New Zealand Law Society
Te Kāhui Ture o Aotearoa

Fair Pay Agreements Bill

19/05/2022

Fair Pay Agreements Bill 2022

1 Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Fair Pay Agreements Bill (**Bill**).

1.2 The Bill seeks to provide a framework for collective bargaining for fair pay agreements (**FPAs**) across entire industries or occupations and improve labour market outcomes in New Zealand by enabling employers and employees to collectively bargain minimum employment terms.

1.3 This submission has been prepared with input from the Law Society's Employment Law Committee.[1]

1.4 The Law Society does not wish to be heard in relation to this submission.

2 General observations

2.1 The Law Society commends the objective of the Bill to improve labour market outcomes in New Zealand by enabling employers and employees to collectively bargain industry-wide or occupation-wide minimum employment terms.[2] However, we are concerned that the sheer number of detailed and complex procedural steps, for example, between clauses 26 to 155 of the Bill will be prohibitive and will preclude, in practical and resourcing terms, any FPAs from actually being bargained for and implemented.

2.2 To give one example, determination of the 'coverage' of an FPA occurs at a number of points in the Bill and requires consideration by both the chief executive and the Authority, and then further consideration by the chief executive later in the process:

(a) Clause 32(1)(b)(ii) provides that the chief executive approves the coverage of the proposed FPA;

(b) Clause 100 requires the chief executive to assess and approve any change to the coverage;

(c) Clauses 103 to 109 require the chief executive to consider whether there is any coverage overlap with another FPA and whether consolidation is needed;

(d) Clauses 132 and 135 require the Authority to carry out a compliance assessment (including whether coverage overlap exists) once bargaining is completed;

(e) Once ratification occurs, the chief executive must verify the ratification (clause 148) and once again, assess whether there is coverage overlap (clause 151);

(f) If there is coverage overlap, clause 151 requires the matter to be referred back to the Authority for assessment as provided for in clause 138; and

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1 More information about this Committee is available on the Law Society's website: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/employment-law-committee/.

2 Explanatory note of the Bill.

(g) If the Authority determines that there is a coverage overlap and a proposed agreement provides better terms overall, the chief executive must amend the coverage of the FPA as required by clause 154(2)(a)(ii).

2.3 These steps are likely to be difficult to unravel and apply, and require the coverage of the FPA to be considered at a number of points, by both the chief executive and the Authority.

2.4 This is just one example of the unnecessarily complex and onerous processes set out in the Bill. In general terms, we suggest the select committee consider whether a simpler and less onerous process for bargaining for FPAs, which requires less involvement by the chief executive and the Authority but still maintains appropriate control and oversight, is more likely to ensure bargaining parties agree to an FPA. The Law Society is concerned that bargaining for FPAs may otherwise become mired in procedural steps which make FPAs very difficult to establish.

3 Preliminary provisions (Part 1 of Bill)

Definitions (clause 5)

3.1 Clause 5(5) of the Bill states that, unless the context otherwise requires, "any term or expression that is defined in the Employment Relations Act 2000 and [is] used, but not defined, in this Act has the same meaning as in that Act". The Bill uses a number of terms which are defined in the Employment Relations Act 2000 (**ER Act**) and require cross referencing the relevant sections of that Act. Some of those definitions are crucial to the operation of the Bill.[3] It would be preferable for these definitions, or a reference to the relevant section of the ER Act, to be included in the Bill to assist readers.

"Independent contractor"

3.2 The definition of "independent contractor" refers to section 69B of the ER Act. This is a somewhat unusual cross-reference as the definition set out in the ER Act relates to the specific issue of continuity of employment in restructuring situations. The Law Society recognises, however, that there is otherwise no statutory definition of the term "independent contractor". A more appropriate solution would be to replicate section 69B of the ER Act in the Bill, rather than using a cross-reference.

"Penalty rates"

3.3 Clause 5 states that "penalty rates" are any identifiable additional amounts payable to an employee for working on a particular day of the week, or on a public holiday, or outside the employee's normal hours of work. We note our comments at paragraphs 8.3 and 8.4 below, regarding the use of the term "normal hours of work" in this definition. We further note that the term "penalty rates", while presumably an attempt to modernise the more traditional phrase "penal rates", brings with it a negative connotation in the word "penalty" – that is, it risks creating the impression that a penalty is being applied, whereas it actually provides a

[3] For example, the Bill contains a number of references to the term "department" and assigns specific roles to the "department" in terms of FPA bargaining and formation. This term is defined in section 5 of the Employment Relations Act 2000 as "the department of State that, with the authority of the Prime Minister, is for the time being responsible for the administration of that provision".

benefit to employees. While the phrase "penalty rates" is currently used in Australian legislation,[4] the Law Society suggests this be reconsidered for New Zealand.

"Coverage"

3.4 Clause 5(2) provides that coverage is determined by considering which employees "perform work" to which the terms of the FPA or proposed FPA apply. The effect of this clause is that an employee will be covered by an FPA by reference to their work. In cases where an employee performs a number of roles for their employer (such as in a retail environment, a small hotel or a manufacturing operation) this definition would appear to require the application of the FPA even where only a small part of an employee's role is 'work' that is covered by the FPA.

3.5 For example, in a small hotel, the receptionist may undertake cleaning and catering work in addition to checking in guests and maintaining the reservations system. If an FPA covers the cleaning work, the receptionist could technically be covered by that agreement even if cleaning only comprises 5 - 10% of their tasks. Additional problems relating to this definition, and the description of coverage of a proposed FPA under clause 31, are discussed at paragraphs 5.3 and 5.4 below.

3.6 The Law Society recommends the Bill either specify or provide a statutory test to determine the proportion of 'covered' work required by an employee in their day-to-day role before an FPA automatically applies.

Representative organisations

3.7 Clause 5(3) and 5(4) provide that regulations which specify the employee default bargaining party must specify an organisation that is "the most representative" of unions or employers. The Bill could be improved by clarifying how "the most representative" organisations are to be determined and what tests should be applied in making this determination.

4 General principles and obligations (Part 2)

Prohibition on preference: employees (clause 13)

4.1 Clause 13(2) states that an FPA may require an employer to pay a "union member payment" to its employees in certain circumstances. The total union member payment cannot exceed the total amount of the employee's union membership fees for the period covered by the FPA.[5]

4.2 If such a provision is included in an FPA, the employees of unionised employers will receive a higher pay than the employees of non-unionised employers. Unionised employers may therefore be reluctant to provide for such a payment in the FPA, and the bargaining processes may become deadlocked as a result. The Bill could be amended to assist bargaining parties by explaining the purpose of these payments, for example, by clarifying:

(a) if such payments are intended to reimburse an employee for any deduction made under section 55 of the ER Act; and

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4 See, for example, the Fair Work Act 2009 (Australia).

5 Clause 13(4)(d).

(b) if the "total" union member payment should exclude any union membership fees.

Prohibition on preference: employers (clause 14)

4.3 Clause 14 prohibits any arrangement conferring a benefit or opportunity on an employer because they are, or are not, a member of an employer association. It is likely some employers are currently paid members of employers' associations or business groups that charge a fee and have arrangements which confer some benefits or opportunities on their employer-members, such as training opportunities, networking events and access to discounted services. Clause 14 would render such arrangements unlawful.

4.4 It would be problematic for employer associations and business groups to avoid charging a fee or providing other benefits to its members simply because they are also involved in bargaining for an FPA. We therefore recommend amending clause 14 to exclude any fees and arrangements which are unrelated to the bargaining.

Good faith obligations between bargaining parties (clause 19)

4.5 Clause 19 sets out the good faith obligations that apply to opposing bargaining sides. We note a potential conflict between clause 19(3)(d) and clause 19(4) as to the parties' obligations to continue bargaining, in that:

(a) A good faith obligation is that the parties continue to bargain with the other bargaining side on any matter, even if either side considers that the bargaining has reached a deadlock on that matter, or any other matter (see clause 19(3)(d)). Assuming bargaining will normally occur in the format of bargaining meetings, this would suggest that the parties will need to continue to meet to discuss such matters.

(b) However, parties are not required to continue to meet with each other about proposals that have been considered and responded to already (see clause 19(4)). This indicates that the parties do not in fact need to continue to bargain when they have already considered and responded to a proposal, again assuming that bargaining will normally occur in the format of bargaining meetings.

4.6 In summary, it is not clear between these two clauses whether the parties must still, in good faith, continue to bargain about matters which have already been considered and responded to.

Treating employee as independent contractor (clause 21)

4.7 Clause 21 prohibits an employer from engaging a person as an independent contractor, instead of as an employee, with the intention of preventing the person from being covered by an FPA. Clause 21(5) provides that a rebuttable presumption – that the employee has been engaged as an independent contractor for the purpose of preventing the employee being within the coverage of an FPA – applies where the Employment Relations Authority (**Authority**) or the Employment Court determines that a person was wrongly engaged as a contractor.

4.8 The Law Society is concerned that this clause does not contain any express test or consideration as to whether the employer had any knowledge of the FPA, and instead places the onus on the employer to demonstrate they had no knowledge of the FPA (noting it may

be practically difficult to demonstrate an *absence* of knowledge). For instance, there could be an FPA in place which has not been notified to the employer, and as a result, the employer fails to consider the consequences of entering into a contract for services.

4.9 We understand this rebuttable presumption has been included to address the difficulties in demonstrating an intention to prevent a person from being covered by an FPA.[6] However, we are concerned with the fairness and natural justice of the proposed test, particularly given an employer can be liable to a penalty of up to $10,000 for an individual and $20,000 for any other person.[7] The Law Society recommends that the select committee consider whether this clause should be re-worded to include a requirement to consider whether the employer had any knowledge of, or ought reasonably to have known of, the existence of the FPA.

5 Initiating bargaining for proposed FPA (Part 3)

Tests for initiating bargaining (clause 29)

5.1 Clause 29 sets out the two initiation tests (i.e., the representation test and the public interest test) for initiating bargaining for a proposed FPA. Clause 29(5) sets out the evidence that may be provided in support of a union's application to initiate bargaining on the basis that the application meets the public interest test.

5.2 An extensive amount of information is required to support an application to initiate bargaining, and we question how a union would be able to gather this information. The requirements of clause 29(5) could better quantify what may demonstrate that an application meets the public interest test, for example, by identifying what constitutes:

(a) a "high proportion" in clause 29(5)(a);

(b) "systemic exploitation" in clause 29(5)(b);

(c) "most" in clause 29(5)(c); and

(d) a "high proportion" in clause 29(5)(e).

Coverage of proposed FPA (clause 31)

5.3 Clause 31 provides that the coverage of a proposed FPA must be described according to the occupation of the employees who would be covered, or the occupations and the industry of the employees. This proposed test, and the examples provided under clause 31(1) are, in the Law Society's view, far too simple. They do not clarify whether and how employees will be covered, particularly in situations where:

(a) An employee's work spans across several occupations and industries;[8] or

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6 Departmental Disclosure Statement for the Bill, at page 11.

7 Clauses 21(3) and 197.

8 For example, a fast-food restaurant worker may work in several different restaurants with a range of hours and pay, performing duties from food preparation, cleaning, management of staff to office administration.

(b) An employee's working arrangements do not fit the traditional 'permanent full-time' format;[9] or

(c) A role overlaps with another role (as discussed at paragraphs 3.4 to 3.6 above) and may potentially be covered by more than one FPA.

5.4 We therefore invite the select committee consider developing a test which identifies what proportion of work is required by (or is carried out by) an employee in their day-to-day role (as suggested at paragraph 3.6 above).

Submissions on whether an application meets the test (clause 33)

5.5 Clause 33 provides that the chief executive may invite public submissions on whether an application meets the relevant test, when deciding whether to approve an application to initiate bargaining. The Bill could be improved by amending this clause to clarify how submissions may be invited and made by the public.

Chief executive to publicly notify decision (clause 34)

5.6 Clause 34 requires the chief executive to publicly notify a decision to approve an application. The Bill does not clarify where such a notification should be published (i.e., on the department's website, in the Gazette, in all major daily newspapers, or all of these). We suggest clarifying this in the Bill, given the likely public interest in the outcome of such decisions.

Notification of approval to initiate bargaining (clause 36)

5.7 Clause 36 requires the initiating union to notify unions and employers of approval to initiate bargaining. We suggest amending the Bill to provide that the chief executive should, at this point, have the ability, or be required, to check whether the list of employers identified by the initiating union (being those employers considered likely to be a covered employer) is complete.

5.8 We also note it may be challenging for the initiating union to determine which employers might employ staff who would fall under the proposed coverage clause. For instance, in the event of a proposed FPA covering employees who do cleaning work, the initiating union will be required to determine which employers in New Zealand employ cleaners. To the Law Society's knowledge, no list of employees who are employed in particular work (or list of their employers) exists in New Zealand. The Bill should therefore provide for a mechanism for the initiating union to obtain this information, whilst maintaining employees' privacy and the confidentiality of employers' business information.

Employer to notify employees and unions of bargaining being initiated (clause 37)

5.9 Clauses 37(1) to 37(4) require employers to pass on statements provided under clause 36(2)(c), and forms provided under clause 36(2)(d), to the covered employees upon "being advised" that the chief executive has approved initiating bargaining. The Bill does not clarify who is responsible for "advising" covered employers of the approval (in contrast to being

[9] For example, where an employee only spends 50% of their time on work that would be covered by the FPA.

"notified" under clause 36(1)(b)) and we recommend that this language be made consistent with the terms used in clause 36(1)(b). We note that similar language is also used in clause 39(1), which should be updated as suggested.

5.10 Clause 37(5) provides for a penalty to be imposed by the Authority on employers who fail to notify employees and unions of bargaining being initiated. We note that unions are not subject to any similar penalties for failing to provide these statements (under clause 36(2)(c)) and forms (under clause 36(2)(d)). Clause 37(5) therefore creates an imbalance of obligations and consequences for unions and employers. To ensure the parties' obligations are balanced in this regard, we invite the select committee to consider whether it would be appropriate for a union which fails to provide a statement or a form to be liable to a similar penalty.

Employer to provide employee contact details to employee bargaining side (clause 39)

5.11 Clause 39 requires an employer to provide each covered employee's contact details to each employee bargaining party, unless the employee has elected not to have their contact details provided. The 20-day timeframe for employees to opt out of their details being provided to the employee bargaining side (which includes, for example, their personal email address if they do not have a work one) is short. There does not seem to be sufficient consideration within this clause of an employee's right to privacy in their personal information, including their name, job title, work site and their personal email address. The timeframe also does not accommodate any need for employees to seek advice as to whether they should consent to the provision of this information. We therefore suggest amending the Bill to provide for a longer timeframe.

Use of employee contact details by initiating union or employee bargaining party (clause 40)

5.12 Clause 40(1) provides that an initiating union or an employee bargaining party must use a covered employee's contact details only for purposes related to the proposed FPA. However, clause 40(3) enables unions and employee parties to use these contact details to also provide supplementary information which is unrelated to the proposed FPA. This subclause appears to be inconsistent with information privacy principle 10, which states that personal information that was obtained in connection with one purpose may not be used for any other purpose.[10] We therefore recommend deleting this subclause.

5.13 If subclause (3) is not deleted, we recommend inserting a new clause which requires the employee bargaining party to discontinue all communications to an employee who has advised, under clause 40(3)(b), that they elect not to receive any further communication. At present, the employee can advise of this election but there is no corresponding requirement on the employee bargaining party to implement it.

Meaning of employer association (clause 42)

5.14 Clause 42(d) states that an "employer association" means an association which has rules that are "not unreasonable". The Bill does not clarify who is to determine whether an employer association has rules that are "not unreasonable", how such a determination is to

[10] Privacy Act 2020, section 22.

be made, and from what perspective 'reasonableness' will be considered in this context. We suggest amending this clause to address these matters.

Entitlement and obligation to represent covered employers (clause 46)

5.15 Clause 46(1) requires an employer bargaining party to endeavour to represent the collective interests of all covered employers, and not just those employers who are members of the employer association. Clause 46(2) sets out what an employer bargaining party is required to do to comply with clause 46(1).

5.16 However, the Bill does not provide any mechanism for the initiating union to provide employer information to the employer bargaining party. As a result, the employer bargaining party will not know which employers are 'covered employers' and will not be able to represent their interests or discharge its functions under clause 46(2). The Bill should therefore include a provision akin to clause 39, requiring the initiating union to provide employer contact details to the employer bargaining party.

Representation of Māori employers (clause 48)

5.17 Clause 48 requires each employer bargaining party to ensure effective representation of Māori employers. We recommend including a definition of "Māori employer" to ensure these employers are identified and effectively represented in the bargaining process.

Representation of Māori employees (clause 54)

5.18 Clause 54 requires each employee bargaining party to ensure effective representation of Māori employees. However, the Bill does not include any requirement for an employer to inform the employee bargaining party about any Māori employees in the workplace, nor does it provide for any other mechanism for identifying Māori employees.[11] It is therefore unclear how an employee bargaining party is to ensure these employees are represented effectively, and we invite the select committee to consider how this clause will operate in practice.

Notification of bargaining parties (clause 56)

5.19 Clause 56 requires the chief executive to provide each bargaining party with the name of each other bargaining party "3 months after the date on which the chief executive publicly notifies approval" of an application to initiate bargaining. We query whether the word "within" ought to be added before the words "3 months after the date" (so that the notification occurs *within* three months, and not *at the point of* three months), or whether this is intentional (for example, to allow employees and employers to join their respective bargaining side before it is formed).

Inter-party side agreements (clauses 59 & 60)

5.20 Clauses 18(3) and 59 require each bargaining side to agree to an inter-party side agreement and appoint a bargaining side lead advocate within 20 working days. Clause 60 further provides that an inter-party side agreement must include the process the bargaining side will

[11] Clause 39 of the Bill only requires employers to provide an employees' name, their job title, the site at which the employee works predominantly, and their email address and/or telephone number.

follow to make decisions relating to bargaining for the proposed FPA. The Bill could be improved by including a clause which sets out the processes which must be followed when agreeing an inter-party agreement, and any other matters which must be included in such inter-party agreements. We also suggest extending the 20 working day timeframe to ensure bargaining sides are able to complete this crucial step.

Options for specified State employer (clause 65)

5.21 Clause 65 sets out the circumstances in which certain specified State employers (i.e., the Chief of Defence Force, the Chief Parliamentary Counsel, and the Commissioner of Police) may be an employer bargaining party, or ask the Public Service Commissioner to act as an employer bargaining party on their behalf.

5.22 It is unclear how this provision interacts with the proposal set out in Parliamentary Paper G.46C (the **G.46C proposal**).[12] The G.46C proposal enables the Authority to set FPA terms without bargaining, but gives the bargaining party the option to provide input into the Authority's determination via bargaining parties that were prepared to bargain.[13]

5.23 However, clause 65(4) provides that employer associations are not required to represent the specified State employer's interests if the specified State employer decides not to act as an employer bargaining party (or be represented by the Public Service Commissioner). As a result, it's unclear what input the specified State employer can usefully give, if their interests are not being represented. If the G.46C proposal is incorporated into the Bill, we invite the select committee to give further thought to what input these specified State employers are expected to provide.

Rights, duties, and obligations of specified employer bargaining party (clause 67)

5.24 The reference to "section 47(1)" in clause 67(2) should be to "section 47" only, as clause 47 does not have a subclause (1).

6 FPA meetings and union access to workplaces (Part 4)

Requirements for arrangement FPA meeting (clause 81)

6.1 In arranging an FPA meeting, clause 81(3)(b) currently requires the employee bargaining party to make arrangements with each employer to ensure that their business is maintained during the FPA meeting (including making arrangements for sufficient employees to remain available to allow the employer's operations to continue).

6.2 The Bill could be improved by providing for a process to address situations where the parties are unable to agree on cover arrangements to enable the employer's business to be maintained for the duration of the meeting (and any associated travel time).

Entitlement to attend FPA meetings (clause 82)

6.3 Clause 82 provides that employees are entitled to attend FPA meetings relating to proposed FPAs. Clause 82(2)(a) stipulates that the meeting may not last longer than two hours but

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12 Hon Michael Wood *Parliamentary paper: Proposed policy change to the Fair Pay Agreements Bill* (31 March 2022).

13 Above n 12, at paragraphs 13-14.

does not put any limit on travel time to and from a meeting (or require that meetings be held virtually if they cannot be held in a reasonably proximate location to the employees' workplace). It is therefore possible that employees may be required to spend a significant amount of time away from work travelling to and from FPA meetings, particularly if a national agreement is being negotiated. The Bill does not stipulate who would bear the cost of such travel. The select committee should therefore consider if it would be appropriate for the Bill to require:

(a) meetings to be held virtually if they cannot be held in a location that is reasonably proximate to the employees' workplace; and

(b) that a reasonable limitation be placed on the amount of travel time during which an employee can be absent from work.

Payment for attending FPA meeting (clause 83)

6.4 Clause 83 provides that an employer must allow an employee to attend an FPA meeting on "ordinary pay", which we assume to be the employee's pay calculated using a 'relevant daily pay' or 'average daily pay' calculation.[14] We note the point at paragraph 3.1 of this submission regarding cross-referencing the ER Act where this informs a definition within the Bill.

6.5 We also note clause 83(1) only provides for payment "to the extent that the employee would otherwise be working for the employer". However, some employers and employees may prefer for employees to attend the meeting outside of working hours (so, for example, business is not interrupted), and for the employer to pay the employee as if the employee was at work. We therefore recommend amending this clause to give employers and employees the flexibility to make suitable alternative arrangements that best suit their needs, with a dispute resolution mechanism available in the event that agreement cannot be reached.

Access to workplaces and conditions relating to access (clauses 86 & 87)

6.6 Clause 86 provides for access to an employer's workplace without consent in a range of circumstances. These provisions are largely consistent with the union access provisions under the ER Act. However, consideration ought to be given to the possibility that in the circumstances set out in the Bill (as opposed to circumstances where a union is visiting site under the ER Act) there is a greater chance that the employee bargaining party representative may not be familiar with the employer, their workplace, or their shift/working arrangements.

6.7 We invite the select committee to consider whether:

(a) A notice requirement would be of practical assistance in these circumstances. Such a requirement would enable the employer to ensure that appropriate induction and health and safety requirements can be adhered to and to facilitate the relevant employee(s) being located in the workplace at the time of the visit.[15]

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[14] This is the definition of the term "ordinary pay" in section 79 of the Employment Relations Act.

[15] That is, confirming that the relevant employees are actually at the workplace at the time of the visit.

(b) A duty should be placed (once notice has been provided) on the employer to convey any relevant information regarding its business operations, and on the employee bargaining party to comply with any health and safety induction requirements (perhaps by amendment to clause 87, which sets out the conditions that apply when an employee bargaining party representative enters a workplace).

7 Bargaining (Part 5)

Providing information when bargaining (clause 92)

7.1 Clause 92 sets out the process for a bargaining side to request information from the other bargaining side during bargaining. Clause 92(3) requires a bargaining party to provide the requested information to an independent reviewer if they reasonably consider the information should be treated as confidential information. The Bill does not provide any guidance as to what "confidential information" might comprise nor what might be reasonable grounds for a bargaining side to consider that information is confidential. These concepts would benefit from some definition or statutory tests.

7.2 Clause 92(5) requires the parties to apply to the Authority for a determination as to who should be appointed as the independent reviewer. A determination by the Authority is likely to take a considerable amount of time. In the Law Society's view, such a determination is unnecessary. The chief executive or a Labour Inspector can readily decide on a person to act as an independent reviewer under this clause.

Consequences of coverage overlap (clause 105)

7.3 Where there is coverage overlap, clause 105 requires the Authority to review the terms of the overlapping agreements and determine which provides the covered employees with the better terms overall.

7.4 As an initial administrative point, it would be helpful if clause 105 included a cross-reference to the definition of 'coverage overlap' in clause 5.

7.5 The Law Society notes that this clause would require the Authority to consider an entire FPA to determine which provides the better terms overall, even in the event of only discrete or minor overlap (that is, there is no ability to 'slice and dice' or consider only the overlapping areas of coverage, as opposed to the entire agreement). We invite the select committee to consider whether the Authority should be able to consider only those overlapping areas of coverage, noting that additional amendments would be required to any related clauses.[16]

Consolidation of bargaining for FPAs (clauses 106 to 111)

7.6 Under clause 107(1)(a), bargaining for two agreements "must" be consolidated where a second application to initiate bargaining is approved less than six months after the first application. This does not account for situations where the first agreement has already been

[16] Including clause 139, which sets out the consequences of the Authority's determination as to which agreement provides the better terms overall, and clause 153, which requires the Authority to determine which agreement provides the better terms overall.

bargained for and agreed within that six month period, and might already be out for a ratification vote.

7.7 Where the chief executive approves an application to initiate bargaining for a second proposed FPA six months after the first proposed FPA, the bargaining sides for the first proposed FPA are required to decide whether bargaining for the two agreements will be consolidated. Clause 107(3) states that the bargaining sides for the first proposed FPA are deemed to have decided not to consolidate bargaining if they do not notify the bargaining parties of the second proposed FPA of their decision within 20 working days. We presume the process set out in clause 111 ("Effect of decision not to consolidate") applies in the event the bargaining sides for the first proposed FPA fail to notify their decision within 20 working days. The clarity of the Bill could be improved by including cross-reference between clauses 107(3) and 111 to confirm that clause 111 applies if a decision is not notified as contemplated in clause 107(3).

7.8 We also query why the option to consolidate bargaining is only available in respect of industry-based agreements and not occupation-based agreements, and invite the select committee to consider if the option should also be available for occupation-based agreements.

8 Content of FPAs (Part 6)

Mandatory content for each FPA (clause 114)

8.1 Clause 114 lists the matters that must be specified in an FPA. This clause refers to a number of terms which require further clarification (perhaps by amending other relevant clauses within the Bill), as discussed below.

"Coverage" (clause 114(1)(b))

8.2 "Coverage" is a key concept which, as discussed at paragraphs 3.4 to 3.6 above, is not well-defined in the Bill.

"Normal hours of work" (clause 114(1)(c))

8.3 This phrase is not defined in the Bill,[17] and this is problematic for a number of reasons:

(a) The phrase is relevant to working out when and how overtime and penalty rates apply.[18]

[17] We note the term is also not defined in the ER Act (although section 18A provides that employees are entitled to "spend reasonable paid time undertaking union activities during the employee's normal hours of work in certain circumstances").

[18] Clause 5 of the Bill states that "penalty rates means any identifiable additional amounts that are payable to an employee under [an FPA] to compensate the employee for working … outside of their normal hours of work…".

(b) The phrase appears to be at odds with existing statutory definitions relating to hours of work, such as "agreed hours of work",[19] an "availability provision",[20] and shift working provisions,[21] which do not include any reference to "normal hours of work".

(c) The concept of "normal hours of work" fails to capture working arrangements where hours of work legitimately fluctuate, for example:

(i) Casual employees who work only as and when required, and have their holiday pay paid with the employees' wages;[22] and

(ii) Fixed term employment under section 66 of the ER Act

(d) It is unclear whether diversity and inclusion initiatives such as job sharing, reduced hours contracts and term-time working come within the meaning of "normal hours of work" (noting that the exclusion of such initiatives would have the adverse impact of, for example, excluding employees who are parents from the benefits and protections of an FPA).

(e) The phrase does not appear to account for workforces that have different seasonalities, or provide essential services. For example:

(i) "normal hours" will differ amongst fruit pickers as fruit ripens at different times depending on the month of the year and where you are in the country; and

(ii) cleaners who work in hospitals may be required to work longer hours in the event of emergencies or staff illness and absence.

8.4 If FPAs are to set out the "normal hours of work" required of each class of employees (as set out in clause 114(1)(c)), the application of FPAs should be restricted to permanent employment arrangements which are more likely to have "normal hours of work". Alternatively, we suggest more flexibility in the concept to account for the many different working arrangements currently in the workforce. If the provision is only intended to determine which hours attract normal pay and which attract overtime, this should be clearly explained in the Bill.

"Details of wages" (clause 114(1)(d))

8.5 This sub-clause requires FPAs to specify "details of wages", including minimum base wage rates, penalty rates and rates for any overtime worked. This sub-clause does not allow for flexibility in an employee's remuneration structure and excludes payment arrangements that are beneficial for both employers and employees (for example, payment arrangements which require an employer to pay an employee a higher flat hourly rate rather than a lower

19 Employment Relations Act 2000, section 67C.
20 Above n 19, section 67D.
21 Above n 19, section 67G.
22 Holidays Act 2003, section 28.

hourly rate with payment for overtime and penalty rates[23]). We recommend amending this sub-clause to provide more flexibility to allow for different remuneration structures.

8.6 Payroll administration can become overly complicated when additional payments are made which can, in turn, make holiday pay calculations cumbersome. Therefore, we also recommend simplifying the content that should be included in an FPA under this sub-clause so "details of wages" do not include overtime and penalty rates where these are already factored into the hourly rate. Allowing for a simpler remuneration structure, such as a flat hourly rate, would also make it easier to compare and consider whether or not terms in employment agreements and collective agreements are more favourable (as required under clause 163(3)).

"Class of employees" (clauses 114(1)(c) and 114(1)(d)

8.7 This term is not defined in the Bill, and appears to be at odds with the meaning of "covered employee".[24] We recommend proving a definition of this concept within the Bill. We also note that the reference to "class" could give rise to a connotation of specified groups being superior to others or holding an advantage over others, and suggest that "group " may be a more neutral term.

"Governance arrangements" (clause 114(1)(e))

8.8 This term is not defined in the Bill and it is unclear what arrangements may be required under the Bill. We recommend including a definition of this term, or providing some other guidance as to the meaning of the term within the Bill.

Mandatory content (clause 114(5))

8.9 Clause 114(5) provides that the mandatory content must be specified in the form required in the regulations, and must include all details required by regulations. However framed, we recommend building in sufficient flexibility to enable bargaining sides to use wording that expresses accurately what has been agreed. We do not recommend the use of regulations which prescribe a rigid format and limits the ability of bargaining sides to tailor an agreement that meets the needs of their occupation and/or industry (and provides tailored hours of work and remuneration structures to suit each workplace).

Topics that bargaining sides must discuss (clause 115)

8.10 Clause 115 requires bargaining sides to discuss a list of topics they may include a provision for in the FPA. If included, the topic must follow the form and include all details prescribed by regulations.[25] The listed topics include health and safety requirements, training and development, and flexible working. These are topics that may have some similarities between workplaces, but are more often tailored to specific workplaces or employers.

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23 A higher hourly rate can benefit both the employer and the employee – an employee need not work in excess of their normal hours (or even work full-time) to earn a higher hourly rate, and an employer has less payroll administration in respect of wages and holiday pay.

24 The term also appears in clauses 5, 122 and 125.

25 Clause 115(3).

8.11 Prescribing the form and details for these terms therefore risks having rigid terms that do not suit certain workplaces and employers. It could overcomplicate what is intended to be a minimum terms document, and hinder progress in bargaining by focussing on non-essential terms. It would also be difficult to compare and consider whether terms in employment agreements and collective agreements are more favourable (as required under clause 163).

8.12 Thought should also be given to whether such provisions (particularly those relating to health and safety) have an impact on the obligations of a Person Conducting a Business or Undertaking (**PCBU**) to assess and consider for themselves the hazards associated with their business, and the reasonably practicable steps required to eliminate or minimise those hazards. We invite the select committee to consider whether any amendments are needed to ensure these provisions do not have an adverse effect on health and safety outcomes.

Minimum entitlement provisions (clause 117)

8.13 Clause 117 provides that a term of an FPA that relates to a topic listed under this clause is a minimum entitlement provision for the purposes of the ER Act. The listed topics include minimum base wage rates, overtime rates, and penalty rates.

8.14 As discussed at paragraph 8.3 above, the concepts of overtime rates and penalty rates are linked to the term "normal hours of work" which is not defined in the Bill. As a result, these concepts cannot easily be applied to the varying working arrangements present in any given occupation and industry (see discussions at paragraphs 8.5 and 8.6 above). The ambiguity surrounding these concepts would make minimum entitlement claims more onerous to bring, particularly where an assessment is being made regarding whether terms in employment agreements and collective agreements are more favourable (as required under clause 163). We urge the select committee to consider clarifying the meaning and scope of these terms within the Bill.

How minimum entitlement provisions relate to other legislation (clause 119)

8.15 Clause 119 specifies how minimum entitlement provisions apply in relation to other employment legislation. We suggest that the Parental Leave and Employment Protection Act 1987 be listed in this clause also.

Permitted differentiation in minimum entitlement provision (clause 125)

8.16 An FPA may include a minimum entitlement provision that applies differently to different employees, if the difference is based on the employee's district (clause 125(a)), their occupation (clause 125(b)) or their role within an occupation (clause 125(c)). We recommend including definitions of the terms "occupation" and "role" to clarify the meaning of this provision.

9 Finalisation of proposed agreement (part 7)

Authority to assess proposed agreement for compliance (clause 133)

9.1 Clause 133 requires the Authority to assess a proposed agreement to determine whether it complies with this Bill, employment standards, and "any other relevant employment law requirements". This is a broad provision which may result in complex and lengthy

procedures in the Authority, particularly in relation to holidays and pay entitlements in shift-work environments. The select committee should therefore consider whether a simpler assessment is appropriate here.

Authority to check whether coverage overlap exists (clauses 135 and 136)

9.2 Clause 135 requires the Authority to assess whether there is any coverage overlap between the proposed agreement and an FPA. We query how the Authority will be able to check whether any such overlap exists as parties are not required to provide this information to the Authority. We also note that the Authority may not be able complete such assessments within 20 working days (as required by clause 136(1)(b)), particularly where a comprehensive FPA exists. We therefore suggest amending this clause to require the bargaining side lead advocates, or the chief executive, to provide copies of any existing FPAs, and to include an option for the Authority to extend the timeframe for undertaking the clause 135 assessment.

How Authority determines which agreement provides better terms overall (clause 138)

9.3 Clause 138 requires the Authority determines which agreement provides the "better" terms for the majority of the employees who are within the coverage of both agreements. However, the Bill does not contain any guidance or framework for how this consideration of what is "better" might occur. For instance, it could be 'better' for employees in a particular region to be provided with a carpark, or receive free lunch in a company cafeteria, than a higher wage rate. For others, a higher wage rate would be 'better' than such benefits. In such circumstances, the Bill does not clarify how the Authority is to balance its consideration of different terms and how it might decide which is "better" overall.

9.4 We note that the chief executive is required to ensure there is no coverage overlap between the proposed agreement and an FPA.[26] We therefore query whether these provisions are in fact needed (particularly given that a finding of coverage overlap leads back to a change in coverage and further ratification).[27]

Approved proposed agreement to be ratified (clause 140)

9.5 Once a proposed agreement has been approved and checked for coverage overlap by the Authority, it must be ratified.[28] This process seems to be in reverse order, as an agreement that does not then ratify may need to be re-bargained or reconsidered, and then go back to the Authority again before looping back to be ratified. We are concerned that these steps will result in lengthy and drawn-out processes where ratification does not initially occur, and we invite the select committee to consider whether a simpler process could be provided for in the Bill.

Time frame for holding ratification vote (clause 142)

9.6 Clause 142 sets out the time frame for holding a ratification vote. This clause contains a minimum timeframe within which ratification must occur, but no corresponding maximum

26 Clause 151.
27 Clause 139.
28 Clause 140.

timeframe. Therefore, either party could hold-up the process at this point by simply not taking the proposed FPA out to a ratification vote. We recommend including a maximum timeframe within this clause.

Chief executive to assess whether coverage overlap exists (clause 151)

9.7 Clause 151 requires the chief executive, after verifying a ratification, to assess whether there is coverage overlap between the proposed agreement and any FPA. Consideration of whether there is coverage overlap after ratification seems too late in the process, as both the bargaining process and the relatively complex ratification processes (which potentially include a number of votes) will have already been completed by that point.

9.8 The existence of any overlap should be identified when the chief executive assesses an application for approval to initiate bargaining (under clause 32) and considers whether there is any coverage overlap with another FPA (under clauses 103 – 105). While potentially intended as a final check, the consequences of coverage overlap being determined after ratification could be significant and cause extensive delay. We therefore recommend deleting this clause.

Chief executive may make editorial changes (clause 159)

9.9 Clause 159 enables the chief executive to make editorial changes to an FPA after it has been validated. This clause could prove to be problematic as the language used in FPAs is likely to be deliberate. While it may not be editorially perfect, clauses agreed to during the bargaining process are designed to reflect the agreements reached by the parties. Omitting or changing punctuation, for example, can have a significant effect on the meaning of a particular provision. While subclause 2 provides that the chief executive is not permitted to change the effect of an FPA, this does not prevent the chief executive from doing so inadvertently. We therefore invite the select committee to consider deleting the following subclauses, which carry such a risk:

(a) clause 159(1)(d), which provides that unnecessary referential words may be omitted;

(b) clause 159(1)(f), which provides that punctuation may be added, changed or omitted;

(c) clause 159(1)(g), which provides that conjunctives and disjunctives may be inserted, omitted, or changed; and

(d) clause 159(1)(h), which enables changes to be made to the way numbers, dates, times, quantities, measurements, and similar matters, ideas, or concepts are expressed.

Application of notice and FPA (clause 160)

9.10 Clause 160 provides the date on which a fair pay agreement notice comes into force. This clause seems to allow an FPA to come into force immediately, if the chief executive issues the notice after the commencement date stated in the FPA (clause 160(1)(b)). In such circumstances, there is no transitional period and the FPA immediately binds the relevant employees and employers. Should this occur, for instance after the employer's payroll calculations have closed and before an employee is paid for subsequent working dates, the

employer would potentially be in breach of the FPA (having had no time to organise for wage rates to be paid correctly). It also prevents an employer from preparing for any wage increases by reconsidering business practices and pricing models, or taking steps to reconfigure its payroll systems. We therefore recommend amending the Bill to provide for a transitional period which would enable employers to make any necessary compliance arrangements and changes to business practices.

Obligation to comply with FPA (clause 161)

9.11 Clause 161 requires each "party" to an FPA to comply with the terms of the FPA, however, the term "party" does not appear to be defined in the Bill. For consistency and clarity, we suggest replacing this term with the terms used in clause 160(2) (i.e., the employees and employers who are within the coverage of the FPA).

Relationship between FPAs and collective agreements (clause 163)

9.12 Clause 163 provides for situations where a covered employee is also covered by a collective agreement under the ER Act, and requires consideration of whether a term in an employment agreement is more favourable to a covered employee than the corresponding term in a collective agreement. Clause 163(3) envisages a term-by-term analysis being undertaken to determine which agreement contains the more favourable term.

9.13 A test similar to the 'better off overall test' (BOOT) adopted in Australia, could also assist in determining whether the terms of an employment agreement are more favourable than the corresponding terms in a collective agreement. A BOOT requires an overall assessment as to whether the wage provisions in an existing agreement are 'better off overall' than the terms of a collective agreement. We note that clause 163 appears to preclude the use of a BOOT by requiring a term-by-term analysis. We query whether this is intended, and if so, if it would be appropriate to also allow for an overall assessment.

10 Variation, renewal, and replacement of FPAs (Part 8)

10.1 Clauses 164 to 195 set out the process for varying, renewing and replacing an FPA. These processes are lengthy and repetitive and include the same types of procedures for finalising, ratifying, and confirming the FPA. We recommend the select committee consider whether it would be more appropriate to simply refer back to those initial provisions so that the same steps and procedures apply each time an FPA is commenced, bargained and finalised.

Limitations on requesting variations (clause 169)

10.2 Clause 169(3)(b) provides that an FPA cannot be varied to extend or alter its coverage. As a result, FPAs cannot be changed to accommodate any new work, new occupations, or new types of employees (for example, as a result of environmental or industrial changes). We invite the select committee to consider whether this clause should include an exception to enable such changes to be made.

11 Recovery of penalties (clause 201)

11.1 Clause 201(1)(a) provides that any "party" to the agreement who is affected by a breach may bring an action for the recovery of a penalty. We note our comments at paragraph 9.11

above regarding the use of the term "party" and suggest this term be defined in the Bill (in relation to the recovery of penalties), as the definition would determine who can bring a case for a breach and seek a penalty under cl 201(1)(a).

12 Institutions (Part 10)

Mediation services (clause 204)

12.1 Clause 204 requires the chief executive to engage or employ persons to provide mediation services to support specified relationships relating to FPAs. We recommend amending this clause to specify that the chief executive may provide mediation services by telephone or an online platform, and direct the parties to attend the mediation. The Law Society is aware that, in some circumstances, mediation meetings cannot be arranged because the parties do not agree on the format for mediation (i.e., whether the mediation should proceed in-person or by Zoom), at which point the attempt to mediate can fail.[29] We also note that this would be a useful amendment to the ER Act, so mediation can proceed promptly and without ongoing discussions about the format of mediation in a particular case.

Role and jurisdiction of Authority (clauses 211 and 213)

12.2 Clauses 211 and 213 set out the role and the jurisdiction of the Authority. We recommend including a reference to the Authority's role in checking whether coverage overlap exists (as required under clause 135) in clause 211(1)(a) and 213.

Parties may apply to Authority for determination (clause 212)

12.3 Clause 212(f) provides that a Labour Inspector may apply to the Authority for a determination as to whether an employee, or a group of employees, is within the coverage of an FPA. We suggest amending this subclause to enable employees and employers to also apply to the Authority for such determinations (rather than limiting this to Labour Inspectors).

Determination relating to topic that must be included in FPA (clause 214)

12.4 Clause 214 provides that specified parties may apply to the Authority for a determination as to whether an FPA should include a term that addresses a topic listed in clause 115. Clause 214(2) provides that the Authority must determine that the FPA "must" include a term to address a topic listed in clause 115 unless there is good reason not to include it. This may entice a party seeking to slow down or defer the bargaining by referring the matter to the Authority, at which point the Authority's usual processes would presumably apply (including evidence, investigation, and a written determination) and cause delays. It may be more appropriate to refer such matters to a Labour Inspector, rather than the Authority.

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29 We also note that this would be a useful amendment to the ER Act, so mediation can proceed promptly and without ongoing discussions about the format of mediation in a particular case. However, we acknowledge that such an amendment may be beyond the scope of the select committee's scrutiny of this Bill.

Authority to direct use of mediation (clause 216)

12.5 We reiterate our comments above regarding the number of steps and processes outlined in the Bill,[30] and note that this clause adds a further step in requiring the Authority to direct the parties to use mediation (or another process) to resolve the matter before the Authority makes the determination or recommendation unless limited exceptions apply. This provision will, once again, lengthen the time and process for an FPA to be bargained and implemented.

Considerations when Authority recommends or fixes terms (cause 220)

12.6 Clause 220(a) requires the Authority to consider various types of evidence when recommending or fixing terms of a proposed FPA. We note that a significant amount of evidence may be required under this clause and result in lengthy hearing times and delays. For instance, the Authority must consider:

(a) the likely impact of any terms in the FPA on covered employers, which may require evidence from some or all of those employers;

(b) relativities against other agreements, which may be extensive; and

(c) industrial practices which likewise may be the subject of significant (and possibly contested) evidence.

12.7 Likewise, under subclause (b), the Authority may consider any likely impacts on New Zealand's economy or society, which seems a very broad consideration (even though that consideration is made optional by use of the word "may"). We invite the select committee to consider whether it would be appropriate to amend this clause to provide that the Authority *may* consider these types of evidence (as provided for in subclause (b)), rather than "must".

Labour Inspector may determine coverage under FPA (clause 236)

12.8 Clause 236 provides that a Labour Inspector may determine whether an employee is covered by an FPA in certain circumstances. In the event an application is made for determination about the coverage of a group of employees, the Labour Inspector *must* make a separate determination about each employee in that group. We note that there could be occasions where a Labour Inspector is asked to determine coverage for hundreds, or even thousands, of employees. In such circumstances, this requirement would be extremely cumbersome and virtually impossible to comply with. We therefore suggest including a provision which would enable Labour Inspectors to consider and make determinations for groups of employees in situations where large numbers of employees fall within the group.

12.9 Clause 236(3)(a) provides that a Labour Inspector who receives an application for a determination must decide whether to investigate whether the employee is covered by the FPA. However, the Bill does not address what happens in the event the Labour Inspector decides not to investigate or determine whether an employee is covered by an FPA.[31] We

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30 At paragraphs 2.1 to 2.4.

31 Clause 239 provides a power to appeal to the Authority against a coverage determination, however, this clause does not contemplate what would happen if a determination is not made at all.

recommend including a provision which sets out the consequences of a Labour Inspector's decision to not make a determination under 236(3)(a).

Challenges to determinations of Authority (Schedule 3, clauses 11 and 12)

12.10 Clauses 11 and 12 provide that parties who are dissatisfied with a determination of the Authority may elect to appeal the matter to the Employment Court provided the appeal is on a question of law. We recommend moving clauses 11 and 12 into the body of the Bill as the ability to challenge a determination of the Authority is a substantive provision. This will also be consistent with the format of the ER Act, where the challenge provisions are contained within the body of the Act, rather than in a schedule.

13 Miscellaneous provisions (Part 11)

Record when minimum entitlement provision has district variation (clause 232)

13.1 Clause 232 sets out the record-keeping requirements that apply to an employer that has an employee covered by an FPA that applies to a specific district.

13.2 The obligation to record the district in which the employee worked on an hourly basis across a workforce may cause practical difficulties in some industries (such as the transport industry where employees may move through a number of districts in the daily course of their duties). These difficulties may not be readily resolved by payroll and time and attendance systems (i.e., there may need to be an interface between this proposed record-keeping requirement and a vehicle-based GPS system).

13.3 If the purpose of this clause is to account for the differences in the cost of living in various districts, then a more practical solution would be to have the employee's home location as their district by default, with the option to have multiple districts if an employee is routinely based in multiple locations.

Extent of Labour Inspectors' powers (clause 241)

13.4 Clause 241(4)(b) contains a reference to a Labour Inspector's power to conduct interviews by telephone conference or video link. We recommend using technology-neutral language in this clause to allow for, for example, Microsoft Teams or Zoom connectivity for Labour Inspectors.

Frazer Barton
Vice-President