Ia Ara Aotearoa Transporting New Zealand

submission to the

Employment and Workforce Select Committee

on the:

Fair Pay Agreements Bill

submitted online:
Fair Pay Agreements Bill - New Zealand Parliament (www.parliament.nz)

Ia Ara Aotearoa Transporting New Zealand
PO Box 1778
Wellington
Ph: (04) 472 3877
Contact: Nick Leggett CEO

May 2022

Ia Ara Aotearoa Transporting New Zealand submission to the Employment and Workforce Select Committee on the Fair Pay Agreements Bill

1. Representation

1.1 Ia Ara Aotearoa Transporting New Zealand (Transporting New Zealand) is made up of several regional trucking associations for which Transporting New Zealand provides unified national representation. It is the peak body and authoritative voice of New Zealand's road freight transport industry which employs 32,868 people (2.0% of the workforce), and has a gross annual turnover in the order of $6 billion.

1.2 Transporting New Zealand members are predominately involved in the operation of commercial freight transport services, both urban and inter-regional. These services are entirely based on the deployment of trucks both as single units for urban delivery and as multi-unit combinations that may have one or more trailers supporting rural or inter-regional transport.

1.3 According to Ministry of Transport (MOT) research (National Freight Demands Study 2018), road freight transport accounts for 93% of the total tonnage of freight moved in New Zealand.

2. Introduction

2.1 Transporting New Zealand provides sector leadership and believes we need to operate in an environment where the following must be managed and co-exist:

- The safety and wellbeing of our drivers and other road users; our drivers are our most valuable asset
- The impacts of transport on our environment
- The transport of goods by road is economically feasible and viable, and it contributes the best way it can to benefit our economy

2.2 Worker pay and working conditions are critical elements to the success and viability of our members' businesses and their movement of freight is critical to our economy. Therefore, any regulatory change that will have an impact on that activity is of great interest to Transporting New Zealand.

2.3 The roles and responsibilities of workers in the transport sector cover a wide and varied range, including, but not limited to, driving, despatching, loading, health and safety, advising and managing, operations and logistics management, fleet maintenance, and servicing and administration. Worker pay typically makes up between 25% and 35% of the cost of transport, therefore material changes to work remuneration will have a relatively significant flow-on effect to the cost of transport.

2.4 While we are always looking for and supportive of opportunities for improvement, we believe the current legislative framework provides a good balance of flexibility and fairness to drivers and employers.

2.5 Transporting New Zealand is pleased to submit on the Fair Pay Agreements Bill (the Bill), and wishes to appear before the Select Committee to speak to its submission.

3. General comments on the Bill

3.1 The Fair Pay Agreements Working Group (FPAWG) delivered its report to the Government in December 2018. Its recommendations were couched in terms of preventing a "race to the bottom" in wages and conditions of employment in highly competitive industries, e.g. cleaning, security and food retail. However, the Bill does not deliver on the stated intentions of the report. Instead, it appears to be designed purely to give unions significantly more sway over the wages and conditions of workers across New Zealand, whether or not those workers have any interest in having their conditions set by unions. This is unsuitable legislation for the road transport industry, where it is estimated that only around 7% of our workforce is a member of a union.

3.2 There are several areas where it appears that unions are to be given greater power in our labour markets. They are:

- Initiation: where only unions can initiate a Fair Payment Agreement (FPA) as employers have no say. The representation criteria are so low as to be farcical and the public interest test is simply a device to circumvent the representation test when a union can't meet even that low threshold.
- Representation: where experienced unions will be bargaining with employer groups cobbled together for the purpose, many of the latter will have little if any experience of industrial relations and collective bargaining.
- Ratification: where employers' votes will be weighted, forcing them to have an intimate knowledge of which employers are affected and exactly how many affected employees each has on the day of the ratification vote. At the same time, a second failed vote (i.e. "no-vote") will refer the settlement to the Employment Relations Authority (ERA) for determination. This makes a vote against an FPA completely meaningless and the whole process more totalitarian than democratic.

3.3 The Bill establishes a cumbersome, labour intensive, costly system of monumental complexity that completely fails to recognise the fast-moving nature of today's economic environment. If passed, New Zealand really will be headed "Back to the Future". It will reinstate the failed national occupational award system in existence between 1894 and 1991. In so doing, the Bill also fails to recognise the most basic lesson learnt during that period, which is that even the award system recognised that one size did not fit all.

3.4 Transporting New Zealand believes FPAs will not deliver the claimed benefits. In fact, they will prove damaging, and should not be introduced at all.

3.5 Transporting New Zealand joins with other industry groups on the following points:

- We oppose the introduction of the Bill on a number of premises, including that they:

- are unfair to workers and employers
- are unworkable in practice
- will lead to a significant increase in disputes and litigation
- will be economically damaging

- We recommend that either:
  - the Bill not proceed; or
  - the Bill be replaced by a system of voluntary collective bargaining built on present provisions for codes of practice and multi-employer collective agreements

3.6 Sections 4 to 7 inclusive in this submission provide our reasons for opposing the Bill.

4. The Bill is unfair to workers and employers

4.1 We do not believe the Bill will lead to workers substantively benefiting from increased wages.

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

- Firstly, FPA settlements, by definition, need to be affordable for most, if not all, affected employers. Settlements that are affordable only by the largest employers will simply drive small businesses under. In the road transport industry, it is estimated that 70% or more businesses have 10 employees or fewer. Indeed, history (informed by New Zealand's system of national awards in place from 1894-1991) demonstrates clearly that national level settlements will necessarily be conservative. Furthermore, even conservative settlements will effectively increase the value of the minimum wage. FPA settlements therefore will be yet another cost, particularly to small employers who already bear the brunt of economic hardship brought about by Covid, and more recently, the effects of the war in Ukraine.
- Secondly, the current minimum wage of $21.20 per hour ($44,223 per annum) is now close to the tax threshold of 30% (payable on income above $48,000). The current "Living Wage" now aspired to by many and paid by some (particularly in local government) is $22.75 per hour ($47,456 per annum). Increases in the minimum wage in 2023 will close the gap to the 30% tax bracket before any FPA settlements are applied. In fact, it is unlikely any settlements will be reached before the next election, let alone by the time of the next scheduled increase in the minimum wage in April 2023. This is because much about the process and outcomes is still unknown, and there are a large number of points in the process at which lengthy litigation is almost inevitable. These include the criteria under which an FPA may be initiated, the composition of bargaining teams, the fairness of the process and proposed settlements, the ratification process, and the accuracy with which the Government translates a settlement into enabling legislation.

- Thirdly, wage increases for the lower paid (whether achieved via FPAs or other means) are likely to be diminished by the application of abatement criteria attached to Government subsidies such as Working for Families, meaning many workers will never obtain the full benefits of a wage increase. While this occurs now, it will be exacerbated by FPAs. Since settlements will be imposed generally upon all workers and employers, there will be little ability to ameliorate the abatement effects of transfer payments on pay increases with workarounds such as improved non-monetary benefits for individuals. Any such workarounds will simply add further cost, further hurting productivity. In other words, the current flexibility many employers use to assist workers will become unavailable.
- Recognition of these deleterious effects on settlements is likely to generate higher claims for wage increases. Yet a settlement will be acceptable only when it is sustainable by the vast majority of those businesses covered by it. Our industry sees this legislation as an attack on small and medium businesses who will struggle to organise themselves and indeed fund wage increases set by a national award.
- As occurred under the pre-1991 award system, this will simply generate frustration among workers, leading ultimately (as occurred with the award system in the late 1960s) to the collapse of the FPA system for all practical purposes and the advent of second tier enterprise-based bargaining where workers seek to achieve their aims at the enterprise level. Notwithstanding a prohibition on strikes for FPAs, strikes can occur in relation to enterprise level (the Employment Relations Act provides for them) and under the previous award system occurred frequently.
- Ultimately, introducing FPAs without addressing these issues may perversely put more money in Government coffers than it will in workers' pay packets.

4.3 Workers face long waits for pay increases.

- FPAs will be in force for a minimum of three and maximum of five years. Technically at least, workers covered by FPAs will have no right to changes to their conditions of employment for at least three years. It is important to contrast this with the choice that individual workers currently have, particularly in a constrained labour market that has to attract employees and meet their cost-of-living strains though wage increases.
- While it will be possible to build in phased increases, these, as mentioned above, are most likely to be conservative, to insure against unsustainable costs (particularly for businesses like those in road transport that operate with low margins). Inflation over a three-year period is highly likely to see the value of workers' incomes fall significantly behind in real terms – something we are already seeing. Workers' only redress will be to seek increases over those in the FPA (second tier bargaining), which opens up the right to strike as mentioned above.

4.4 We believe FPAs risk disenfranchising the unions.

- Under the award system, demarcation disputes between unions were common due to strict rules about which unions covered which work. At times these disputes caused as much disruption as strikes over collective bargaining.

- The FPAWG's recommendations would enable unions (on behalf of workers) to nominate the coverage of a proposed FPA. Over time, this will almost certainly create tensions between the boundaries of FPA coverage and the unions that negotiate them, recreating demarcation as an issue. Warfare between unions will not assist worker wage levels or bring us badly needed lifts in productivity.
- There are currently around 135 unions in New Zealand. Tensions already exist between many of the unions affiliated to the NZ Council of Trade Unions (CTU), which number fewer than 30, and the more than 100 unions that are not; the Resident Doctors Association is a notable example as evidenced by media attacks from the CTU[1].
- Opportunistic claims for FPAs by CTU affiliates could easily force non-affiliated domestic unions into a corner, particularly those that currently are associated with a single employer. There are many of these in New Zealand, in private schools, local government, ports, and private sector companies. These so-called "yellow dog" unions are traditionally disavowed by internationally affiliated unions.
- As an example, a union that is not represented in all ports, but which has enough members to initiate an FPA, can effectively "take over" the conditions of the ports in which they do not currently have a presence. This could easily disenfranchise other unions present, and lead to levels of internecine union conflict not seen since before the 1990s. It may also affect the constructive relationships now in place between many employers and their local union by replacing those unions with more militant nationally oriented ones.
- We are concerned that the proposed system is likely to lead to demarcation style disputes between unions, something not possible under the present system.

5. FPAs are unworkable in practice

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

- Initiation criteria
- Threshold criteria
- Notification requirements
- Coverage (sector, industry, occupation or sub occupation; regional or national?)
- Exemptions
- Good faith criteria
- Scope of FPAs (i.e. what they can cover)
- Representation, including of those people and organisations not members of representative bodies
- Bargaining costs and cost recovery
- Support and resource requirements
- Anticompetitive behaviour
- Disputes
- Arbitration
- Appeals

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

- Ratification
- Enactment
- Enforcement

5.2 The issues in 5.1 above are illustrative of a system that is vastly more complex than the present system of collective bargaining under the Employment Relations Act 2000.

5.3 An FPA will be established via one or both of two routes, bargaining or arbitration, and there is no escaping an FPA once initiated. While the Bill addresses the issues in paragraph 5.1 above in terms of some basic requirements, there is no guidance as to how the many and complex obligations can be met without breaching the law. Yet each of these issues represents a significant risk of dispute and litigation.

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

5.5 Furthermore, many, if not most, employers are not associated with any national organisation, let alone one with the expertise to represent them in collective bargaining. Simply identifying and contacting employers whose employees will be caught by the coverage of a proposed FPA is hugely problematic. This means many thousands of small businesses may have no input at all into matters that affect the very existence of their businesses. "Best endeavours" is not good enough here. As an industry association, we say no to what amounts to an unfunded, or at least underfunded mandate to negotiate on behalf of employers in our sector.

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

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

5.8 The proposed approach is even more unacceptable in the face of the Bill's requirement that settlements be subject to a ratification vote by employers. This is so impracticable as to be farcical. It is arguably impossible for an employer organisation representing, say, retail workers, to know in time for a ratification

vote how many employers in the country have employees that will be covered by a proposed FPA and how many employees each of those employers has on that day.[2]

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

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

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

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

- As can be seen in the table, it will be at least three months before bargaining for an FPA can even start. Given the complexity of the process following initiation, it will be almost impossible to conclude an FPA within six months of commencement, even with good will on both sides. However, the reality is that it will take much longer, first as unwilling employers come to grips with both the process and union claims, and second in terms of the logistics required to complete each stage. When the high probability of litigation at one or more stages is factored in, particularly in relation to early FPA claims, it becomes arguable that the first FPAs will in fact take many months, even years, to complete. This will not serve workers' interests well and it will not suit a New Zealand economy attempting to correct itself after Covid-driven inflation.

5.11 Representation is fraught with problems.

- Deciding who will represent employers under the Bill's provisions is fraught with practical difficulty. Both a lack of sufficiently representative organisations for given occupations and a lack of expertise in national level collective bargaining with battle-hardened unions will create enormous challenges for employers confronted with a claim for an FPA, in particular, how to identify affected employers and how to choose a representative bargaining team who will bargain on behalf of affected employers.
- While the Bill sets out the requirements in this regard, it provides no guidance on how to meet the requirements. Any guidance not included in the legislation will be a point of potential litigation making even starting bargaining, let alone reaching a settlement, a real challenge. It can reasonably be assumed that the first FPAs will be a significant test of process that could take months, if not years, to resolve.
- Significant practical issues also arise when it comes to claims initiated in the public sector, but which also involve coverage of private sector employers and workers.
- There will be a question of "dominant interest" to be resolved. For instance, an FPA claim in the public sector that has private sector coverage may be construed by the state as a public sector issue with flow-on effects, whereas private sector employers may feel they have a primary interest in the outcome as they are individually vulnerable and want to protect their particular interests. This engenders a need for rules about the status of the parties representing different sectors. This has not been taken into account in the Bill.

5.12 There will be issues fairly determining and differentiating between "industry" and "occupation".

- FPAs may take the form of "industry-based agreements" or "occupation-based agreements". An occupation-based agreement covers everyone in a specified occupation irrespective of the industry or sector in which they work. An industry-based agreement will cover all employees in specified occupations in a given industry (e.g. all butchers and bakers in the supermarket and grocery industry).
- That said, no recognition has been given to the fact that no occupation is completely confined to one industry or sector. Nurses, for instance, are found in hospitals, schools, and factories, and so are carpenters and electricians. Taking account of the highly variable realities between these

different environments will further complicate matters. Indeed, this was the very reason that awards and agreements prior to 1991 were not all-encompassing. Even in respect of a single occupation, there were many documents, some national in scope, others regional (based on labour districts), and others focused on single enterprises.

- While some occupations were covered by only a few documents (e.g. woollen mills were covered by 15 awards and agreements), others were covered by many more. Drivers as an occupation were covered by nearly 200 different industrial awards and agreements; clerical workers had more than 200 across national, district and enterprise levels. The number of awards and agreements in existence just before their abolition in 1991 was in the thousands and nearly double the number of collective agreements (1988) currently registered under the present system governed by the Employment Relations Act.
- Unions have indicated that the first FPAs they will seek include cleaners, retail workers, security guards, and bus drivers. Prior to 1991, each of these groups was covered by multiple documents, e.g. based on regional and sub-occupational differences. Examples to demonstrate that include:
    - Cleaners and security guards (classified in 1990 as *cleaners, caretakers, lift attendants and watchmen*) – 54 documents
    - Retail workers (classified in 1990 as *shop attendants*) – 12 documents
    - Drivers (local body transport) – 18 documents
- This multiplicity of documents was developed over the nearly 100 years between 1894 and 1991 and recognised the reality that "one size fits all" documents were unworkable. Local and regional differences, as well as the unique features of some jobs within the generic description, could not be dealt with by generic documents. This fundamental reality appears to have been either unappreciated or ignored in the Government's consideration of FPAs as a future approach to managing conditions of employment.

5.13 Government will not be able to control the rate of introduction of FPAs.

- While the Prime Minister has offered several assurances that there will only be one or two FPAs in the first year, the Bill provides no means for the Government to control this. This makes it quite possible that claims will proliferate once the requisite law is passed. The long list of occupations at the back of the FPAWG report indicates just how many there could be[3]. Although we do not want them or see them as necessary, ironically, we could also argue that there is something inherently unfair and discriminatory in initially limiting the number of FPAs.
- There are already strong signals that workers will not wait in a "queue" for their FPA to be settled. For instance, under the Equal Pay Act 1972, there are already more than 20 pay equity claims being bargained over in the state sector, and this is before the new Equal Pay Amendment Bill has been passed. Pay equity bargaining is directly analogous to Fair Pay Agreements as the outcome is a settlement covering an entire occupational group. Similarly, significantly increased levels of strike action in the transport and other sectors since the 2017 election hint at an impatience for results from workers who will not appreciate being "queued".

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

- The Equal Pay Act has not resulted in any pay equity settlements since the Act was amended in 2020 to allow for these. Here, it is noteworthy that the pay equity claim of nurses is now headed to litigation, and that the aged care settlement reached as a result of the case brought by Kristine Bartlett has not been renewed by the Government.

5.14 The coordination of representatives is problematic.

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

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

6. FPAs will lead to a significant increase in disputes and litigation

6.1 Settlements

- The Bill contains many FPAWG aspects of the pre-1990 award system that make significant industrial action and economic disruption not only more likely, but almost certain.
- Under the pre-1991 award system, settlements became more and more conservative in order to enable most businesses to cope with negotiated or arbitrated changes. Dissatisfied with low outcomes, workers and their unions put pressure on individual employers for “above award” settlements.
- History (and reality) suggest that FPAs will need to be similarly conservative, which will create pressure for extra increases through enterprise level bargaining, thus recreating the ingredients of the disastrous industrial environment of the 1970s and 80s. (Refer Figure 1, industrial action since 1921.)
- Furthermore, if FPAs become the vehicle for significant changes to wages and conditions, it is almost certain that many smaller businesses will be consumed, leaving mainly the larger players standing. This also opens the door to increased monopolistic behaviours by larger companies. Either way, the prospects are bleak for smaller players and their employees, particularly those in the regions.

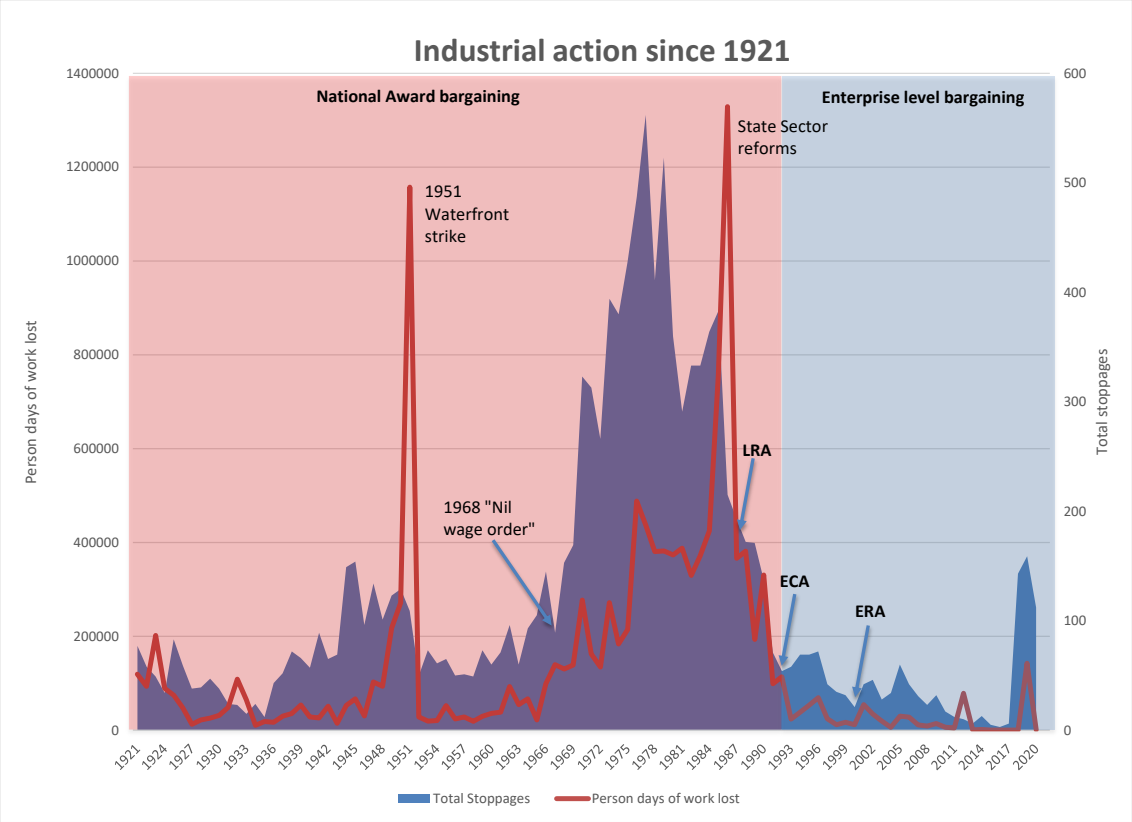

Figure 1: Industrial action since 1921.

6.2 Disputes

- The ability to take disputes under the Bill is extremely limited. Schedule 3 limits appeals on an ERA determination that fixes the terms of an FPA to questions of law. In most cases, this will mean the terms of an FPA cannot be challenged. The outcome will be the simple imposition of flawed outcomes to hundreds if not thousands of businesses and indeed their employees.
- Even without being able to appeal determinations of the ERA, the potential for disputes over other aspects of the Bill is huge. Every stage of the FPA process (Initiation, Bargaining, Vetting, Ratification, Bringing into force) includes multiple sub-process elements at which disputes may, and are expected, to occur.
- The consequences of these disputes and impacts on the efficacy, integrity, and credibility of the FPA process are enormous.

6.3 Strikes

- As can be seen above in Figure 1: Industrial action since 1921, even without Fair Pay Agreements, strike action has increased significantly since 2017.
- This is unlikely to change despite the fact the Bill prohibits strikes in relation of bargaining for an FPA, because the current right to strike for a collective agreement that is not an FPA remains. This enables a right to strike over collective bargaining for “above award” enterprise level agreements.

- The most significant and economically costly strikes since Labour was elected in 2017 have been in the state sector, involving doctors, teachers and nurses, who are all on national level collective agreements (i.e. analogous to FPAs).
- From 1894, the ability to be part of the award system was premised on unions and workers giving up the right to strike and submitting to compulsory arbitration to resolve differences. Under the pre-1991 award system, strikes were not permitted in pursuance of a settlement, by virtue of trade unions being registered under Industrial Conciliation and Arbitration Act 1894 (and its successors) which, until the Labour Relations Act of 1987, bound unions registered under the Act to the award system.
- This was unpopular with both unions and employers. The larger and more powerful unions disliked giving up the right to strike even for the benefits the award system offered. For their part, employers opposed placing decisions on wages and working conditions in the hands of a judge, instead of relying on the labour market.
- From about 1902, the Arbitration Court became bogged down in so many cases that could take up to a year to be heard. Dissatisfaction became widespread and in 1906, the country "without strikes" saw its first strike since the Act was passed 12 years before.
- Following the infamous "nil wage order" of 1968, unions began pursuing "above award" deals outside of the prohibition against strike action. It was this second-tier bargaining that gave rise to the phenomenally high level of strikes and lockouts during the 1970s and 80s (see the graph below).
- The proposed FPA model openly envisages "above FPA" deals being used to supplement FPAs, just as occurred in the 1970s and 80s. It appears to us that the huge disruption due to industrial action over that corresponding period is bound to be repeated (refer Figure 1: Industrial action since 1921).

7. FPAs will be economically damaging

7.1 The risk of adverse impacts on wage increases and productivity.

- The FPAWG argued that workers' incomes are diminishing as a share of productivity, i.e. wages are going backwards compared with the value produced. However, this is highly debatable. The NZ Initiative for instance has found that workers' wages in fact have done the opposite.
- In its paper "Work in Progress – Why Fair Pay Agreements would be bad for productivity", [4] the NZ Initiative found that:
    - While the labour share of income declined in the 1960s and 70s (a period of intense industrial action driven by low wage increases under the award system), the decline ceased, then reversed upon the introduction of enterprise-based wage bargaining in the 1990s.
    - Wage inequality and a "hollowing out" of middle-income wages in NZ has actually declined since 1990.
    - That the "race to the bottom is somewhat mythical given that average wages have risen faster than inflation across all income deciles.

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

- New Zealand's lack of productivity relative to other countries dates back to the 1970s and cannot be directly attributed to economic practices since the 1990s.

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

  - Firstly, history suggests that wage gains for workers via FPAs will be constrained by a realistic need to ensure that increases are sustainable for as many businesses as possible.
  - History also suggests that this will increase pressure for enterprise level "top-ups", which in turn will increase the incidence of industrial action (depriving workers of incomes and employers of production).
  - History therefore suggests that FPAs will do little or nothing to improve productivity. Instead, they will reduce it. Illustrating this point, unions have been pushing for shorter working weeks for decades[5]. In simple terms, this equates to "more money and less pressure". However, this simply adds cost for employers and reduces the availability of employees.

- By definition, higher wages and shorter, more flexible, "family friendly" hours do not of themselves add up to improved productivity. In these circumstances, rather, improved productivity is likely drive employers to seek smarter work practices (with fewer employees) and increased investment in technology (also with fewer employees). This was also recognised by the FPAWG which said "we note raising wage floors may make capital investment more attractive for firms; that is, it may speed up employer decisions to replace some jobs with automation".

- When it came to increasing productivity, however, the FPAWG took an overly simplistic view, saying that collective bargaining "would have the potential to increase aggregate productivity by setting higher wage floors and better conditions; forcing unproductive firms to exit; and lifting overall productivity of the sector".
  - In other words, the FPAWG felt that productivity could be improved by compelling payment of higher wages thus forcing weaker firms out of business while the strongest (usually also the biggest) survive. This approach is economically illiterate. Weaker firms are not weak just because they are not efficient. More often they are weak because they lack scale or are in vulnerable stages of an otherwise successful development. The vast bulk of New Zealand SMEs fall into this category.
  - Smaller firms are often relatively more innovative than their larger counterparts, whereas monopolies often "rest on their laurels". Being essentially anti-competitive, they can simply charge (and pay) more.
  - A likely early effect of this is an increase in stronger firms developing monopolistic strategies to consolidate their position. While this may reduce competition that leads to a "race to the bottom", it paradoxically also strengthens the ability of the stronger firms to dictate terms, including lower wages and lower rates to service

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

providers, of which our industry is a key one. The downstream impacts of monopolies not only drive down wages, but can potentially see corners cut with health and safety as large companies with market power make unfair demands with a “take it or leave it” approach.

- Irrespective of which outcome emerges, nowhere in the world does reducing competition result in improved productivity or sustainable economic growth. Such an approach does nothing for the workers who lose their jobs or for the size of the economy. Ultimately, while (according to the FPAWG) FPAs may reduce wage-based competition, they will not improve the ability of an employer to pay the increased costs, unless they can commensurately improve productivity. Nor should it be forgotten that, while New Zealand’s productivity was at a notably high level during the 1980s, so also was the level of unemployment.
- Wages are paid for by the productive value of workers’ work. Imposing increased costs beyond the value produced by workers incentivises or even necessitates employers to restructure costs and/or take on debt, at least in the short term. In such circumstances, a focus on increased productivity is usually delayed while the employer comes to grips with the immediate demands of sustaining the viability of the business. Worker layoffs are also an all-too-common by-product of such exercises. This will compound likely pressures the New Zealand economy is already experiencing.
- Overseas experience, for instance in the UK, suggests that rises in the minimum wage correlate with increases in unemployment for young people and minority groups. They also correlate to a slowdown in the creation of new jobs, a further blow to the employment aspirations of these groups.

- For other low paid jobs, raising wages through FPAs or any other means may have no effect at all, as the lowest paid jobs usually remain sufficiently unattractive that only those with no other options are likely to compete for them. Historically, migrant workers have filled these roles. However, current restraints on immigration, and the current shortages of labour in traditionally low paid sectors suggest that even higher wages will not solve the problem.
- Furthermore, while increasing low pay levels eventually forces up all pay rates, this can have unintended consequences. Employees in jobs requiring a high level of skill and knowledge rightly expect a higher rate of pay than a worker in a job requiring little skill and/or knowledge. Pressure on wage levels above the minimum wage adds to inflationary pressures, ultimately resulting in increased costs and interest rates, both of which ironically impact most on the lowest paid.

- It has been observed that as the minimum wage rate rises, so too does the number of people paid the minimum wage. At its present level (58% of the average wage and 69% of the medium wage) the minimum wage now influences wage levels generally, particularly those covered by collective bargaining. This is more marked in sectors with relatively higher proportions of the lowest paid workers (e.g. hospitality and retail).
- Ultimately, unless all effects are managed, simply increasing the minimum wage can marginalise the very people the increase is designed to assist, low-paid New Zealanders.

- Transporting New Zealand believes if FPAs proceed as the Bill proposes, they will accelerate and exacerbate these effects.

7.2 FPAs promote equality over productivity and growth.

- The FPAWG recognised that while sector and industry-based approaches to collective bargaining may assist in reducing inequality, they are less effective in terms of economic productivity, growth and prosperity. The road transport industry strongly believes that we cannot have the first without the latter three. For example: "The difference in wages found by the OECD may also signal higher productivity in companies with enterprise level bargaining than those in a context with a high degree of centralised bargaining" [6] and "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". [7]
- However, and paradoxically, while acknowledging New Zealand's relatively poor productivity, the FPAWG promoted (and the Government agreed to) equality over productivity and growth. While this makes little sense economically, it is consistent with the Labour Party Policy Platform (May 2017) which states: *"Our vision of a just society is founded on equality and fairness. Labour believes that social justice means that all people should have equal access to social, economic, cultural, political, and legal spheres regardless of wealth, gender, ethnicity, sexuality, gender identity, or social position. Labour says that no matter the circumstances of our birth, we are each accorded equal opportunity to achieve our full potential in life. We believe in more than just equal opportunities – we believe in equality of outcomes."*
- Nowhere did the FPAWG (or the Government) identify possible other options to address the unsubstantiated "race to the bottom" argument, e.g. the targeted use of tools such as the minimum wage and improved detection and enforcement of exploitative and non-compliant practices. Nor is there any recognition of the fact that New Zealand's ever-increasing minimum wage, and strong underlying minimum employment code, is one of the most generous in the world. Nor was there any examination of New Zealand's nearly 100 years' experience of centralised bargaining, culminating, ultimately, in two decades of industrial and economic disruption.

7.3 Relativity issues will drive up prices and growth.

- Under the award system, awards were negotiated in a strict hierarchy based on "fair relativity"; settlements were reflective of the perceived historical relationship between one award and another.
- The private sector Metal Trades Award traditionally set the scene for all other trades. Settlements would not disturb the overall wage relativity between awards. In the state sector, secondary school teachers headed a long chain of over a dozen relativities that ended with school audiologists. Considerable care was taken to ensure that settlements did not disturb the overall wage relativity between awards.
- Occupational relativities disappeared as the basis for wage setting upon the introduction of the Employment Contracts Act in 1991, and awards as

[6] FPAWG Report, page 16
[7] FPAWG Report, page 17

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

- History suggests that once the first FPA is settled, other occupations will formulate claims based on the perceived value of the precedential FPA. Unchecked, this will promote wage inflation and spiralling prices.
- Industrial pressure played a large part in driving the Muldoon government to introduce price controls in the early 1980s and caused the near collapse of the economy in 1983, when the "wage freeze" was lifted and wage claims spiralled out of control. Mortgage interest rates and food prices spiked and created enormous pressure on workers and employers alike.
- Nowhere in the preparatory work for the Bill does the Government deal with the critical issue of relativities, although it does recognise that the advent of pay equity claims under the forthcoming Equal Pay Act will add a new dimension, as pay equity settlements will recalibrate historical relativities between classes of work.

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

- The Equal Pay Act further requires that claimant group wages be kept in line with the comparator group once a pay equity settlement is achieved. If the comparator group's wages are subsequently adjusted by an FPA settlement, the pay equity claimant group's wages will have to be similarly adjusted even though they are not covered by an FPA.
- FPA settlements therefore may cause relativity "ripples" to flow into sectors, industries and occupations not covered by FPAs, causing relativity issues in those areas, and putting pressure on employers and their businesses to respond to stimuli they cannot control.

7.4 There is no evidence of a national appetite for FPAs.

- The law already provides for multi-employer collective agreements. However, there are very few of these and almost all are in the state sector (teachers, doctors and nurses). Neither the FPAWG report nor the subsequent Discussion Paper analyse why FPAs might be needed. Lack of evidence supporting a need or desire was flagged by the Treasury when commenting on the Cabinet Paper proposing the establishment of the FPAWG and its proposed terms of reference. It said in part: *"The paper does not, however, identify empirical evidence indicating that imbalances in bargaining power are causing the highlighted wages and productivity concerns. Nor does the paper make a strong case that a system of industry- or occupation-level bargaining would be the most effective policy response to address these concerns…...the paper does not refer to an evidence base for these potential impacts. Initial work by officials from the Ministry of Business, Innovation and Employment (MBIE) has not identified an occupation or industry in which the proposed system would address the highlighted wage and productivity concerns."*

- The dominating factor here for the Government is ideology, not evidence. In so doing it risks international ridicule for an ideologically driven approach that most mature economies now seek to either avoid or exit.
- Credit rating agencies are among those who will scrutinise the Government's actions with concern.

8. A voluntary approach would be better

8.1 The discussion above leads to a view that FPAs have few, if any, redeeming features. The rational response to this is to conclude that FPAs should not proceed in any form.

8.2 In the event that the Government elected to proceed with FPAs in some form, it was the view of the employer members of the FPAWG that a voluntary approach would be a more balanced approach than the recommended one. The employer members of the FPAWG suggested an alternative to the approach taken in the FPAWG report.

8.3 As the negative impacts of FPAs stem predominantly from their compulsory and all-encompassing nature, the compromise approach proposed by the FPAWG's employer members focuses on a voluntary approach, one that also complies with relevant and applicable international law.

8.4 This approach is built on the idea that "problematic" industries (in terms of perceived undesirable labour outcomes or practices) could develop a "code of practice" setting out an agreed view of a reasonable approach to terms and conditions of employment in that environment. We would certainly support such a code for the road transport sector, and would see it fitting under the banner of a sector accord, which we have advocated to Transport Minister Michael Wood already. Such an accord would be a partnership between Government and industry and would seek to drive improvements across Chain of Responsibility, wages, training and development, workforce shortages, and health and safety more generally.

8.5 A code as part of an industry accord could be signed up to by (and would become binding on) willing employers but used as non-binding guidance by those who choose not to sign on. Over time, those employers who sign on would generate labour market pressure on wages and conditions of those who have not signed. Such pressure should dampen if not disincentivise any "race to the bottom" effect if, as the FPAWG believed, such an effect exists. Non-"problematic" industries or occupations would be unaffected.

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

9. Specific comments on the Bill

9.1 The Bill is long and complex. Every step of the proposed process of establishing an FPA is lengthy, bureaucratically cumbersome, costly and fraught with the risk

of litigation. Transporting New Zealand opposes the whole idea of the Bill and has not provided comments on every clause, however, we have highlighted some areas of major concern to us.

9.2 Part 2 General principles and obligations

- Clause 12 provides that only an employer bargaining party (which must be an incorporated society) may represent the collective interests of covered employers. Some industries, such as road transport, have more than one entity that would meet this definition. How would the choice be decided?
- Clause 13 prohibits an FPA from giving preference based on whether or not a person is a union member. Yet, an FPA may provide for an employee to be paid a union member payment, which must be no more than the employee's annual union membership fees. In other words, no preference may be given unless it is given to a union member with the effect of partially or fully refunding their union fees.
- In essence, such a requirement would have employers paying the union fees of those of their employees who join a union after an FPA is settled. This would constitute potentially significant and uncontrolled cost escalation for employers with large numbers of currently non-unionised employees. And it would represent a significant income and growth opportunity for unions at no cost to employees who join them, which presumably is a key aim of the Bill. This proviso contributes nothing to the purpose of the Bill, which is to "*provide a framework for collective bargaining for 10 fair pay agreements that specify industry-wide or occupation-wide minimum employment terms*". Rather, it simply gives a financial "leg up" to unions and should be **struck out.**
- Clause 22 provides that where an obligation is imposed on a bargaining side, each bargaining party on the bargaining side must ensure that at least one of the parties on the bargaining side complies with the obligation. Essentially only one of the bargaining parties (i.e. organisations) in the bargaining side must comply with the specified obligations in order to comply with this clause. This appears nonsensical in the face of the general requirement to act in good faith. We believe this clause should be **struck out.**

9.3 Part 3 Initiating bargaining for proposed FPAs and obligations

Tests for initiating bargaining

- Both the representativeness and public interest triggers allow a minority of workers in a sector or industry to initiate bargaining for an FPA, without any ability on the part of employers to argue. Employers will not be able to opt out if the proposed FPA covers them.
- Since workers can only be represented by unions, this effectively means unions can initiate bargaining in any sector or industry, whether or not they have members there. For all practical purposes, once an FPA is created, unions will control the dialogue over working conditions under the FPA. This is a classic tail wags the dog scenario and is the same scenario that several European countries, e.g. France, are trying hard to get away from after many decades of constant industrial unrest and poor economic performance.

- Clause 33 provides that the chief executive may, in certain circumstances, invite public submissions when deciding whether to approve an application to initiate bargaining. Whilst the representativeness trigger is relatively straightforward, decisions over public interest are complex, even with guiding criteria. Essentially officials will be making decisions over the economic prospects of an entire industry or sector. This is economically unsound at best.
- At the very least, where the public-interest criteria are invoked, it **should be mandatory for MBIE to seek public submissions** on whether it is indeed in the public interest for an FPA to be established. Without such a requirement, "public interest" is a misleading description because it simply circumvents an inability to establish an FPA via representative means. As such, it becomes a device permitting self-interested parties to initiate the process of establishing an FPA in any occupation they feel might benefit.
- The representative triggers of either 10% or 1000 (whichever is lower) of all workers in the sector or occupation are simply farcical and strike against the very notion of democracy. For instance, hundreds of thousands of clerical workers could be subjected to an outcome in which they had no objective input because 1000 of them asked for an FPA. Both criteria should be **struck out or amended to substantially higher thresholds.** Alternatively, MBIE should be required to seek public submissions on whether an FPA is warranted.

Employer bargaining side

- Clause 43 provides that, once the chief executive has approved a union's application to initiate bargaining for an FPA, an eligible employer association must apply for approval to form or join the employer bargaining side. Clause 45 provides that an employer bargaining side is formed three months after the chief executive notifies approval of a union's application to initiate bargaining. The Bill provides no guidance on how to determine which, if any, employer association must apply, nor does it deal with the possibility that no employer association is available or willing to apply.
- This is a prime example of a Bill that is not rooted in reality. Furthermore, as these provisions compel an employer organisation to join bargaining, they are inconsistent with New Zealand's obligations under international law. Specifically, they contravene Article 4 of the Right to Organise and Collective Bargaining Convention 1949 (No 98) which requires that bargaining systems be voluntary (which, as has previously been noted, New Zealand has ratified). These clauses should be **struck out** or replaced with a voluntary form.
- Clause 46 provides that an employer bargaining party must endeavour to represent the collective interests of all covered employers, not just those employers who are members of the employer association. And Clause 48 requires each employer bargaining party for a proposed FPA to ensure effective representation of Māori employers.
- These requirements completely ignore the considerable challenges inherent in them. Bargaining for an FPA is likely to affect many hundreds, even thousands, of employers, many if not most of whom will not be members of any association, let alone one that is a bargaining party for an FPA. This is a logistical nightmare and beyond the scale of most industry associations in New Zealand. There is also no definition of a Māori employer. This means the bargaining party must first know who they may

be representing, notify them of the existence of bargaining and create a meaningful opportunity for their thoughts and concerns to be taken into account. The logistics, time and costs of this are not recognised in the Bill.

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

Default bargaining

- Transporting New Zealand understands that BusinessNZ has previously notified the Government that it is not prepared to be a default employer bargaining party for FPAs. The Bill completely ignores this and disguises the fact that it casts BusinessNZ as the default employer bargaining party against its will. This must be remedied and clarified.
- Clause 5 defines the employer default bargaining party as the employer default bargaining party specified in regulations. Clause 5(4) states that regulations made to specify the employer default bargaining party must specify an organisation that (a) represents employers; and (b) is the most representative organisation of employers in New Zealand. By any definition these criteria can describe only BusinessNZ, which is recognised by the International Labour Organisation as the most representative organisation of employers in New Zealand.
- Clause 71 sets out who the chief executive must notify in various situations where there is no (or no longer) a bargaining party on a bargaining side. Given the provisions of clause 5, clause 71 effectively requires MBIE to notify BusinessNZ of that fact that there is no obvious employer bargaining party and that as a result BusinessNZ must become the bargaining party for the FPA, with all the obligations that that entails.

- The disguising of BusinessNZ's identity by the use of criteria that cannot mean anyone else is an act of subterfuge that borders on disgraceful and is completely unacceptable. No organisation should be forced to the bargaining table to participate in, let alone lead, bargaining it does not support. To force one to do so in the face of penalties for non-compliance is unlawful. Quite simply, if there is no one to bargain with, no bargaining should take place. Furthermore, forcing an outcome is contrary to international law under which New Zealand is bound. Provisions relating to default parties should therefore be **struck out**.

9.4 Part 4 meetings and union access to workplaces

FPA meetings

- Clause 82 provides that employees are entitled to attend two FPA meetings in relation to a proposed FPA, one meeting in relation to a proposed variation, and two meetings in relation to a proposed renewal or proposed replacement. Meetings must last no longer than two hours.

Clause 86 provides the right for a representative of an employee bargaining party to enter a workplace without the employer's consent to discuss bargaining or a fair pay agreement. And Clause 87 sets out the conditions that apply when a representative of an employee bargaining party enters a workplace.

- Given the wide coverage of FPAs, meetings will not be enterprise based. They are more likely to involve all affected employees in a given town or district. Employee meetings under the pre-1991 award system typically were "town hall" meetings where affected employees would gather to be briefed on the union position and progress in bargaining.
- Such meetings essentially deprive the local economy of labour in a given occupation for the duration of the meeting, which in the case of the road transport industry would likely bring the supply chain to its knees, and have consequences around the delivery of life-supporting goods and supplies, along with having potential ramifications for animal welfare. Additionally, it is not conducive to productivity. Provisions that meetings be organised to ensure businesses can be kept operating have historically proved only marginally effective. For instance, an FPA meeting for grocery and supermarket employees would deprive all such businesses in a given area of the bulk of their employees for the duration of the meeting.

Employee bargaining may access workplaces

- We disagree with Clause 86 providing the right for a representative of an employee bargaining party to enter a workplace without the employer's consent to discuss bargaining or a fair pay agreement regardless of Clause 87, which sets out the conditions that apply when a representative of an employee bargaining party enters a workplace.

9.5 Part 5 Bargaining

Good faith obligation to provide information

- Clause 92 sets out the process for a bargaining side to request information from the other bargaining side during bargaining. A bargaining side must provide the requested information to the requesting bargaining side or to an independent reviewer. If the parties are unable to agree whom to appoint as an independent reviewer, they may apply to the Authority for a determination.
- The provision of information in bargaining has long been a source of contention, even under the present system of enterprise based collective bargaining. Bargaining for an FPA presents even greater difficulties as competing employers who will be covered by a proposed FPA will be asked for, and may be required to provide, information that may affect their relative competitiveness.
- The use of an independent reviewer arguably is of only marginal use in an FPA situation. At the enterprise level, the issue of provision of information is generally restricted to how much information a given business will give to the union representing its employees in collective bargaining.
- However, with respect to FPAs, bargaining sides will comprise only a few of the employers who will be covered by an FPA. Information sought by unions from the employer bargaining side will necessarily include information from and about many employers, some of whose information

is likely to be competitively beneficial to other members of the employer bargaining side.
- At the very least, the **Bill should provide means to protect the commercial confidentiality of information** that is to be provided. Currently it does not do this.

Coverage, overlap, consolidation and addition of occupation

- Clauses 105 and 135 provide that if there is coverage overlap, the Authority must review the terms of the overlapping agreements and determine which provides the covered employees with the better terms overall. This is easier said than done.
- For instance, is a supermarket employee who delivers online orders to customers a retail worker or a driver? Depending on the answer to that question, are they even covered by the proposed FPA? If two FPAs exist, does the one with "better conditions overall" then define the role played by the worker? In Australia, such disputes have been tied up in the courts for months at a time.

9.6 Part 6 Content of FPAs

- Clause 114 provides a list of terms that must be included in each fair pay agreement. These are unremarkable and typical of any collective agreement. However, Clause 115 provides a list of topics that bargaining sides must at least discuss whether to include in a proposed FPA, a proposed renewal, or a proposed replacement. These topics are:
    - the objectives of the proposed FPA
    - health and safety requirements
    - arrangements relating to training and development
    - arrangements relating to flexible working
    - leave entitlements
    - arrangements relating to redundancy
- The bargaining sides are not required to agree to include provisions on any of these topics. However, a lack of agreement to include them can be overridden by the ERA if the matter is taken to arbitration. This possibility adds to the pressure employers will face in trying to negotiate a deal they can live with.
- FPA conditions will override corresponding existing statutory and contractual minimum provisions in the affected industry or sector. This enables them to be vehicles for advancing Government or union agendas on such things as minimum redundancy compensation across whole sectors, on businesses large and small, successful or marginal.
- FPAs may also impact on the fundamental right of employers to manage their business, e.g. through provisions requiring employees and unions to be involved when making important business decisions.

Differentiation

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

- The ability to agree regional and other variations within sectors raises many issues of relativity and demarcation (both terms intrinsic to the pre-1990 award system), e.g. if Auckland is to be better treated than elsewhere, where does "elsewhere" begin? Do "Elsewherians" resolve their consequent angst at a sub-sector, regional or enterprise level?
- The road transport industry is concerned that the Bill proposes a construct that is guaranteed to produce conflict, as it creates a framework for "ratcheting" wages and conditions across geographic regions as well as creating occupational relativity tensions within and between sectors and industries. This could be particularly impactful in our industry with diverse sectors operating in sprawling geographical locations across New Zealand.
- Regional and intra-occupational variation is not new in collective bargaining. This is a key reason the pre-1991 award system began to fail in the 1970s and 80s. Over time, in the face of the reality that one size does not fit all, more and more awards began to break into smaller more focused documents. This is apparent in the number of documents that existed with respect to occupational groups by 1991.
- Overall, the economic reality of FPAs is that settlements will need to reflect the capacity of the "weaker" (not necessarily the "weakest") employers to cope with the outcomes. The alternative is that only the strongest (usually the largest) employers survive, which is a recipe for monopolistic outcomes to flourish. Moreover, driving settlements to lowest common denominator levels is fine for equality of outcomes but not for productivity and is counterintuitive in preventing a "race to the bottom", if that is intended, because it places everyone at the bottom to start with. History indicates that it will be mainly low paid workers who seek to "top up" meagre FPA outcomes.
- Even worse, unlike the 1970s and 80s where unions had to "opt out" of coverage of the Industrial Relations Act to undertake second tier bargaining, the Bill effectively promotes second tier bargaining as part of the process. Second tier bargaining did and will lead to an escalation of industrial action to unprecedented heights. As illustrated earlier in Figure 1: Industrial action since 1921, that is not a recipe for economic success.

9.7 Part 7 Finalisation of FPAs

Compliance assessment

- Clause 132 provides that when bargaining for a proposed agreement is complete, the agreement must be submitted to the Authority for a compliance assessment. Clause 135 provides that, as well as assessing a proposed agreement for compliance, the Authority must also check for coverage overlap. If the Authority decides there is coverage overlap, it must determine which agreement provides the better terms overall. Clause 138 explains how the Authority determines which agreement provides the better terms overall.
- As mentioned in relation to coverage, determining which of the competing FPAs has better conditions overall may also impact on the occupation a worker is deemed to be engaged in. Thus, an ambulance medic may be classified as a driver if a drivers' FPA has "better conditions overall". The risks of misclassification or inappropriate classification of work have not been considered at any point by the FPAWG or the Government. The risks include implications for pay equity, as inappropriately classified

workers have the ability to seek redress through this mechanism. This can only complicate matters for employers and employees alike.

Ratification

- Clause 141 requires the bargaining sides to notify "covered" employees and covered employers that a ratification vote will soon be held and provide related information. Employers must provide additional information to their covered employees. Clause 144 sets out the details for holding a ratification vote. Covered employees are entitled to one vote each in the employee vote, and covered employers are entitled to a number of votes determined by the number of covered employees they employ (one vote per employee over 20 employees, or for 20 or fewer employees, the number specified in Schedule 2). Clause 145 requires a bargaining side that completes a ratification vote to notify the other bargaining side of the outcome of the vote. If the first ratification vote for a proposed agreement is against ratification, the bargaining sides must restart bargaining. If the second ratification vote is against ratification, either bargaining side may apply to the Authority to fix the terms of the proposed agreement. Clause 146 requires each bargaining side to retain records of a ratification vote to demonstrate that the vote was held in accordance with the Bill.
- This process cannot be described as anything other than a farce and it is one in which it is almost impossible for employers to succeed. As proposed, ratification will be a simple majority vote of employers and employees to be covered by the FPA. While employees will get one vote each, employers will be treated differently. Smaller employers' votes are to be weighted according to the number of employees they have.[8] From a practical point of view, it is almost impossible to conduct a vote in this way with any degree of integrity because of the difficulties in:
    - determining that every employee or employer entitled to vote knows they have a right to vote
    - ascertaining that the number of employees employed by each employer to be covered by the FPA has been accurately counted. Most small employers do not belong to any organisation, let alone one that might represent them in bargaining for an FPA. Identifying and contacting them is difficult in any circumstances. The more employees covered by a proposed FPA, the harder this problem gets

- More importantly, however, is the fact that **it will not be possible for a vote against FPAs to succeed.** Two "failed" ratification votes will result in an arbitrated outcome being imposed, without a right of appeal.
- A lack of fairness is also evident in the makeup of the voting strength of employers. Nearly 80% of all employees are employed by larger employers. This translates to a small number of larger employers potentially having a controlling vote in the outcome of an FPA.
- In all these circumstances, ratification is simply window dressing for an inevitable result. If unions want an FPA, they will get one irrespective of a potentially overwhelming weight of opinion against them. This is unacceptable in a functioning democracy. It clearly is not consistent with

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

the principle of free and voluntary collective bargaining enshrined in international law.

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

MBIE assessment

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

9.8 Part 8 Variation, renewal and replacement of FPAs.

Variations

- Clause 166 provides that bargaining for a proposed variation may start only if both bargaining sides agree to do so. If a bargaining side withdraws its agreement to bargain, the bargaining ceases.
- In other words, unless both sides agree otherwise, the terms and conditions contained in an FPA are locked for the duration of its term, i.e. at least three years.
- Employers are unlikely to agree to variations that increase their costs during a period in which costs have been locked in. Conversely, workers are unlikely to agree to make additional flexibility available to employers without something in return.
- Industrial relations reality suggests that variations will occur rarely, leaving both parties effectively moribund for the duration. This is another key reason awards were abolished in 1991, i.e. to free enterprise up to be more agile in today's increasingly fast moving and challenging economic conditions.

Renewal and replacement

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

9.9 Part 10 Institutions

Bargaining support services

- Clause 207 requires MBIE to employ or engage persons to provide bargaining support services to support bargaining under the Bill. This seems to make it clear that the provision of such services is at the Government's cost, unless bargaining parties make their own arrangements.
- However, the nature of support is only vaguely defined in the Bill and may stop well short of the needs of organisations that have minimal experience of collective bargaining at any level, let alone bargaining at the national level. Without some understanding of the Government's capabilities in this regard, it must be questionable whether the Bill's provisions provide any security to inexperienced employers required to bargain for FPAs.
- Moreover, given that New Zealand's last experience of the model now proposed is more than 30 years old, the pool of expertise in New Zealand in such things is now very small. It is therefore likely that the Government-provided support available under the Bill will be of marginal use, forcing employers to spend time and money on sourcing expertise from the private sector which is also largely devoid of experience in national level bargaining.

Employment Relations Authority

- Clause 213 provides that the Authority has exclusive jurisdiction to make determinations relating to fair pay agreements.
- Clause 175 sets out what the Authority must consider when recommending or fixing terms of a proposed FPA. It requires that the ERA must consider each of the following (and the relationship between them):
    - what the parties have actually agreed in bargaining
    - industrial practices and norms (including their evolution)
    - the likely impact and benefit on employees, particularly low-paid and vulnerable workers as well as the likely impact on employers
    - relativities within the proposed FPA and with other relevant employment standards and agreements
    - the ease with which the proposed FPA will be understood by those it, and
    - any other relevant considerations

- The ERA may also consider the likely impacts on the New Zealand economy or society.
- Clause 222 provides that terms fixed by the Authority are binding and enforceable and are not required to be assessed or ratified under subparts 1 and 2 of Part 7.
- The requirements the Bill places on the ERA are extremely significant and therefore fraught with risk. Indeed, the complexity of the criteria in Clause 220 that must be considered by the ERA in fixing the terms of an FPA is at a level that would tax the Supreme Court, let alone a tribunal level jurisdiction such as the ERA.
- The fact that the ERA decision will be binding, enforceable and all but unappealable, simply increases both the risks of poor decision making

affecting entire sectors and the significant challenges already faced in today's challenging economic environment.

- In addition to the complexity of the obligations placed upon the ERA, it is also the case that compulsory arbitration, in the form proposed by the Bill, is inconsistent with the Right to Organise and Collective Bargaining Convention 1949 (C98), which New Zealand ratified in 2003. In its 2021 report on New Zealand's compliance with C98, the International Labour Organisation's Committee of Experts on the Applications stated: "*The Committee first wishes to recall that compulsory arbitration in the case that the parties have not reached agreement is generally contrary to the principles of collective bargaining. In the Committee's opinion, compulsory arbitration is only acceptable in certain specific circumstances, namely: (i) in essential services in the strict sense of the term, that is those the interruption of which would endanger the life, personal safety or health of the whole or part of the population; (ii) in the case of disputes in the public service involving public servants engaged in the administration of the State; (iii) when, after protracted and fruitless negotiations, it becomes obvious that the deadlock will not be broken without some initiative by the authorities; or (iv) in the event of an acute crisis."*
- It is clear that none of the acceptable reasons for requiring compulsory arbitration exist in the context of FPAs. **Clauses 218-225 should be struck out.**

10. Conclusion

10.1 Transporting New Zealand **opposes the introduction of the Fair Pay Agreements Bill proceeding as proposed** on a number of premises, including:

- The law already provides for multi-employer collective agreements. Neither the FPAWG report nor the subsequent Discussion Paper analyse why FPAs might be needed and there is no evidence of a national appetite for FPAs.
- The lack of evidence supporting a need or desire was flagged by the Treasury when commenting on the Cabinet Paper proposing the establishment of the FPAWG and its proposed terms of reference. It said in part: *"The paper does not, however, identify empirical evidence indicating that imbalances in bargaining power are causing the highlighted wages and productivity concerns. Nor does the paper make a strong case that a system of industry- or occupation-level bargaining would be the most effective policy response to address these concerns."*
- As proposed this legislation will undoubtably hurt workers and is unfair to employers. It will almost certainly not deliver the kind of benefits proponents claim. History amply demonstrates that increases for workers covered by national level agreements will necessarily be conservative in order to ensure that most if not all employers can afford them. Workers will then need to wait at least three and as long as five years before being able to negotiate another increase. Low-paid workers who receive support such as Working for Families are likely to see the take-home value of any wage increase reduced by the abatement mechanisms of such transfer payments.
- As proposed, this legislation is unworkable in practice. The system proposed to manage FPAs is excessively bureaucratic and contains many steps at which challenges may be mounted. Even without challenges,

following the timeframes prescribed for the core steps will take many months to complete. Add to this the inexperience of today's employers in negotiating national level collective agreements and it becomes almost certain that no FPAs will be settled before the next general election in 2023.

- As proposed, FPAs will lead to a significant increase in disputes and litigation. Especially in the early stages of their introduction, it can be expected that a multiplicity of legal challenges to the introduction of FPAs will eventuate. A non-exhaustive list of examples includes challenges on:

    - the integrity of information used to justify initiating an FPA
    - who will be covered by a proposed FPA
    - the rights of employers to have a say in the formation of bargaining teams and subsequent negotiations
    - the adequacy and fairness of mechanisms used to inform employers of the existence of a claim for an FPA and of progress in bargaining
    - the requirement to provide personal information of workers who are not union members to unions.
    - whether or not exclusions from coverage (or their denial) are fair
    - the accuracy of vote counting for ratification
    - points of law relating to determinations of the Employment Relations Authority in fixing the terms of an FPA

- As proposed, the Bill will be economically damaging. New Zealand's pre-1990 history amply demonstrates that FPAs will do little or nothing to improve productivity. Our economy has entered a period where we can least afford this kind of backwards focused experiment.
- By definition, higher wages and shorter, more flexible, "family friendly" hours do not of themselves add up to improved productivity. In these circumstances, rather, the drive to improve productivity is likely to incentivise employers to seek smarter work practices (with fewer employees) and increase investment in technology (also with fewer employees).
- New Zealand's experience of the pre-1990 system of national awards instructs us that workers who feel frustrated at the inability of FPAs to deliver meaningful change will seek more from their employers directly. This is exactly what caused the enormous levels of industrial disruption that characterised the 1970s and 80s. Early signs are already evident in the form of the industrial action now being taken by nurses and others seeking pay equity deals (which are analogous to Fair Pay Agreements in that they also cover whole occupations). Industrial action at such levels does nothing to incentivise higher productivity.

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