



Proposed Fair Pay Agreement System: What it means for the public sector

Date: 16 February 2021 **Security Level:** IN CONFIDENCE
Report No: 2021/0018
Contact: Sarah Borrell, Manager, Workforce and Employment Relations
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	Actions Sought	Due Date
Hon Chris Hipkins, Minister for the Public Service	Note the advice in this report	17 February 2021
	You may wish to forward this advice to core MOGSSER Ministers: Hon Grant Robertson, Minister of Finance; Hon Michael Wood, Minister for Workplace Relations and Safety and Hon Willie Jackson, Minister for Māori Development	17 February 2021

Enclosure: Yes: Draft slide pack on Fair Pay Agreement proposals, 17 February 2021

Minister's Office Comments

Comments:	
Date returned to Te Kawa Mataaho:	

Recommended Action

We recommend that you:

- a **note** you are attending a workshop being hosted by Minister Wood for a group of Ministers on the proposed Fair Pay Agreement system on 17 February 2021, 3-4pm.
- b **note** you may wish to discuss the Fair Pay Agreement system at the next MOGSSER meeting on 17 February, 4pm which immediately follows the workshop and you may wish to share this advice with the core MOGSSER Ministers.
- c **note** our advice is based on the unique legislative, fiscal and employment environment in which the public sector employment operates, particularly the Public Service Act 2020 which provides a purpose, principles, and values for the Public Service.
- d **note** the high-level objectives of the Fair Pay Agreement system are to:
 - i. improve labour outcomes, particularly for workers in occupations or industries where competition is based on decreasing labour costs
 - ii. facilitate greater and more mature sector wider dialogue.
- e **note** in the public sector there is an additional objective of ensuring settlements fall within the employment relations expectations of government.
- f **note** there is high risk that the proposed FPA system will not achieve the above objectives because:
 - i. the proposed system may improve employment conditions for groups of employees who are already in a secure and relatively privileged position, i.e., the proposed Fair Pay Agreement system is not targeted towards improving labour outcomes for workers in occupations or industries where competition is based on decreasing labour costs.
 - ii. the proposed system may see public sector employers bound into settlements where the majority of employer parties are private sector companies. There is no certainty that settlements will adhere to government's fiscal or other parameters in these cases.
- g **note** the initiation of Fair Pay Agreement bargaining needs to target workers in occupations or industries where competition is based on decreasing labour costs to meet the objectives of the Fair Pay Agreement system, for example, by requiring initiating unions to meet both the representation test and the public interest test.
- h **note** that our preference is to make the Public Service Commissioner responsible for negotiating Fair Pay Agreements that cover the Public Service as if the Commissioner were the employer, similar to the Commissioner's existing role regarding collective agreements in the Public Service.
- i **note** this proposal would enable the Commissioner to:
 - i. provide clear direction to chief executives on Fair Pay Agreement bargaining for consistency with any government expectations on employment relations, including affordability
 - ii. better co-ordinate Public Service employers in response to a Fair Pay Agreement

- iii. better keep Ministers informed of the progress of Fair Pay Agreement bargaining and to keep Treasury informed to support its fiscal management role.
- j **note** the proposal to make the Commissioner responsible for Fair Pay Agreement bargaining in the Public Service may require amendment of the Public Service Act, however we are exploring other ways this proposal could be achieved within the existing legislation.
- k **note** that we have yet to consider the implications of this proposal for the wider public sector, including the Education Service and District Health Boards.
- l **agree** that Te Kawa Mataaho Public Service Commission (the Commission) provides you with further advice on the role of the Commissioner in Fair Pay Agreement bargaining in the Public Service, including the implications for the wider public sector, and the options for achieving the proposal.
Agree/disagree
- m **agree** that the Commission releases this briefing once Cabinet has completed making decisions on the Fair Pay Agreement system.
Agree/disagree

Hon Chris Hipkins
Minister for the Public Service

PROACTIVELY RELEASED BY TE KAWA MATAAHO PUBLIC SERVICE COMMISSION

Te Kawa Mataaho Report: Proposed Fair Pay Agreement System: What it means for the public sector

Purpose of Report

- 1 To provide advice on the proposed Fair Pay Agreement (FPA) system to support your attendance at a workshop of Ministers on the system on 17 February. The advice focuses on the implications of the proposed system for the public sector.
- 2 This advice is based on our understanding of the ongoing advice that the Ministry of Business, Innovation and Employment (MBIE) is providing to the Minister for Workplace Relations and Safety, Hon Michael Wood. MBIE's advice is being developed at pace and so aspects of proposed FPA system may have evolved since the time of writing.

Workshop details

- 3 Minister Wood is hosting a workshop for a group of Ministers on the proposed FPA system on 17 February 2021, 3-4pm. The draft slides prepared by MBIE for the workshop are attached.
- 4 The other Ministers invited to the workshop are Ministers: Hon Grant Robertson, Hon Carmel Sepuloni, Hon Andrew Little and Hon Stuart Nash.
- 5 The workshop immediately precedes the 17 February 2021 MOGSSER meeting. You may wish to discuss the FPA system at MOGSSER, ahead of the Cabinet Economic Development Committee (DEV) consideration of the proposed FPA system scheduled for 14 April. You may then wish to share this advice with the core MOGSSER Ministers.

Previous decisions

- 6 Cabinet agreed in principle to establish a system for employers and workers to bargain for FPAs that set minimum terms and conditions of employment across a sector or occupation, in May 2018 [DEV-18-MIN-0100].
- 7 The Fair Pay Agreement Working Group (FPAWG) was established in June 2018.
- 8 Cabinet agreed to consult on a proposed FPA model broadly consistent with the FPAWG model in September 2019 [DEV-19-MIN-0266], and this consultation occurred in October to November 2019.
- 9 No decisions have been taken by Cabinet since. DEV is due to consider the proposed design of the FPA system on 14 April.

Implications for the public sector and options

- 10 Our advice is based on the unique legislative, fiscal and employment environment in which the public sector operates. The Public Service Act 2020 (the Act) provides a purpose, a spirit of service to the community, principles, and values to be upheld by the Public Service. The employment and workforce provisions of the Act support the realisation of the purpose, principles, and values. The Act seeks to create a unified, modern, agile, and adaptive Public Service with consistent terms and conditions to enable public servants to move around the system to deliver better outcomes and services for all of New Zealanders. The government's response to the COVID-19 pandemic has highlighted the

importance of an expert Public Service that can adapt and mobilise its workforce to meet the evolving pressures from the pandemic.

- 11 Where an FPA covers more than one sector, the interests of Public Service employers may be fundamentally different from private sector employers, making the co-construction of terms and conditions challenging. When Public Service employers are a minority of employers covered by an FPA, this could result in FPAs that undermine the consistency of Public Service employment to the detriment of a unified Public Service that is able to serve and adapt to the needs of New Zealanders (with funding consequences).
- 12 The likelihood and scale of the implications for the public sector are uncertain given the uncertainty about what FPAs will be initiated by unions and when, the coverage of FPAs that are initiated, and whether public sector employers are the majority of employers covered by an FPA. The New Zealand Council of Trade Unions has signalled cleaners, security guards, supermarket workers and bus drivers as early priorities. We therefore expect a number of FPAs that will impact on the funded sector.

The proposed FPA system is not well targeted to meet its objectives

- 13 The high-level objectives of the FPA system are:
 - To improve labour outcomes particularly for workers in occupations or industries where competition is based on decreasing labour costs.
 - To facilitate greater and more mature sector wider dialogue.
- 14 The proposed initiation process is not aligned with the FPA system objectives and so there is no guarantee that FPAs will deliver these objectives. The threshold to initiate bargaining for an FPA is very open and does not target occupations or industries where competition is based on decreasing labour costs.
- 15 It is proposed that unions initiate for FPA bargaining, and meet one of these initiation tests:
 - Representation: 1000 or 10 percent of workers within coverage of the FPA, whichever is lower, or
 - Public interest: the workforce in question experiences low bargaining power and there is evidence that the workforce is affected by one or more of a specified list of labour market challenges.
- 16 “Coverage” is the proposed boundaries of which occupations and industries (and therefore workers and employers) are to be covered by any given FPA.
- 17 The representation test is likely to be the easier test to meet, and so is the most likely to be used. This test does not target workers in occupations or industries where competition is based on decreasing labour costs, and so improved labour outcomes for these workers may not be achieved. Relying on the representation test alone may result in FPAs for any workforces, including already privileged and secure workforces.

Recommendation: Align initiation with the FPA system objectives

- 18 The initiation of FPA bargaining needs to align with the objectives of the FPA system, to ensure that FPAs do improve labour outcomes for workers in occupations or industries where competition is based on decreasing labour costs. Closer alignment of the initiation threshold with the FPA system objective could be achieved, for example, by requiring initiating unions to meet both the representation and public interest tests.

Public sector employers may have little to no influence over FPA bargaining

- 19 It is proposed that the initiating union will be free to define which industries or occupations will be covered by an FPA, as long the description of the industry or occupation is sufficiently clear.
- 20 Public sector employers (as with all employers) will have no control over which FPAs they are bound by.
- 21 The proposed system may see public sector employers bound into settlements where the majority of employer parties are private sector companies. There is no certainty that settlements will adhere to government's fiscal or other expectations in this case.
- 22 The Public Service Act 2020 provides that Public Service Commissioner (the Commissioner) is the employer for the purposes of collective bargaining in the Public Service. This enables the Commissioner to approve proposed bargaining strategies and settlements to ensure their consistency with any government expectations on employment relations in the public sector.

Recommendation: Role of Public Service Commissioner as employer

- 23 Our preference is to make the Commissioner responsible for negotiating FPAs that cover the Public Service as if the Commissioner were the employer, similar to the Commissioner's existing role regarding collective agreements in the Public Service.
- 24 This proposal would enable the Commissioner to provide clear direction to chief executives on FPA bargaining for consistency with any government expectations on employment relations, including affordability.
- 25 It also strengthens the ability of the Commissioner to:
 - Co-ordinate Public Service employers in response to an FPA
 - Keep Ministers informed of the progress of FPA bargaining
 - Keep Treasury informed to support its fiscal management role.
- 26 This proposal may require amendment to the Public Service Act, however, opening up the Act for amendment is time consuming and would add complexity. We are therefore exploring how to make the Commissioner responsible for FPA bargaining in the Public Service within the existing workforce provisions of the Act. This could include, for example, a Government Workforce Policy Statement that promotes the effective management of employment relations (section 97(2)(c)).
- 27 Treating the Commissioner as if he/she were the employer for FPAs in the Public Service may have implications for how the employer party votes are counted at ratification. For example, would the Commissioner be treated as one employer or as multiple employers depending on the number of Public Service chief executives covered by the FPA. We understand that a majority of employers (50%+1 of employers who vote) and a majority of workers (50%+1 of employers who vote) will be required for ratification to pass. MBIE is developing further advice on how employers should be counted in ratification and we will continue to engage with MBIE as we consider the role of the Commissioner.
- 28 The proposal above does not address the problem of public sector employers being bound into settlements where the majority of employer parties are from the private sector, with no certainty that settlements will adhere to government's employment or fiscal expectations in this case.
- 29 The [Public Service Act](#), [Education and Training Act](#) and [New Zealand Public Health and Disability Act](#) already have good employer provisions which require employers in these sectors to, among other things, operate an employment policy containing provisions generally accepted as necessary for the fair and proper treatment of employees in all aspects of their employment, including for good and safe

working conditions (please see Appendix 1). The Public Service is also demonstrably striving to be an exemplar employer, e.g. CTU Accord, addressing low pay and pay equity, consistency of terms and conditions, and diversity and inclusion.

- 30 We have yet to consider the implications of our proposal for the wider public sector, including the Education Service and District Health Board (DHB) sector.
- 31 In previous advice to MBIE, we highlighted the importance of initiating unions in the public sector being required to meet both the representation test and public interest test to help keep FPAs aligned to the system objectives whilst minimising the fiscal impact on the government.
- 32 We will provide you with further advice on the role of the Commissioner in FPA bargaining in the Public Service, including on the implications for the Education Service and DHBs, and the options for achieving this proposal.

Employment relations capability is already stretched in the public sector

- 33 Public sector employment relations capability is already stretched including by the growing number of pay equity claims and the significant volume of collective bargaining across the sector. This limited capability has a number of existing impacts which will be amplified by the introduction of FPA bargaining: agencies are in competition for a limited pool of talent, and further impeding the efficient progress of collective and pay equity bargaining.
- 34 The Commission is doing a number of things to help grow capability and capacity across the sector, e.g. running practitioner networks, developing tools, and facilitating access to training. These efforts will take time to come to fruition.

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Appendix 1: Public Service Act 2020

Good employer requirements

Section 73: Chief executive of department and board of an interdepartmental venture to be good employer

- (1) A chief executive of a department and a board of an interdepartmental venture must—
- (a) operate an employment policy that complies with the principle of being a good employer; and
 - (b) make that policy (including the equal employment opportunities programme) available to its employees; and
 - (c) ensure its compliance with that policy (including its equal employment opportunities programme) and report in its annual report on the extent of its compliance.
- (2) See also section 75 (which relates to promoting diversity and inclusiveness).
- (3) In this section, a good employer is an employer who operates an employment policy containing provisions generally accepted as necessary for the fair and proper treatment of employees in all aspects of their employment, including for—
- (a) the impartial selection of suitably qualified people for appointment (except in the case of ministerial staff); and
 - (b) good and safe working conditions; and
 - (c) an equal employment opportunities programme; and
 - (d) recognition of—
 - (i) the aims and aspirations of Māori; and
 - (ii) the employment requirements of Māori; and
 - (iii) the need for greater involvement of Māori in the public service; and
 - (e) opportunities for the enhancement of the abilities of individual employees; and
 - (f) recognition of the aims and aspirations, employment requirements, and the cultural differences of ethnic and minority groups; and
 - (g) recognition of the employment requirements of women; and
 - (h) recognition of the employment requirements of people with disabilities; and
 - (i) recognition of the importance of achieving pay equity between female and male employees; and
 - (j) recognition of the importance of decisions about remuneration being free from bias including, but not limited to, gender bias.
- (4) The chief executive of a departmental agency, or an interdepartmental executive board,—
- (a) is entitled to use a policy developed by their host or servicing department (and need not develop their own); but
 - (b) in relation to employees carrying out the functions of the departmental agency or interdepartmental board, has the same duty under this section as the chief executive of a department.

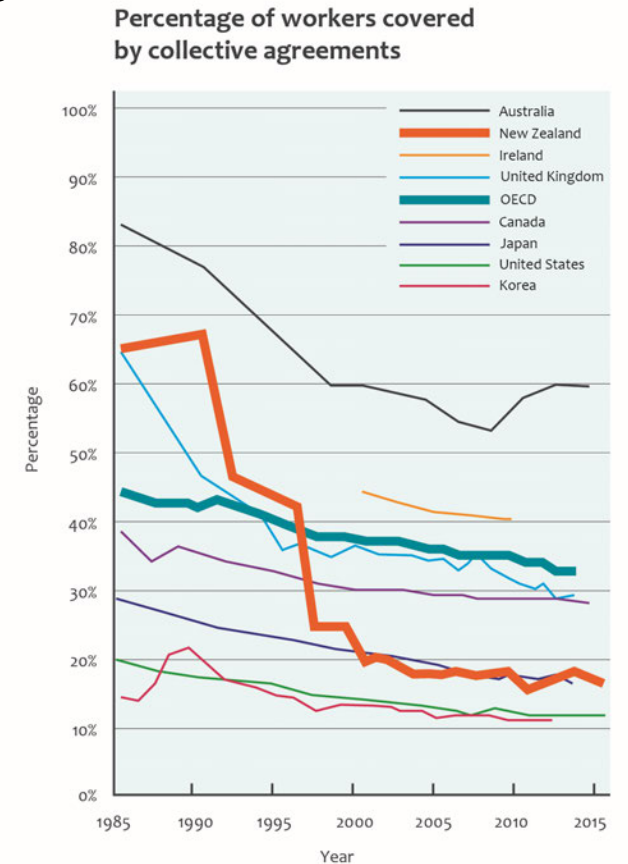
Fair Pay Agreements proposals

17 February 2021

DRAFT

Problem / opportunity

- There is an inherent imbalance of power between workers and employers. The usual way to compensate for this is collective bargaining.
- NZ has weak collective agreement coverage, and this enables firms to engage in a 'race to the bottom' – competing by driving down labour costs and shifting risks onto employees.
- The Fair Pay Agreements system will enable workers and employers to bargain for **minimum terms and conditions of employment across sectors or occupations.**
- The Fair Pay Agreements Working Group made recommendations on the scope and design of this system in 2019. I am sticking closely to their recommendations.



Key elements of FPA system (1 of 3)

Initiation – how bargaining starts

- Bargaining is initiated by unions, if 10% or 1000 workers in the relevant workforce indicate approval OR the workforce demonstrates characteristics which meet a public interest test.
- The initiation tests will be assessed by MBIE (for 10% / 1000) or ER Authority (for public interest), with a chance for submissions except for the 1000 workers test.
- MBIE also checks the proposed coverage is clear – so people know if they are in. Parties can bargain to redefine the coverage.
- Initiating union notifies known employers; employers notify their workers who are within coverage
- Employers pass on workers' contact details to unions periodically unless workers opt out

How bargaining will work

- Unions will represent workers, including non-members. Employer representatives must be an incorporated society.
- Other interests can be at the table if both sides agree.
- Bargaining is supported by a navigator.
- Workers may attend 2 x 2hr paid meetings with bargaining representatives during bargaining, and a further 2hr meeting if the FPA is referred back to bargaining after a failed ratification
- Unions can access workplaces without consent during FPA bargaining

Key elements of FPA system (2 of 3)

Coverage – who is affected by the FPA

- *[Add details once decisions made]*

Scope – what topics are in an FPA

- An FPA has to contain provisions on: base wages and adjustments; superannuation; ordinary hours, overtime, penalty rates; and must specify the coverage, duration and governance arrangements for the FPA
- Parties also must at least discuss: redundancy, leave entitlements, objectives of the FPA, skills and training, regional differences, health and safety, flexible working.

Dispute resolution

- If parties can't agree on terms, first they go to mediation, then (if certain conditions are met) ER Authority can make a determination on the terms.

Key elements of FPA system (3 of 3)

Ratification

- If parties reach agreement, or ER Authority only determines some of the terms, FPA goes to a vote – if a majority of affected workers AND affected employers who vote are in favour, FPA is ratified.
- Employers' votes are weighted by number of employees
- Before the vote, ER Authority checks the FPA complies with relevant laws.
- If ER Authority determines all terms of the FPA, there is no ratification vote.
- If first ratification vote fails, parties go back to bargaining.
- If second ratification vote fails, the FPA is referred straight to ER Authority for determination.

Conclusion

- The final FPA will be given legal effect in a legislative instrument.

Government support for FPA bargaining

Budget Sensitive. Subject to Budget decisions.

Support for peak bodies

- \$250,000pa for 3 years, to support the system and build capability

Support for bargaining parties

- \$50,000 on initiation for each side +\$25,000 if membership is less than 20% of coverage
- To subsidise the costs of bargaining, as bargaining fees will not be allowed

Infrastructure for the FPA system

- Additional staff for mediation, navigation, verification, awareness raising, ER Authority, Labour Inspectorate.

Coming later - contractors, new institution

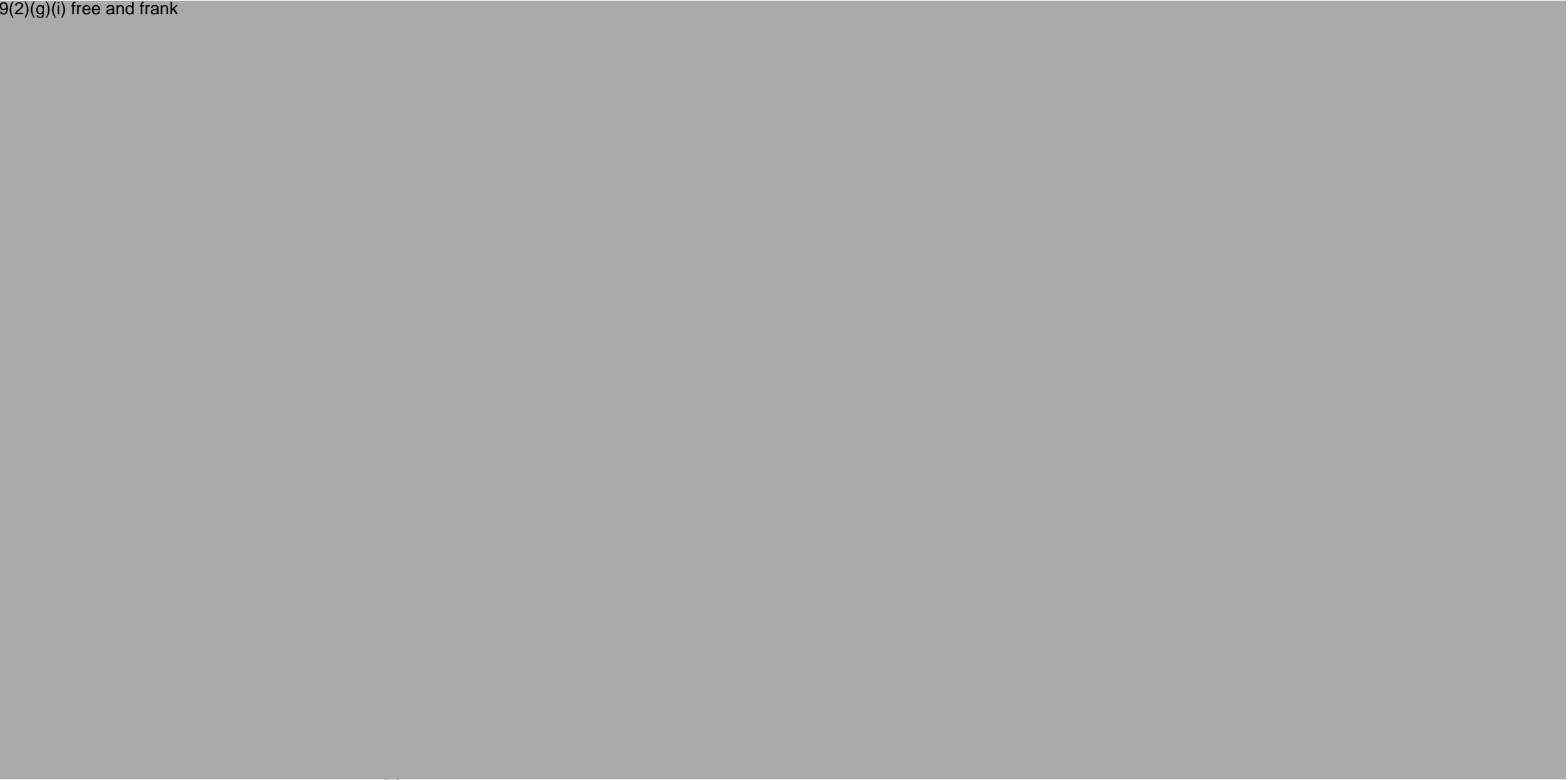
- I am focussed on delivering a FPA system this term. I plan to introduce a FPA Bill later this year.
- To achieve this timeframe, I have temporarily carved out some aspects of the FPA system:
 - Contractors will not initially be within scope, it will only cover employees.
 - I plan to create a new institution to support the FPA system, and take over many of the functions which will initially sit with MBIE and the ER Authority
- I will begin work on an amendment to the FPA system to incorporate contractors and a new institution later this term.

Equity impacts - who might benefit

- I have set a permissive system, with low barriers to entry. This means any workforce with 1000 workers' support can initiate bargaining.
- NZCTU has **indicated cleaners, security guards, supermarket workers and bus drivers** will be early priorities.
- In some cases those workforces have higher percentages of women, Māori and Pacific peoples than the general population
- I'm considering how we might prioritise access to financial or institutional support, as a way to prioritise demand for the FPA system.

	% women	% Māori	% Pacific
Cleaners	~70%	~18%	~10%
Security guards	~18%	~19%	~18%
Checkout operators	83%	~10%	~7%
Bus drivers	~20%	~14%	~10%

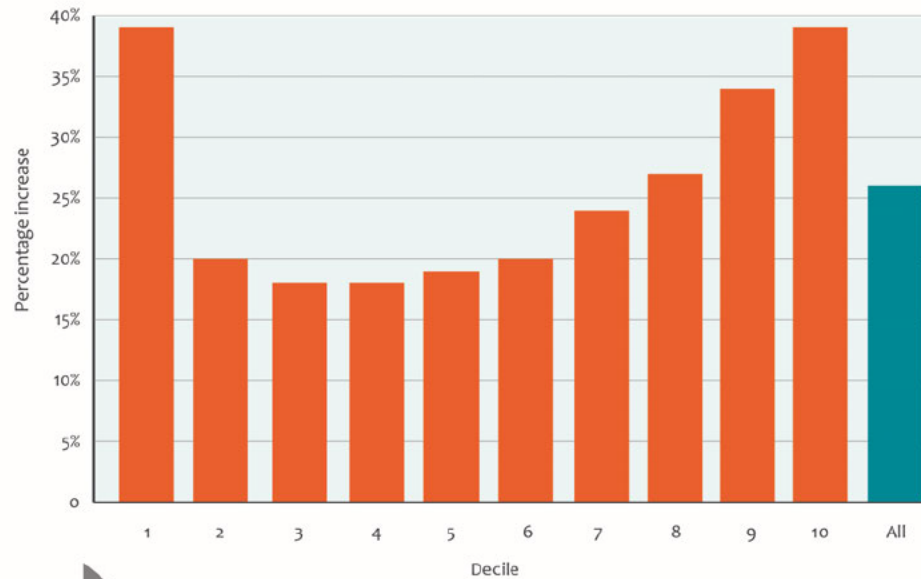
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[Options for charts to add to other slides]

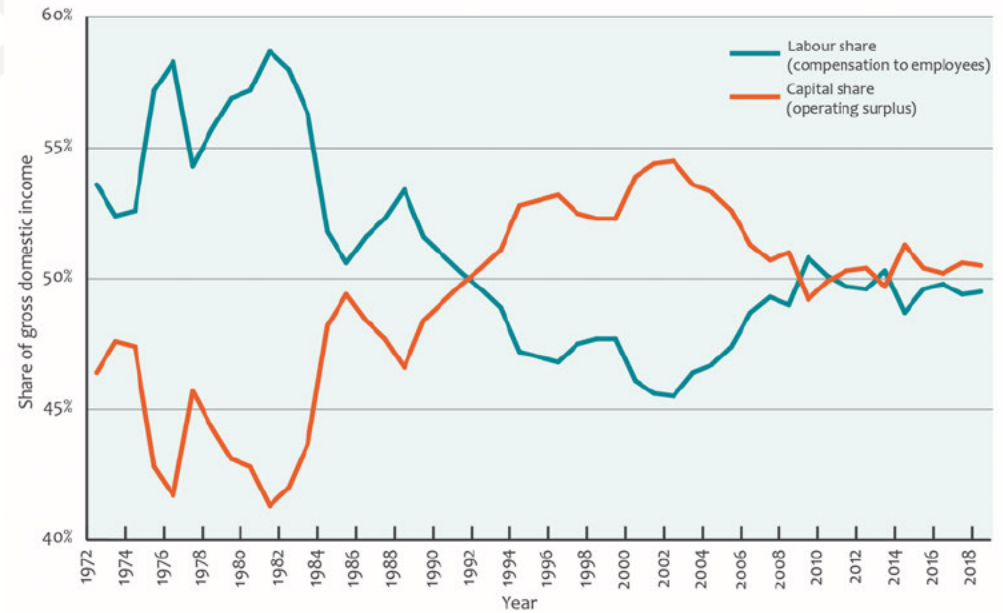
These are all copied from FPAWG report

Real increase in average hourly wage in each decile for employees from 1998 to 2015



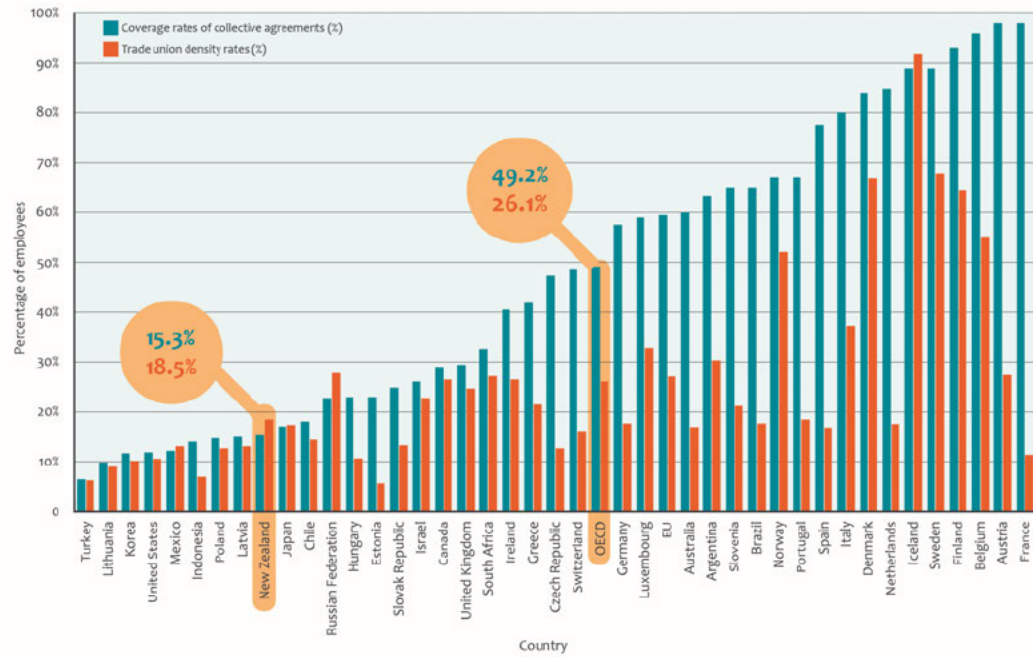
To calculate the real increase in average hourly wage, the 1998 figures have been adjusted to be in terms of June 2015 dollars.

Labour and capital share of gross domestic income in New Zealand (1972-2018)

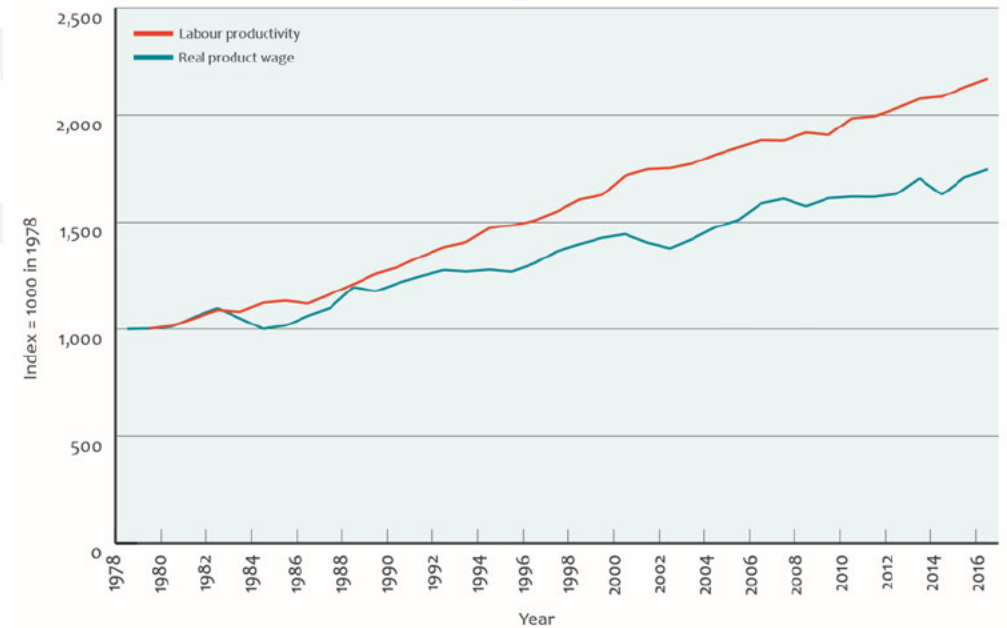


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Coverage rates of collective bargaining agreements and trade union density rates (2013)

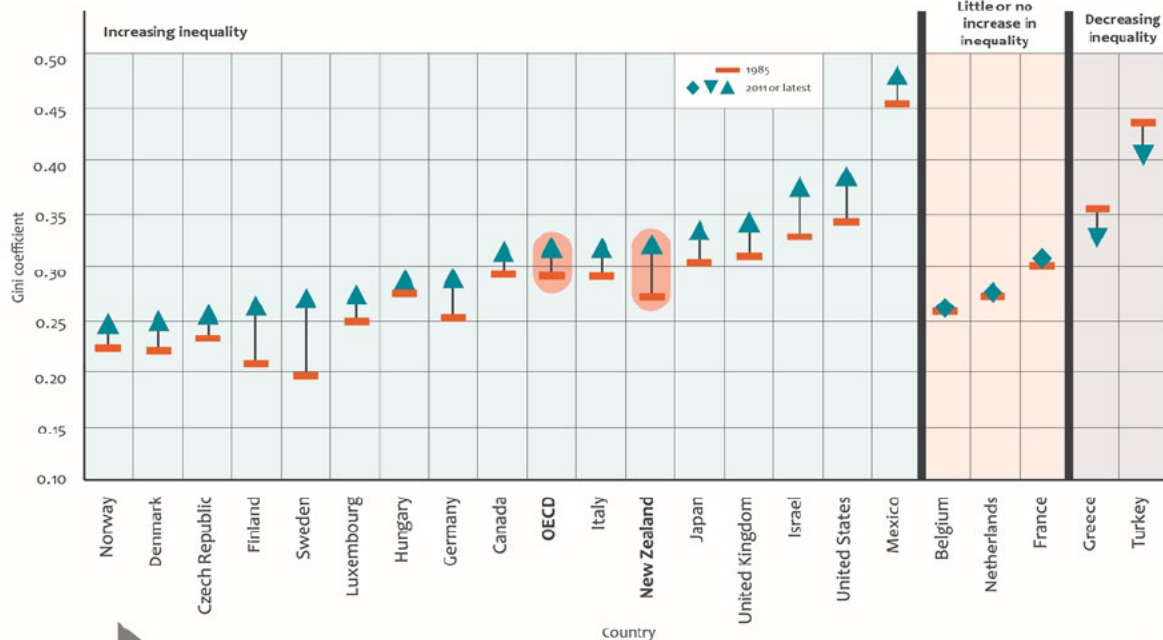


Labour productivity and the real product wage (1978-2016)



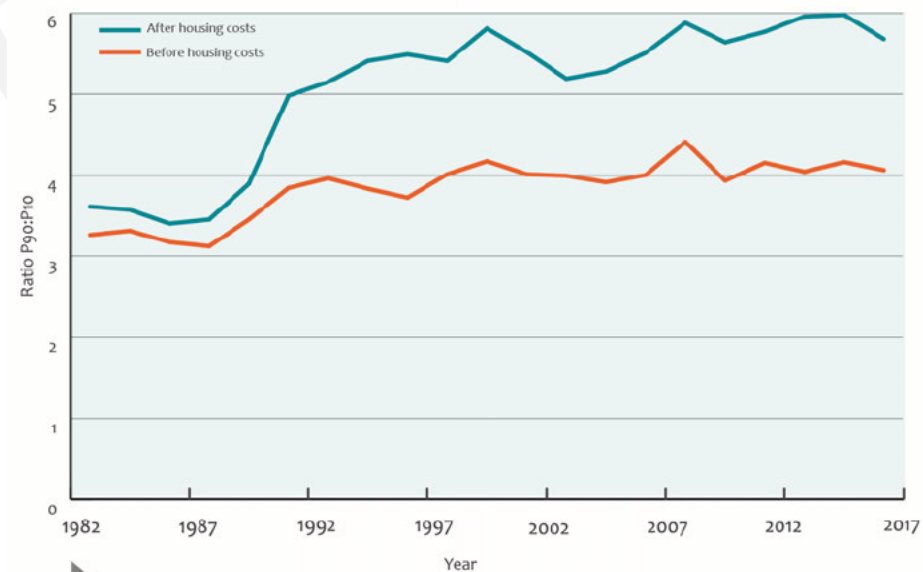
[Options for charts to add to other slides]

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



Incomes refer to household disposable income, adjusted for household size. The Gini coefficient is a measure of income inequality using household disposable income. It ranges between 0 in the case of perfect equality and 1 in the case of perfect inequality.

Income inequality in New Zealand (1982-2017)



The P90:P10 ratio summarises the relative distance between the 10th and 90th percentile of the household income distribution.