector or occupation.

- The representativeness threshold should cover both union and non-union workers.

- The conditions to be met under the public interest trigger should be set in legislation. An independent body is needed to determine these conditions are met.

- The Government will need to consider how to assess and mitigate potential negative effects, including to competition.

Coverage

- The occupation or sector to be covered by an agreement should be defined and negotiated by the parties.

- It is important for agreements to cover all workers - not just employees - to avoid perverse incentives to define work outside of employment regulation.

- All employers in the defined sector or occupation should be covered by the agreement.

- [placeholder for Business NZ statement here]
- There may be a case for limited flexibility for exemptions from the agreement in some circumstances.

Scope

- The legislation should set the minimum content that must be included in the agreement.
- Parties should be able to bargain on additional terms to be included in the agreement.
- Any enterprise level collective agreement must equal or exceed the terms of the relevant Fair Pay Agreement.

Bargaining parties

- Parties should nominate a representative organisation to bargain on their behalf.
- There should be a role for the national representative bodies to coordinate bargaining representatives.
- Parties should be encouraged to coordinate.
- Representative bodies must represent non-members in good faith.
- Workers need to be allowed to attend paid meetings to elect and instruct their representatives.
- Costs should not fall disproportionately on the groups directly involved in bargaining.

Bargaining process rules

- Clear timelines are needed to prevent lengthy processes creating excessive uncertainty or cost.
- Notification of parties will be a critical element of the process.
- Bargaining should be supported through facilitation.

Dispute resolution during bargaining

- There is no recourse to industrial action during bargaining.
- After initiation disputes over coverage may be determined by the Employment Relations Authority.

- When disputes arise during facilitated bargaining, parties go to mediation in the first instance.
- Where a dispute cannot be resolved through mediation, parties may apply to have the matter determined.
- Parties may only challenge the determination on limited procedural grounds, with rights of appeal.
- Once in force, any dispute over the terms of a Fair Pay Agreement should use the standard dispute resolution process.

Conclusion, variation and renewal

- Where parties reach agreement, conclusion should require ratification by a simple majority of both employers and workers.
- Where bargaining is referred to determination of the terms of the agreement, the final agreement should not need ratification.
- The procedure for ratification must be set in law.
- Registration of agreements should be required by law, and agreements should be publicly available.
- Before an agreement expires, either party should be able to initiate a renewal of the agreement, or for variation of some or all terms.

Enforcement

- The Employment Relations Act approach to enforcement should be applied.

Support to make the bargaining process work well

- Support to build capability and capacity of the parties and to facilitate the process is needed.
- Resourcing levels for support services will need to be considered.

1. Introduction: Lifting incomes and economic growth in New Zealand for the 21st century

The Government asked the Group to design a new tool to complement the collective bargaining system in New Zealand which will help transition the current employment relations framework to one which can support the transition to a 21st century economy: a highly skilled and innovative economy that provides well-paid, decent jobs, and delivers broad-based gains from economic growth and productivity.

As a starting point, the Government asked us to make recommendations on a new tool which can support a level playing field across a sector or occupation, where good employers are not disadvantaged by offering reasonable, industry-standard wages and conditions.

Our first step was to take a holistic view of our labour market: looking backwards at how our current labour market is operating, and looking ahead to the global megatrends that will shape our labour market over the coming decades.

New Zealand's labour market has seen big changes over the last 30-40 years. Over the coming decades, technological change, globalisation, demographic change and climate change will continue to change the demand for labour and skills.

This process is likely to be uneven, and its impact on society and our labour market is uncertain. We cannot predict exactly how these changes will manifest themselves, or when, but we know globalisation and skills-based technological change have also been drivers of growing inequalities world-wide.

The evidence doesn't currently show the pace of change accelerating, but we need to prepare in New Zealand for a faster rate of job loss and skill obsolescence. We know that certain groups, such as young or low-skilled workers, are likely to be more at risk when these changes happen. We also recognise the challenges faced by each sector are varied as we transition to the future – with different scales of opportunity to improve productivity, sustainability, and inclusiveness.

The Group concluded a mature 21st century labour market in New Zealand will require stronger dialogue between employers and workers. There is a wide range of measures the Government has underway or which could be considered to tackle the challenge of just transition in our economy and promoting increased sector level dialogue among employers and workers. Changing our employment relations model and introducing a new way of doing collective bargaining, while maintaining the essential elements of the current system in New Zealand is just one part of this story, alongside interventions to improve coordination and incentives within other regulatory systems, such as taxation and welfare. These issues are highly related, but the subject of ongoing discussion and advice from other Working Groups.

We agreed a collective bargaining dialogue at sectoral or occupational level is most likely to gain real traction when:

- it is focussed on problems which are broadly based in the sector,
- it presents real opportunities for both employers and workers to gain from the process
- parties are well represented, and

- it is connected to the fundamentals of the employment relationship: the exchange of labour and incentives to invest in workplace productivity enhancing measures such as skills and technology.

The Group considered this measure could be most useful in sectors or occupations where particular issues with competitive outcomes are identified – for example, where competition is based on ever-decreasing labour costs rather than quality or productivity. It could also be useful more generally where workers and employers identify scope to improve outcomes across a sector or occupation via sectoral or occupational collective bargaining. We also considered this may not be a necessary or useful tool in some sectors or occupations.

Bringing this sector dialogue into a regulated mechanism like collective bargaining provides the critical incentive of an enforceable contract binding the parties. It provides the opportunity for employers to invest and engage without the fear of being undercut by those employers engaged in the race to the bottom. There may also be mutual benefits for workers and employers through improved worker engagement, productivity and better workplaces.

2. The approach of the FPA Working Group

The FPA Working Group has held a series of eleven fortnightly meetings from July 2018 to November 2018. The Government asked the Group to report by November 2018, and this report forms the Group's final recommendations.

The Group has discussed the employment relations and standards system and approach to collective bargaining in New Zealand over recent decades, international models, the relationship between wages and productivity, and the design of an additional sectoral or occupational approach to collective bargaining for New Zealand.

The Group was supported by the Ministry of Business Innovation and Employment as Secretariat, who also provided information and data on a range of topics.

The Group also heard from speakers who provided their expertise from within the Working Group, and some external experts on particular issues:

- Paul Conway, Productivity Commission on productivity in New Zealand
- John Ryall, E tū, on the E tū experience of negotiating multi-employer collective agreements
- Richard Wagstaff, Council of Trade Unions, and Kirk Hope, Business New Zealand, on their experience of what does and does not work under the current model for collective bargaining in New Zealand
- Stephen Blumenfeld, Centre for Labour, Employment and Work at Victoria University of Wellington on data trends in collective bargaining and collective agreements
- Doug Martin, Martin Jenkins, on a Fair Pay Agreements system
- Vicki Lee, Hospitality NZ, on the small business perspective on the employment relations and standards regulatory system

3. Context

We looked at the relationship between productivity growth and wage growth in recent decades in New Zealand, and their relationship with overall incomes and inequality.

3.1 Productivity and wage growth, incomes and inequality in New Zealand

Productivity growth in New Zealand

New Zealand's productivity growth over recent decades has been relatively poor. Since 1970, our GDP per hour worked has declined significantly relative to the high-income OECD average: it fell from about equal to the OECD average to about 30 per cent under it.

Our productivity performance is also considerably lower than the OECD average, the G-7 and that of the small advanced economies we compare ourselves with. Figure 1 shows New Zealand's slower rate of labour productivity growth since 1970.

Figure 1

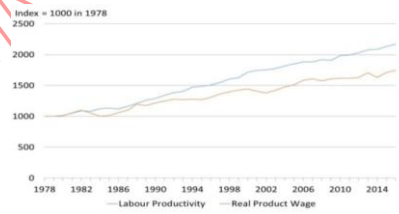
In other words, New Zealanders work for longer hours and produce less per hour worked than those in most OECD countries.

Our recent economic growth has been driven primarily by increased labour force participation rather than labour productivity growth.

Wage growth in New Zealand

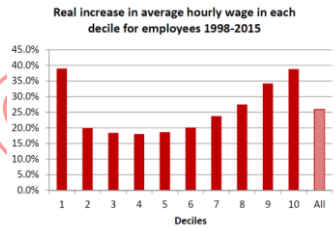
Real wages in New Zealand have increased since the 1970s, but not as fast as labour productivity. Figure 1 shows this divergence between labour productivity and wage growth over the last four decades.

Figure 2 - Labour productivity and the real product wage in the measured sector 1978-2016, indexed to 1978



Over the last two decades, wages in New Zealand have risen more slowly for employees in deciles 2 to 6 (50% of employees) than for those in higher deciles. Figure 3 shows real increases in hourly wage for employees over the last two decades, broken down by decile.

Figure 3



The exception is decile 1, where rising wages have been heavily influenced by increases to the minimum wage.

This has "hollowed out" the wage scale and increased wage inequality among the majority of employees.

Commented [KM1]: Note to Working Group:

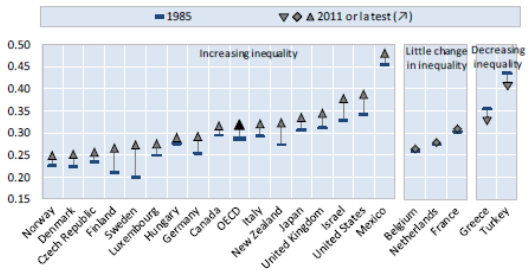
We will confirm and add whether Figure 1 is based on real or nominal figures.

Incomes and inequality in New Zealand

Income inequality has been rising in many developed countries in recent decades. According to the OECD, the gap between rich and poor is at its highest for 30 years[1]. As the OECD points out, the drivers of these growing income gaps are complex and reflect both economic and social changes. The evidence increasingly suggests high inequality has a negative and statistically significant impact on a country's medium-term economic growth.

Figure 4 **1. Income inequality increased in most OECD countries**

Gini coefficients of income inequality, mid-1980s and 2011/12



Note: Incomes refer to household disposable income, adjusted for household size.
Source: OECD Income Distribution Database (http://oe.cd/idd).

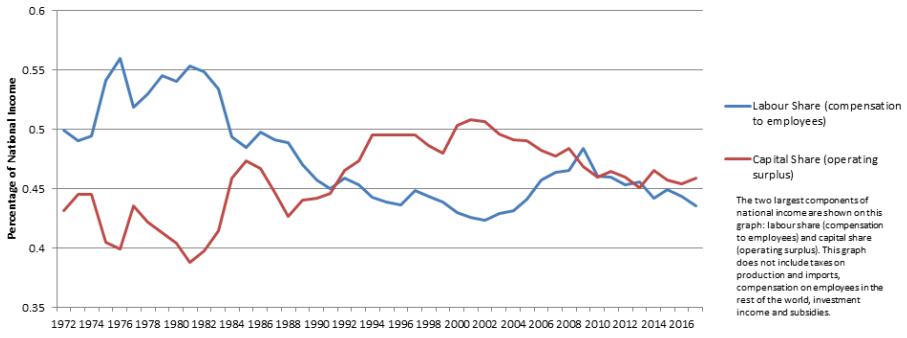
According to the OECD, New Zealand has a slightly higher degree of income inequality than the OECD average. But while most OECD countries are experiencing increases in income inequality, New Zealand saw one of the largest increases in income equality during the 1980s and 1990s, with our rate of increase in inequality exceeded only by Sweden and Finland. Figure 4 shows the change in income inequality across selected OECD countries between the 1980s and 2011/12, measured by the Gini coefficient[2].

Despite wages rising in absolute terms in New Zealand, workers' share of the national income has fallen since the 1970s, with a particularly large fall in the 1980s (see Figure 5). This reflects wages growing slower than returns to capital, rather than wages falling.

Commented [BG2]: Note to Working Group:

On Figure 5 we have added the explanation of why the graph doesn't add up to 100% - and made it larger so that text is visible.

Figure 5 **Labour and capital share of national income in New Zealand**



[1] http://www.oecd.org/els/soc/Focus-Inequality-and-Growth-2014.pdf
[2] The Gini coefficient is a broader measure of inequality which ranges from zero, where everybody has identical incomes, to 1 where all income goes to only one person.

There was some recovery in the 2000s, though the labour income share in New Zealand has fallen again since 2009 and is still well below levels that were seen in the 1970s.

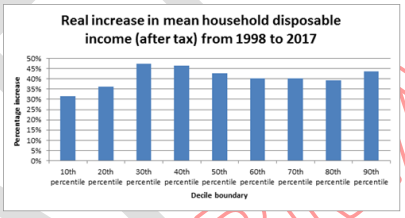
A similar trend of a falling share of income going to workers has also been observed in many other countries worldwide, in both developed and emerging economies, although New Zealand remains well below the OECD median.

The reasons for their divergence are not entirely clear and are a matter of ongoing and wide debate. The Group observed that since 2004, the change in New Zealand's labour–capital income share has been flatter than in other countries which have continue to see a fall in labour's share of national income.

Like many countries, our income support system in New Zealand helps to even out income increases across households through transfers from the state through taxes and benefits. Many low income earners are in high income households – for example, teenagers or students.

Figure 6 shows how the 'hollowing out' of wages changes when looked at as part of overall household income.

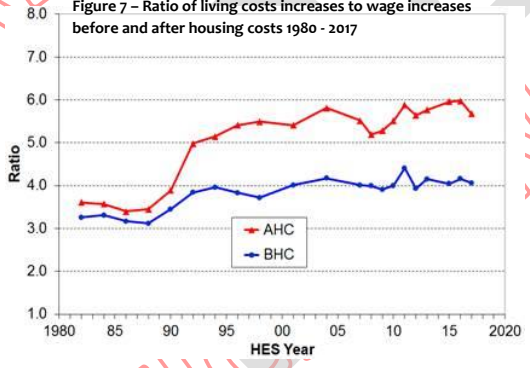
Figure 6



The Group also looked at increases in the cost of living (or inflation) relative to wage growth in New Zealand.

In plain terms, this examines whether wages are keeping up with, or exceeding, the increasing cost of living and translating into higher living standards. Wages have been rising in recent years, and for most of the last decade, wage increases have exceeded inflation, but both have been increasing modestly.

Figure 7 – Ratio of living costs increases to wage increases before and after housing costs 1980 - 2017



We know that incomes after housing costs are more unequal in New Zealand than before housing costs are considered, and this gap has widened since the 1980s (see Figure 7).

Low income earners

The Group looked at the distribution of wages within sectors and occupations across New Zealand, to identify where there was a high proportion of low-wage and low-income earners.

The tables in Annex 2 set out the latest data available for workers in all occupations in New Zealand, ranked by highest proportion of those paid under $20 per hour.

We also examined the demographics of those working on or near the minimum wage – under $20 per hour. Figure 8 shows the different demographic groups which are either over or under

represented in this low income category compared to those same groups' proportion of total wage earners in our economy.

Figure 8 - Employees aged 16 to 64 earning less than $20.00 per hour as of June 2018

Demographic	% of minimum wage earners	% of total wage earners
Aged 16 – 24	38.70%	16.10%
Women	56.60%	49.00%
European/Pākehā	52.10%	62.80%
Māori	18.50%	13.30%
Pasifika	9.20%	6.20%
Working part-time	36.90%	18.10%
Working while studying	18.10%	12.00%
Total number of employees aged 16 to 64	493,479	2,068,500

Commented [BG3]: Note to Working Group:
We have updated this table to now reflect all employees earning under $20.00 per hour.

In addition to transfers through taxation and benefits, there are a number of interventions the Government makes to address wage and income inequality. This includes statutory mechanisms to provide basic worker protections (such as the minimum wage and conditions), as well as other interventions targeting particular problems. For example, where there is systemic undervaluation of wages based on discrimination, this is addressed through the Equal Pay Act.

The Group noted the Equal Pay Act is being amended to introduce a pre-determination bargaining framework for addressing pay equity issues, which bears some similarities to FPAs. This is still being developed, but it could include referral to a determination process if bargaining fails to reach agreement. Other changes are being considered or made to minimum standards, and the tax and benefit systems.

The Group noted as the Government develops Fair Pay Agreements, it will need to carefully consider the interface between FPAs and these other developments.

3.2 Skills and productivity in New Zealand

New Zealand has a relatively high mismatch between the skills in our workforce and the jobs people do, compared to the OECD average.[3] This mismatch may affect productivity, as it may

[3] Ministry of Education and the Ministry of Business Innovation and Employment, "Skills at Work: Survey of Adult Skills (PIACC)", November 2016,

make it difficult for firms to successfully adopt new ideas or technology. Addressing this skills mismatch will be a major challenge for New Zealand's skills system as our labour market – and the skills in demand – change in the future.[4]

We noted the range of initiatives underway in New Zealand to match employers with workers with relevant skills, and to support in-work upskilling. We noted the Vocational Education and Training system is under review and suggest this review should take into consideration the fact one barrier to higher participation is the opportunity cost faced by workers and employers in prioritising training, especially where a significant time commitment is required, or where the benefits are longer term, or spread across the industry.

Training and skills provisions should be encouraged as a key feature of collective agreements

The Group saw evidence that some collective agreements (including MECAs) in New Zealand explicitly provide for training pathways and corresponding wage increases, and similarly in other countries such as Singapore.

We considered this increasing reference to skills and training pathways should be encouraged, including through FPAs.

Case study: Public hospital service workers MECA

In November 2018 a new public hospital service workers MECA was agreed between the E tū union and 20 District Health Boards around New Zealand. The MECA sets the conditions for around 3,500 workers, including cleaners, laundry workers, orderlies, catering workers and security staff.

The deal is structured to encourage workers to work towards level 2 and level 3 qualifications, which will be rewarded with higher hourly rates: by the end of the MECA term, workers with a Level 3 qualification will earn $25.58 an hour – an increase of 32.6 percent above current rates. Workers will be supported by their employers and given access to resources for training, and will be able to do assessments and some book work on the job.

3.3 The role of collective bargaining in lifting incomes and economic growth

At the outset we note a country's employment relations system and choice of collective bargaining model are not the only factors affecting its economic performance.

In general, international research has tended to find a strong link between productivity and both wage growth and wage levels. However, while productivity growth appears to be necessary for wage growth, it is not in itself sufficient. There is also a body of research in labour economics, however, that supports the 'efficiency wage' hypothesis. These researchers argue higher wages can increase the productivity of workers (and profits of the firm) through various means, such as reducing costs associated with turnover or providing employees with incentives to work.

https://www.educationcounts.govt.nz/publications/series/survey_of_adult_skills/skills-at-work-survey-of-adult-skills

[4] Paul Conway, "Can the Kiwi Fly? Achieving Productivity Lift-off in New Zealand", *International Productivity Monitor* (34), Spring 2018

The OECD has warned against assuming the form of collective bargaining systems matches perfectly to economic and social outcomes. Outcomes depend on other important factors such as the wider social and economic model, including tax and welfare systems, and the quality and sophistication of social dialogue.

Making changes to a collective bargaining system without considering this wider context could have unintended consequences.

The relationship between collective bargaining and wage growth

One of the objectives of collective bargaining is typically to balance out the uneven bargaining power between parties. The OECD has found collective bargaining is associated with lower levels of inequality, for example through limiting wage increases for mid- and high-earners to allow for low-earners' incomes to rise.[5] Across the OECD, workers with an enterprise-level collective agreement tend to be paid more than those without a collective agreement.

Typically most regulatory frameworks at national level rule out the possibility of enterprise-level negotiations offering worse terms than a sector-level collective agreement or national statutory minimum standards. This 'favourability principle' means an individual or enterprise-level collective agreement can only *raise* wages relative to sector-level collective agreements or minimum standards.

The difference in wages found by the OECD may also signal higher productivity in companies with enterprise-level bargaining than those in a context with a high degree of coverage of centralised bargaining. Where a firm is not constrained by centralised bargaining, the firm's overall performance forms the context for pay increases, and a highly productive firm could choose to pay its workers more, or to pay its highly-productive workers more. A firm offering its workers greater rewards for productivity could induce higher engagement and effort and therefore productivity among its workers.

The relationship between collective bargaining and productivity

Research globally on collective bargaining and productivity growth similarly suggests the relationship between these factors is not clear cut, and is highly dependent on wider labour market systems, and the social and economic models of individual countries.

The Group looked to other countries' experiences in introducing productivity related measures to their collective bargaining systems, in particular recent changes in Singapore to introduce a Progressive Wage Model. We observed a positive collective bargaining experience would have the potential to increase aggregate productivity by setting higher wage floors and better conditions; forcing unproductive firms to exit the market; and lifting overall productivity of the sector.

The evidence in the research literature suggests wages tend to be less aligned with labour productivity in countries where collective bargaining institutions have a more important role. This research tends to be based on sector-level data and examination of the relationship between wages and productivity across sectors.

[5] OECD, Employment Outlook 2018, p 83

We note raising wage floors may make capital investments relatively more attractive for firms; that is, it may speed up employer decisions to replace some jobs with automation.

3.4 The role of collective bargaining in an inclusive and flexible labour market

The Group looked at the role of collective bargaining more generally in labour markets internationally. Collective bargaining remains the predominant model for labour negotiations world-wide. It enables employers and employees to enter into a collective dialogue to negotiate the terms for their employment relationship in the form of a collective agreement.

The International Labour Organisation (ILO) names collective bargaining as a fundamental right endorsed by all Member States in the ILO Constitution[6] and reaffirmed this in 1998 in the ILO Declaration on Fundamental Principles and Rights at Work. The ILO recognises the role of collective bargaining in improving inclusivity, equalising wage distribution, and stabilising labour relations.[7]

New Zealand is bound by ILO Convention No 98 (Right to Organise and Collective Bargaining) to "encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."

As a group we recognised there is value in the process of collective bargaining as a participatory mechanism to provide collective voices for both employers and employees. It can encourage participation and engagement by employers and employees in actively setting the terms of their relationship. In contrast to minimum standards set in legislation at the national level, which apply across the entire workforce uniformly and are imposed by a third party (the Government), collective bargaining may enable the parties who know their particular circumstances best to set the terms that work for them.

We noted shared dialogue between employees and employers across a sector or occupation leads to wider benefits and other forms of collaboration between firms or workers. This is possible when bargaining involves groups of employers or unions with a common interest or shared problem to solve, although we recognise this will not always be the case.[8]

Parties may also save in transaction costs by working together on collective bargaining. They can access the expertise of other players in their sector and other scale benefits (for example, arranging for investment in skills or technology for the benefit of the sector).

In countries where union density is low, collective bargaining tends to be concentrated in larger employers, whether public or private sector. Small businesses can therefore find it difficult to access the potential benefits of collective bargaining in an enterprise-level collective bargaining system, although that may also help them avoid unnecessary costs.

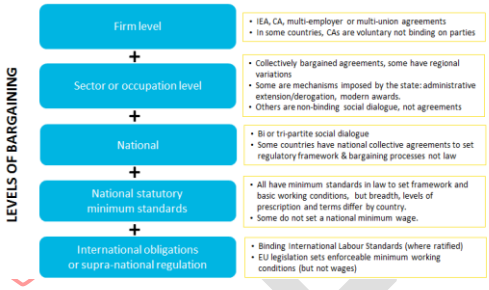
---

[6] New Zealand was a founding member of the ILO, has signed the 1998 Declaration, and is bound by the primary ILO Convention on collective bargaining No 98 (Right to Organise and Collective Bargaining 1949).
[7] ILO 'Collective Bargaining: A Policy Guide', Foreword
[8] In New Zealand, this is known as Multi-Enterprise Collective Agreement (MECA) and Multi-Union Collective Agreement (MUCA) bargaining under the Employment Relations Act.

3.5 The relationship between minimum standards and collective bargaining

Despite having a century-old international labour standards framework, which provides common principles and rules binding states at a high level, the nature and extent of state encouragement for collective bargaining differs significantly between countries. We found the diagram in Figure 9 useful to describe the basic model of how employment relations systems are structured globally.

Figure 9
Collective Bargaining: the underlying global model



The sharpest delineation between different state models for collective bargaining systems is whether a country has chosen to rely on collective bargaining to provide basic floors for their employment standards (such as a minimum wage, annual leave, redundancy), or whether they rely on statutory minimum employment standards set at a national level which are then supplemented by more favourable terms offered through collective bargaining at a sector or enterprise level.

This choice of whether to set a country's minimum employment standards primarily through legislation or collective agreement, along with a country's legal and social traditions, result in the markedly different detailed design of countries' collective bargaining systems. This manifests in the variations in the levels at which collective bargaining takes place and in the mechanisms for determining representativeness, dispute resolution and enforcement. There is no "one size fits all" model that can be picked up and deployed in another country without significant adaptation for local circumstances.

Variations in their employment relations and standards systems may mean some other countries:

- Have no statutory minimum wage, and often only a basic framework for minimum conditions, set in law. These countries use collective bargaining to provide the same minimum floors we presently regulate for at national level.
- Set only a framework enabling collective bargaining in the law, and allows the representative organisations for employers and employees to agree a national level collective agreement on the bargaining process rules we have set in law.
- Do not provide for collective bargaining to be binding, meaning collective agreements are voluntary and cannot be enforced in court as they can be in New Zealand and most countries.
- Provide for multiple levels of collective bargaining, with a hierarchy of agreements at national, sectoral and enterprise levels – where we only provide for enterprise level.

In New Zealand, we have an employment relations and standards system which is based on setting minimum standards for employment in statute (including a statutory minimum wage, and rights to flexible working, and leave) and a legal framework that sets the rules for collective bargaining. Agreements reached through collective bargaining may equal or add to the statutory floor, not detract from it. There is nothing in these rules that limits collective bargaining to the enterprise, multi-employer or multi-union levels. The rules allow for voluntary bargaining at a sectoral or occupational level.

Some other countries rely more heavily on collective bargaining to set these minimum standards, mainly in Europe. Under the Award system which preceded New Zealand's current employment relations and standards system, we too relied mostly on collective bargaining and awards to set minimum standards.

3.6 International good practice in designing collective bargaining systems

We looked at how collective bargaining systems are designed internationally, and what different models we may be able to learn from.

Overall the OECD has concluded the main trade-off in designing collective bargaining systems is between inclusiveness and flexibility. In other words, collective bargaining can generate benefits for employment and inclusiveness (wage inequality is lower and employment for vulnerable groups is higher) but can also have drawbacks in reducing the flexibility for firms to adjust wages and conditions when their situation requires it.

The OECD recommends countries consider adopting a model with sector-level bargaining, combined with the flexibility to undertake firm-level bargaining to tailor higher-level agreements to each workplace's particular circumstances.

The OECD has found this model delivers good employment performance, better productivity outcomes and higher wages for covered workers compared to fully decentralised systems[9].

> "Co-ordinated collective bargaining systems are associated with higher employment, lower unemployment, a better integration of vulnerable groups and less wage inequality than fully decentralised systems... these systems help strengthen the resilience of the economy against business-cycle downturns."
>
> -- OECD

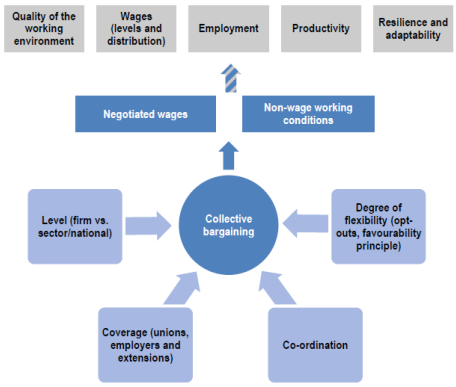
Key features of a bargaining system

The OECD characterises collective bargaining systems as set out in Figure 10, including the following key features:

- degree of coverage,
- level of bargaining,
- degree of flexibility, and
- coordination

[9] The role of collective bargaining systems for good labour market performance', 2018

Figure 10



We have looked at the OECD's four characterisations, and how New Zealand compares to other OECD countries on each feature.

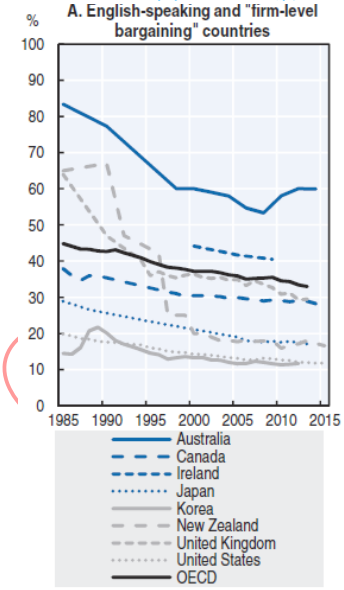
Degree of coverage

The degree of coverage refers to the proportion of employees who are covered by a collective agreement. This should not be confused with the proportion of employees who are members of a union. Wide collective agreement coverage can have a more sizeable macroeconomic effect—positive or negative—on employment, wages and other outcomes of interest than agreements confined to a few firms.

The share of employees across the OECD covered by collective agreements has declined significantly over the past 25 years. On average, collective bargaining coverage shrank in OECD countries from 45 per cent in 1985 to 33 per cent in 2013. As of 2016, New Zealand's collective bargaining coverage is 15.9 per cent. Figure 11 shows the most recent data from the OECD's Employment Outlook, showing the overall trend over the last three decades of decline in the percentage of workers covered by collective agreements in countries the OECD considers similar to New Zealand (these are English-speaking or have predominantly enterprise-level collective bargaining).

Figure 11 Percentage of workers covered by collective agreements

Source: OECD Employment Outlook 2017, p138



The evidence we saw from the OECD suggests collective bargaining coverage tends to be high and stable in countries where multi-employer agreements (either sectoral or national) are the norm – even where union density is quite low – and where employer organisations are willing to negotiate.

Some countries also provide for the extension of coverage of collective agreements beyond the initial signatories. This explains why collective bargaining coverage is higher than

union density across the OECD, where sector level extensions are commonly used in two-thirds of countries.

In countries where collective agreements are generally at the enterprise level, coverage tends to match union density. However, it should be noted not all union members are covered by collective agreements.

Data on New Zealand union membership and collective bargaining coverage suggests a notable minority (approximately 10%) of those who claim to be covered by a collective agreement are not union members.[10] Many collective agreements in New Zealand permit employers to offer the same terms (by agreement between the union and employer) to all or parts of the employer's non-union workforce. This is known as 'passing on' of terms. One thing which affects this is the negotiation of bargaining fees for non-union workers, although these clauses are relatively rare.[11]

Across the OECD, about 17 per cent of employees are members of a union. This rate varies considerably across countries. Union membership density has been declining steadily in most OECD countries over the last three decades. In 2015, New Zealand's equivalent rate was 17.9 per cent. It should be noted union density in New Zealand declined sharply from around 46% to 21% in the four years following enactment of the Employment Contracts Act 1991, and has declined gradually since that time. Data on employer organisation density (that is, the percentage of firms that belong to employer organisations) is patchy, and comparisons can be difficult to draw between countries given the absence of common metrics and reliable data. Across those OECD countries that do collect this data, employer organisation density is 51 per cent on average. Although it varies considerably across countries, this figure has been quite stable in recent decades. There is no national level statistical information gathered on New Zealand's employer organization density.

Level of bargaining

The level of bargaining refers to whether parties negotiate at the enterprise, sector or national level. Centralised bargaining systems are ones in which bargaining tends to happen at the national level, although may be supplemented by enterprise-level agreements. Highly decentralised systems are ones in which collective bargaining tends to be primarily at the enterprise level.

New Zealand sits at the far end of the decentralised spectrum. Although our current system permits voluntary sector bargaining, in practice most bargaining takes place at the enterprise level, although there is some bargaining among groups of employers within a sector (through a MECA).

According to the OECD, centralised bargaining systems can be expected to have less wage inequality relative to systems with mostly enterprise-level agreements. Centralised systems tend to experience smaller wage differences, within firms, across firms, or even across sectors. Enterprise-level agreements, by contrast, allow more attention to be paid to enterprise-specific

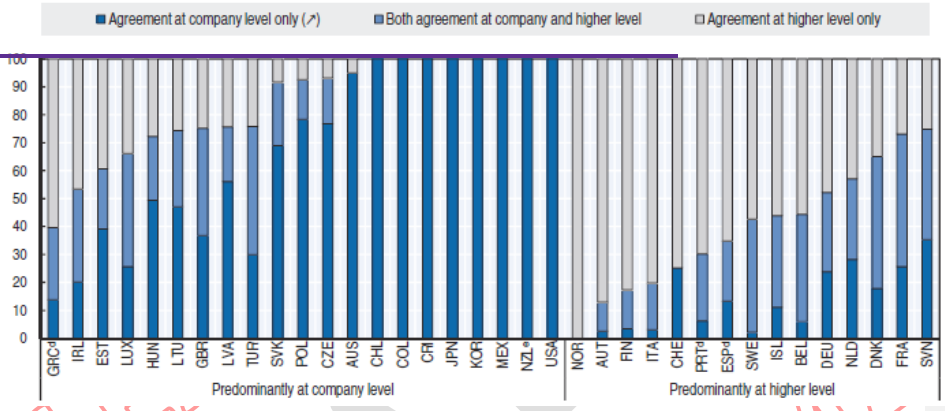
[10] Stats NZ March quarter HLFS

[11] Centre for Labour, Employment and Work, "Employment Agreements: Bargaining Trends & Employment Law Update 2017/2018", July 2018, pages 27-28

conditions and individual performance, and allow for more variation in wages. Figure 12 shows where different OECD countries sit on this spectrum. That graph groups countries by those which have predominantly enterprise level agreements, both enterprise and higher (sector or national) level agreements, and those countries which predominantly have only higher level agreements.

Figure 12

Percentage of employees covered by a collective agreement[a] in the private sector[b] 2013 or latest year available[c]



Source: OECD Employment Outlook 2017, p148

Degree of flexibility

In systems with sector or national level collective agreements, the degree of flexibility refers to the extent to which employers can modify or depart from those higher-level agreements through an enterprise level agreement or exemptions.

The possibility of exemptions can increase the flexibility of a system and allow for a stronger link between wages and firm performance, for example in economic downturns. On the upside, this may bolster employment and productivity. On the downside, exemptions can increase wage inequality.

Like most countries, New Zealand does not allow collective agreements to offer less favourable terms than statutory minimum standards. Collective agreements, including MECAs, are binding on the parties who agreed them, but this would not be characterised as a limitation on flexibility as each party to the agreement has chosen to be bound by it.

Coordination

Coordination refers to the degree to which minor players deliberately follow what major players decide, and to which common targets (e.g. wage levels) are pursued through bargaining. Coordination can happen between bargaining units at different levels, for example when an enterprise-level agreement follows guidelines fixed by peak-level organisations. Or it can happen at the same level, for example when some sectors follow terms set in another sector.

According to the OECD's definition of coordination, and relative to other countries, our collective bargaining system in New Zealand does not feature coordination between bargaining units. This

is because bargaining is typically at the enterprise level, and the Government does not exert influence beyond establishing the bargaining framework and minimum standards.

However, the Group noted we have unions that represent workers in several sectors or occupations, and this could allow similar bargaining objectives to be pursued in collective bargaining across various sectors or occupations.

3.7 Other countries' approaches to sectoral or occupational bargaining

New Zealand currently provides a voluntary mechanism for employers and employees to bargain at a sector level, through MECAs, but this mechanism is not used widely, particularly in the private sector.

We noted any Fair Pay Agreement system design will need to be bespoke to suit New Zealand's own social and economic context, but we looked to other countries to understand how they approached the design and concept of sector level bargaining.

There are four main models of sector level bargaining we looked at:

- Australian Modern Awards system
- The Nordic model
- The Continental European model
- Singapore's progressive wage model.

These models are discussed more fully below. It is worth noting the comparator countries have different societal factors that influence how they approach the question of collective bargaining. For example there is a high level of government intervention in the Singaporean Progressive Wage Model compared with a high level of social dialogue and cooperation in Nordic countries such as Denmark.

Australia – Modern Awards system

In 2009, Australia introduced a system of Modern Awards: industry-wide regulations that provide a fair and relevant minimum safety net of terms and conditions such as pay, hours of work and breaks, on top of National Employment Standards.

Awards are not bargained for. They are determined by the Fair Work Commission following submissions from unions and employer representative groups. The Fair Work Commission must review all Modern Awards every four years.

A Modern Award does not apply to an employee when an enterprise level collective agreement applies to them. If the enterprise agreement ceases to exist, the appropriate Modern Award will usually apply again. Enterprise agreements cannot provide entitlements that are less than those provided by the relevant Modern Award and must meet a 'Better Off Overall Test' as determined by the Fair Work Commission.[12]

[12] https://www.fwc.gov.au/awards-and-agreements/agreements

Broadly speaking, the statutory minima in Australia – the National Employment Standards - coupled with Modern Awards provide the equivalent function of worker protection to New Zealand's existing national statutory minimum employment standards. However, a key difference is that in Australia the Modern Awards system provides the ability for the Government to impose differentiated minimum standards by occupation.

Collective bargaining in Australia is predominantly at enterprise level. Sector-level bargaining does not exist in Australia in the form envisaged by the Fair Pay Agreement system. Australian law provides for multi-enterprise collective agreements in limited circumstances. One of these circumstances is when the Fair Work Commission makes a Low-Paid Authorisation to "encourage bargaining for and making an enterprise agreement for low-paid employees who have not historically had the benefits of collective bargaining with their employers and assisting those parties through multi enterprise bargaining to identify improvements in productivity and service delivery and which also takes account of the needs of individual enterprises."[13] The private security sector appears to be one of the more frequent users of the low-paid provisions.

The Nordic model

Under the Nordic model of collective bargaining, national legislation only provides a broad legal framework for collective bargaining. The rules are set at national level through 'basic agreements' between the employee and employer representative organisations. Sectoral collective agreements then define the broad framework for terms, but often leave significant scope for further bargaining at the enterprise level.

None of the Nordic countries has a statutory minimum wage. Collective agreements therefore fulfil the function of setting minimum floors for wages and conditions in each sector or occupation, rather than these being set in statute. Denmark and Sweden use collective agreements as their only mechanism for setting minimum wages, meaning there is no floor for wages for workers outside of collective agreements.

Due to the high level of union density in these countries, it is generally unusual to extend sector level collective agreements to all employees in an industry but agreements can be extended through "application agreements". A union may enter into application agreements with employers who are not signatories to a collective agreement, with the effect of making that collective agreement also apply to a non-signatory company. Non-union employees can also enter into application agreements with unions.

For example, in Sweden, there is no bargaining extension mechanism in statute or otherwise. A voluntary approach to extension is also made easier due to high union membership. Finland, Iceland and Norway however have all started to use extension mechanisms to cover all employees at industry level, to provide those minimum floors.[14]

These countries tend to have historically high levels of organisation on both the employer and employee sides, with continuing high union density and a strong social dialogue and cooperation around collective bargaining and in their wider economic model.

[13] Fair Work Act 2009

[14] https://www.ilo.org/global/topics/wages/minimum-wages/setting-machinery/WCMS_460934/lang--en/index.htm

Countries that generally follow this model are Iceland, Denmark, Germany, the Netherlands, Norway and Sweden.

The Continental Europe model

Under the Continental model, the legal framework provides statutory minimum standards for wages and conditions, along with the rules for collective bargaining.

National or sectoral collective agreements set terms and conditions for employees but allow for improvements on these at enterprise level ('the favourability principle'), or opt outs from the sector agreement (although these derogations are usually limited).

Under this model, collective bargaining is conducted at three levels - national, industry and enterprise:

- At national level, negotiations cover a much wider range of topics than normal pay and conditions issues, including job creation measures, training and childcare provision. Pay rates are normally dealt with at sector and enterprise level, but the framework for pay increases could be set at national level.
- At sector level, negotiations are carried on by unions and employers' organisations often meeting in 'joint committees' (binding on all employers in the sectors or occupations they cover)
- At enterprise level, the union delegations together with the local union organisations negotiate with individual employers.

Collective bargaining is typically hierarchical and structured such that an agreement concluded at one level cannot be less favourable than agreements reached at a broader level. Sector agreements are therefore subject to minimum terms set out in national agreements. Enterprise-level agreements can be more favourable than industry agreements. There is, however, large variation among sectors in terms of the relative importance of sector-level and enterprise-level agreements.

Extension mechanisms are more widely used under this model of collective bargaining. Criteria for extension can be a public interest test or often a threshold of coverage. For example in Latvia if the organisations concluding an agreement employ over 50% of the employees or generates over 60% of the turnover in a sector, a general agreement is binding for all employers of the relevant sector and applies to all of their employees. In Belgium or France, however, extensions are issued by Royal Decree or the Labour Ministry respectively upon a formal request from the employer and employee representative organisations that concluded the agreement. This can result in relatively high collective bargaining coverage, even if union density is not high. For example, Belgium and France have collective bargaining coverage over 90%, despite union density rates of 55% (Belgium) and 11% (France).

Countries that generally follow this model of collective bargaining are Belgium, France, Italy, Portugal, Slovenia, Spain and Switzerland.

Singapore – the Progressive Wage Model

Singapore has similar levels of collective bargaining and union density to New Zealand. The legal framework does not provide for a statutory minimum wage.

Singapore undertakes sector level bargaining in specific sectors in the form of the Progressive Wage Model (PWM) introduced in 2015. The PWM is a productivity-based wage progression pathway that helps to increase wages of workers through upgrading skills and improving productivity. It is mandatory for workers in the cleaning, security and landscape sectors which are mostly outsourced services. The PWM benefits workers by mapping out a clear career pathway for their wages to rise along with training and improvements in productivity and standards.

The PWM also offers an incentive to employers, for example, in order to get a licence a cleaning company must implement the PWM. At the same time, higher productivity improves business profits for employers.

The PWM is mandatory for Singaporeans and Singapore permanent residents in the cleaning, security and landscape sectors. It is not mandatory for foreign workers but employers are encouraged to use these principles of progressive wage for foreign cleaners, landscape workers and security officers.

3.8 New Zealand's employment relations and employment standards regulatory system

Any Fair Pay Agreements system will need to complement and support the existing parts of New Zealand's regulatory system for employment relationships and standards. Therefore, it is worth setting out our understanding of that system.

The Employment Relations and Employment Standards (ERES) regulatory system aims to promote productive and mutually beneficial employment relationships. It incorporates mechanisms, including a framework for bargaining, that are intended to:

- support and foster benefits to society that are associated with work, labour market flexibility, and efficient markets
- enable employees and employers to enter and leave employment relationships and to agree terms and conditions to apply in their relationships, and
- provide a means to address market failures such as inherent power imbalances and information asymmetries which can lead to exploitation of workers.

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

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

Employment relationships are regulated for a number of reasons:

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

The system therefore provides:

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

The system can be a key driver for innovation and growth in our labour market and wider economy

The effective use of knowledge, skills and human capital in firms is a key driver of innovation and growth. This can increase wages, lifts firms' competitiveness and profitability, and lead to better social and economic outcomes.

The ERES system sets the boundaries for the operation of a market for labour hire, risk and reward. The operation of this market is not simply about having an employment agreement for the exchange of goods and services; it is based on human relationships where mutual good faith, confidence and fair dealing are important.

The ERES system is also important for New Zealanders, as employment is a primary source of income that is used to purchase goods and services, and is a source of investment and insurance. There is an emphasis on these relationships being conducted in good faith, and also on effective dispute resolution.

Institutions support the functioning of this system

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

- Mediation Services
- the Employment Relations Authority
- the Employment Court
- Labour Inspectors
- the Registrar of Unions

3.9 The current state of collective bargaining in New Zealand and trends over time

The legal framework for collective bargaining in New Zealand

The ER Act sets out the rules for engaging and, at least in its stated objectives, promotes collective bargaining in New Zealand. As in individual employment relations, the duty of good faith underpins collective bargaining in New Zealand.

The ER Act contains mechanisms for multi-employer collective bargaining but no specific mechanisms for industry or occupation-wide collective bargaining.

There are also rules around 'passing on' of collectively bargained terms and conditions to non-union members. While employers can't automatically pass on terms which have been collectively bargained for, around 11% of collective agreements extend coverage to all employees of the employers. Often this is done through non-union members paying a bargaining fee, or union members voting to allow terms to be passed on. Informally, many employers 'pass on' many collective terms through 'mirror' individual employment agreements.

A collective employment agreement expires on the earlier of its stated expiry date or 3 years after it takes effect, with some exceptions. Over time, collective agreements have become longer in duration. One reason for this may be the transaction costs for both sides of collective bargaining incentivising longer duration for efficiency reasons. Another explanation may be that inflation has been low and stable for an increasing length of time.

Data on collective bargaining in New Zealand

Over the last few decades, changes to our employment relations and standards system have resulted in a decrease in coverage. It should be noted collective bargaining coverage varies considerably between countries, and there has been a decline in collective bargaining coverage in most countries over that time.

New Zealand has low collective bargaining coverage compared with many OECD countries (see

Figure 13

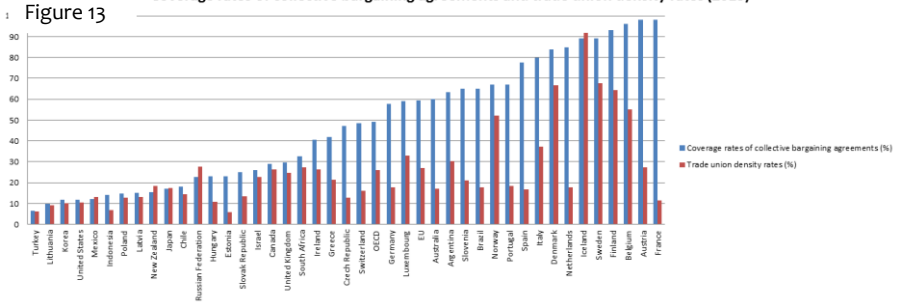
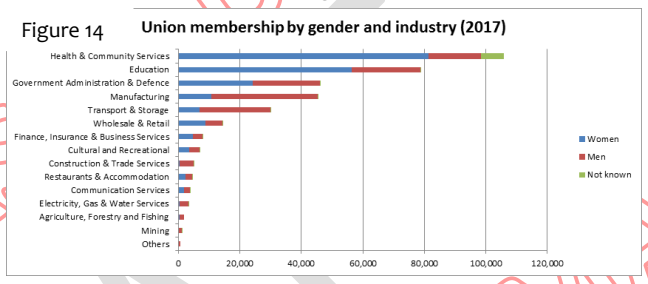


Figure 13). The Group observed that some countries with low union density also provide for the extension of coverage of collective agreements beyond the initial signatories. This explains why collective bargaining coverage is higher than union density across the OECD, where sector level extensions are commonly used in two-thirds of countries.

Collective agreements are more significant in the public sector in New Zealand while private sector coverage is low, and is mainly concentrated in certain industries and large firms. The concentration of collective agreements in the public sector is consistent with many other OECD countries including Australia, the United Kingdom, United States and Canada.[15]

Union membership in New Zealand is voluntary. Membership and collective agreement coverage are around 17% of all employees. It should be noted not all union members are covered by collective agreements. Union members as a percentage of the workforce have declined from over 20% in 2012 to 17.2% in 2017 (a 6.2% decline), although according to the Household Labour Force Survey, union membership numbers may have risen slightly over the past year. The majority of union members are women and are concentrated in particular sectors (see Figure 14).

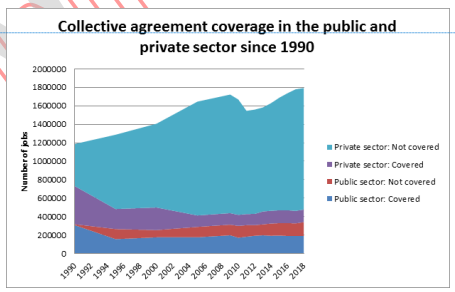
Figure 14 **Union membership by gender and industry (2017)**



Collective bargaining coverage has decreased proportionately and is not keeping up with growth in the number of jobs in the economy. The Group considered this was in part due to the difficulties faced by workers in accessing the collective bargaining system. This means workers on small worksites being able to organise their fellow workers, finding a union that is willing to spend the extensive time to negotiate a collective agreement, and voluntarily concluding an agreement before the union members on the site have left their employment. We considered that the lack of coordination in small workplaces is another factor.

Currently in New Zealand there are 1600 collective agreements, covering 10% of workforce in the private sector. There are also 456 collective agreements, covering 60% of workforce in the public sector. While the number of employees covered by a collective agreement is stable, the total labour force is growing as illustrated in Figure 15.

Collective agreement coverage in the public and private sector since 1990



Commented [BG4]: Note to Working Group:
We replaced the graph, because the old version had an uneven timescale. An effect of this change is the GFC-related dip in total number of jobs is now more prominent.

Coverage under multi-employer collective agreements (MECAs) is low outside the public sector, as is coverage of single employer collective agreements. MECAs are generally found in the health and education sectors (excluding tertiary education). There were 37 private sector MECAs in 2004, when the duty to conclude was added to the ER Act, and 37 private sector MECAs in 2015, when the employer opt out was added. There are currently 72 MECAs which is the same number as five years ago.

[15] https://www.victoria.ac.nz/__data/assets/pdf_file/0006/1235562/New-Zealand-Union-Membership-Survey-report-2016FINAL.pdf

MECA bargaining may be frustrated by competitive instincts between firms, as well as a general disinclination to bargain with unions or collectively. These competitive pressures do not, for the most part, exist in the public sector, where bargaining is undertaken by centralised authorities (e.g. District Health Board Shared Services and the Ministry of Education) on behalf of what are technically separate employers (e.g. the independent District Health Boards and school Boards of Trustees).

In practice, MECAs only exist where the employer parties all agree prior to the commencement of bargaining - or early thereafter - to engage together in multi-employer collective bargaining. This was the case even before 2015, when the ER Act was amended to allow employers to opt out of MECA bargaining. Salary reviews have become more prevalent, mainly in the public sector. The increase in productivity or performance payments is associated with a movement to a range of rates (because employers have discretion to place employees within the range). However, output can be hard to measure, especially on an individual basis. In contrast to this, specific mention of training and skill development in private sector collective agreements has decreased over time. These provisions do not tend to link pay to skills development. It appears employers move towards providing for training and skills development in company policy instead. This does not necessarily mean less training and skills development is taking place; in fact the Survey of Working Life indicates it is increasing.

It is rare to see wages being indexed to inflation in Collective Agreements. This may partly reflect parties' preference for certainty, to know exactly what wages will be. However, another factor may be that inflation has been low in the last decade and parties may feel reasonable certainty it will not exceed 3% per annum, in line with the Reserve Bank's policy.

Case study: NZ Plastics Industry Multi-Employer Collective Agreement

This agreement dates from 1992, with many of the standard conditions from the previous system of awards (eg hours of work, overtime rates, shift payments etc) carrying over from then.

The Plastics MECA moved away from multi-classification pay rates and service pay to a skill-based pay system linked to qualifications very early in its development. Training was, and has been, a central part of the Plastics MECA pay scheme, although training was not mandatory for either the employers or the employees. One of the agreed objectives of the Plastics MECA is "the improvement of productivity, efficiency and competitiveness of the industry through a commitment to qualifications."

The Metals MECA has similar commitments to productivity and skill development although the minimum wage rates are generally based on work classifications. The negotiations for both MECAs normally take place with a key group of employers and the unions. The unions then go around other employers and get them to sign on as a "subsequent party" to the MECA.

While the MECAs have been good for setting the base industry employment conditions, if an employer does not want to accept the industry standards created in the MECA, there is little the union can do to force the issue, especially in small enterprises. Even the subsequent industry parties have lists of conditions from the MECA that they opt out of.

3.10 Collective bargaining experiences in New Zealand

What makes for good bargaining process?

In our experience, a good bargaining process underpinned by a strong rules-based system that addresses the inherent inequality of bargaining power in employment relationships will lead to a good outcome. By good outcome we mean one both parties support, with real improvements over the status quo. The Group considers the elements of effective collective bargaining come down to three factors: attitude/commitment, skills and process.

The attitude or commitment of parties to collective bargaining is important. Good collective bargaining requires good faith and a genuine willingness to engage and negotiate. Collective agreements are forward-looking documents and, to reflect this, good collective bargaining involves a conversation about where both the business and workers are going in the next few years. Bargaining works best for employers when they can see it is transformational not transactional, i.e. it affects the whole business, not just higher wages. A good attitude when approaching bargaining can also be self-reinforcing: bargaining allows for intense discussions about real issues, which ultimately adds value to the entire employment relationship.

Good bargaining also typically involves having skilled people in the room, and strategic leadership that takes a long-term perspective.

In terms of the process, it must be built around a strong rules-based process that addresses the inherent inequality of bargaining power in employment relationships. This includes employers not interfering in the choice of workers to join a union, respecting the workers' right to meet in the workplace to formulate their bargaining position, elect their own bargaining team and to conduct bargaining in an efficient manner. This also includes the ability of the parties to access statutory processes for the resolution or determination of the terms of such an agreement if bargaining becomes protracted or difficult. The capacity and capability of bargaining parties will also support an efficient process and lead to timely outcomes. It can also be useful to involve trained third-party facilitators, mediators or other forms of support.

What makes for a bad process?

A bad or ineffective process can lead to a worsening of employment relationships. Employment relationships are ongoing and long-term; ending a bargaining episode with a 'winner' and a 'loser' does not bode well for this ongoing relationship. A bad process can also lead to protracted negotiations, impatience on both sides and industrial disputes.

Barriers to good outcomes can take a number of forms. This may involve bad faith, where one or both parties are making no real effort to honestly engage. If the approach to bargaining is transactional, it's harder to get all parties to the bargaining table. Likewise if one party feels like it is being forced to the negotiating table, or there is a lack of bargaining skills, it can lead to an ineffective process.

In the case of MECAs, if one party is unwilling to come to the table – or wants to withdraw from an established MECA when it is being revised – that is enough to put an end to negotiations.

Bargaining can be quite different depending on the scale of the parties or the characteristics of the industry. The bargaining process can impose higher relative transaction costs on small businesses, who can have quite different needs. It can also be harder in industries or occupations with higher turnover.

Coordination

Notwithstanding the existence of some MECAs, the vast majority of collective agreements negotiated in New Zealand are for single employers. In contrast, Fair Pay Agreements would require a high degree of coordination to work effectively, and could require multiple representative groups to be involved.

We note levels of coordination can vary significantly across industries and occupations in New Zealand: some industries have well-established industry groups and unions, whereas others do not. Even where industry groups do exist, they tend to be focused on representing the interests of the industry and sharing best practice, and do not typically have a role in collective bargaining.

The process of collective bargaining and the problem of coordination can also be more difficult where SMEs are predominant in a sector, as is common in New Zealand.

4. The role of Fair Pay Agreements in our economy

4.1 Purpose of introducing a Fair Pay Agreement system

The Government asked us to make independent recommendations on the scope and design of a legislative system of industry or occupation-wide bargaining, which would support the Government's vision for:

- A highly skilled and innovative economy that delivers good jobs, decent work conditions and fair wages while boosting economic growth and productivity.
- Lifting the conditions of New Zealand workers, businesses benefit through improved worker engagement, productivity and better workplaces.
- An employment relations framework that creates a level playing field where good employers are not disadvantaged by paying reasonable, industry-standard wages.
- A highly skilled and innovative economy that provides well-paid, decent jobs, and delivers broad-based gains from economic growth and productivity.
- Meeting New Zealand's obligation to promote and encourage the setting of terms and conditions of employment by way of collective bargaining between workers, worker's representatives, employers and their representatives.

The Government mandated that it will be up to the workers and employers in each industry to make use of the system to improve the productivity and working conditions in the industry.

In designing this system, the Government also mandated us to manage and where possible mitigate the following risks:

- slower productivity growth if a Fair Pay Agreement locks in inefficient or anti-competitive businesses models or market structures
- a "two-speed" labour market structure with a greater disparity in terms and conditions and job security between workers covered by Fair Pay Agreements and those who are not
- unreasonable price rises for some goods and services if increased labour costs are not offset by productivity gains and profit margins are held at existing levels
- undermining of union membership through the reduction of the value of enterprise bargaining by way of the pass on of collectively negotiated terms and conditions to non-union members, and

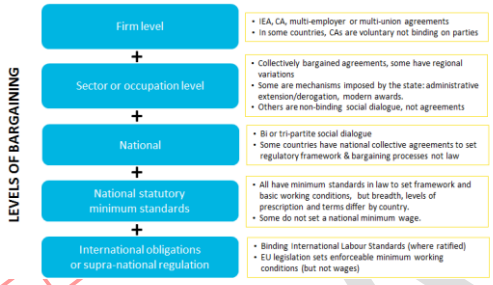
- possible job losses, particularly in industries exposed to international competition which are unable to pass on higher labour costs to consumers of those goods and services.

4.2 Where Fair Pay Agreements would fit into the ERES system

As mandated by the Government in our terms of reference, Fair Pay Agreements would provide a collective bargaining mechanism which complements the existing ERES system, rather than replacing it. FPAs would strengthen sector or occupational level bargaining, providing a new collective bargaining tool for workers and employers to use, as shown in the diagram below.

Diagram 16

Collective Bargaining: the underlying global model



Relationship with minimum employment standards

A FPA system will allow for collective agreements which bind a sector or occupation. These will build on, rather than replace, existing minimum standards. Minimum standards will continue to operate as a 'floor', and terms in an FPA agreement may match or improve on those standards. If minimum standards overtake those in the FPA over time, the minimum standards would apply.

Relationship with enterprise level collective agreements

Workers and firms would also be able to negotiate enterprise level agreements (whether MECAs, MUCAs, single employer collective agreements, or individual employment agreements) within that sector or occupation. These agreements would be able to, as appropriate to the circumstances:

- further improve on the terms and conditions in the FPA
- clarify the specific terms which apply at the enterprise level (for example, when the FPA sets a range)
- set terms and conditions for employers or workers which are exempt from the FPA, and/or
- set terms and conditions on matters where the FPA is silent.

5. Summary of proposed FPA model and key features

In developing the design of a FPA system, we have examined several options, including how to apply the use of extension bargaining (Continental Europe) and a more coordinated approach (Nordic model) in New Zealand.

The Group agrees with the OECD's advice that there is no single international model for collective bargaining or employment relations that can be applied in another country, without being adapted to suit that country's social and economic context.

We recognise we are not designing a system from a blank sheet, and certain characteristics of our current state need to be considered pragmatically:

- the existence of statutory minimum standards
- low levels of organisation among workers and employers
- low levels of take up of voluntary approaches to sector or occupational bargaining in New Zealand, particularly in private sector and among small businesses

Further, we took into account that a FPA system is intended to complement, and not replace or standalone from the existing employment relations and standards system. Where the existing system works this can be adapted for FPAs.

Nevertheless, the group agreed New Zealand could benefit from stronger employer – worker dialogue. If a collective bargaining dialogue at sectoral or occupational level is introduced, it is most likely to gain real traction when:

- it is focussed on problems which are broadly based in the sector,
- it presents real opportunities for both employers and workers to gain from the process
- parties are well represented, and where
- it is connected to the fundamentals of the employment relationship: the exchange of labour and incentives to invest in workplace productivity-enhancing measures such as skills and technology.

The Group considered this measure could be most useful in sectors or occupations where particular issues with competitive outcomes are identified, for example, where competition is based on ever-decreasing labour costs rather than quality or productivity. It could also be useful more generally where workers and employers identify scope to improve outcomes across a sector or occupation.

We also considered that this may not be a necessary or useful tool in some sectors or occupations.

[Placeholder for BusinessNZ statement here]

Commented [KM5]: Note to Working Group:

Kirk will provide this text separately.

However, all members agreed that if the Government decided to introduce FPAs, then this was the best way to design it.

The Group recommended the Government seek advice from officials and the ILO on the compatibility of the system with New Zealand's international obligations.

6. Detailed design of a FPA collective bargaining system

6.1 Initiation

The Government asked us to recommend a process and criteria for initiating Fair Pay Agreement (FPA) collective bargaining, including bargaining thresholds or public interest tests.

The FPA collective bargaining process should be initiated by only workers and their union representatives

We recommend the group initiating the process must be workers' union representatives, and they must nominate the sector or occupation they seek to cover through a FPA. How they define the proposed boundaries of the sector or occupation may be narrow or broad.

There should be two circumstances where a FPA collective bargaining process may be initiated

The Group envisages two circumstances where employers and/or workers' union representatives in a sector or occupation may see benefit in bargaining a FPA.

On the one hand there may be an opportunity for employers and workers to improve productivity and wage growth in their sector or occupation through the dialogue and enforceable commitments FPA collective bargaining provides.

On the other hand, there may be harmful labour market conditions in that sector or occupation which can be addressed through employer-worker collective bargaining. This would enable them to reach a shared and enforceable FPA that sets wages and terms and conditions across the sector or occupation, to tackle those harmful conditions and to set a level playing field where good employers are not disadvantaged by paying reasonable industry-standard wages.

The Group can therefore see two routes for a FPA collective bargaining process to be initiated:

- **Representativeness trigger**: In any sector or occupation, workers, via their union representatives, should be able to initiate a FPA collective bargaining process if they can meet a minimum threshold of number of workers in the nominated sector or occupation; or,
- **Public interest trigger**: Where the representativeness test is not met, a FPA may still be triggered where there are harmful labour market conditions in the nominated sector or occupation.

The representativeness threshold should cover both union and non-union workers

Where workers through their union representatives wish to initiate a FPA process, we recommend a minimum representativeness threshold should apply across all workers in the nominated sector or occupation. This should cover both union members and non-union workers.

We recommend at least 10 per cent or 1,000 (whichever is lower) of workers in the sector or occupation (as defined by the workers) must have indicated their wish to trigger FPA bargaining.

This representativeness threshold is intended to ensure there is sufficient demand for bargaining within the sector or occupation. There would be no equivalent employer representation test.

The conditions to be met under the public interest trigger should be set in legislation

To provide certainty for all parties, if the option of a 'public interest trigger' is progressed, we recommend the conditions for harmful labour market conditions should be set in legislation and assessed by an independent third party.

In developing the conditions for this test, Government should consider including some or all of the following:

- historical lack of access to collective bargaining
- high proportion of temporary and precarious work
- poor compliance with minimum standards
- high fragmentation and contracting out rates
- poor health and safety records
- migrant exploitation
- lack of career progression
- occupations where a high proportion of workers suffer 'unjust' conditions and have poor information about their rights or low ability to bargain for better conditions
- occupations with a high potential for disruption by automation

These conditions, or criteria, should be designed so they assess whether there is an overriding public interest reason for FPA bargaining to be initiated in that particular sector or occupation.

An independent body is needed to determine these conditions are met

Under either route, there is a need for an independent body to determine the trigger conditions have been met before the bargaining process commences:

- Under the representativeness trigger, where the number of workers requesting the process is lower than 1,000, the body would determine the baseline number of workers in the nominated sector or occupation and confirm the threshold of 10 per cent has been met.

- Under the public interest trigger, the body would determine the claim that the harmful conditions are evidenced, and invite comment from affected parties within a set time period.

There should be time limits set for the body to complete the determination process to provide certainty for all parties on whether the bargaining process may proceed.

Once determined, the body would inform all affected parties (workers and employers) that bargaining will commence. This provides an opportunity for any party who considers they do not fall within the proposed coverage to contest whether they fall within the coverage.

Once initiation is complete, the bargaining process would be the same under either trigger circumstance.

The Group considered such an independent body would have quasi-judicial functions, for example, in circumstances where the coverage or representativeness test need to be adjudicated, rather than agreed by consensus. The body would need to interpret the legislation and exercise determinative functions. We suggest the body could be a statutory body, similar to a Commission, at arm's length from the Government of the day. The independent body must be a costs free jurisdiction.

The Government will need to consider how to assess and mitigate potential negative effects

We acknowledge some sectors perceive there could be negative effects on competition or consumer prices from FPA bargaining. For example, agreements could have the effect of shutting out new entrants to an industry, or higher wage costs passed on through product price increases. We invite the Government to consider how existing competition law mechanisms may need to be adapted to mitigate the risk of such effects.

6.2 Coverage

The Government asked us to make recommendations on:

- how to determine the scope of agreement coverage, including demarcating the boundaries of the industry or occupation and whether the FPA system would apply to employees only, or a broader class of workers;
- whether there are circumstances in which an employer can seek an exemption from a relevant agreement and the process for doing so; and
- whether FPAs should apply to industries or occupations, or both.

The occupation or sector to be covered should be defined and negotiated by the parties

We recommend Parties should be able to negotiate the boundaries of coverage, within limits set in the legislation. The workers and their representatives initiating the bargaining process must propose the intended boundaries of the sector or occupation to be covered by the agreement.

It is important for FPAs to cover all workers – not just employees – to avoid perverse incentives to define work outside of employment regulation

The majority of the Group considered the parties covered by the FPA should include all workers in the defined sector or occupation, subject to any exemptions (see below). We consider it is necessary for FPAs to cover all workers, as otherwise the system may create a perverse incentive to define work outside employment (regulatory arbitrage).

However, the Group acknowledges this would be a significant change to the current employment relations model, and some members noted contractors operate under a business, rather than employment, model.

We acknowledge the issue of defining workers as contractors to avoid minimum standards is a broader issue, and Government may wish to give effect to our recommendation through other work directly on that issue across the ERES system.

All employers in the defined sector or occupation should be covered by the agreement

The Group noted the premise of the Fair Pay Agreement was that it should cover all employers in the defined sector or occupation, if it was desired to avoid incentives for under-cutting the provisions of the FPA. This approach, if adopted, should also extend coverage under the FPA to any new employers or workers in that sector or occupation after the FPA has been signed.

[add Business NZ position statement here]

Commented [KM6]: Note to Working Group:

Kirk will provide this text separately.

We all agreed it would be important for employers to be able to achieve certainty and avoid incurring unnecessary transaction costs. If an employer does not believe they are within the

coverage of the initiation of a particular FPA they should be able to apply to the independent body for a determination of whether they fall within the coverage and are required to be involved in the FPA process.

There may be a case for limited flexibility for exemptions from FPAs in some circumstances

The Group noted lifting standards may force some employers out of the industry, if they can neither absorb costs nor raise prices and remain competitive in the market. A higher floor for wages or conditions may also discourage employers from hiring some workers with perceived risk factors.

We consider some flexibility should be permissible in FPAs, for example for employers where they are facing going out of business. Parties could include defined circumstances for temporary exemptions for employers or workers in the FPA. They could also do this by including administrative procedures for the parties or a third party independent body to approve requests for an exemption after the FPA is ratified.

Particular circumstances where exemptions are allowed should be set in legislation and be agreed on by parties in the bargaining process.

As a general rule, the Group considered any exemptions should be limited and typically time bound (e.g. up to 12 months), as exemptions will increase complexity, uncertainty, perverse incentives (e.g. incentivising small firms not to grow), and misallocation of resources in the affected sector. There would be merit in including exemptions in law or sample/guideline exemptions for FPA clauses for parties to use as a basis.

The existence of a FPA should not deter employers from offering more favourable terms to their workers.

6.3 Scope

The Government asked us to make recommendations on the scope of matters that may be included in an agreement, including whether regional variations are permitted.

The legislation should set the minimum content that must be included in the agreement

We recommend the minimum content for FPAs should be set in legislation. This is a similar approach to the current collective bargaining system under the ER Act. The Group considered FPAs must be a written agreement and must include provisions on:

- The objectives of the FPA
- Coverage
- Wages and how pay increases will be determined
- Terms & conditions, namely working hours, overtime and/or penal rates, leave, redundancy, and flexible working arrangements
- Skills and training
- Duration, eg expiry date

- Governance arrangements to manage the operation of the FPA and ongoing dialogue between the signatory parties

We considered it will be useful for parties to be able to discuss other matters, such as other productivity-related enhancements or actions, even if they do not reach agreement on provisions to insert in the FPA.

We recognise labour markets can vary significantly across New Zealand (e.g. on a geographic basis). Therefore, the Group considered parties should also be able to include provisions for regional differences within sectors or occupations.

We also considered whether FPAs could potentially disadvantage particular groups through the wage rates that are set, for example young workers; or for long-term beneficiaries in their first year back in employment. We recommend the Government consider whether the parties should be able to agree variations in the terms set within a FPA on these or other grounds.

The Group also considered the duration of agreements should be up to the parties to agree, but with a maximum of 5 years.

Parties should be able to bargain on additional terms to be included in the agreement

The Group considered additional industry-relevant provisions should be able to be included by negotiation in the FPA, so long as they were compliant with minimum employment standards and other law.

Any enterprise level collective agreement must equal or exceed the terms of the relevant Fair Pay Agreement.

The Group recommends employers and employees could agree an enterprise-level collective agreement in addition to the FPA, and if so, the principle of favourability should apply. This would mean any enterprise level collective agreements must equal or exceed the terms of the relevant FPA. They may offer additional provisions not within the scope of the FPA agreed for that sector or occupation.

6.4 Bargaining parties

The Government asked us to make recommendations on the identification and selection of bargaining participants including any mechanisms for managing the views of workers without union representation.

Parties should nominate a representative organisation to bargain on their behalf

To be workable, we consider the bargaining parties on both sides should be represented by incorporated entities.

Workers should be represented by unions, and employers may be represented by employer organisations.

We note different groups of both workers and employers may wish to have their own representatives and the system should accommodate this within reason, for example, small employers may wish to be represented independently from large, or there may be multiple representative organisations involved..

The Group also considered any representatives should be required to have relevant expertise and skills.

If there is disagreement within a party about who their representative is (or are, if plural) the first step would be mediation. If mediation was unsuccessful, parties could then refer to the independent third party to determine who the representative(s) should be.

There should be a role for the national representative bodies to coordinate bargaining representatives

Both employers and workers should elect a lead advocate to ensure there is an orderly process and to be responsible for communication between the parties, and with the independent body.

The Group considers there will need to be a role for national-level social partners, for example, Business New Zealand and the New Zealand Council of Trade Unions, to coordinate bargaining representatives.

Parties should be encouraged to coordinate

The Group recognised the fundamental principle of freedom of association. The Group noted there would be wider benefits for both employers and workers from belonging to representative organisations. For example, industry organisations can offer peer networks, human resources support, and training opportunities for workers and management. All of these could contribute to raising firm productivity. Unions offer representation, advice and support to members and membership benefits. This could take the form of greater participation in existing representative groups or forming new ones, particularly in sectors or occupations with low existing levels of coordination.

Representative bodies must represent non-members in good faith

As a Group, we recognise representative bodies will not be perfectly representative – not every worker is a member of a union, and not every employer will belong to an industry organisation.

It is important, for instance, that all workers potentially covered by an FPA are able to vote on their bargaining team representatives whether they are union members or not. The same principle should apply for the employer bargaining group.

It is a normal practice in collective bargaining internationally for the 'most representative bodies' to conduct bargaining processes. We think in New Zealand this can be achieved by placing, for example, duties on the representative bodies at the bargaining table to represent non-members, to do so in good faith, and to consult those non-members throughout the process. We note there may be challenges in undertaking this wide consultation in some sectors or occupations, but we do not think this is insurmountable, given modern communication technologies.

Workers need to be allowed to attend paid meetings to elect and instruct their representatives

The Group considered there will need to be legislated rights for workers covered by FPA bargaining to be able to attend paid meetings (similar to the union meetings provision in the ER

Act), to elect their bargaining team and to exercise their rights to endorse the provisions they wish their advocate to advance in the FPA process.

Costs should not fall disproportionately on the groups directly involved in bargaining

There is currently no provision for costs to be covered under the ER Act. Where bargaining is at enterprise level, meetings will typically be on site and costs currently often fall on unions and employers.

For FPA bargaining, inevitably negotiations will require travel for some bargaining parties. The Group considered the parties chosen to represent the sides in negotiations should not disproportionately bear these costs. The Group concluded Government should consider how these costs should be funded – for example, through Government financial support, a levy, or bargaining fee.

6.5 Bargaining process rules

We recommend as a default, existing bargaining processes as currently defined in the ER Act (as amended by Employment Relations Act Amendment Bill) should apply, including the duty of good faith.

Clear timelines are needed to prevent lengthy processes creating excessive uncertainty or cost

There should be clear timelines set for the FPA initiation process, including for the third party to determine whether bargaining may commence after receiving notification from an initiating party. This will give certainty to all parties.

Notification of parties will be a critical element of the process

Once a FPA process is initiated, it will be critical that all affected employers and workers and their respective representatives are notified, have an opportunity to be represented, and are informed throughout the bargaining progress. Minimum requirements for notifying affected parties should be set in law.

Bargaining should be supported through facilitation[16]

Once bargaining has been initiated, we recommend a neutral expert facilitator be available to support parties during the bargaining process.

This facilitator could include, for example:

- informing bargaining teams about the process
- advising about options for the process the parties should follow to reach agreement, and
- helping parties to discuss the range of possible provisions of the collective agreement.

[16] Note this is envisaged as neutral, expert facilitation, not facilitated bargaining under the current ER Act.

This facilitation function is intended to support a more efficient and effective bargaining process and to minimise the risk of disputes occurring. There should not be any threshold test for the parties to access this facilitation service.

The Government or the independent body should also provide materials to reduce time and transaction costs, for example, templates for the bargaining process and agreement, similar to that currently provided on the Employment New Zealand website.

6.6 Dispute resolution during bargaining

The Government asked us to make recommendations on the rules or third party intervention to resolve disputes, including whether the third party's role is facilitative, determinative or both.

The principle guiding the Group's recommendations on a dispute resolution system for FPAs has been to maintain, as far as possible, the existing processes under the ER Act, with additions or simplifications to be suitable for sector-wide bargaining. The aim is to minimise the time and cost lost through litigation, and to keep the process simple. Resource and encouragement needs to be provided to help the parties to resolve issues themselves, with support.

When disputes cannot be resolved, the current ER Act system provides recourse to determination by the Employment Relations Authority and challenge of their determinations through the court system, and ultimately appeal rights.

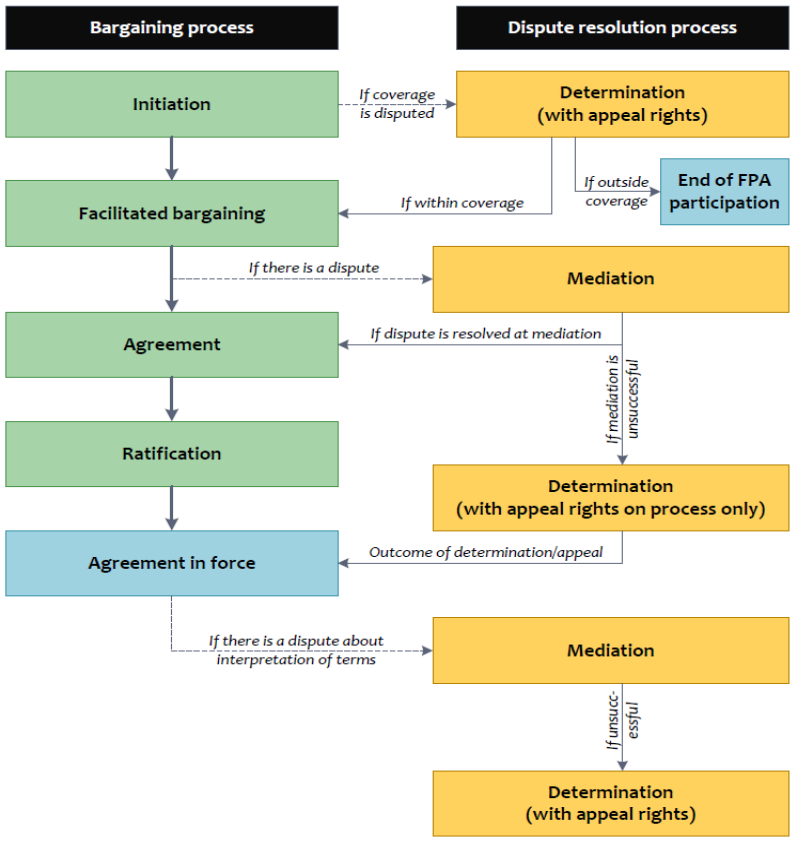
The alternative the Government could consider is to introduce an arbitration-based model, with recourse to an individual arbiter or arbitration panel, with rights to appeal in the Courts. This would require the establishment of a bespoke model and institutions to support it.

Diagram xx outlines the key features of our proposed approach to dispute resolution.

Commented [SD7]: Note to Working Group:

The flow diagram will be updated to refer to challenge/appeal rights not just appeal (challenge of ERA to Employment Court and then appeal to Appeal Court

Diagram 17: Dispute resolution process



There is no recourse to industrial action during bargaining

The Group noted the Government has already stated no industrial action – i.e. strikes or lock outs – will be permitted, during bargaining. It will therefore be critically important that dispute resolution mechanisms work effectively.

We have interpreted this to be a relational, not a temporal, ban – it is only strikes and lockouts related to FPA bargaining which are prohibited, not strikes about other matters which coincide with FPA bargaining.

We acknowledge this may be perceived by some as conflicting with New Zealand's obligations under ILO Convention 87, but this prohibition of strikes during bargaining for FPAs does not preclude striking during enterprise level collective bargaining over the same matters. In other words, FPAs complement the terms of collective agreements in the same manner as employment standards.

After initiation, disputes over coverage may be determined by the Employment Relations Authority

If a party who has received an initiation notice for an FPA, disputes that they are covered by the process, we recommend they may apply to the Employment Relations Authority for a determination on the matter. The aim is to provide an efficient mechanism for determining those that should be included, to minimise the risk of excluding relevant parties or parties incurring costs by participating unnecessarily.

Where parties disagree with the determination, we recommend the existing challenge and appeals process applies.

When disputes arise during facilitated bargaining, parties go to mediation in the first instance

If disputes arise during facilitated bargaining, we recommend either party may refer the process to mediation to resolve disputes concerning either substantive matters or procedure. A neutral expert mediator will play an active role in supporting the parties to resolve the dispute.

Where a dispute cannot be resolved through mediation, parties may apply to have the matter determined

Where mediation does not resolve the dispute, we recommend either party can apply to a deciding body, to have the matter finally determined. We suggest the body could be the Employment Relations Authority or Employment Court. The deciding body may then either issue a determination including terms for settlement in the agreement or refer the matter back to mediation where appropriate.

The Group considers the deciding body should be independent with the requisite specialist skills and experience in collective bargaining matters. This may mean, where necessary, having the support of expert advice or a panel to assist the deciding body to make a determination on the matter.

Parties may only challenge the determination on limited procedural grounds, with rights to appeal

In order to avoid costly and lengthy litigation processes, we recommend either party may only challenge a determination on limited procedural grounds. Appeals should be heard through the court system.

Once in force, any dispute over the terms of a Fair Pay Agreement should use the standard dispute resolution process

Once the FPA has been agreed and is in force, if parties disagree about how the terms should be interpreted, we recommend either party seek to resolve the dispute through mediation.

Where mediation is unsuccessful, either party may seek a determination from the Employment Relations Authority, with the right to challenge it in the Employment Court, and recourse to appeal through the Court of Appeals. This is the current process for parties who have a dispute about the terms of a collective agreement under the ER Act.

6.7 Conclusion, variation and renewal

The Government asked us to make recommendations on the mechanism for giving effect to a FPA, including any ratification process for employers and workers within the coverage of an agreement.

The Government also asked for recommendations on the duration and process for renewing or varying an agreement.

Where parties reach agreement, conclusion should require ratification by a simple majority of both employers and workers

Where bargaining has concluded in parties reaching an agreement we recommend the agreement must not be signed until a simple majority of both employers and workers covered by the agreement have ratified it.

Where bargaining is referred to determination of the terms of the agreement, the final agreement should not need ratification

In circumstances where mediation fails to resolve the disputes, and the parties refer the bargaining process to determination, the Group considered this determination should then become a FPA without a further ratification process. There should only be an appeals mechanism on the grounds of a breach of process or seeking a determination as to coverage.

The procedure for ratification must be set in law

We recommend the procedure for ratification be set in law. This differs from the current requirements under the ER Act where parties may decide how to ratify an agreement. We have recommended this departure from the existing law because, under a bargained FPA, all affected parties in the sector or occupation will need to be given an opportunity to ratify.

The law should clarify that workers are entitled to paid meetings for the purposes of ratifying the agreement.

Registration of FPAs should be required in the law, and they should be publicly available

Once an agreement has been concluded, parties must register and lodge the FPA with Government. The FPA itself should be made publicly available and affected parties notified.

Before an agreement expires, either party should be able to initiate a renewal of the agreement, or for variation of some or all terms

The Group considered any variation or renewal of the agreement agreed between the bargaining parties must meet the same initiation and ratification thresholds.

An expiring FPA should be able to be renewed easily, for example employers and workers may be able to vote for a renewal with wages increased in line with CPI or some other indicator.

6.8 Enforcement

The Government asked us to consider how the terms of an agreement should be enforced.

The Employment Relations Act approach to enforcement should be applied

Overall, we consider the existing dispute resolution and enforcement mechanisms under the ER Act should be applied to the new FPA system, with the changes noted above to dispute resolution during bargaining.

This would provide for parties who believe there has been a breach of a FPA to turn first to dispute resolution services including mediation, before looking to enforcement options including the Labour Inspectorate and the Court system.

The Government will need to consider whether additional resources for bodies involved in dispute resolution and enforcement are needed during the detailed design and implementation of the overall system.

We suggest unions and employers and employers' organisations should (where possible and appropriate) also play a role in supporting compliance, to identify breaches of FPAs, and address implementation problems.

6.9 Support to make the bargaining process work well

The Group considers a number of conditions need to be present to support a positive outcome to a FPA collective bargaining process:

- Capability and capacity in both parties to support the bargaining process, with the skills and expertise to manage a respectful, efficient dialogue that leads to timely outcomes
- Strategic leadership on both sides that takes a long-term perspective, supporting a transformational not transactional conversation, i.e. it affects the whole sector or occupation, not just higher wages.
- High levels of inclusion and participation in the dialogue, particularly among small employers, both through direct involvement at the bargaining table and consultation.
- In a process likely to require involvement of multiple representative groups, a high degree of coordination to work effectively and efficiently.
- The involvement of trained third-party facilitators to support the parties through the process.

In addition, both workers and employers will need to see potential benefits of bargaining for an FPA, with a real improvement over the status quo. There also needs to be a genuine willingness to engage and confidence in the good faith approach of both parties.

Support to build capability and capacity of the parties and to facilitate the process is needed

In order to facilitate effective bargaining, a good level of information will need to be provided to parties, and capability building will be important to build up the skills of those around the negotiating table, and maximise the potential for constructive bargaining.

The Government will also need to consider the role and resourcing required for the third party body to support the various elements of the bargaining process described above including the processes for determination of the trigger tests, notifications to parties, and facilitation of the bargaining process.

A proactive role will also be needed to provide notifications, information and education on their obligations to employers and workers following the ratification and coming into force of a FPA.

Resourcing levels for support services will need to be considered

The existing functions provided by Government to support the collective bargaining process are fit for purpose and should still apply, including the provision of:

- general information and education about rights and obligations
- information about services available to support the bargaining process and the resolution of employment relationship problems
- facilitation, mediation and determination services
- compliance and enforcement through the Employment Relations Authority, Labour Inspectorate and Courts
- reporting and monitoring of the employment relations system

However, the Government should consider the level of resources available as part of the detailed design and implementation of the overall system. In particular, we consider resources will be needed for dedicated facilitators to work with parties at all stages of bargaining, as well as for the independent body to assess whether trigger conditions have been met and notify parties.

Annex 1 – Terms of Reference: Fair Pay Agreement Working Group

Purpose

1 The Fair Pay Agreement Working Group has been established to make independent recommendations to the Government on the scope and design of a system of bargaining to set minimum terms and conditions of employment across industries or occupations.

Background

2 This Government has a vision for a highly skilled and innovative economy that delivers good jobs, decent work conditions and fair wages while boosting economic growth and productivity. When we lift the conditions of New Zealand workers, businesses benefit through improved worker engagement, productivity and better workplaces.

3 The Government's vision of the employment relations framework is a level playing field where good employers are not disadvantaged by paying reasonable, industry-standard wages. New Zealand must have a highly skilled and innovative economy that provides well-paid, decent jobs, and delivers broad-based gains from economic growth and productivity.

4 In addition, the Government intends to promote the setting of terms and conditions of employment by way of collective bargaining between workers, worker's representatives, employers and their representatives.

Objectives

5 The objective of the Fair Pay Working Group is to make independent recommendations to the Government on the scope and design of a legislative system of industry or occupation-wide bargaining.

6 In achieving these objectives, it will be important to ensure that the Working Group's recommendations manage and where possible mitigate the following risks:

6.1 slower productivity growth if a Fair Pay Agreement locks in inefficient or anti-competitive businesses models or market structures

6.2 a "two-speed" labour market structure with a greater disparity in terms and conditions and job security between workers covered by Fair Pay Agreements and those who are not

6.3 unreasonable price rises for some goods and services if increased labour costs are not offset by productivity gains and profit margins are held at existing levels

6.4 undermining of union membership through the reduction of the value of enterprise bargaining by way of the pass on of collectively negotiated terms and conditions to non-union members, and

6.5 possible job losses, particularly in industries exposed to international competition which are unable to pass on higher labour costs to consumers of those goods and services.

Parameters and scope

7 The Fair Pay Agreement Working Group's recommendations must address:

7.1 the process and criteria for initiating Fair Pay Agreement bargaining (including bargaining thresholds or public interest tests)

7.2 identification and selection of bargaining participants including any mechanisms for managing the views of workers without union representation

7.3 how to determine the scope of agreement coverage, including demarcating the boundaries of the industry or occupation and whether the Fair Pay Agreement system would apply to employees only, or a broader class of workers

7.4 whether Fair Pay Agreements should apply to industries or occupations, or both

7.5 the scope of matters that may be included in an agreement, including whether regional variations are permitted

7.6 rules or third party intervention to resolve disputes, including whether the third party's role is facilitative, determinative or both

7.7 the mechanism for giving effect to an agreement, including any ratification process for employers and workers within the coverage of an agreement

7.8 how the terms of an agreement should be enforced

7.9 duration and process for renewing or varying an agreement

7.10 whether there are circumstances in which an employer can seek an exemption from a relevant agreement and the process for doing so

8 Any model proposed by the Fair Pay Agreement Working Group must:

8.1 operate effectively as a component part of the overall employment relations and standards system, including existing single- and multi-employer collective bargaining and minimum employment standards, and

8.2 manage and where possible mitigate the risks in paragraph 6.

9 The Fair Pay Agreement Working Group's recommendations must be within the following parameters:

9.1 Industrial action is not permitted as part of bargaining over a Fair Pay Agreement.

9.2 It will be up to the workers and employers in each in each industry to make use of the system to improve the productivity and working conditions in the industry.

Membership

10 The Fair Pay Agreement Working Group will be chaired by the Rt Hon Jim Bolger.

11 The Fair Pay Agreement Working Group will comprise the following members:

Dr Stephen Blumenfeld	Director, Centre for Labour, Employment and Work at Victoria University
Steph Dyhrberg	Partner, Dyhrberg Drayton Employment Law
Tony Hargood	Chief Executive, Wairarapa-Bush Rugby Union
Kirk Hope	Chief Executive, BusinessNZ
Vicki Lee	Chief Executive, Hospitality NZ
Caroline Mareko	Senior Manager, Communities & Participation, Wellington Region Free Kindergarten Association
John Ryall	National Secretary, E tū
Dr Isabelle Sin	Fellow, MOTU Economic and Public Policy Research
Richard Wagstaff	President, New Zealand Council of Trade Unions

12 The chair and members of the Fair Pay Agreement Working Group will be entitled to a fee in accordance with the Cabinet fees framework for members appointed to bodies in which the Crown has an interest.

13 Officials from the Ministry of Business, Innovation and Employment will support the Working Group as secretariat. The Working Group will be able to seek independent advice and analysis on any matter within the scope of these terms of reference.

Timeframes

14 It is anticipated that the Fair Pay Agreement Working Group will:

14.1 commence discussions in June 2018

14.2 make recommendations to the Minister for Workplace Relations and Safety by November 2018.

15 These dates may be varied with the consent of the Minister for Workplace Relations and Safety.

Annex 2 - Occupations ranked according to proportion of workers earning under $20 per hour

Commented [BG8]: Note to Working Group:

This is now updated to show % earning below $20 per hour.

This table was created by obtaining wage information for all occupations in New Zealand at the three-digit level (minor groups) under the Australian and New Zealand Standard Classification of Occupations (ANZSCO). We then arranged these occupations according to the proportion of workers earning under $20.00 an hour.

Occupations according to proportion of workers earning under $20 per hour	Regular hourly rate (main job)		% below $20 per hour	Weekly income (all sources)	Total workers
Three-digit occupation (ANZSCO)	Mean	Median	Percent	Mean	
Food Preparation Assistants	17.33	16.5	91.27%	412.07	21,900
Checkout Operators and Office Cashiers	17.77	17	91.08%	406.57	15,600
Hospitality Workers	17.79	17	84.34%	487.59	39,200
Packers and Product Assemblers	18.32	17.26	78.94%	640.76	17,200
Cleaners and Laundry Workers	20.01	17.5	73.05%	479.78	44,900
Hairdressers	19.85	18.22	72.58%	630.05	9,900
Sales Assistants and Salespersons	19.98	18	72.16%	655.99	107,000
Child Carers	18.5	18	71.96%	462.04	12,800
Freight Handlers and Shelf Fillers	21.41	18	64.93%	716.11	8,600
Food Trades Workers	20.44	19	59.99%	774.54	40,100
Miscellaneous Labourers	20.34	18.5	59.74%	763.92	40,100
Miscellaneous Sales Support Workers	23	19.18	58.96%	624.5	8,300
Farm, Forestry and Garden Workers	20.93	18.7	57.14%	794.71	41,400
Delivery Drivers	20.43	19.36	56.81%	702.71	6,500
Education Aides	20.8	19.21	55.89%	511.57	15,500
Clerical and Office Support Workers	21.11	19.5	50.54%	754.89	13,000
Sports and Fitness Workers	24.19	20	49.13%	668.39	15,000
Arts Professionals	24.41	20	48.00%	753.7	7,800

Storepersons	21.3	20	47.68%	900.62	25,900
Machine Operators	21.52	20.2	44.41%	902.38	18,900
Personal Service and Travel Workers	24.49	20.62	43.48%	873.51	20,300
Automobile, Bus and Rail Drivers	21.95	20.45	39.45%	870.24	16,300
Food Process Workers	23.67	22.38	39.30%	965.91	27,000
Horticultural Trades Workers	24.54	22	38.69%	755.25	17,200
Farmers and Farm Managers	35.62	22	38.34%	1272.73	54,500
Receptionists	23.19	21.58	37.96%	713.52	24,100
Animal Attendants and Trainers, and Shearers	25.97	21.6	37.33%	870.54	7,600
Textile, Clothing and Footwear Trades Workers	25.13	22	36.98%	1036.31	2,500
Accommodation and Hospitality Managers	26.93	21.37	36.05%	973.61	19,600
Retail Managers	24.86	21.31	34.33%	1077.04	36,600
Floor Finishers and Painting Trades Workers	24.73	23	32.61%	957.82	15,700
Personal Carers and Assistants	21.46	21	31.32%	688.28	54,800
Keyboard Operators	21.55	21.58	31.16%	768.33	5,900
Insurance Agents and Sales Representatives	25.04	22.54	30.93%	986.1	48,300
Prison and Security Officers	27.25	26	30.31%	1130.81	15,400
Miscellaneous Factory Process Workers	24.9	22.8	30.22%	1031.12	9,000
Chief Executives, General Managers and Legislators	50.4	31.97	28.59%	1922.54	148,600
Construction and Mining Labourers	50.75	23	27.92%	1094.88	22,900
Automotive Electricians and Mechanics	24.9	25	26.95%	1074.62	21,300
Mobile Plant Operators	25.79	23.98	26.54%	1176.93	27,200
Call or Contact Centre Information Clerks	23.3	21	25.87%	911.61	6,700
Bricklayers, Carpenters and Joiners	24.93	25	25.15%	1066.64	19,700

Real Estate Sales Agents	55.47	28.77	25.07%	1741.83	16,600
Panelbeaters, and Vehicle Body Builders, Trimmers and Painters	24.05	24	24.98%	979.11	4,700
Glaziers, Plasterers and Tilers	26.79	23.97	24.67%	1096.99	11,900
Plumbers	30.94	24.93	23.52%	1107.35	12,500
Printing Trades Workers	29.04	27.9	23.46%	1148.29	5,300
Miscellaneous Technicians and Trades Workers	28.6	24	22.90%	1136.1	11,700
Electricians	31.41	27.2	22.58%	1290.76	18,100
Fabrication Engineering Trades Workers	26.29	25	20.70%	1167.9	13,900
Logistics Clerks	25.69	23.97	20.32%	1070.98	26,600
ICT and Telecommunications Technicians	27.18	23.97	20.01%	1066.63	8,800
Stationary Plant Operators	27.87	24.93	19.74%	1249.98	13,200
General Clerks	34.07	24.29	19.14%	954.96	64,800
Health and Welfare Support Workers	24.89	23.5	19.01%	884.46	21,600
Truck Drivers	24.05	23.61	17.88%	1195.82	31,000
Mechanical Engineering Trades Workers	32.51	30	16.39%	1432.54	17,500
Architects, Designers, Planners and Surveyors	41.98	31.17	15.86%	1572.76	28,600
Construction, Distribution and Production Managers	32.17	29	15.80%	1454.33	61,500
School Teachers	28.69	27.24	15.32%	1097.53	101,300
Agricultural, Medical and Science Technicians	26.45	24.69	14.55%	1051.22	17,100
Social and Welfare Professionals	29.31	26.15	14.41%	1040.55	35,200
Media Professionals	40.4	35.96	14.29%	1562.61	7,700
Health Therapy Professionals	41.58	32.6	13.83%	1475.11	16,900
Wood Trades Workers	29.86	26.37	13.29%	1293.12	5,000
Miscellaneous Clerical and	31.54	25.89	12.71%	1238.82	17,600

Administrative Workers					
Office and Practice Managers	32.97	25.21	11.90%	1125.24	35,900
Air and Marine Transport Professionals	55.22	40	11.58%	2002.36	8,400
Electronics and Telecommunications Trades Workers	29.49	28	11.29%	1274.34	13,800
Accounting Clerks and Bookkeepers	34.29	26.37	11.02%	966.58	35,700
Building and Engineering Technicians	33.21	29.73	10.89%	1348.28	21,400
Miscellaneous Education Professionals	34.79	30.69	10.66%	1119.05	12,300
Information and Organisation Professionals	44.82	35.8	9.99%	1564.73	34,600
Personal Assistants and Secretaries	30.11	27	9.76%	1035.7	20,400
Database and Systems Administrators, and ICT Security Specialists	38.83	32.5	9.58%	1559.42	6,200
Medical Practitioners	79.83	71.92	8.78%	3076.52	14,600
Sales, Marketing and Public Relations Professionals	36.42	30	8.69%	1431.97	23,500
Business Administration Managers	43.08	35.96	8.64%	1813.23	70,200
ICT Network and Support Professionals	39.22	35	8.46%	1606.92	9,300
Tertiary Education Teachers	39.54	35.96	8.45%	1494.3	22,700
Natural and Physical Science Professionals	41.89	36.44	6.55%	1705.59	16,600
Contract, Program and Project Administrators	34.31	29.92	6.50%	1268.59	20,100
Health Diagnostic and Promotion Professionals	36.64	35.96	6.48%	1265.62	14,700
Advertising, Public Relations and Sales Managers	42.8	38.36	6.43%	1896.85	34,300
Accountants, Auditors and Company Secretaries	42.11	38.36	6.42%	1652.86	45,600
Defence Force Members, Fire Fighters and Police	35.08	31.84	6.18%	1540.19	21,800
Miscellaneous Hospitality, Retail and Service Managers	35.55	34.52	5.97%	1548.15	18,900

Engineering Professionals	43.23	38.36	5.53%	1843.23	40,700
Miscellaneous Specialist Managers	39.38	36.76	5.28%	1669.84	8,700
Human Resource and Training Professionals	37.48	31.97	5.15%	1492.07	14,600
Financial Brokers and Dealers, and Investment Advisers	44.06	32.32	5.10%	1917.98	9,800
Legal Professionals	49.81	40	4.65%	2046.89	19,200
Business and Systems Analysts, and Programmers	44.78	41.94	4.32%	1803.22	52,400
ICT Managers	57.95	52.74	2.65%	2624.76	10,200
Financial and Insurance Clerks	32.47	28.77	2.38%	1314.62	18,700
Midwifery and Nursing Professionals	33.12	32	2.20%	1139.91	57,700
Education, Health and Welfare Services Managers	41.44	36.23	1.27%	1808.82	14,500

12C

FAIR PAY AGREEMENTS

Supporting workers and firms to drive productivity growth and share its benefits

Version 0.9

18 December 2018

Recommendations from the Fair Pay Agreements Working Group, 2018

Summary

New Zealanders work longer hours and produce less per hour than in most OCED countries. Our productivity growth over recent decades has been poor, and our economic 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.

The Government's vision is to use the employment relations framework to create a level playing field where good employers are not disadvantaged by paying reasonable, industry-standard wages. New Zealand must have a highly skilled and innovative economy that provides well-paid, decent jobs, and delivers broad-based gains from economic growth and productivity.

The Government asked us to make independent recommendations on the scope and design of a system of sector or occupation wide bargaining to set minimum terms and conditions of employment and achieve these goals.

Many other countries, especially in Europe, use sector-wide collective agreements as part of their employment relations systems. The OECD recommends a model of combined sector and enterprise level collective bargaining, because it is associated with higher employment, lower unemployment, a better integration of vulnerable groups and less wage inequality than fully decentralised systems like ours. Some countries also link wage increases to skills and training pathways, with the aim of increasing productivity and sharing its benefits. Centralised bargaining, however, is less strongly linked to economic productivity and growth, which means care needs to be taken in selecting the most appropriate pathway for a given country.

The Group considered that introducing a sector or occupational level bargaining system could be most useful in sectors or occupations where particular issues with competitive outcomes are identified, for example, where competition is based on ever-decreasing labour costs rather than on increasing quality or productivity. It could be useful more generally where workers and employers identify opportunity to improve outcomes across a sector or occupation. We also considered that this may not be a necessary or useful tool in some sectors or occupations.

We have therefore designed a system where workers can initiate sector- or occupation-wide collective bargaining, if they meet a representativeness threshold or a public interest test.

We all agreed that if a collective bargaining dialogue at sectoral or occupational level is introduced, it is most likely to gain real traction when:

- it is focussed on problems that are broadly based in the sector,
- it presents real opportunities for both employers and workers to gain from the process

- parties are well represented, and
- it is connected to the fundamentals of the employment relationship: the exchange of labour and incentives to invest in workplace productivity-enhancing measures such as skills and technology.

We have designed this system with these principles in mind. Another fundamental design principle was to minimise cost and complexity for all parties, and this has led us to build on the existing mechanisms in the employment relations and standards system where possible.

Most of the Group agreed that to achieve the Government's objectives, all employers in the sector or occupation should be covered by a Fair Pay Agreement.

Business New Zealand opposes this view as it believes that any such system should be voluntary, consistent with the principle of free and voluntary negotiation enshrined in international labour standards to which New Zealand is bound.

BusinessNZ also opposes the following recommendations on the basis that they largely ignore the recognised diversity of issues confronting business in a given industry, and give greater preference to equality of outcomes than economic productivity and growth.

It is also concerned that the recommendations essentially recreate the structure and rules of the national award system that existed prior to 1991, something the government has consistently stated would not happen.

Most of us agreed, however, that if such a system were introduced, this would be the best design for it.

Recommendations

Designing a Fair Pay Agreement System

The Group concluded that:

1. There is no international model for collective bargaining that can be applied to New Zealand, without being adapted to suit our social and economic context.

2. A Fair Pay Agreement system cannot be designed from a blank sheet. Certain characteristics of our current state need to be considered pragmatically:
   - the existence of statutory minimum standards,
   - low levels of organisation among workers and employers, and
   - low levels of take up of voluntary approaches to sector or occupational collective bargaining in New Zealand, particularly in the private sector and among small businesses.

3. This system is intended to complement, not replace, the existing employment relations and standards system. Where possible a Fair Pay Agreements system should be designed to build on and adapt existing provisions to minimise cost and complexity.

4. New Zealand could benefit from stronger employer- worker dialogue.

5. Fair Pay Agreements could be most useful in sectors or occupations where particular issues with competitive outcomes are identified. For example, they could be useful where competition is based on ever-decreasing labour costs, rather than on increased quality or productivity.

6. They could also be useful more generally where workers and employers identify scope to improve outcomes across a sector or occupation. However, they may not be a necessary or useful tool in some sectors or occupations.

7. Consistent with its view that any system of collective bargaining should be voluntary in accordance with international labour standards BusinessNZ believes it is advisable to ensure that a thorough analysis of the circumstances be undertaken before determining how to proceed in any given industry sector. For this reason BusinessNZ suggests FPAs should not be triggered by a simple request from workers.

8. Notwithstanding BusinessNZ's view most members of the Group agreed that if the Government decided to introduce this system, then this was the best way to design it.

9. Fair Pay Agreements are most likely to gain real traction where:
   - they are focussed on problems which are broadly based in the sector,
   - there are real opportunities for both employers and workers to gain from the process,
   - parties are well represented, and
   - agreements are connected to the fundamentals of the employment relationship: the exchange of labour and incentives to invest in workplace productivity-enhancing measures such as skills and technology.

10. Training and skills provisions should be a key feature of collective agreements.

11. The Government should seek advice from officials and the International Labour Organisation (ILO) on the compatibility of the proposed system with New Zealand's international obligations.

Detailed design of a Fair Pay Agreement system

The Group, with the exception of BusinessNZ, agreed the following recommendations on how to design each of the key features of the Fair Pay Agreement collective bargaining system.

Initiation

12. A Fair Pay Agreement bargaining process should be initiated by only workers and their union representatives.

13. There should be two circumstances where a Fair Pay Agreement collective bargaining process may be initiated:
    a. *Representativeness trigger*: in any sector or occupation, workers should be able to initiate a Fair Pay Agreement 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 Fair Pay Agreement may still be initiated where there are harmful labour market conditions in the nominated sector or occupation.

14. The representativeness threshold should cover both union and non-union workers.

15. The conditions to be met under the public interest trigger should be set in legislation.

16. An independent body will be needed to determine whether the trigger conditions are met.

17. The Government will need to consider how to assess and mitigate potential negative effects, including to competition.

Coverage

18. The occupation or sector to be covered by an agreement should be defined and negotiated by the parties.

19. It is important for agreements to cover all workers - not just employees - to avoid perverse incentives to define work outside of employment regulation.

20. All employers in the defined sector or occupation should, as a default, be covered by the agreement.

21. There may be a case for limited flexibility for exemptions from the agreement in some circumstances.

Scope

22. The legislation should set the minimum content that must be included in the agreement.

23. Parties should be able to bargain on additional terms to be included in the agreement.

24. Any enterprise-level collective agreement must equal or exceed the terms of the relevant Fair Pay Agreement.

Bargaining parties

25. Parties should nominate a representative organisation to bargain on their behalf.

26. There should be a role for the national representative bodies to coordinate bargaining representatives.

27. Parties should be encouraged to coordinate.

28. Representative bodies must represent non-members in good faith.

29. Workers should be allowed to attend paid meetings to elect and instruct their representatives.

30. Costs should not fall disproportionately on the groups directly involved in bargaining.

Bargaining process rules

31. Clear timelines will be needed to prevent lengthy processes creating excessive uncertainty or cost.

32. Notification of parties will be a critical element of the process.

33. Bargaining should be supported through facilitation.

Dispute resolution during bargaining

34. The Government has stated there will be no recourse to industrial action during bargaining.

35. After initiation, disputes over coverage may be determined by the Employment Relations Authority.

36. When disputes arise during facilitated bargaining, parties should go to mediation in the first instance.

37. Where a dispute cannot be resolved through mediation, parties should be able to apply to have the matter determined.

38. Parties should only be able to challenge the determination on limited procedural grounds, with rights of appeal.

39. Once in force, any dispute over the terms of a Fair Pay Agreement should use the standard dispute resolution process.

Conclusion, variation and renewal

40. Where parties reach agreement, conclusion should require ratification by a simple majority of both employers and workers.

41. Where bargaining is referred to determination of the terms of the agreement, the final agreement should not need ratification.

42. The procedure for ratification must be set in law.

43. Registration of agreements should be required by law, and agreements should be publicly available.

44. Before an agreement expires, either party should be able to initiate a renewal of the agreement, or for variation of some or all terms.

Enforcement

45. The Employment Relations Act 2000 approach to enforcement should be applied.

Support to make the bargaining process work well

46. Support to build capability and capacity of the parties and to facilitate the process will be needed.

47. Resourcing levels for support services will need to be considered.

1. Introduction: Lifting incomes and economic growth in New Zealand for the 21st century

The Government asked the Group to design a new tool to complement the collective bargaining system in New Zealand which will help transition the current employment relations framework to one which can support the transition to a 21st century economy: a highly skilled and innovative economy that provides well-paid, decent jobs, and delivers broad-based gains from economic growth and productivity.

As a starting point, the Government asked us to make recommendations on a new tool which can support a level playing field across a sector or occupation, where good employers are not disadvantaged by offering reasonable, industry-standard wages and conditions.

Our first step was to take a holistic view of our labour market: looking backwards at how our current labour market is operating, and looking ahead to the global megatrends that will shape our labour market over the coming decades.

New Zealand's labour market has seen big changes over the last 30-40 years. Over the coming decades, technological change, globalisation, demographic change and climate change will continue to affect the demand for labour and skills.

This process is likely to be uneven, and its impact on society and our labour market is uncertain. We cannot predict exactly how these changes will manifest themselves, or when, but we know globalisation and skills-based technological change are drivers of growing inequalities world-wide.

The evidence doesn't currently show the pace of change accelerating, but New Zealand needs to prepare for a faster rate of job loss and skill obsolescence. We know that certain groups, such as young or low-skilled workers, are likely to be more at risk when these changes happen. We also recognise the challenges faced by each sector are varied as we transition to the future – with different scales of opportunity to improve productivity, sustainability, and inclusiveness.

The Group concluded a mature 21st century labour market in New Zealand will require stronger dialogue between employers and workers. There is a wide range of measures the Government has underway or which could be considered to tackle the challenge of just transition in our economy and promoting increased sector level dialogue among employers and workers. Changing our employment relations model and introducing a new way of doing collective bargaining, while maintaining the essential elements of the current system in New Zealand is only one part of this story, alongside interventions to improve coordination and incentives within other regulatory systems, such as taxation and welfare. These issues are highly related, but the subject of ongoing discussion and advice from other Working Groups.

We agreed a collective bargaining dialogue at sectoral or occupational level is most likely to gain real traction when:

- it is focussed on problems which are broadly based in the sector,
- it presents real opportunities for both employers and workers to gain from the process
- parties are well represented, and

- it is connected to the fundamentals of the employment relationship: the exchange of labour and incentives to invest in workplace productivity enhancing measures such as skills and technology.

The Group considered this measure could be most useful in sectors or occupations where particular issues with competitive outcomes are identified – for example, where competition is based on ever-decreasing labour costs rather than on increasing quality or productivity. It could also be useful more generally where workers and employers identify scope to improve outcomes across a sector or occupation via sectoral or occupational collective bargaining. We also considered this may not be a necessary or useful tool in some sectors or occupations.

Bringing this sector-wide dialogue into a regulated mechanism like collective bargaining creates the critical incentive of an enforceable contract binding the parties. It provides the opportunity for employers to invest and engage without the fear of being undercut by those employers engaged in a 'race to the bottom'. There may also be mutual benefits for workers and employers through improved worker engagement, increased productivity and better workplaces.

2. The approach of the Fair Pay Agreement Working Group

The Fair Pay Agreement (FPA) Working Group has held a series of eleven fortnightly meetings from July 2018 to November 2018. The Government asked the Group to report by November 2018, and this report forms the Group's final recommendations.

The Group has discussed the employment relations and standards system and approach to collective bargaining in New Zealand over recent decades, international models, the relationship between wages and productivity, and the design of an additional sectoral or occupational approach to collective bargaining for New Zealand.

The Group was supported by the Ministry of Business, Innovation and Employment as Secretariat, who also provided information and data on a range of topics.

The Group also heard from speakers who provided their expertise from within the Working Group, and some external experts on particular issues:

- Paul Conway (Productivity Commission) on productivity in New Zealand
- John Ryall (E tū) on the E tū experience of negotiating multi-employer collective agreements (MECAs)
- Richard Wagstaff (Council of Trade Unions) and Kirk Hope (Business New Zealand) on their experience of what does and does not work under the current model for collective bargaining in New Zealand
- Stephen Blumenfeld (Centre for Labour, Employment and Work at Victoria University of Wellington) on data trends in collective bargaining and collective agreements
- Doug Martin (Martin Jenkins) on a Fair Pay Agreements system
- Vicki Lee (Hospitality NZ) on the small business perspective on the employment relations and standards regulatory system.

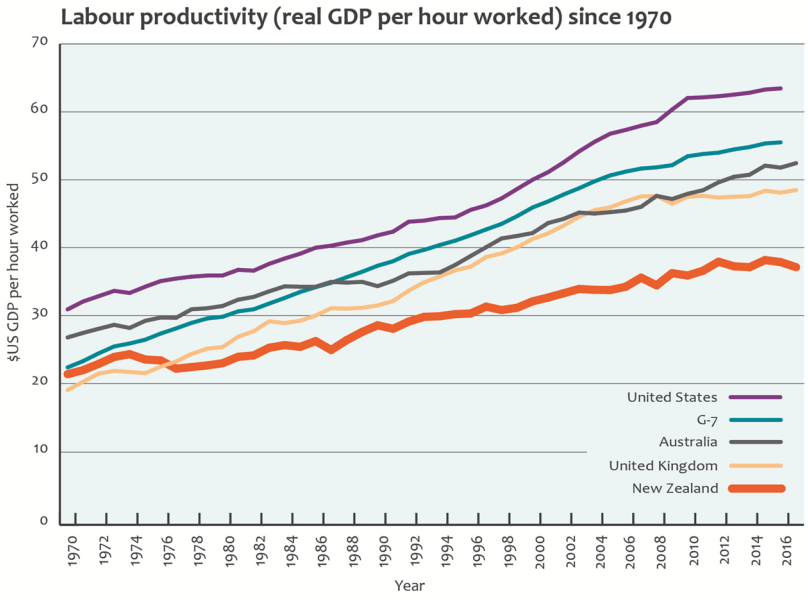
3. Context

The Group looked at the relationship between productivity growth and wage growth in recent decades in New Zealand, and their relationship with overall incomes and inequality.

3.1 Productivity and wage growth, incomes and inequality in New Zealand

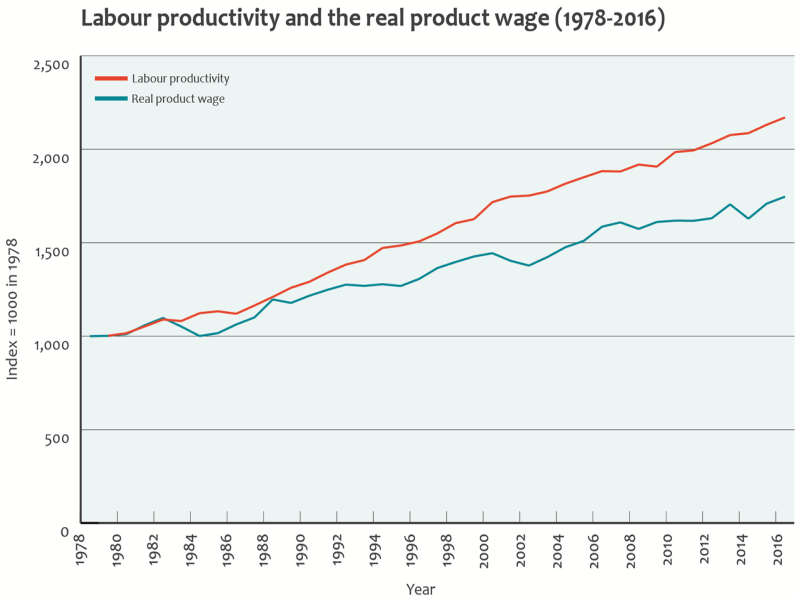
Productivity growth in New Zealand

New Zealand's productivity growth over recent decades has been relatively poor. Since 1970, our GDP per hour worked has declined significantly relative to the average across the high-income countries in the Organisation for Economic Co-operation and Development (OECD): it fell from about equal to the OECD average to about 30 per cent under it.



Our productivity performance is also considerably lower than the OECD average, the G-7 and that of the small advanced economies we compare ourselves with. Figure 1 shows New Zealand's slower rate of labour productivity growth since 1970.

In other words, New Zealanders work for longer hours and produce less per hour worked than those in most OECD countries.



Our recent economic growth has been driven primarily by increased labour force participation rather than labour productivity growth.

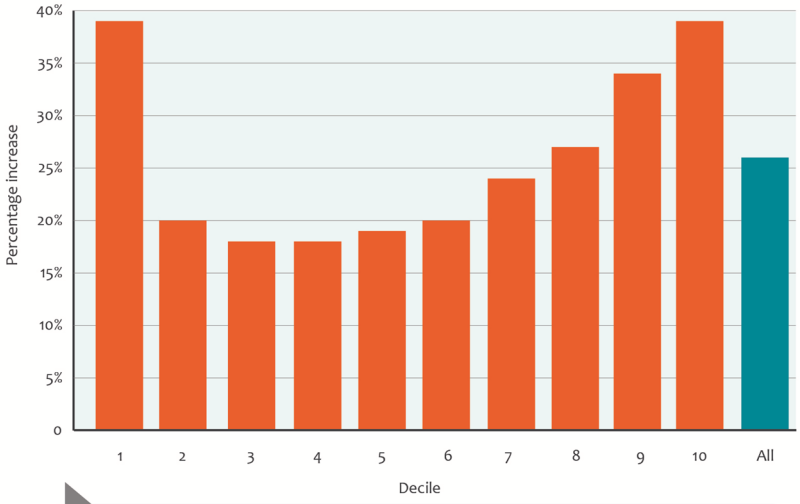
Wage growth in New Zealand

Real wages in New Zealand have increased since the 1970s, but not as fast as labour productivity. Figure 2 shows this divergence between labour productivity

and wage growth over the last four decades.

Over the last two decades, wages in New Zealand have risen more slowly for employees in deciles 2 to 6 (50 per cent of employees) than for those in higher deciles. Figure 3 shows real increases in hourly wage for employees over the last two decades, broken down by decile.

Real increase in average hourly wage in each decile for employees from 1998 to 2015



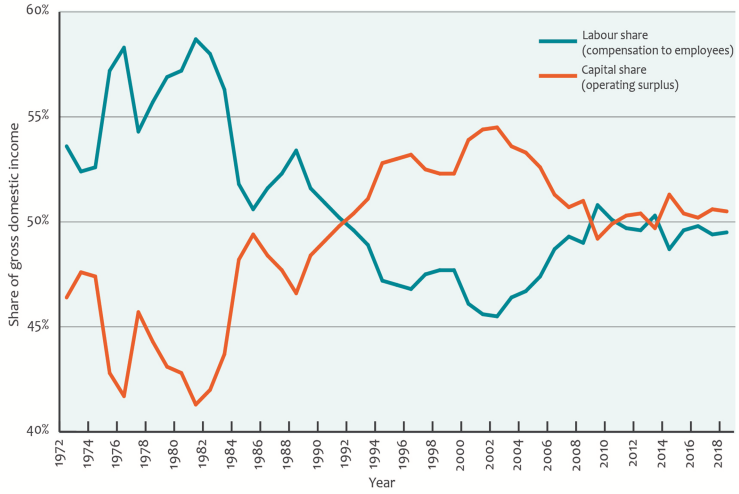
To calculate the real increase in average hourly wage, the 1998 figures have been adjusted to be in terms of June 2015 dollars.

The exception is decile 1, where rising wages have been heavily influenced by increases to the minimum wage. This has 'hollowed out' the wage scale and increased wage inequality among the majority of employees.

Incomes and inequality in New Zealand

Income inequality has been rising in many developed countries in recent decades. According to the OECD, the gap between rich and poor is at its highest for 30 years[1]. As the OECD points out, the drivers of these growing income gaps are complex and reflect both economic and social changes. The evidence increasingly suggests high inequality has a negative and statistically significant impact on a country's medium-term economic growth.

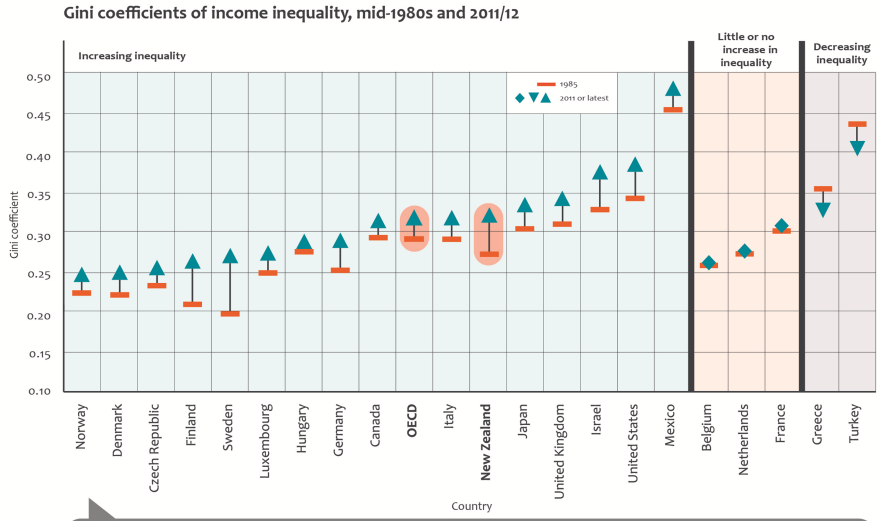
Labour and capital share of gross domestic income in New Zealand (1972-2018)



According to the OECD, New Zealand has a slightly higher degree of income inequality than the OECD average. While most OECD countries are experiencing increases in income inequality, New Zealand saw one of the largest increases in income inequality during the 1980s and 1990s, with our rate of increase in inequality exceeded only by Sweden and Finland. Figure 4 shows the change in income

[1] OECD, "Focus on Inequality and Growth", December 2014, http://www.oecd.org/els/soc/Focus-Inequality-and-Growth-2014.pdf

inequality across selected OECD countries between the 1980s and 2011/12, measured by the Gini coefficient[2].

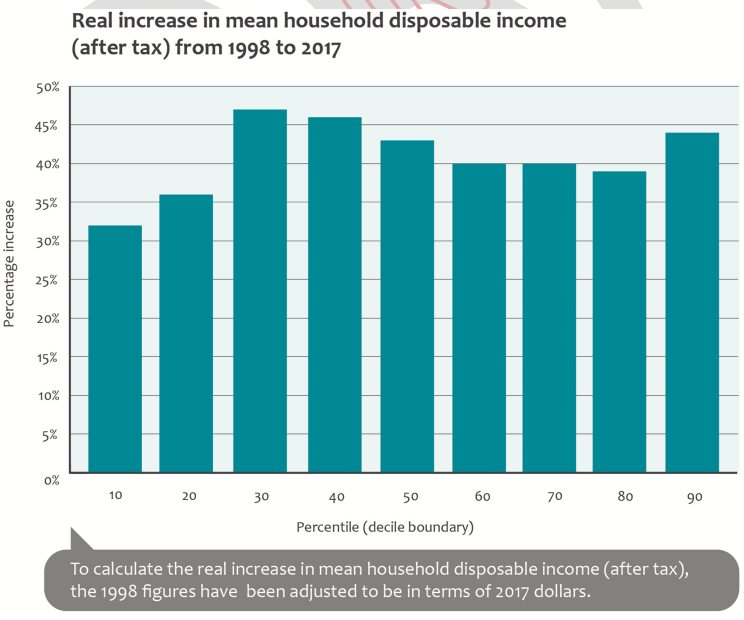


Despite wages rising in absolute terms in New Zealand, workers' share of the national income has fallen since the 1970s, with a particularly large fall in the 1980s (see Figure 5). This reflects wages growing slower than returns to capital, rather than wages falling.

There was some recovery in the 2000s, though the labour income share in New Zealand has fallen again since 2009 and is still well below levels that were seen in the 1970s.

A similar trend of a falling share of income going to workers has also been observed in many other countries worldwide, in both developed and emerging economies, although New Zealand remains well below the OECD median.

The reasons for their divergence are not entirely clear and are a matter of ongoing and wide debate. The Group observed that since 2004, the change in New Zealand's labour–capital income share has been flatter than in other countries which have continued to see a fall in the labour share of national income.



Like many countries, our income support system in New Zealand helps to even out income increases across households through transfers from the state (taxes and benefits). Many low income earners are in high income households – for example, teenagers or students.

Figure 6 shows how the 'hollowing out' of wages changes when looked at as

[2] The Gini coefficient is a broad measure of inequality which ranges from zero, where everybody has identical incomes, to 1 where all income goes to only one person.

part of overall household income.

The Group also looked at increases in the cost of living (inflation) relative to wage growth in New Zealand.

In plain terms, this examines whether wages are keeping up with, or exceeding, the increasing cost of living and translating into higher living standards. Wages have been rising in recent years, and for most of the last decade, wage increases have exceeded inflation, but both have been increasing modestly.

We know that incomes after housing costs are more unequal in New Zealand than before housing costs are considered, and this gap has widened since the 1980s (see Figure 7). The graph shows that before housing costs, household incomes in 2017 at the 90th percentile were about four times the level of household incomes at the 10th percentile. After housing costs, this this ratio is closer to six times.

Low income earners

The Group looked at the distribution of wages within sectors and occupations across New Zealand, to identify where there was a high proportion of low-wage and low-income earners.

We examined the demographics of those working on or near the minimum wage – under $20 per hour. Figure 8 shows the different demographic groups which are either over or under represented in this low income category compared to those same groups' proportion of total wage earners in our economy.

The tables in Annex 2 set out the latest data available for workers in all occupations in New Zealand, ranked by highest proportion of those paid under $20 per hour.

Employees aged 16 to 64 earning less than $20.00 per hour (June 2018)		
Demographic	**% of minimum wage earners**	**% of total wage earners**
Aged 16 – 24	38.70%	16.10%
Women	56.60%	49.00%
European/Pākehā	52.10%	62.80%
Māori	18.50%	13.30%
Pasifika	9.20%	6.20%
Working part-time	36.90%	18.10%
Working while studying	18.10%	12.00%
Total number of employees aged 16 to 64	493,479	2,068,500

BusinessNZ pointed out that this figure is nominal, as it equates to the government's stated goal of a minimum wage of $20 per hour by 2021. It therefore does not set out relative earnings in today's terms.

In addition to transfers through taxation and benefits, there are a number of interventions the Government makes to address wage and income inequality. This includes statutory mechanisms to provide basic worker protections (such as the minimum wage and conditions), as well as other interventions targeting particular problems. For example, where there is systemic undervaluation of wages based on discrimination, this is addressed through the Equal Pay Act.

The Group noted the Equal Pay Act is being amended to introduce a pre-determination bargaining framework for addressing pay equity issues, which bears some similarities to FPAs. This is still being developed, but it could include referral to a determination process if bargaining fails to reach agreement. Other changes are being considered or made to minimum standards, and the tax and benefit systems.

The Group noted as the Government develops a FPA system, it will need to carefully consider the interface between FPAs and these other developments.

3.2 Skills and productivity in New Zealand

New Zealand has a relatively high mismatch between the skills in our workforce and the jobs people do, compared to the OECD average.[3] This mismatch may affect productivity, as it may make it difficult for firms to successfully adopt new ideas or technology. Addressing this skills mismatch will be a major challenge for New Zealand's skills system as our labour market – and the skills in demand – change in the future.[4]

We noted the range of initiatives underway in New Zealand to match employers with workers with relevant skills, and to support in-work upskilling. We noted the Vocational Education and Training system is under review and suggest this review should take into consideration the fact one barrier to higher participation is the opportunity cost faced by workers and employers in prioritising training, especially where a significant time commitment is required, or where the benefits are longer term, or spread across the industry.

Training and skills provisions should be encouraged as a key feature of collective agreements

The Group saw evidence that some collective agreements (including MECAs) in New Zealand explicitly provide for training pathways and corresponding wage increases, and similarly in other countries such as Singapore.

We considered this increasing reference to skills and training pathways should be encouraged, including through FPAs.

[3] Ministry of Education and Ministry of Business, Innovation and Employment, "Skills at Work: Survey of Adult Skills (PIACC)", November 2016, https://www.educationcounts.govt.nz/__data/assets/pdf_file/0007/173572/Skills-at-Work.pdf
[4] Paul Conway, "Can the Kiwi Fly? Achieving Productivity Lift-off in New Zealand", *International Productivity Monitor* (34), Spring 2018

Case study: Public hospital service workers MECA

In November 2018 a new public hospital service workers MECA was agreed between the E tū union and 20 District Health Boards around New Zealand. The MECA sets the conditions for around 3,500 workers, including cleaners, laundry workers, orderlies, catering workers and security staff.

The deal is structured to encourage workers to work towards level 2 and level 3 qualifications, which will be rewarded with higher hourly rates: by the end of the MECA term, workers with a Level 3 qualification will earn $25.58 an hour – an increase of 32.6 percent above current rates. Workers will be supported by their employers and given access to resources for training, and will be able to do assessments and some book work on the job.

3.3 The role of collective bargaining in lifting incomes and economic growth

At the outset we note a country's employment relations system and choice of collective bargaining model are not the only factors affecting its economic performance.

In general, international research has tended to find a strong link between productivity and both wage growth and wage levels. However, while productivity growth appears to be necessary for wage growth, it is not in itself sufficient. There is also a body of research in labour economics, however, that supports the 'efficiency wage' hypothesis. These researchers argue higher wages can increase the productivity of workers (and profits of the firm) through various means, such as reducing costs associated with turnover or providing employees with incentives to work.

The OECD has warned against assuming the form of collective bargaining systems matches perfectly to economic and social outcomes. Outcomes depend on other important factors such as the wider social and economic model, including tax and welfare systems, and the quality and sophistication of social dialogue.

Making changes to a collective bargaining system without considering this wider context could have unintended consequences.

The relationship between collective bargaining and wage growth

One of the objectives of collective bargaining is typically to balance out the uneven bargaining power between parties. The OECD has found collective bargaining is associated with lower levels of inequality, for example through limiting wage increases for mid- and high-earners to allow for low-earners' incomes to rise.[5] Across the OECD, workers with an enterprise level collective agreement tend to be paid more than those without a collective agreement.

Typically most regulatory frameworks at national level rule out the possibility of enterprise- level negotiations offering worse terms than a sector level collective agreement or national statutory minimum standards. This 'favourability principle' means an individual or enterprise level collective

[5] OECD, "Employment Outlook 2018", 2018, https://read.oecd-ilibrary.org/employment/oecd-employment-outlook-2018_empl_outlook-2018-en#page1, page 83

agreement can only *raise* wages relative to sector level collective agreements or minimum standards.

The difference in wages found by the OECD may also signal higher productivity in companies with enterprise level bargaining than those in a context with a high degree of coverage of centralised bargaining. Where a firm is not constrained by centralised bargaining, the firm's overall performance forms the context for pay increases, and a highly productive firm could choose to pay its workers more, or to pay its highly-productive workers more. A firm offering its workers greater rewards for productivity could induce higher engagement and effort and therefore productivity among its workers.

The relationship between collective bargaining and productivity

Research globally on collective bargaining and productivity growth similarly suggests the relationship between these factors is not clear cut, and is highly dependent on wider labour market systems, and the social and economic models of individual countries.

The Group looked to other countries' experiences in introducing productivity related measures to their collective bargaining systems, in particular recent changes in Singapore to introduce a Progressive Wage Model. We observed a positive collective bargaining experience would have the potential to increase aggregate productivity by setting higher wage floors and better conditions; forcing unproductive firms to exit the market; and lifting overall productivity of the sector.

The evidence in the research literature suggests wages tend to be less aligned with labour productivity in countries where collective bargaining institutions have a more important role. This research tends to be based on sector level data and examination of the relationship between wages and productivity across sectors.

We note raising wage floors may make capital investments relatively more attractive for firms; that is, it may speed up employer decisions to replace some jobs with automation.

3.4 The role of collective bargaining in an inclusive and flexible labour market

The Group looked at the role of collective bargaining more generally in labour markets internationally. Collective bargaining remains the predominant model for labour negotiations world-wide. It enables employers and employees to enter into a collective dialogue to negotiate the terms for their employment relationship in the form of a collective agreement.

The ILO names collective bargaining as a fundamental right endorsed by all Member States in the ILO Constitution[6] and reaffirmed this in 1998 in the ILO Declaration on Fundamental Principles and Rights at Work. The ILO recognises the role of collective bargaining in improving inclusivity, equalising wage distribution, and stabilising labour relations.[7]

[6] New Zealand was a founding member of the ILO, has signed the 1998 Declaration, and is bound by the primary ILO Convention on collective bargaining No 98 (Right to Organise and Collective Bargaining 1949).
[7] ILO "Collective Bargaining: A Policy Guide", December 2015, https://www.ilo.org/travail/whatwedo/instructionmaterials/WCMS_425004/lang--en/index.htm

New Zealand is bound by ILO Convention No 98 (Right to Organise and Collective Bargaining) to "encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."

As a group we recognised there is value in the process of collective bargaining as a participatory mechanism to provide collective voices for both employers and employees. It can encourage participation and engagement by employers and employees in actively setting the terms of their relationship. In contrast to minimum standards set in legislation at the national level, which apply across the entire workforce uniformly and are imposed by a third party (the Government), collective bargaining may enable the parties who know their particular circumstances best to set the terms that work for them.

We noted shared dialogue between employees and employers across a sector or occupation leads to wider benefits and other forms of collaboration between firms or workers. This is possible when bargaining involves groups of employers or unions with a common interest or shared problem to solve, although we recognise this will not always be the case.[8]

Parties may also save in transaction costs by working together on collective bargaining. They can access the expertise of other players in their sector and other scale benefits (for example, arranging for investment in skills or technology for the benefit of the sector).

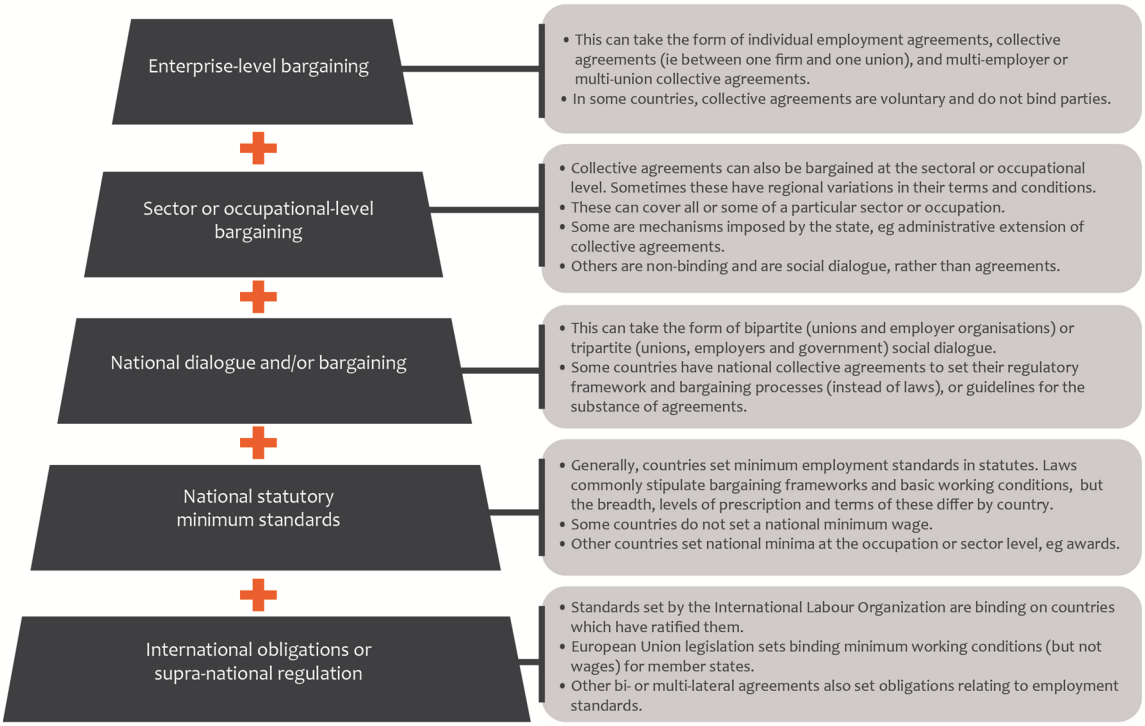
In countries where union density is low, collective bargaining tends to be concentrated in larger employers, whether public or private sector. Small businesses can therefore find it difficult to access the potential benefits of collective bargaining in an enterprise level collective bargaining system, although that may also help them avoid unnecessary costs.

3.5 The relationship between minimum standards and collective bargaining

Despite having a century-old international labour standards framework, which provides common principles and rules binding states at a high level, the nature and extent of state encouragement for collective bargaining differs significantly between countries. We found the diagram in Figure 9 useful to describe the basic model of how employment relations systems are structured globally.

[8] In New Zealand, this is known as Multi-Enterprise Collective Agreement (MECA) and Multi-Union Collective Agreement (MUCA) bargaining under the Employment Relations Act.

The general model for employment relationships globally



The sharpest delineation between different state models for collective bargaining systems is whether a country has chosen to rely on collective bargaining to provide basic floors for their employment standards (such as a minimum wage, annual leave, redundancy), or whether they rely on statutory minimum employment standards set at a national level which are then supplemented by more favourable terms offered through collective bargaining at a sector- or enterprise-level.

This choice of whether to set a country's minimum employment standards primarily through legislation or collective agreement, along with a country's legal and social traditions, result in the markedly different detailed design of countries' collective bargaining systems. This manifests in the variations in the levels at which collective bargaining takes place and in the mechanisms for determining representativeness, dispute resolution and enforcement. There is no 'one size fits all' model that can be picked up and deployed in another country without significant adaptation for local circumstances.

Variations in their employment relations and standards systems may mean some other countries:

- Have no statutory minimum wage, and often only a basic framework for minimum conditions, set in law. These countries use collective bargaining to provide the same minimum floors we presently regulate for at national level.
- Set only a framework enabling collective bargaining in the law, and allows the representative organisations for employers and employees to agree a national level collective agreement on the bargaining process rules we have set in law.

- Do not provide for collective bargaining to be binding, meaning collective agreements are voluntary and cannot be enforced in court as they can be in New Zealand and most countries.
- Provide for multiple levels of collective bargaining, with a hierarchy of agreements at national, sectoral and enterprise levels – where we only provide for enterprise level.

In New Zealand, we have an employment relations and standards system which is based on setting minimum standards for employment in statute (including a statutory minimum wage, and rights to flexible working, and leave) and a legal framework that sets the rules for collective bargaining. Agreements reached through collective bargaining may equal or add to the statutory floor, not detract from it. There is nothing in these rules that limits collective bargaining to the enterprise, multi-employer or multi-union levels. The rules allow for voluntary bargaining at a sectoral or occupational level.

Some other countries rely more heavily on collective bargaining to set these minimum standards, mainly in Europe. Under the Award system which preceded New Zealand's current employment relations and standards system, we too relied mostly on collective bargaining and awards to set minimum standards.

3.6 International good practice in designing collective bargaining systems

We looked at how collective bargaining systems are designed internationally, and what different models we may be able to learn from.

Overall the OECD has concluded the main trade-off in designing collective bargaining systems is between inclusiveness and flexibility. In other words, collective bargaining can generate benefits for employment and inclusiveness (wage inequality is lower and employment for vulnerable groups is higher) but can also have drawbacks in reducing the flexibility for firms to adjust wages and conditions when their situation requires it.

The OECD recommends countries consider adopting a model with sector level bargaining, combined with the flexibility to undertake firm-level bargaining to tailor higher-level agreements to each workplace's particular circumstances.

The OECD has found this model delivers good employment performance, better productivity outcomes and higher wages for covered workers compared to fully decentralised systems.[9]

> "Co-ordinated collective bargaining systems are associated with higher employment, lower unemployment, a better integration of vulnerable groups and less wage inequality than fully decentralised systems... these systems help strengthen the resilience of the economy against business-cycle downturns."
>
> -- OECD

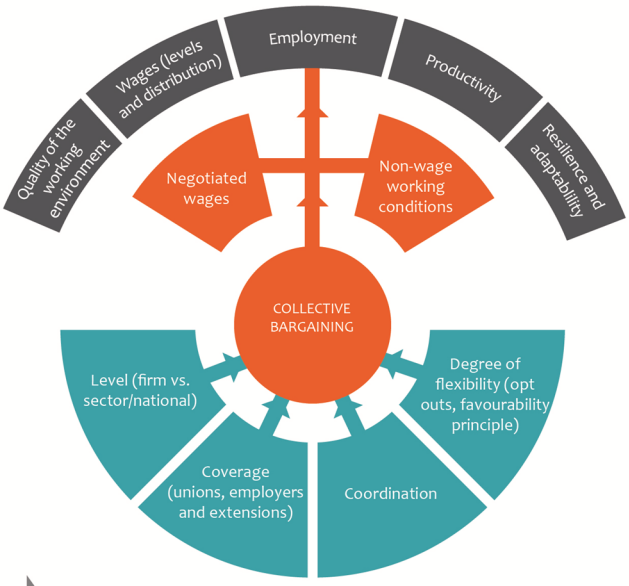
Key features of a bargaining system

[9] OECD, "The role of collective bargaining systems for good labour market performance", *OECD Employment Outlook 2018*, OECD, https://doi.org/10.1787/empl_outlook-2018-7-en.

The OECD characterises collective bargaining systems as set out in Figure 10, including the following key features:

- degree of coverage,
- level of bargaining,
- degree of flexibility, and
- coordination.

OECD description of collective bargaining characteristics



"Firm" in the above diagram refers to what we consider enterprise-level bargaining in New Zealand. The term "opt outs" refers to what we consider exemptions.

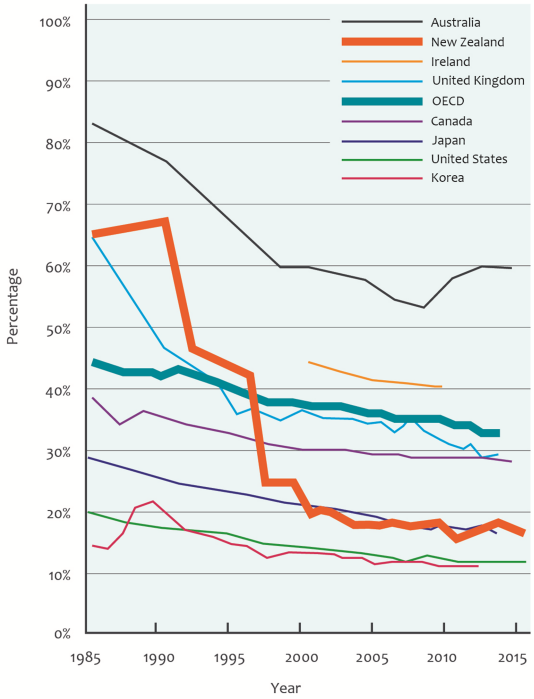
We have looked at the OECD's four characterisations, and how New Zealand compares to other OECD countries on each feature.

Degree of coverage

The degree of coverage refers to the proportion of employees who are covered by a collective agreement. This should not be confused with the proportion of employees who are members of a union. Wide collective agreement coverage can have a more sizeable macroeconomic effect—positive or negative—on employment, wages and other outcomes of interest than agreements confined to a few firms.

The share of employees across the OECD covered by collective agreements has declined significantly over the past 25 years. On average, collective bargaining coverage shrank in OECD countries from 45 per cent in 1985 to 33 per cent in 2013. As of 2016, New Zealand's collective bargaining coverage is 15.9 per cent. Figure 11 shows the most recent data from the OECD's Employment Outlook, showing the overall trend over the last three decades of decline in the percentage of workers covered by collective agreements in countries the OECD considers similar to New Zealand (these are English-speaking or have predominantly enterprise level collective bargaining).

Percentage of workers covered by collective agreements



The evidence we saw from the OECD suggests collective bargaining coverage tends to be high and stable in countries where multi-employer agreements (either sectoral or national) are the norm – even where union density is quite low – and where employer organisations are willing to negotiate.

Some countries also provide for the extension of coverage of collective agreements beyond the initial signatories. This explains why collective bargaining coverage is higher than union density across the OECD, where sector level extensions are commonly used in two-thirds of countries.

In countries where collective agreements are generally at the enterprise level, coverage tends to match union density. However, it should be noted not all union members are covered by collective agreements.

Data on New Zealand union membership and collective bargaining coverage suggests a notable minority (approximately ten per cent) of those who claim to be covered by a collective agreement are not union members.[10] Many collective agreements in New Zealand permit employers to offer the same terms (by agreement between the union and employer) to all or parts of the employer's non-union workforce. This is known as 'passing on' of terms. One thing which affects this is the negotiation of bargaining fees for non-union workers, although these clauses are relatively rare.[11]

Across the OECD, about 17 per cent of employees are members of a union. This rate varies considerably across countries. Union membership density has been declining steadily in most OECD countries over the last three decades. In 2015, New Zealand's equivalent rate was 17.9 per cent. It should be noted union density in New Zealand declined sharply from around 46 per cent to 21 per cent in the four years following enactment of the Employment Contracts Act 1991, and has declined gradually since that time. Data on employer organisation density (that is, the percentage of firms that belong to employer organisations) is patchy, and comparisons can be difficult to draw between countries given the absence of common metrics and reliable data. Across those OECD countries that do collect this data, employer organisation density is 51 per cent on average. Although it varies considerably across countries, this figure has been quite stable in recent decades. There is no national level statistical information gathered on New Zealand's employer organisation density.

Level of bargaining

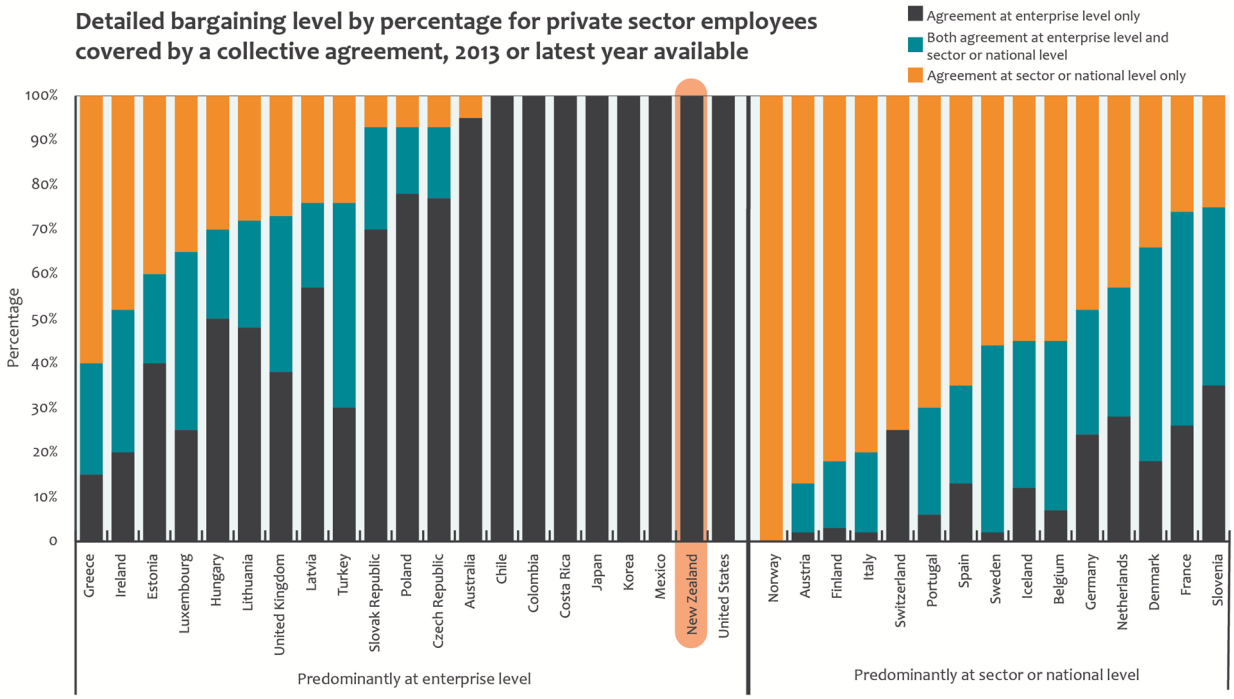
The level of bargaining refers to whether parties negotiate at the enterprise, sector or national level. Centralised bargaining systems are ones in which bargaining tends to happen at the national level, although may be supplemented by enterprise level agreements. Highly decentralised systems are ones in which collective bargaining tends to be primarily at the enterprise level.

New Zealand sits at the far end of the decentralised spectrum. Although our current system permits voluntary sector bargaining, in practice most bargaining takes place at the enterprise level, although there is some bargaining among groups of employers within a sector (through a MECA).

[10] Statistics New Zealand, "Labour market statistics: March 2018 quarter (Household labour force survey)", May 2018, https://www.stats.govt.nz/information-releases/labour-market-statistics-march-2018-quarter

[11] Centre for Labour, Employment and Work, "Employment Agreements: Bargaining Trends & Employment Law Update 2017/2018", July 2018, pages 27-28

According to the OECD, centralised bargaining systems can be expected to have less wage inequality relative to systems with mostly enterprise level agreements. Centralised systems tend to experience smaller wage differences, within firms, across firms, or even across sectors. Enterprise level agreements, by contrast, allow more attention to be paid to enterprise-specific conditions and individual performance, and allow for more variation in wages. Figure 12 shows where different OECD countries sit on this spectrum. That graph groups countries by those which have predominantly enterprise level agreements, both enterprise and higher (sector or national) level agreements, and those countries which predominantly have only higher level agreements.



Degree of flexibility

In systems with sector or national level collective agreements, the degree of flexibility refers to the extent to which employers can modify or depart from those higher-level agreements through an enterprise level agreement or exemptions.

The possibility of exemptions can increase the flexibility of a system and allow for a stronger link between wages and firm performance, for example in economic downturns. On the upside, this may bolster employment and productivity. On the downside, exemptions can increase wage inequality.

Like most countries, New Zealand does not allow collective agreements to offer less favourable terms than statutory minimum standards. Collective agreements, including MECAs, are binding on the parties who agreed them, but this would not be characterised as a limitation on flexibility as each party to the agreement has chosen to be bound by it.

Coordination

Coordination refers to the degree to which minor players deliberately follow what major players decide, and to which common targets (e.g. wage levels) are pursued through bargaining. Coordination can happen between bargaining units at different levels, for example when an enterprise level agreement follows guidelines fixed by peak-level organisations. Or it can happen at the same level, for example when some sectors follow terms set in another sector.

According to the OECD's definition of coordination, and relative to other countries, our collective bargaining system in New Zealand does not feature coordination between bargaining units. This is because bargaining is typically at the enterprise level, and the Government does not exert influence beyond establishing the bargaining framework and minimum standards.

However, the Group noted we have unions that represent workers in several sectors or occupations, and this could allow similar bargaining objectives to be pursued in collective bargaining across various sectors or occupations.

3.7 Other countries' approaches to sectoral or occupational bargaining

New Zealand currently provides a voluntary mechanism for employers and employees to bargain at a sector level, through MECAs, but this mechanism is not used widely, particularly in the private sector.

We noted any Fair Pay Agreement system design will need to be bespoke to suit New Zealand's own social and economic context, but we looked to other countries to understand how they approached the design and concept of sector level bargaining.

There are four main models of sector level bargaining we looked at:

- Australian Modern Awards system
- The Nordic model
- The Continental European model
- Singapore's progressive wage model.

These models are discussed more fully below. It is worth noting the comparator countries have different societal factors that influence how they approach the question of collective bargaining. For example there is a high level of government intervention in the Singaporean Progressive Wage Model compared with a high level of social dialogue and cooperation in Nordic countries such as Denmark.

Australia – Modern Awards system

In 2009, Australia introduced a system of Modern Awards: industry-wide regulations that provide a fair and relevant minimum safety net of terms and conditions such as pay, hours of work and breaks, on top of National Employment Standards.

Awards are not bargained for. They are determined by the Fair Work Commission following submissions from unions and employer representative groups. The Fair Work Commission must review all Modern Awards every four years.

A Modern Award does not apply to an employee when an enterprise level collective agreement applies to them. If the enterprise agreement ceases to exist, the appropriate Modern Award will usually apply again. Enterprise agreements cannot provide entitlements that are less than those provided by the relevant Modern Award and must meet a 'Better Off Overall Test' as determined by the Fair Work Commission.[12]

Broadly speaking, the statutory minima in Australia – the National Employment Standards - coupled with Modern Awards provide the equivalent function of worker protection to New Zealand's existing national statutory minimum employment standards. However, a key difference is that in Australia the Modern Awards system provides the ability for the Government to impose differentiated minimum standards by occupation.

Collective bargaining in Australia is predominantly at enterprise level. Sector level bargaining does not exist in Australia in the form envisaged by the Fair Pay Agreement system. Australian law provides for multi-enterprise collective agreements in limited circumstances. One of these circumstances is when the Fair Work Commission makes a Low-Paid Authorisation to "encourage bargaining for and making an enterprise agreement for low-paid employees who have not historically had the benefits of collective bargaining with their employers and assisting those parties through multi enterprise bargaining to identify improvements in productivity and service delivery and which also takes account of the needs of individual enterprises."[13] The private security sector appears to be one of the more frequent users of the low-paid provisions.

The Nordic model

Under the Nordic model of collective bargaining, national legislation only provides a broad legal framework for collective bargaining. The rules are set at national level through 'basic agreements' between the employee and employer representative organisations. Sectoral collective agreements then define the broad framework for terms, but often leave significant scope for further bargaining at the enterprise level.

None of the Nordic countries have a statutory minimum wage. Collective agreements therefore fulfil the function of setting minimum floors for wages and conditions in each sector or occupation, rather than these being set in statute. Denmark and Sweden use collective agreements as their only mechanism for setting minimum wages, meaning there is no floor for wages for workers outside of collective agreements.

Due to the high level of union density in these countries, it is generally unusual to extend sector level collective agreements to all employees in an industry but agreements can be extended through 'application agreements'. A union may enter into application agreements with employers who are not signatories to a collective agreement, with the effect of making that collective agreement also apply to a non-signatory company. Non-union employees can also enter into application agreements with unions.

For example, in Sweden, there is no bargaining extension mechanism in statute or otherwise. A voluntary approach to extension is also made easier due to high union membership. Finland,

[12] Fair Work Commission, "Awards and Agreements", September 2018, https://www.fwc.gov.au/awards-and-agreements/agreements
[13] Fair Work Act 2009 (Australia)

Iceland and Norway however have all started to use extension mechanisms to cover all employees at industry level, to provide those minimum floors.[14]

These countries tend to have historically high levels of organisation on both the employer and employee sides, with continuing high union density and a strong social dialogue and cooperation around collective bargaining and in their wider economic model.

Countries that generally follow this model are Iceland, Denmark, Germany, the Netherlands, Norway and Sweden.

The Continental Europe model

Under the Continental model, the legal framework provides statutory minimum standards for wages and conditions, along with the rules for collective bargaining.

National or sectoral collective agreements set terms and conditions for employees but allow for improvements on these at enterprise level ('the favourability principle'), or opt outs from the sector agreement (although these derogations are usually limited).

Under this model, collective bargaining is conducted at three levels - national, industry and enterprise:

- At national level, negotiations cover a much wider range of topics than normal pay and conditions issues, including job creation measures, training and childcare provision. Pay rates are normally dealt with at sector and enterprise level, but the framework for pay increases could be set at national level.
- At sector level, negotiations are carried on by unions and employers' organisations often meeting in 'joint committees' (binding on all employers in the sectors or occupations they cover).
- At enterprise level, the union delegations together with the local union organisations negotiate with individual employers.

Collective bargaining is typically hierarchical and structured such that an agreement concluded at one level cannot be less favourable than agreements reached at a broader level. Sector agreements are therefore subject to minimum terms set out in national agreements. Enterprise level agreements can be more favourable than industry agreements. There is, however, large variation among sectors in terms of the relative importance of sector level and enterprise level agreements.

Extension mechanisms are more widely used under this model of collective bargaining. Criteria for extension can be a public interest test or often a threshold of coverage. For example in Latvia if the organisations concluding an agreement employ over 50 per cent of the employees or generates over 60 per cent of the turnover in a sector, a general agreement is binding for all employers of the relevant sector and applies to all of their employees. In Belgium or France, however, extensions are issued by Royal Decree or the Labour Ministry respectively upon a

[14] ILO, "Minimum wages in Nordic countries", https://www.ilo.org/global/topics/wages/minimum-wages/setting-machinery/WCMS_460934/lang--en/index.htm

formal request from the employer and employee representative organisations that concluded the agreement. This can result in relatively high collective bargaining coverage, even if union density is not high. For example, Belgium and France have collective bargaining coverage over 90 per cent, despite union density rates of 55 per cent (Belgium) and 11 per cent (France).

Countries that generally follow this model of collective bargaining are Belgium, France, Italy, Portugal, Slovenia, Spain and Switzerland.

Singapore – the Progressive Wage Model

Singapore has similar levels of collective bargaining and union density to New Zealand. The legal framework does not provide for a statutory minimum wage.

Singapore undertakes sector level bargaining in specific sectors in the form of the Progressive Wage Model (PWM) introduced in 2015. The PWM is a productivity-based wage progression pathway that helps to increase wages of workers through upgrading skills and improving productivity. It is mandatory for workers in the cleaning, security and landscape sectors which are mostly outsourced services. The PWM benefits workers by mapping out a clear career pathway for their wages to rise along with training and improvements in productivity and standards.

The PWM also offers an incentive to employers, for example, in order to get a licence a cleaning company must implement the PWM. At the same time, higher productivity improves business profits for employers.

The PWM is mandatory for Singaporeans and Singapore permanent residents in the cleaning, security and landscape sectors. It is not mandatory for foreign workers but employers are encouraged to use these principles of progressive wage for foreign cleaners, landscape workers and security officers.

3.8 New Zealand's employment relations and employment standards regulatory system

Any Fair Pay Agreements system will need to complement and support the existing parts of New Zealand's regulatory system for employment relationships and standards. Therefore, it is worth setting out our understanding of that system.

The Employment Relations and Employment Standards (ERES) regulatory system aims to promote productive and mutually beneficial employment relationships. It incorporates mechanisms, including a framework for bargaining, that are intended to:

- support and foster benefits to society that are associated with work, labour market flexibility, and efficient markets
- enable employees and employers to enter and leave employment relationships and to agree terms and conditions to apply in their relationships, and
- provide a means to address market failures such as inherent power imbalances and information asymmetries which can lead to exploitation of workers.

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

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

Employment relationships are regulated for a number of reasons:

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

The system therefore provides:

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

The system can be a key driver for innovation and growth in our labour market and wider economy

The effective use of knowledge, skills and human capital in firms is a key driver of innovation and growth. This can increase wages, lifts firms' competitiveness and profitability, and lead to better social and economic outcomes.

The Employment Relations and Employment Standards (ERES) system sets the boundaries for the operation of a market for labour hire. The operation of this market is not simply about having an employment agreement for the exchange of goods and services; it is based on human relationships where mutual good faith, confidence and fair dealing are important.

The ERES system is also important for New Zealanders, as employment is a primary source of income that is used to purchase goods and services, and is a source of investment and insurance. There is an emphasis on these relationships being conducted in good faith, and also on effective dispute resolution.

Institutions support the functioning of this system

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

- Mediation Services
- the Employment Relations Authority
- the Employment Court
- Labour Inspectors
- the Registrar of Unions

3.9 The current state of collective bargaining in New Zealand and trends over time

The legal framework for collective bargaining in New Zealand

The Employment Relations Act 2000 (ER Act) sets out the rules for engaging and, at least in its stated objectives, promotes collective bargaining in New Zealand. As in individual employment relations, the duty of good faith underpins collective bargaining in New Zealand.

The ER Act contains mechanisms for multi-employer collective bargaining but no specific mechanisms for industry or occupation-wide collective bargaining.

There are also rules around 'passing on' of collectively bargained terms and conditions to non-union members. While employers can't automatically pass on terms which have been collectively bargained for, around 11 per cent of collective agreements extend coverage to all employees of the employers. Often this is done through non-union members paying a bargaining fee, or union members voting to allow terms to be passed on. Informally, many employers 'pass on' many collective terms through 'mirror' individual employment agreements.

A collective employment agreement expires on the earlier of its stated expiry date or 3 years after it takes effect, with some exceptions. Over time, collective agreements have become longer in duration. One reason for this may be the transaction costs for both sides of collective bargaining incentivising longer duration for efficiency reasons. Another explanation may be that inflation has been low and stable for an increasing length of time.

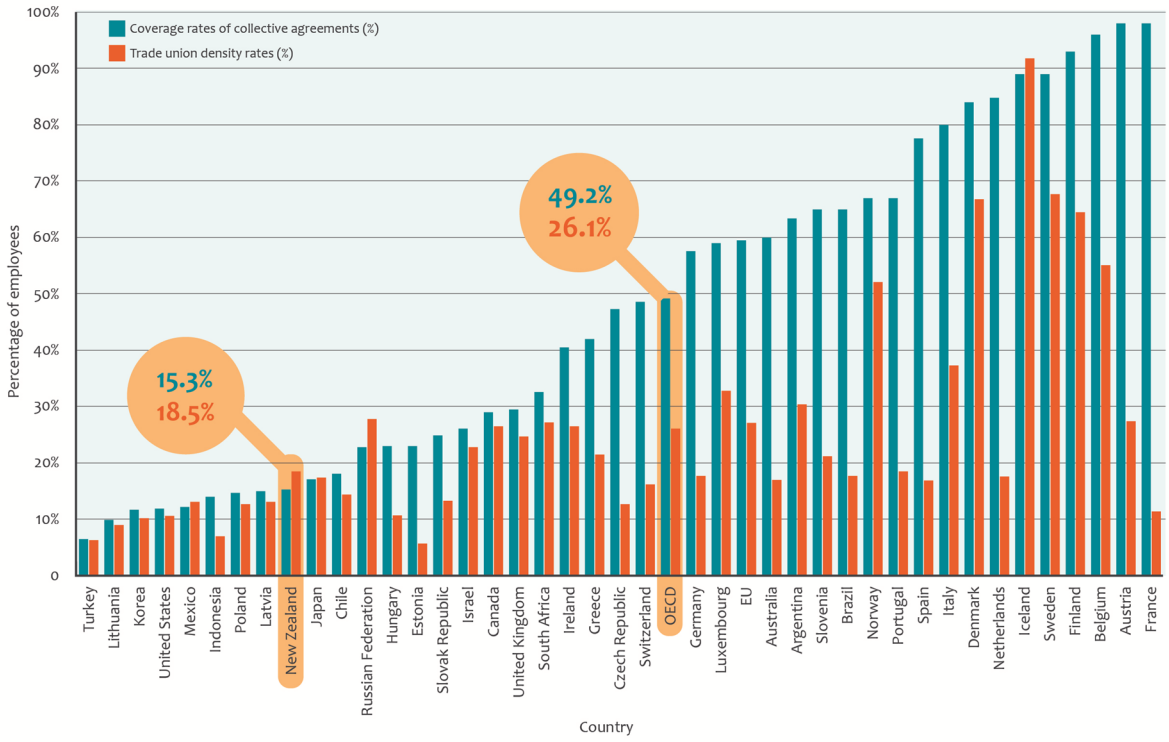
Data on collective bargaining in New Zealand

Over the last few decades, changes to our employment relations and standards system have resulted in a decrease in coverage. It should be noted collective bargaining coverage varies considerably between countries, and there has been a decline in collective bargaining coverage in most countries over that time.

New Zealand has low collective bargaining coverage compared with many OECD countries (see Figure 13). The Group observed that some countries with low union density also provide for the extension of coverage of collective agreements beyond the initial signatories. This explains why collective bargaining coverage is higher than union density across the OECD, where sector level

extensions are commonly used in two-thirds of countries.

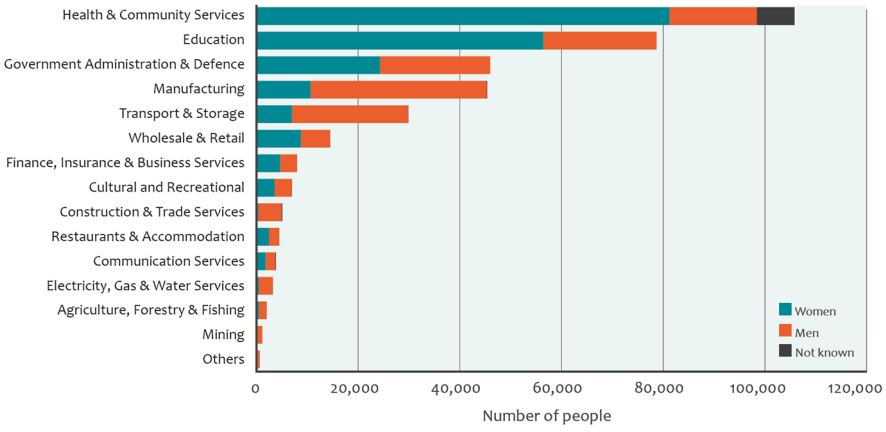
Coverage rates of collective bargaining agreements and trade union density rates (2013)



Collective agreements are more significant in the public sector in New Zealand while private sector coverage is low, and is mainly concentrated in certain industries and large firms. The concentration of collective agreements in the public sector is consistent with many other OECD countries including Australia, the United Kingdom, United States and Canada.[15]

Union membership in New Zealand is voluntary. Membership and collective agreement coverage are around 17 per cent of all employees. It should be noted not all union members are covered by collective agreements. Union membership as a percentage of the workforce has declined from over 20 per cent in 2012 to 17.2 per cent in 2017 (a 6.2 per cent decline), although according to the Household Labour Force Survey, union membership numbers

Union membership in New Zealand by gender and industry (2017)

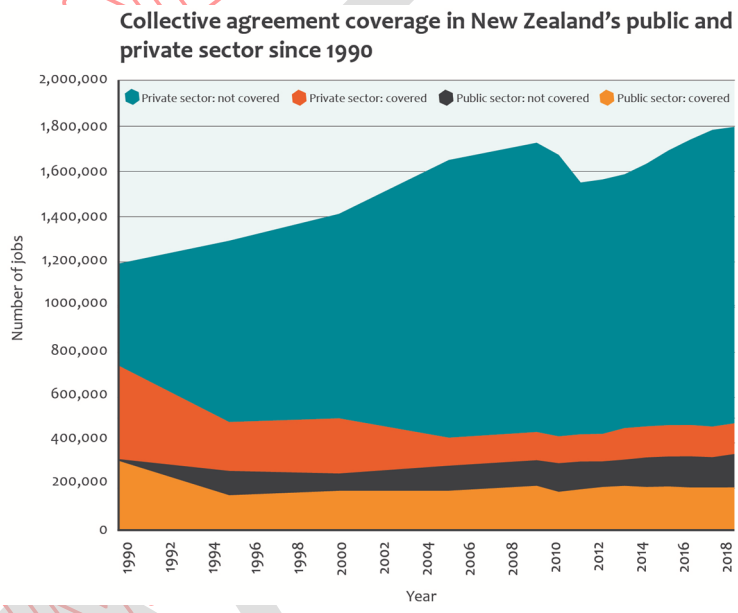


[15] Centre for Labour, Employment and Work, "Unions and Union Membership in New Zealand – report on 2016 Survey" https://www.victoria.ac.nz/__data/assets/pdf_file/0006/1235562/New-Zealand-Union-Membership-Survey-report-2016FINAL.pdf

may have risen slightly over the past year. The majority of union members are women and are concentrated in particular sectors (see Figure 14).

Collective bargaining coverage has decreased proportionately and is not keeping up with growth in the number of jobs in the economy. The Group considered this was in part due to the difficulties faced by workers in accessing the collective bargaining system. This means workers on small worksites being able to organise their fellow workers, finding a union that is willing to spend the extensive time to negotiate a collective agreement, and voluntarily concluding an agreement before the union members on the site have left their employment. We considered that the lack of coordination in small workplaces is another factor.

Currently in New Zealand there are 1600 collective agreements covering ten per cent of the private sector workforce. There are also 456 collective agreements covering 60 per cent of the public sector workforce. While the number of employees covered by a collective agreement is stable, the total labour force is growing as illustrated in Figure 15.



Coverage under MECAs is low outside the public sector, as is coverage of single employer collective agreements. MECAs are generally found in the health and education sectors (excluding tertiary education). In 2004 there were 37 private sector MECAs when the duty to conclude bargaining was added to the ER Act. In 2015 there were 37 private sector MECAs when the employer opt out was added. There are currently 72 MECAs, which is the same number as five years ago.

MECA bargaining may be frustrated by competitive instincts between firms, as well as a general disinclination to bargain with unions or collectively. These competitive pressures do not, for the most part, exist in the public sector, where bargaining is undertaken by centralised authorities (e.g. District Health Board Shared Services and the Ministry of Education) on behalf of what are technically separate employers (e.g. the independent District Health Boards and school Boards of Trustees).

In practice, MECAs only exist where the employer parties all agree prior to the commencement of bargaining - or early thereafter - to engage together in multi-employer collective bargaining. This was the case even before 2015, when the ER Act was amended to allow employers to opt out of MECA bargaining. Salary reviews have become more prevalent, mainly in the public sector. The increase in productivity or performance payments is associated with a movement to a range of pay rates (because employers have discretion to place employees within the range). However, output can be hard to measure, especially on an individual basis. In contrast to this, specific

mention of training and skill development in private sector collective agreements has decreased over time. These provisions do not tend to link pay to skills development. It appears employers move towards providing for training and skills development in company policy instead. This does not necessarily mean less training and skills development is taking place; in fact the Survey of Working Life indicates it is increasing.

It is rare to see wages being indexed to inflation in Collective Agreements. This may partly reflect parties' preference for certainty, to know exactly what wages will be. However, another factor may be that inflation has been low in the last decade and parties may feel reasonable certainty it will not exceed 3 per cent per annum, in line with the Reserve Bank's policy.

Case study: NZ Plastics Industry Multi-Employer Collective Agreement

This agreement dates from 1992, with many of the standard conditions from the previous system of awards (e.g. hours of work, overtime rates, shift payments) carrying over from then.

The Plastics MECA moved away from multi-classification pay rates and service pay to a skill-based pay system linked to qualifications very early in its development. Training was, and has been, a central part of the Plastics MECA pay scheme, although training was not mandatory for either the employers or the employees. One of the agreed objectives of the Plastics MECA is "the improvement of productivity, efficiency and competitiveness of the industry through a commitment to qualifications."

The Metals MECA has similar commitments to productivity and skill development although the minimum wage rates are generally based on work classifications. The negotiations for both MECAs normally take place with a key group of employers and the unions. The unions then go around other employers and get them to sign on as a 'subsequent party' to the MECA.

While the MECAs have been good for setting the base industry employment conditions, if an employer does not want to accept the industry standards created in the MECA, there is little the union can do to force the issue, especially in small enterprises. Even the subsequent industry parties have lists of conditions from the MECA that they opt out of.

3.10 Collective bargaining experiences in New Zealand

What makes for good bargaining process?

In our experience, a good bargaining process underpinned by a strong rules-based system that addresses the inherent inequality of bargaining power in employment relationships will lead to a good outcome. By good outcome we mean one both parties support, with real improvements over the status quo. The Group considers the elements of effective collective bargaining come down to three factors: attitude/commitment, skills and process.

The attitude or commitment of parties to collective bargaining is important. Good collective bargaining requires good faith and a genuine willingness to engage and negotiate. Collective agreements are forward-looking documents and, to reflect this, good collective bargaining involves a conversation about where both the business and workers are going in the next few years. Bargaining works best for employers when they can see it is transformational not transactional, i.e. it affects the whole business, not just higher wages. A good attitude when

approaching bargaining can also be self-reinforcing: bargaining allows for intense discussions about real issues, which ultimately adds value to the entire employment relationship.

Good bargaining also typically involves having skilled people in the room, and strategic leadership that takes a long-term perspective.

In terms of the process, it must be built around a strong rules-based process that addresses the inherent inequality of bargaining power in employment relationships. This includes employers not interfering in the choice of workers to join a union, respecting the workers' right to meet in the workplace to formulate their bargaining position, elect their own bargaining team and to conduct bargaining in an efficient manner. This also includes the ability of the parties to access statutory processes for the resolution or determination of the terms of such an agreement if bargaining becomes protracted or difficult. The capacity and capability of bargaining parties will also support an efficient process and lead to timely outcomes. It can also be useful to involve trained third-party facilitators, mediators or other forms of support.

What makes for a bad process?

A bad or ineffective process can lead to a worsening of employment relationships. Employment relationships are ongoing and long-term; ending a bargaining episode with a 'winner' and a 'loser' does not bode well for this ongoing relationship. A bad process can also lead to protracted negotiations, impatience on both sides and industrial disputes.

Barriers to good outcomes can take a number of forms. This may involve bad faith, where one or both parties are making no real effort to honestly engage. If the approach to bargaining is transactional, it's harder to get all parties to the bargaining table. Likewise if one party feels like it is being forced to the negotiating table, or there is a lack of bargaining skills, it can lead to an ineffective process.

In the case of MECAs, if one party is unwilling to come to the table – or wants to withdraw from an established MECA when it is being revised – that is enough to put an end to negotiations.

Bargaining can be quite different depending on the scale of the parties or the characteristics of the industry. The bargaining process can impose higher relative transaction costs on small businesses, who can have quite different needs. It can also be harder in industries or occupations with higher turnover.

Coordination

Notwithstanding the existence of some MECAs, the vast majority of collective agreements negotiated in New Zealand are for single employers. In contrast, Fair Pay Agreements would require a high degree of coordination to work effectively, and could require multiple representative groups to be involved.

We note levels of coordination can vary significantly across industries and occupations in New Zealand: some industries have well-established industry groups and unions, whereas others do not. Even where industry groups do exist, they tend to be focused on representing the interests of the industry and sharing best practice, and do not typically have a role in collective bargaining.

The process of collective bargaining and the problem of coordination can also be more difficult where small and medium enterprises are predominant in a sector, as is common in New Zealand.

4. The role of Fair Pay Agreements in our economy

4.1 Purpose of introducing a Fair Pay Agreement system

The Government asked us to make independent recommendations on the scope and design of a legislative system of industry or occupation-wide bargaining, which would support the Government's vision for:

- a highly skilled and innovative economy that provides good jobs, decent work conditions and fair wages while boosting economic growth and productivity.
- lifting the conditions of New Zealand workers, businesses benefit through improved worker engagement, productivity and better workplaces.
- an employment relations framework that creates a level playing field where good employers are not disadvantaged by paying reasonable, industry-standard wages.
- meeting New Zealand's obligation to promote and encourage the setting of terms and conditions of employment by way of collective bargaining between workers, workers' representatives, employers and their representatives.

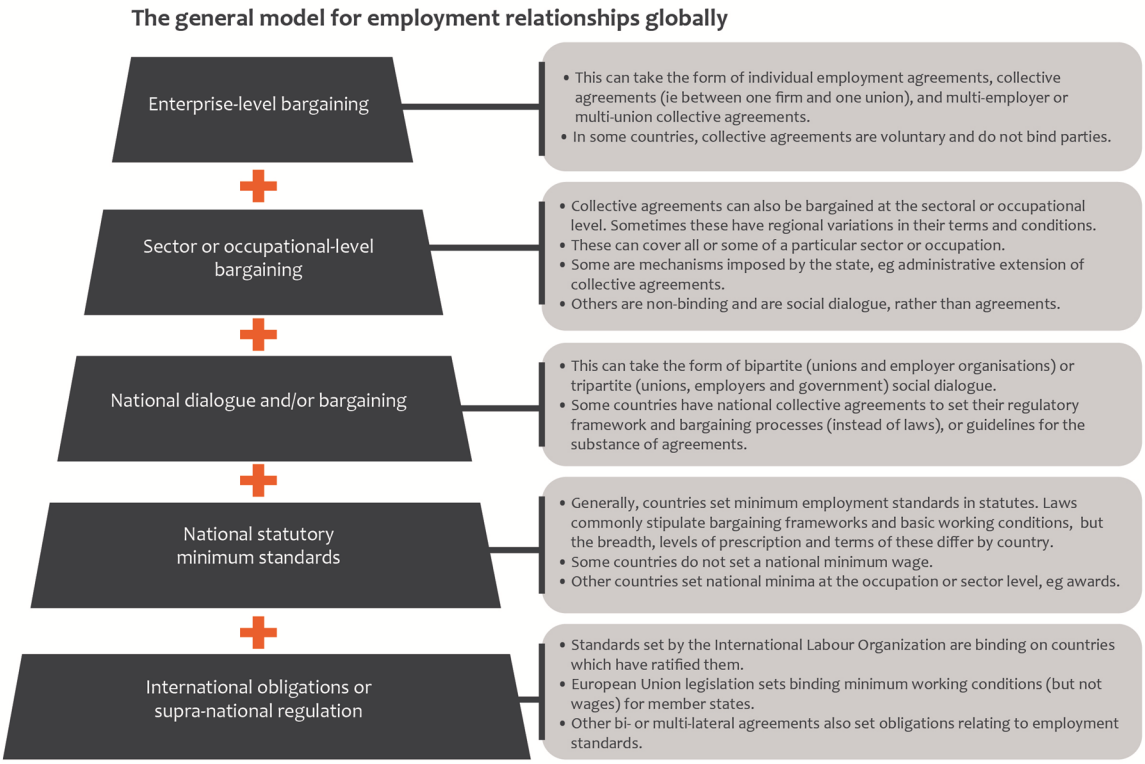
The Government mandated that it will be up to the workers and employers in each industry to make use of the system to improve the productivity and working conditions in the industry.

In designing this system, the Government also mandated us to manage and where possible mitigate the following risks:

- slower productivity growth if a Fair Pay Agreement locks in inefficient or anti-competitive businesses models or market structures
- a 'two-speed' labour market structure with a greater disparity in terms and conditions and job security between workers covered by Fair Pay Agreements and those who are not
- unreasonable price rises for some goods and services if increased labour costs are not offset by productivity gains and profit margins are held at existing levels
- undermining of union membership through the reduction of the value of enterprise bargaining by way of the pass on of collectively negotiated terms and conditions to non-union members, and
- possible job losses, particularly in industries exposed to international competition which are unable to pass on higher labour costs to consumers of those goods and services.

4.2 Where Fair Pay Agreements would fit into the ERES system

As mandated by the Government in our terms of reference, Fair Pay Agreements would provide a collective bargaining mechanism which complements the existing ERES system, rather than replacing it. FPAs would strengthen sector or occupational level bargaining, providing a new collective bargaining tool for workers and employers to use, as shown in Figure 16.



Relationship with minimum employment standards

A FPA system will allow for collective agreements which bind a sector or occupation. These will build on, rather than replace, existing minimum standards. Minimum standards will continue to operate as a 'floor', and terms in an FPA agreement may match or improve on those standards. If minimum standards overtake those in the FPA over time, the minimum standards would apply.

Relationship with enterprise level collective agreements

Workers and firms would also be able to negotiate enterprise level agreements (whether MECAs, MUCAs, single employer collective agreements, or individual employment agreements) within that sector or occupation. These agreements would be able to, as appropriate to the circumstances:

- further improve on the terms and conditions in the FPA
- clarify the specific terms which apply at the enterprise level (for example, when the FPA sets a range)
- set terms and conditions for employers or workers which are exempt from the FPA, and/or
- set terms and conditions on matters where the FPA is silent.

5. Summary of proposed FPA model and key features

In developing the design of a FPA system, we have examined several options, including how to apply the use of extension bargaining (Continental Europe) and a more coordinated approach (Nordic model) in New Zealand.

The Group agrees with the OECD's advice that there is no single international model for collective bargaining or employment relations that can be applied in another country, without being adapted to suit that country's social and economic context.

We recognise we are not designing a system from a blank sheet, and certain characteristics of our current state need to be considered pragmatically:

- the existence of statutory minimum standards
- low levels of organisation among workers and employers
- low levels of take up of voluntary approaches to sector or occupational bargaining in New Zealand, particularly in private sector and among small businesses

Further, we took into account that a FPA system is intended to complement, and not replace or standalone from the existing employment relations and standards system. Where the existing system works this can be adapted for FPAs.

Nevertheless, the group agreed New Zealand could benefit from stronger employer – worker dialogue. If a collective bargaining dialogue at sectoral or occupational level is introduced, it is most likely to gain real traction when:

- it is focussed on problems which are broadly based in the sector,
- it presents real opportunities for both employers and workers to gain from the process
- parties are well represented, and where
- it is connected to the fundamentals of the employment relationship: the exchange of labour and incentives to invest in workplace productivity-enhancing measures such as skills and technology.

The Group considered this measure could be most useful in sectors or occupations where particular issues with competitive outcomes are identified, for example, where competition is based on ever-decreasing labour costs rather than quality or productivity. It could also be useful more generally where workers and employers identify scope to improve outcomes across a sector or occupation.

We also considered that this may not be a necessary or useful tool in some sectors or occupations.

Business NZ however believes that the recommended system will marginalise the existing system rather than complement it. This is because enterprise level agreements will be subservient to FPAs. Employers must first be aware of, then accommodate the results of FPA bargaining before they can respond with initiatives of their own. By definition this slows business responses and threatens productivity. However, most members agreed that if the Government decided to introduce a system for FPA bargaining, then this was the best way to design it.

The Group recommended the Government seek advice from officials and the ILO on the compatibility of the system with New Zealand's international obligations. BusinessNZ has concerns that a system that involves forms of compulsion is not consistent with those obligations. BusinessNZ holds that the principle of voluntary negotiation embodied in the Right

to Organise and Collective Bargaining Convention 1949, which NZ has ratified, is not upheld if employers who will be bound by a document are not at the table to negotiate, despite the fact they will be "represented". This would be further exacerbated if initiation was to be permitted on grounds of public interest despite a lack of representation by the initiating party.

For this reason, among others, BusinessNZ opposes the following recommendations for the detailed design of an FPA system. Appendix (x) sets out its views on an alternative approach.

6. Detailed design of a FPA collective bargaining system

6.1 Initiation

The Government asked us to recommend a process and criteria for initiating Fair Pay Agreement (FPA) collective bargaining, including bargaining thresholds or public interest tests.

The FPA collective bargaining process should be initiated by only workers and their union representatives

We recommend the group initiating the process must be workers' union representatives, and they must nominate the sector or occupation they seek to cover through a FPA. How they define the proposed boundaries of the sector or occupation may be narrow or broad.

There should be two circumstances where a FPA collective bargaining process may be initiated

The Group envisages two circumstances where employers and/or workers' union representatives in a sector or occupation may see benefit in bargaining a FPA.

On the one hand there may be an opportunity for employers and workers to improve productivity and wage growth in their sector or occupation through the dialogue and enforceable commitments FPA collective bargaining provides.

On the other hand, there may be harmful labour market conditions in that sector or occupation which can be addressed through employer-worker collective bargaining. This would enable them to reach a shared and enforceable FPA that sets wages and terms and conditions across the sector or occupation, to tackle those harmful conditions and to set a level playing field where good employers are not disadvantaged by paying reasonable industry-standard wages.

The Group can therefore see two routes for a FPA collective bargaining process to be initiated:

- **Representativeness trigger**: In any sector or occupation, workers, via their union representatives, should be able to initiate a FPA collective bargaining process if they can meet a minimum threshold of number of workers in the nominated sector or occupation; or,
- **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

Where workers through their union representatives wish to initiate a FPA process, we recommend a minimum representativeness threshold should apply across all workers in the nominated sector or occupation. This should cover both union members and non-union workers.

We recommend at least ten per cent or 1,000 (whichever is lower) of workers in the sector or occupation (as defined by the workers) must have indicated their wish to trigger FPA bargaining.

This representativeness threshold is intended to ensure there is sufficient demand for bargaining within the sector or occupation. There would be no equivalent employer representation threshold.

The conditions to be met under the public interest trigger should be set in legislation

To provide certainty for all parties, if the option of a 'public interest trigger' is progressed, we recommend the conditions for harmful labour market conditions should be set in legislation and assessed by an independent third party.

In developing the conditions for this test, Government should consider including some or all of the following:

- historical lack of access to collective bargaining
- high proportion of temporary and precarious work
- poor compliance with minimum standards
- high fragmentation and contracting out rates
- poor health and safety records
- migrant exploitation
- lack of career progression
- occupations where a high proportion of workers suffer 'unjust' conditions and have poor information about their rights or low ability to bargain for better conditions
- occupations with a high potential for disruption by automation.

These conditions, or criteria, should be designed so they assess whether there is an overriding public interest reason for FPA bargaining to be initiated in that particular sector or occupation.

An independent body is needed to determine these conditions are met

Under either route, there is a need for an independent body to determine the initiation conditions have been met before the bargaining process commences:

- Under the representativeness trigger, where the number of workers requesting the process is lower than 1,000, the body would determine the baseline number of workers in the nominated sector or occupation and confirm the threshold of ten per cent has been met.

- Under the public interest trigger, the body would determine the claim that the harmful conditions are evidenced, and invite comment from affected parties within a set time period.

There should be time limits set for the body to complete the determination process to provide certainty for all parties on whether the bargaining process may proceed.

Once determined, the body would inform all affected parties (workers and employers) that bargaining will commence. This provides an opportunity for any party who considers they do not fall within the proposed coverage to contest whether they fall within the coverage.

Once initiation is complete, the bargaining process would be the same under either trigger circumstance.

The Group considered such an independent body would have quasi-judicial functions, for example, in circumstances where the coverage or representativeness threshold need to be adjudicated, rather than agreed by consensus. The body would need to interpret the legislation and exercise determinative functions. We suggest the body could be a statutory body, similar to a Commission, at arm's length from the Government of the day. The independent body must be a costs free jurisdiction.

The Government will need to consider how to assess and mitigate potential negative effects

We acknowledge some sectors perceive there could be negative effects on competition or consumer prices from FPA bargaining. For example, agreements could have the effect of shutting out new entrants to an industry, or higher wage costs passed on through product price increases. We invite the Government to consider how existing competition law mechanisms may need to be adapted to mitigate the risk of such effects.

6.2 Coverage

The Government asked us to make recommendations on:

- how to determine the scope of agreement coverage, including demarcating the boundaries of the industry or occupation and whether the FPA system would apply to employees only, or a broader class of workers;
- whether there are circumstances in which an employer can seek an exemption from a relevant agreement and the process for doing so; and
- whether FPAs should apply to industries or occupations, or both.

The occupation or sector to be covered should be defined and negotiated by the parties

We recommend Parties should be able to negotiate the boundaries of coverage, within limits set in the legislation. The workers and their representatives initiating the bargaining process must propose the intended boundaries of the sector or occupation to be covered by the agreement.

It is important for FPAs to cover all workers – not just employees – to avoid perverse incentives to define work outside of employment regulation

The majority of the Group considered the parties covered by the FPA should include all workers in the defined sector or occupation, subject to any exemptions (see below). We consider it is necessary for FPAs to cover all workers, as otherwise the system may create a perverse incentive to define work outside employment (regulatory arbitrage).

However, the Group acknowledges this would be a significant change to the current employment relations model, and some members noted contractors operate under a business, rather than employment, model.

We acknowledge the issue of defining workers as contractors to avoid minimum standards is a broader issue, and Government may wish to give effect to our recommendation through other work directly on that issue across the ERES system.

All employers in the defined sector or occupation should be covered by the agreement

The Group noted the premise of the Fair Pay Agreement was that it should cover all employers in the defined sector or occupation in order to avoid incentives for under-cutting the provisions of the FPA. This approach, if adopted, should also extend coverage under the FPA to any new employers or workers in that sector or occupation after the FPA has been signed.

Nothwithstanding its general opposition to any form of imposed FPAs, BusinessNZ believes it therefore is advisable to ensure that a thorough analysis of the circumstances be undertaken before determining how to proceed in any given industry sector. For this reason, BusinessNZ believes FPAs should not be triggered by a simple request from workers. If an industry or sector standard is to be created, BusinessNZ believes it should be in the nature of a voluntary code of practice, rather than a nationally imposed standard. The majority agreed it would be important for employers to be able to achieve certainty and avoid incurring unnecessary transaction costs. If an employer does not believe they are within the coverage of the initiation of a particular FPA they should be able to apply to the independent body for a determination of whether they fall within the coverage and are required to be involved in the FPA process.

There may be a case for limited flexibility for exemptions from FPAs in some circumstances

The Group noted lifting standards may force some employers out of the industry, if they can neither absorb costs nor raise prices and remain competitive in the market. A higher floor for wages or conditions may also discourage employers from hiring some workers with perceived risk factors.

We consider some flexibility should be permissible in FPAs, for example for employers where they are facing going out of business. Parties could include defined circumstances for temporary exemptions for employers or workers in the FPA. They could also do this by including administrative procedures for the parties or a third party independent body to approve requests for an exemption after the FPA is ratified.

Particular circumstances where exemptions are allowed should be set in legislation and be agreed on by parties in the bargaining process.

As a general rule, the Group considered any exemptions should be limited and typically time bound (e.g. up to 12 months), as exemptions will increase complexity, uncertainty, perverse incentives (e.g. incentivising small firms not to grow), and misallocation of resources in the affected sector. There would be merit in including exemptions in law or producing sample/guideline exemptions for FPA clauses for parties to use as a basis.

The existence of a FPA should not deter employers from offering more favourable terms to their workers.

6.3 Scope

The Government asked us to make recommendations on the scope of matters that may be included in an agreement, including whether regional variations are permitted.

The legislation should set the minimum content that must be included in the agreement

The Group recommend the minimum content for FPAs should be set in legislation. This is a similar approach to the current collective bargaining system under the ER Act. The Group considered FPAs must be a written agreement and must include provisions on:

- 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, eg expiry date
- governance arrangements to manage the operation of the FPA and ongoing dialogue between the signatory parties

We considered it will be useful for parties to be able to discuss other matters, such as other productivity-related enhancements or actions, even if they do not reach agreement on provisions to insert in the FPA.

We recognise labour markets can vary significantly across New Zealand (e.g. on a geographic basis). Therefore, we considered parties should also be able to include provisions for regional differences within sectors or occupations.

We also considered whether FPAs could potentially disadvantage particular groups through the wage rates that are set, for example young workers; or for long-term beneficiaries in their first year back in employment. We recommend the Government consider whether the parties should be able to agree variations in the terms set within a FPA on these or other grounds.

The Group also considered the duration of agreements should be up to the parties to agree, but with a maximum of five years.

Parties should be able to bargain on additional terms to be included in the agreement

The Group considered additional industry-relevant provisions should be able to be included by negotiation in the FPA, so long as they were compliant with minimum employment standards and other law.

Any enterprise level collective agreement must equal or exceed the terms of the relevant Fair Pay Agreement

The Group recommends employers and employees could agree an enterprise level collective agreement in addition to the FPA, and if so, the principle of favourability should apply. This would mean any enterprise level collective agreements must equal or exceed the terms of the relevant FPA. They may offer additional provisions not within the scope of the FPA agreed for that sector or occupation.

6.4 Bargaining parties

The Government asked us to make recommendations on the identification and selection of bargaining participants including any mechanisms for managing the views of workers without union representation.

Parties should nominate a representative organisation to bargain on their behalf

To be workable, we consider the bargaining parties on both sides should be represented by incorporated entities.

Workers should be represented by unions, and employers may be represented by employer organisations.

We note different groups of both workers and employers may wish to have their own representatives and the system should accommodate this within reason. For example, small employers may wish to be represented independently from large employers, or there may be multiple representative organisations involved.

The Group also considered any representatives should be required to have relevant expertise and skills.

If there is disagreement within a party about who their representative is (or are, if plural) the first step would be mediation. If mediation was unsuccessful, parties could then refer to the independent third party to determine who the representative(s) should be.

There should be a role for the national representative bodies to coordinate bargaining representatives

Both employers and workers should elect a lead advocate to ensure there is an orderly process and to be responsible for communication between the parties, and with the independent body.

The Group considers there will need to be a role for national level social partners, for example, Business New Zealand and the New Zealand Council of Trade Unions, to coordinate bargaining representatives.

Parties should be encouraged to coordinate

The Group recognised the fundamental principle of freedom of association. The Group noted there would be wider benefits for both employers and workers from belonging to representative organisations. For example, industry organisations can offer peer networks, human resources support, and training opportunities for workers and management. All of these could contribute to raising firm productivity. Unions offer representation, advice and support to members and membership benefits. This could take the form of greater participation in existing representative groups or forming new ones, particularly in sectors or occupations with low existing levels of coordination.

Representative bodies must represent non-members in good faith

As a Group, we recognise representative bodies will not be perfectly representative – not every worker is a member of a union, and not every employer will belong to an industry organisation.

It is important, for instance, that all workers potentially covered by an FPA are able to vote on their bargaining team representatives whether they are union members or not. The same principle should apply for the employer bargaining group.

It is a normal practice in collective bargaining internationally for the 'most representative bodies' to conduct bargaining processes. We think in New Zealand this can be achieved by placing, for example, duties on the representative bodies at the bargaining table to represent non-members, to do so in good faith, and to consult those non-members throughout the process. We note there may be challenges in undertaking this wide consultation in some sectors or occupations, but we do not think this is insurmountable, given modern communication technologies. Business NZ disagreed with this view, as even modern technology requires knowledge of the "addresses" of recipients. The proposals therefore would pass over many employers who would then not be effectively represented.

Workers need to be allowed to attend paid meetings to elect and instruct their representatives

The Group considered there will need to be legislated rights for workers covered by FPA bargaining to be able to attend paid meetings (similar to the union meetings provision in the ER Act), to elect their bargaining team and to exercise their rights to endorse the provisions they wish their advocate to advance in the FPA process. BusinessNZ noted that this effectively creates a need for industry wide "stop work" meetings on a regular basis while an FPA is being initiated, negotiated and settled.

Costs should not fall disproportionately on the groups directly involved in bargaining

There is currently no provision for costs to be covered under the ER Act. Where bargaining is at enterprise level, meetings are typically on site and costs currently often fall on unions and employers.

For FPA bargaining, inevitably negotiations will require travel for some bargaining parties. The Group considered the parties chosen to represent the sides in negotiations should not disproportionately bear these costs. The Group concluded Government should consider how these costs should be funded – for example, through Government financial support, a levy, or bargaining fee.

6.5 Bargaining process rules

We recommend as a default, existing bargaining processes as currently defined in the ER Act (as amended by the Employment Relations Amendment Act 2018) should apply, including the duty of good faith.

Clear timelines are needed to prevent lengthy processes creating excessive uncertainty or cost

There should be clear timelines set for the FPA initiation process, including for the third party to determine whether bargaining may commence after receiving notification from an initiating party. This will give certainty to all parties.

Notification of parties will be a critical element of the process

Once a FPA process is initiated, it will be critical that all affected employers and workers and their respective representatives are notified, have an opportunity to be represented, and are informed

throughout the bargaining progress. Minimum requirements for notifying affected parties should be set in law.

Bargaining should be supported through facilitation[16]

Once bargaining has been initiated, we recommend a neutral expert facilitator be available to support parties during the bargaining process.

This facilitator could include, for example:

- informing bargaining teams about the process
- advising about options for the process the parties should follow to reach agreement, and
- helping parties to discuss the range of possible provisions of the collective agreement.

This facilitation function is intended to support a more efficient and effective bargaining process and to minimise the risk of disputes occurring. There should not be any threshold test for the parties to access this facilitation service.

The Government or the independent body should also provide materials to reduce time and transaction costs, for example, templates for the bargaining process and agreement, similar to those currently provided on the Employment New Zealand website.

6.6 Dispute resolution during bargaining

The Government asked us to make recommendations on the rules or third party intervention to resolve disputes, including whether the third party's role is facilitative, determinative or both.

The principle guiding the Group's recommendations on a dispute resolution system for FPAs has been to maintain, as far as possible, the existing processes under the ER Act, with additions or simplifications to be suitable for sector-wide bargaining. The aim is to minimise the time and cost lost through litigation, and to keep the process simple. Resource and encouragement needs to be provided to help the parties to resolve issues themselves, with support.

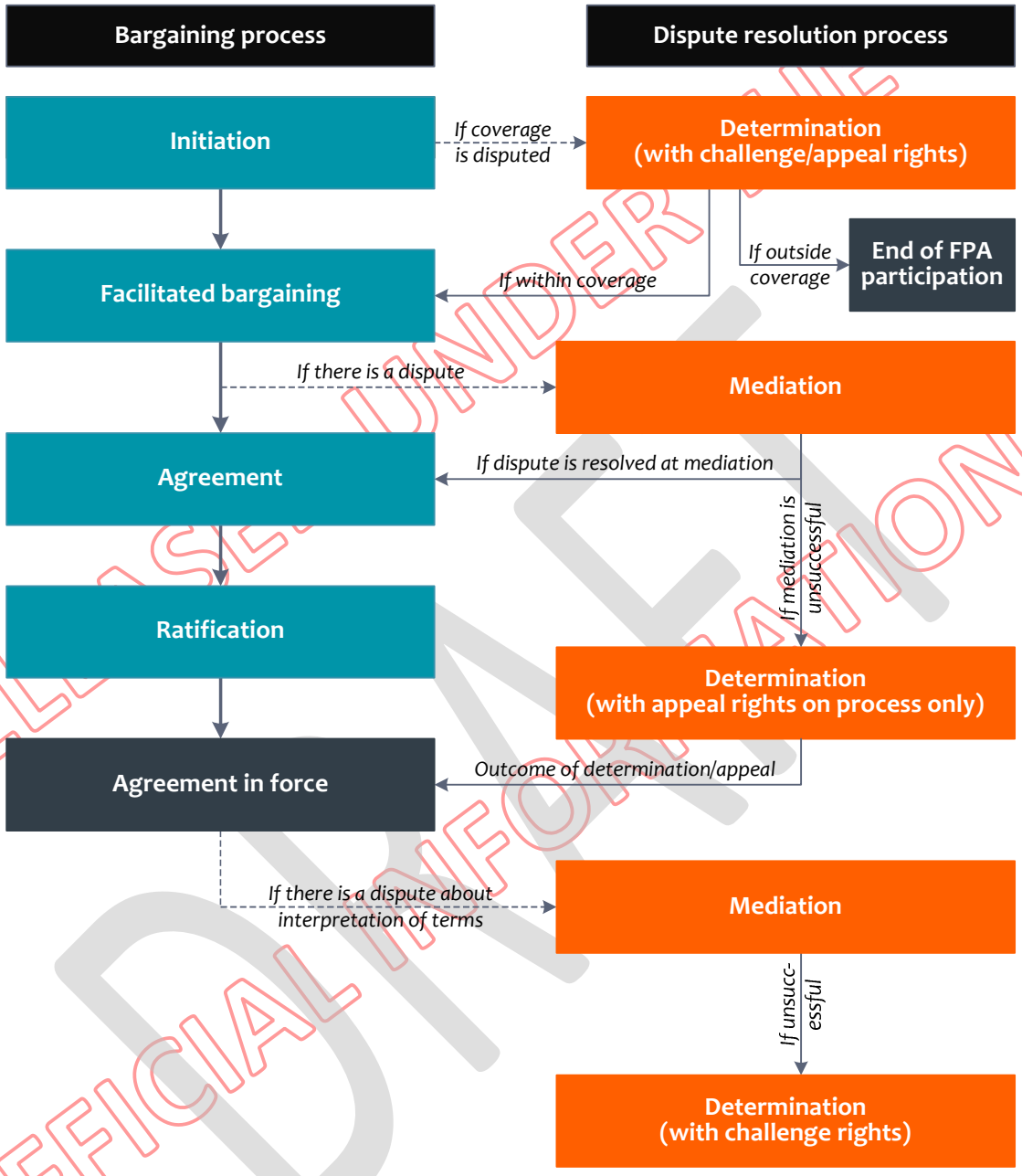
When disputes cannot be resolved, the current ER Act system provides recourse to determination by the Employment Relations Authority. Determinations may be challenged through the court system, and ultimately with appeal rights.

The alternative the Government could consider is to introduce an arbitration-based model, with recourse to an individual arbiter or arbitration panel, with rights to appeal in the Courts. This would require the establishment of a bespoke model and institutions to support it.

Figure 16 outlines the key features of our proposed approach to dispute resolution.

[16] Note this is envisaged as neutral, expert facilitation, not facilitated bargaining under the current ER Act.

Proposed bargaining and dispute resolution processes



There is no recourse to industrial action during bargaining

The Group noted the Government has already stated no industrial action – i.e. strikes or lock outs – will be permitted, during bargaining. It will therefore be critically important that dispute resolution mechanisms work effectively.

We have interpreted this to be a relational, not a temporal, ban – it is only strikes and lockouts related to FPA bargaining which are prohibited, not strikes about other matters which coincide with FPA bargaining.

This prohibition of strikes during bargaining for FPAs does not preclude striking during enterprise level collective bargaining over the same matters. In other words, FPAs complement the terms of collective agreements in the same manner as employment standards.

After initiation, disputes over coverage may be determined by the Employment Relations Authority

We recommend a party should be able to apply to the Employment Relations Authority for a determination if the party has received an initiation notice for an FPA but disputes that it is covered by the process. The aim is to provide an efficient mechanism for determining those that should be included, to minimise the risk of excluding relevant parties or parties incurring costs by participating unnecessarily.

Where parties disagree with the determination, we recommend the existing challenge and appeals process applies.

When disputes arise during bargaining, parties go to mediation in the first instance

If disputes arise during bargaining, we recommend either party may refer the process to mediation to resolve disputes concerning either substantive or procedural matters. A neutral expert mediator will play an active role in supporting the parties to resolve the dispute.

Where a dispute cannot be resolved through mediation, parties may apply to have the matter determined

Where mediation does not resolve the dispute, we recommend either party can apply to a deciding body, to have the matter finally determined. We suggest the body could be the Employment Relations Authority or Employment Court. The deciding body may then either issue a determination including terms for settlement in the agreement or refer the matter back to mediation where appropriate.

The Group considers the deciding body should be independent with the requisite specialist skills and experience in collective bargaining matters. This may mean, where necessary, having the support of expert advice or a panel to assist the deciding body to make a determination on the matter.

Parties may only challenge the determination on limited procedural grounds, with rights to appeal

In order to avoid costly and lengthy litigation processes, we recommend either party may only challenge a determination on limited procedural grounds. Appeals should be heard through the court system.

Once in force, any dispute over the terms of a Fair Pay Agreement should use the standard dispute resolution process

Once the FPA has been agreed and is in force, if parties disagree about how the terms should be interpreted, we recommend either party seek to resolve the dispute through mediation.

Where mediation is unsuccessful, either party may seek a determination from the Employment Relations Authority, with the right to challenge it in the Employment Court, and recourse to appeal through the Court of Appeal. This is the current process for parties who have a dispute about the terms of a collective agreement under the ER Act.

6.7 Conclusion, variation and renewal

The Government asked us to make recommendations on the mechanism for giving effect to a FPA, including any ratification process for employers and workers within the coverage of an agreement.

The Government also asked for recommendations on the duration and process for renewing or varying an agreement.

Where parties reach agreement, conclusion should require ratification by a simple majority of both employers and workers

Where bargaining has concluded in parties reaching an agreement we recommend the agreement must not be signed until a simple majority of both employers and workers covered by the agreement have ratified it. BusinessNZ noted that the logistics of getting every worker and every employer who will be covered to "vote" are difficult if not insurmountable.

Where bargaining is referred to determination of the terms of the agreement, the final agreement should not need ratification

In circumstances where mediation fails to resolve the disputes, and the parties refer the bargaining process to determination, the Group considered this determination should then become a FPA without a further ratification process. There should only be an appeals mechanism on the grounds of a breach of process or seeking a determination as to coverage.

The procedure for ratification must be set in law

We recommend the procedure for ratification be set in law. This differs from the current requirements under the ER Act where parties may decide how to ratify an agreement. We have recommended this departure from the existing law because, under a bargained FPA, all affected parties in the sector or occupation will need to be given an opportunity to ratify.

The law should clarify that workers are entitled to paid meetings for the purposes of ratifying the agreement.

Registration of FPAs should be required in the law, and they should be publicly available

Once an agreement has been concluded, parties must register and lodge the FPA with Government. The FPA itself should be made publicly available and affected parties notified.

Before an agreement expires, either party should be able to initiate a renewal of the agreement, or for variation of some or all terms

The Group considered any variation or renewal of the agreement agreed between the bargaining parties must meet the same initiation and ratification thresholds.

An expiring FPA should be able to be renewed easily, for example employers and workers may be able to vote for a renewal with wages increased in line with the Consumer Price Index or another indicator.

6.8 Enforcement

The Government asked us to consider how the terms of an agreement should be enforced.

The Employment Relations Act approach to enforcement should be applied

Overall, we consider the existing dispute resolution and enforcement mechanisms under the ER Act should be applied to the new FPA system, with the changes noted above to dispute resolution during bargaining.

This would provide for parties who believe there has been a breach of a FPA to turn first to dispute resolution services including mediation, before looking to enforcement options including the Labour Inspectorate and the Court system.

The Government will need to consider whether additional resources for bodies involved in dispute resolution and enforcement are needed during the detailed design and implementation of the overall system.

We suggest unions, employers and employers' organisations should (where possible and appropriate) also play a role in supporting compliance, to identify breaches of FPAs, and address implementation problems.

6.9 Support to make the bargaining process work well

The Group considers a number of conditions need to be present to support a positive outcome to a FPA collective bargaining process:

- Capability and capacity in both parties to support the bargaining process, with the skills and expertise to manage a respectful, efficient dialogue that leads to timely outcomes.
- Strategic leadership on both sides that takes a long-term perspective, supporting a transformational not transactional conversation, i.e. to ensure it affects the whole sector or occupation, not just higher wages.
- High levels of inclusion and participation in the dialogue, particularly among small employers, both through direct involvement at the bargaining table and consultation.
- In a process likely to require involvement of multiple representative groups, a high degree of coordination to work effectively and efficiently.
- The involvement of trained third-party facilitators to support the parties through the process.

In addition, both workers and employers will need to see potential benefits of bargaining for an FPA, with a real improvement over the status quo. There also needs to be a genuine willingness to engage and confidence in the good faith approach of both parties.

Support to build capability and capacity of the parties and to facilitate the process is needed

In order to facilitate effective bargaining, a good level of information will need to be provided to parties, and capability building will be important to build up the skills of those around the negotiating table, and maximise the potential for constructive bargaining.

The Government will also need to consider the role and resourcing required for the third party body to support the various elements of the bargaining process described above including the processes for determination of the trigger tests, notifications to parties, and facilitation of the bargaining process.

A proactive role will also be needed to provide notification, information and education on their obligations to employers and workers following the ratification and coming into force of a FPA.

Resourcing levels for support services will need to be considered

The existing functions provided by Government to support the collective bargaining process are fit for purpose and should still apply, including the provision of:

- general information and education about rights and obligations
- information about services available to support the bargaining process and the resolution of employment relationship problems
- facilitation, mediation and determination services
- compliance and enforcement through the Employment Relations Authority, Labour Inspectorate and Courts
- reporting and monitoring of the employment relations system

However, the Government should consider the level of resourcing available as part of the detailed design and implementation of the overall system. In particular, we consider resourcing will be needed for dedicated facilitators to work with parties at all stages of bargaining, as well as for the independent body to assess whether trigger conditions have been met and notify parties.

Annex 1 – Terms of Reference: Fair Pay Agreement Working Group

Purpose

1 The Fair Pay Agreement Working Group has been established to make independent recommendations to the Government on the scope and design of a system of bargaining to set minimum terms and conditions of employment across industries or occupations.

Background

2 This Government has a vision for a highly skilled and innovative economy that delivers good jobs, decent work conditions and fair wages while boosting economic growth and productivity. When we lift the conditions of New Zealand workers, businesses benefit through improved worker engagement, productivity and better workplaces.

3 The Government's vision of the employment relations framework is a level playing field where good employers are not disadvantaged by paying reasonable, industry-standard wages. New Zealand must have a highly skilled and innovative economy that provides well-paid, decent jobs, and delivers broad-based gains from economic growth and productivity.

4 In addition, the Government intends to promote the setting of terms and conditions of employment by way of collective bargaining between workers, worker's representatives, employers and their representatives.

Objectives

5 The objective of the Fair Pay Working Group is to make independent recommendations to the Government on the scope and design of a legislative system of industry or occupation-wide bargaining.

6 In achieving these objectives, it will be important to ensure that the Working Group's recommendations manage and where possible mitigate the following risks:

6.1 slower productivity growth if a Fair Pay Agreement locks in inefficient or anti-competitive businesses models or market structures

6.2 a 'two-speed' labour market structure with a greater disparity in terms and conditions and job security between workers covered by Fair Pay Agreements and those who are not

6.3 unreasonable price rises for some goods and services if increased labour costs are not offset by productivity gains and profit margins are held at existing levels

6.4 undermining of union membership through the reduction of the value of enterprise bargaining by way of the pass on of collectively negotiated terms and conditions to non-union members, and

6.5 possible job losses, particularly in industries exposed to international competition which are unable to pass on higher labour costs to consumers of those goods and services.

Parameters and scope

7 The Fair Pay Agreement Working Group's recommendations must address:

7.1 the process and criteria for initiating Fair Pay Agreement bargaining (including bargaining thresholds or public interest tests)

7.2 identification and selection of bargaining participants including any mechanisms for managing the views of workers without union representation

7.3 how to determine the scope of agreement coverage, including demarcating the boundaries of the industry or occupation and whether the Fair Pay Agreement system would apply to employees only, or a broader class of workers

7.4 whether Fair Pay Agreements should apply to industries or occupations, or both

7.5 the scope of matters that may be included in an agreement, including whether regional variations are permitted

7.6 rules or third party intervention to resolve disputes, including whether the third party's role is facilitative, determinative or both

7.7 the mechanism for giving effect to an agreement, including any ratification process for employers and workers within the coverage of an agreement

7.8 how the terms of an agreement should be enforced

7.9 duration and process for renewing or varying an agreement

7.10 whether there are circumstances in which an employer can seek an exemption from a relevant agreement and the process for doing so

8 Any model proposed by the Fair Pay Agreement Working Group must:

8.1 operate effectively as a component part of the overall employment relations and standards system, including existing single- and multi-employer collective bargaining and minimum employment standards, and

8.2 manage and where possible mitigate the risks in paragraph 6.

9 The Fair Pay Agreement Working Group's recommendations must be within the following parameters:

9.1 Industrial action is not permitted as part of bargaining over a Fair Pay Agreement.

9.2 It will be up to the workers and employers in each in each industry to make use of the system to improve the productivity and working conditions in the industry.

Membership

10 The Fair Pay Agreement Working Group will be chaired by the Rt Hon Jim Bolger.

11 The Fair Pay Agreement Working Group will comprise the following members:

Dr Stephen Blumenfeld	Director, Centre for Labour, Employment and Work at Victoria University
Steph Dyhrberg	Partner, Dyhrberg Drayton Employment Law
Tony Hargood	Chief Executive, Wairarapa-Bush Rugby Union
Kirk Hope	Chief Executive, BusinessNZ
Vicki Lee	Chief Executive, Hospitality NZ
Caroline Mareko	Senior Manager, Communities & Participation, Wellington Region Free Kindergarten Association
John Ryall	National Secretary, E tū
Dr Isabelle Sin	Fellow, MOTU Economic and Public Policy Research
Richard Wagstaff	President, New Zealand Council of Trade Unions

12 The chair and members of the Fair Pay Agreement Working Group will be entitled to a fee in accordance with the Cabinet fees framework for members appointed to bodies in which the Crown has an interest.

13 Officials from the Ministry of Business, Innovation and Employment will support the Working Group as secretariat. The Working Group will be able to seek independent advice and analysis on any matter within the scope of these terms of reference.

Timeframes

14 It is anticipated that the Fair Pay Agreement Working Group will:

14.1 commence discussions in June 2018

14.2 make recommendations to the Minister for Workplace Relations and Safety by November 2018.

15 These dates may be varied with the consent of the Minister for Workplace Relations and Safety.

Annex 2 - Occupations ranked according to proportion of workers earning under $20 per hour

This table was created by obtaining wage information for all occupations in New Zealand at the three-digit level (minor groups) under the Australian and New Zealand Standard Classification of Occupations (ANZSCO). We then arranged these occupations according to the proportion of workers earning under $20.00 an hour.

Occupations according to proportion of workers earning under $20 per hour	Regular hourly rate (main job)		% below $20 per hour	Weekly income (all sources)	Total workers
Three-digit occupation (ANZSCO)	Mean	Median	Percent	Mean	
Food Preparation Assistants	17.33	16.5	91.27%	412.07	21,900
Checkout Operators and Office Cashiers	17.77	17	91.08%	406.57	15,600
Hospitality Workers	17.79	17	84.34%	487.59	39,200
Packers and Product Assemblers	18.32	17.26	78.94%	640.76	17,200
Cleaners and Laundry Workers	20.01	17.5	73.05%	479.78	44,900
Hairdressers	19.85	18.22	72.58%	630.05	9,900
Sales Assistants and Salespersons	19.98	18	72.16%	655.99	107,000
Child Carers	18.5	18	71.96%	462.04	12,800
Freight Handlers and Shelf Fillers	21.41	18	64.93%	716.11	8,600
Food Trades Workers	20.44	19	59.99%	774.54	40,100
Miscellaneous Labourers	20.34	18.5	59.74%	763.92	40,100
Miscellaneous Sales Support Workers	23	19.18	58.96%	624.5	8,300
Farm, Forestry and Garden Workers	20.93	18.7	57.14%	794.71	41,400
Delivery Drivers	20.43	19.36	56.81%	702.71	6,500
Education Aides	20.8	19.21	55.89%	511.57	15,500
Clerical and Office Support Workers	21.11	19.5	50.54%	754.89	13,000
Sports and Fitness Workers	24.19	20	49.13%	668.39	15,000
Arts Professionals	24.41	20	48.00%	753.7	7,800
Storepersons	21.3	20	47.68%	900.62	25,900
Machine Operators	21.52	20.2	44.41%	902.38	18,900
Personal Service and Travel Workers	24.49	20.62	43.48%	873.51	20,300
Automobile, Bus and Rail Drivers	21.95	20.45	39.45%	870.24	16,300
Food Process Workers	23.67	22.38	39.30%	965.91	27,000
Horticultural Trades Workers	24.54	22	38.69%	755.25	17,200
Farmers and Farm Managers	35.62	22	38.34%	1272.73	54,500
Receptionists	23.19	21.58	37.96%	713.52	24,100
Animal Attendants and Trainers, and Shearers	25.97	21.6	37.33%	870.54	7,600
Textile, Clothing and Footwear Trades Workers	25.13	22	36.98%	1036.31	2,500
Accommodation and Hospitality	26.93	21.37	36.05%	973.61	19,600

Managers					
Retail Managers	24.86	21.31	34.33%	1077.04	36,600
Floor Finishers and Painting Trades Workers	24.73	23	32.61%	957.82	15,700
Personal Carers and Assistants	21.46	21	31.32%	688.28	54,800
Keyboard Operators	21.55	21.58	31.16%	768.33	5,900
Insurance Agents and Sales Representatives	25.04	22.54	30.93%	986.1	48,300
Prison and Security Officers	27.25	26	30.31%	1130.81	15,400
Miscellaneous Factory Process Workers	24.9	22.8	30.22%	1031.12	9,000
Chief Executives, General Managers and Legislators	50.4	31.97	28.59%	1922.54	148,600
Construction and Mining Labourers	50.75	23	27.92%	1094.88	22,900
Automotive Electricians and Mechanics	24.9	25	26.95%	1074.62	21,300
Mobile Plant Operators	25.79	23.98	26.54%	1176.93	27,200
Call or Contact Centre Information Clerks	23.3	21	25.87%	911.61	6,700
Bricklayers, Carpenters and Joiners	24.93	25	25.15%	1066.64	19,700
Real Estate Sales Agents	55.47	28.77	25.07%	1741.83	16,600
Panelbeaters, and Vehicle Body Builders, Trimmers and Painters	24.05	24	24.98%	979.11	4,700
Glaziers, Plasterers and Tilers	26.79	23.97	24.67%	1096.99	11,900
Plumbers	30.94	24.93	23.52%	1107.35	12,500
Printing Trades Workers	29.04	27.9	23.46%	1148.29	5,300
Miscellaneous Technicians and Trades Workers	28.6	24	22.90%	1136.1	11,700
Electricians	31.41	27.2	22.58%	1290.76	18,100
Fabrication Engineering Trades Workers	26.29	25	20.70%	1167.9	13,900
Logistics Clerks	25.69	23.97	20.32%	1070.98	26,600
ICT and Telecommunications Technicians	27.18	23.97	20.01%	1066.63	8,800
Stationary Plant Operators	27.87	24.93	19.74%	1249.98	13,200
General Clerks	34.07	24.29	19.14%	954.96	64,800
Health and Welfare Support Workers	24.89	23.5	19.01%	884.46	21,600
Truck Drivers	24.05	23.61	17.88%	1195.82	31,000
Mechanical Engineering Trades Workers	32.51	30	16.39%	1432.54	17,500
Architects, Designers, Planners and Surveyors	41.98	31.17	15.86%	1572.76	28,600
Construction, Distribution and Production Managers	32.17	29	15.80%	1454.33	61,500
School Teachers	28.69	27.24	15.32%	1097.53	101,300
Agricultural, Medical and Science Technicians	26.45	24.69	14.55%	1051.22	17,100
Social and Welfare Professionals	29.31	26.15	14.41%	1040.55	35,200
Media Professionals	40.4	35.96	14.29%	1562.61	7,700
Health Therapy Professionals	41.58	32.6	13.83%	1475.11	16,900
Wood Trades Workers	29.86	26.37	13.29%	1293.12	5,000
Miscellaneous Clerical and Administrative Workers	31.54	25.89	12.71%	1238.82	17,600

Office and Practice Managers	32.97	25.21	11.90%	1125.24	35,900
Air and Marine Transport Professionals	55.22	40	11.58%	2002.36	8,400
Electronics and Telecommunications Trades Workers	29.49	28	11.29%	1274.34	13,800
Accounting Clerks and Bookkeepers	34.29	26.37	11.02%	966.58	35,700
Building and Engineering Technicians	33.21	29.73	10.89%	1348.28	21,400
Miscellaneous Education Professionals	34.79	30.69	10.66%	1119.05	12,300
Information and Organisation Professionals	44.82	35.8	9.99%	1564.73	34,600
Personal Assistants and Secretaries	30.11	27	9.76%	1035.7	20,400
Database and Systems Administrators, and ICT Security Specialists	38.83	32.5	9.58%	1559.42	6,200
Medical Practitioners	79.83	71.92	8.78%	3076.52	14,600
Sales, Marketing and Public Relations Professionals	36.42	30	8.69%	1431.97	23,500
Business Administration Managers	43.08	35.96	8.64%	1813.23	70,200
ICT Network and Support Professionals	39.22	35	8.46%	1606.92	9,300
Tertiary Education Teachers	39.54	35.96	8.45%	1494.3	22,700
Natural and Physical Science Professionals	41.89	36.44	6.55%	1705.59	16,600
Contract, Program and Project Administrators	34.31	29.92	6.50%	1268.59	20,100
Health Diagnostic and Promotion Professionals	36.64	35.96	6.48%	1265.62	14,700
Advertising, Public Relations and Sales Managers	42.8	38.36	6.43%	1896.85	34,300
Accountants, Auditors and Company Secretaries	42.11	38.36	6.42%	1652.86	45,600
Defence Force Members, Fire Fighters and Police	35.08	31.84	6.18%	1540.19	21,800
Miscellaneous Hospitality, Retail and Service Managers	35.55	34.52	5.97%	1548.15	18,900
Engineering Professionals	43.23	38.36	5.53%	1843.23	40,700
Miscellaneous Specialist Managers	39.38	36.76	5.28%	1669.84	8,700
Human Resource and Training Professionals	37.48	31.97	5.15%	1492.07	14,600
Financial Brokers and Dealers, and Investment Advisers	44.06	32.32	5.10%	1917.98	9,800
Legal Professionals	49.81	40	4.65%	2046.89	19,200
Business and Systems Analysts, and Programmers	44.78	41.94	4.32%	1803.22	52,400
ICT Managers	57.95	52.74	2.65%	2624.76	10,200
Financial and Insurance Clerks	32.47	28.77	2.38%	1314.62	18,700
Midwifery and Nursing Professionals	33.12	32	2.20%	1139.91	57,700
Education, Health and Welfare Services Managers	41.44	36.23	1.27%	1808.82	14,500

Annex Three: BusinessNZ comments on the report of the Fair Pay Agreements Working Group

General Comment

1. The Fair Pay Agreements Working Group report contains elements that concern BusinessNZ.

2. This document sets out reasons for these concerns and suggests alternatives to the recommendations that address them.

3. The suggested alternatives are based on a voluntary approach that combines the concept of codes of practice with the ability to agree a MECA.

Concerns

4. By definition a system of collective bargaining that imposes outcomes, whether or not those covered were directly involved in the bargaining, involves compulsion. We believe such an outcome to be inconsistent with the provisions of international law, in particular the Right to Organise and Collective Bargaining Convention 1949 (No 98). The draft Working Group report does not take account of this, despite it being an issue that has been raised at the highest levels of government but not yet resolved.

5. The draft report's analysis supports a view that while sector and industry based approaches to collective bargaining may assist in reducing inequality they are less effective in terms of economic productivity, growth and prosperity. However, the suggested recommendations appear to push equality over productivity and growth. This seems counterintuitive and is deserving of further explanation.

6. Employers have previously expressed concerns about the similarity of the FPA concept to pre 1991 award systems. It will be important for this perception to be addressed in any system that is promoted for the future. However, the draft report does not identify how the suggested system will avoid the pitfalls of the past, and indeed contains a number of similarities. For instance:

    a. Under the award system, two outcomes were possible; "*industrial agreements*" - national occupational agreements agreed in bargaining and, "*awards*" - the result of a decision of the Arbitration Commission when agreement could not be reached in bargaining. The same model would apply under the proposed system albeit that "Fair Pay Agreements" would be the term applied to both agreements reached in bargaining and arbitrated decisions made by a proposed independent third party.

    b. Under the award system, unions were coordinated by the Federation of Labour and Council of State Unions (later merged into the CTU) while employer associations were coordinated by the NZ Employers Federation (now BusinessNZ). The same basic model will apply under the proposed system under which it is recommended that the "social partners" (BusinessNZ and the CTU) coordinate bargaining representatives.

c. Under the award system, negotiated settlements and awards were both registered by the independent arbitration body (the Arbitration Commission). The proposed approach is for an independent arbitration body (possibly the Employment Relations Authority) to authenticate both negotiated settlements and decisions made in arbitration.

d. Under the award system, strikes were not permitted in pursuance of a settlement, but were lawful in pursuit of non-award bargaining. The proposed model prohibits strikes for FPAs and actively envisages "above FPA" deals being used to supplement FPAs, for which strike action is possible.

7. These are not exhaustive comparisons but serve to illustrate the striking similarity between the two approaches. Given employers' strong lack of confidence in the systems of the past, it is important that the Working Group's recommendations for the future identify those aspects of its proposals that will mitigate concerns.

An alternative approach

8. With these points in mind, the table below addresses the structures and processes suggested in the draft interim report, with a view to better aligning them with our international obligations and with our aspirations for a high performing economy.

9. Overarching principles of the alternative approach are:

a. Participation is voluntary.
b. FPAs are industry/sector/occupational Codes of Practice that become binding on parties that sign it (e.g., like MECAs).

NB the draft recommendations have been simplified and reordered for ease of presentation.

Phase	Draft FPA Working Group Recommendation	A possible alternative approach
Initiation	**FPA bargaining process initiated *only* by workers** • Workers to nominate the sector or occupation they seek to cover through a FPA. • Proposed boundaries of the sector or occupation may be narrow or broad.	**Workers or employers can initiate.** • Notice of initiation must include the parameters of a proposed FPA, including scope (breadth) and coverage (depth).
	Two grounds for initiation • *Representativeness trigger* – 10% or 1,000 (whichever is lower) of all workers (union and non-union) in the sector or occupation as defined by the workers. • *Public interest trigger* – legislatively specified harmful	**Two grounds for initiation** • *Representativeness* (based on membership) • *Issues* (verifiable issues with wide employment related connotations) which require systemic responses wider than single enterprises to rectify, but

	labour market conditions exist in the nominated sector or occupation. • No equivalent employer representation test.	which do not apply outside of the sector or industry in which the issues occur. • Wider issues should be matters for national legislation
	Independent body to verify trigger conditions met • Public interest trigger - verify the claim that the statutory conditions are evidenced. • Representativeness trigger - where the number of workers requesting the process is lower than 1,000, the body would verify the baseline number of workers in the nominated sector or occupation and confirm the threshold of 10% has been met. • Time limits set to complete the verification process.	• No verification of initiation conditions required as participation is voluntary
Coverage	**Occupation or sector to be covered to be defined by the parties** • Parties to negotiate the boundaries of coverage, within limits set in the legislation. • Workers initiating the bargaining process must propose intended boundaries of the sector or occupation to be covered by the agreement. • Parties also able to define coverage using additional parameters, including providing for variations in terms for geographic regions.	**Occupation or sector to be defined by participating parties**
	FPAs cover all employers and all workers (not just employees) • FPAs to cover all workers and employers in the defined sector or occupation, subject to any exemptions. • Coverage to extend to any new employers or workers after the FPA has been signed. • Employers able to apply to the	• FPAs guide those not signatory to it and bind those who are. • Courts can take account of provisions of a relevant FPA in cases of disputes involving matters addressed by FPAs in the same way as they take account of codes of practice .

	independent body for a declaration of whether their business falls within the coverage and is required to be involved in the FPA process.	
	Limited flexibility for exemptions from FPAs • Possible temporary exemptions for small employers; new entrants to the workforce or those returning after extended period out of the workforce. • Exemptions limited and temporary in nature (up to 12 months), as the more exemptions provided for will increase complexity and uncertainty.	• No exemptions required

Scope	**Minimum content for FPA set in law**
	• Must include:
	  • The objectives of the FPA
	  • Coverage
	  • Wages and how pay increases will be determined
	  • Terms & conditions, including working hours, overtime and/or penal rates, leave, redundancy, and flexible working arrangements
	  • Skills and training
	  • Duration, eg expiry date
	  • Governance arrangements to manage the operation of the FPA and ongoing dialogue between the signatory parties, for example, if administrative arrangements are needed for exemptions
	  • Other matters, such as other productivity-related
		Minimum content set by agreement but within law
		• Can include:
		  • The objectives of the FPA
		  • Coverage
		  • Wages and how pay increases will be determined
		  • Terms & conditions, including working hours, overtime and/or penal rates, leave, redundancy, and flexible working arrangements
		  • Skills and training
		  • Duration, eg expiry date
		  • Governance arrangements to manage the operation of the FPA and ongoing dialogue between the signatory parties,
		  • Other matters, such as other productivity-related enhancements or actions, even if there is no reach agreement

	enhancements or actions, even if there is no agreement reached on provisions to insert in the FPA. • FPAs may take account of regional differences within industries or occupations. • Duration of agreements to be agreed, but with a maximum of 5 years. • Additional provisions able to be included by negotiation in the FPA, provided they are compliant with minimum employment standards and other law.	reached on provisions to insert in the FPA. • May take account of regional differences within industries or occupations. • Duration of agreements to be agreed, but should include requirements for regular review.
	Enterprise level agreements • Enterprise level collective agreements must equal or exceed the terms of the relevant FPA. • Additional provisions not within the scope of the FPA may also be agreed.	**Enterprise level agreements** • Continue under existing rules
Bargaining process rules	**Good faith rules to apply** • Existing bargaining processes as currently defined in the Employment Relations Act (as amended by ERA Bill) apply, including the duty of good faith.	**Good faith rules to apply** (no change) • Existing bargaining processes as currently defined in the Employment Relations Act (as amended by ERA Bill) apply, including the duty of good faith.
	Time limits for negotiation of FPAs • Fixed timelines for FPA initiation and bargaining process, including for independent third party to verify whether bargaining may proceed after receiving notification from an initiating party.	**No time limits for negotiation or renewal of FPAs** • Being voluntary FPA's do not expire, but should contain requirements for regular review
	Notification requirements • Minimum requirements for all affected employers and workers to be notified of FPA initiation, opportunity to be represented, and informed throughout the bargaining	**Notification requirements** • Minimum requirements for all affected employers and workers to be notified of FPA initiation, opportunity to participate and be informed of progress and outcomes.

	progress.	
Bargaining parties	**Parties to nominate a bargaining representative to bargain on their behalf** • Parties to be represented by incorporated entities. o Workers to be represented by unions. o Employers to be represented by employer organisations. • Representatives must meet minimum requirements relating to expertise and skills. • Employers and workers to elect a lead advocate. • Business New Zealand and the New Zealand Council of Trade Unions, to coordinate bargaining representatives. • Disagreement about who representative should be to be resolved by mediation with arbitration by independent body if no agreement. • If mediation was unsuccessful, parties could then refer to the independent third party to decide who the representative(s) should be.	**Parties to nominate a bargaining representative to bargain on their behalf** • Parties can elect to participate themselves or nominate a person or organisation to do so. • Members of organisations are bound by those organisation's rules in this regard
	Representative bodies must represent non-members in good faith • Non-members of representative bodies to have the right to be represented during the bargaining process. • Representative bodies have a duty to represent non-members, to do so in good faith, and to consult those non-members throughout the process.	**Representatives bargaining for an FPA required represent their interests and those of members in good faith** • Non-members or clients of participating representatives can choose whether or not to follow their lead or be bound by negotiated outcomes.
	Workers allowed to attend paid meetings to elect and instruct their representatives • Workers covered by FPA bargaining able to attend paid	**Workers in enterprises affected by proposed FPA allowed to attend paid enterprise meetings to elect and instruct their representatives** • Rules as for collective bargaining

	meetings to elect their bargaining team and to endorse claims. • Government to determine whether costs met through Government financial support, a levy, or fee.	under the ER Act 2000.
Dispute resolution during bargaining	**No recourse to industrial action during bargaining** • Strikes and lockouts related to FPA bargaining prohibited, ***but not*** strikes about other matters which coincide with FPA bargaining.	**No recourse to industrial action during bargaining for an FPA** • Industrial action permitted under existing rules in Part 8 ER Act 2000.
	Mediation and facilitation should be the starting point for dispute resolution • Mediation and facilitation are the starting point for resolution of FPA bargaining disputes. • One or both parties may refer bargaining to mediation, in relation to one or more provisions of the proposed agreement.	**Mediation should available for dispute resolution** • Mediation available as a non-binding option for resolution of FPA bargaining disputes. • One or both parties may refer bargaining to mediation, in relation to one or more provisions of the proposed agreement.
	Failed mediation to be referred to final offer arbitration	**No recourse to courts if bargaining fails** • Being voluntary, bargaining for FPAs should not be subject to the jurisdiction of the courts.
Conclusion, variation and renewal	**Ratification** • Procedure for ratification to be set in law. • Simple majority of both employers and workers before agreement can be signed • Workers are entitled to paid meetings for the purposes of ratifying the agreement.	**Ratification** • Signing on as a party will constitute ratification. • An employer not to sign unless a majority of employees also agree.
	No ratification required for arbitrated final agreement • Appeals mechanism on the	N/A

	grounds of a breach of process or seeking a declaration as to coverage.	
	Prior to expiry, either party able to initiate a renewal of the agreement, or for variation of some or all terms. • Variation or renewal of the agreement that is agreed between the bargaining parties must meet the same initiation and ratification thresholds.	**Any signatory party to an FPA able to initiate a renewal of the agreement, or for variation of some or all terms.** • Variation or renewal of the agreement that is agreed between the bargaining parties must meet the same initiation and ratification thresholds. • Participants must meet to review FPAs in accordance with any required review provisions.
Enforcement	• Existing collective bargaining dispute resolution and enforcement mechanisms apply to FPA system.	• Labour Inspectorate will have their current jurisdiction and rules extended to apply to signatory parties to FPAs and the enforcement provisions of the Employment Relations Act 200 will apply.