Framework for Fairness:
A Purposive Approach to Labour Law Evaluation of the Proposed Fair Pay Agreements

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List of Abbreviations

CEA: Collective Employment Agreement

EC Act: Employment Contracts Act 1991

ER Act: Employment Relations Act 2000

ERES: Employment Relations and Employment Standards

FPA: Fair Pay Agreements

FPAWG: A Fair Pay Agreement Working Group

FWTF: Future of Work Tripartite Forum

IEC: Individual Employment Contract

IC&A Act: Industrial Conciliation and Arbitration Act 1894

ILO: International Labour Organisation

MBIE: Ministry of Business, Innovation, and Employment

MECA: Multi-Employer Collective Agreements

MSD: Ministry of Social Development

MUCA: Multi-Union Collective Agreements

NZ: New Zealand / Aotearoa

NZCTU: New Zealand Council of Trade Unions

OECD: Organisation for Economic Co-operation and Development

SECA: Single-Employer Collective Agreements

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I. Part 1: Introduction

A. Introduction and Outline of Dissertation

The 'Fair Pay Agreement' (FPA) policy of sector wide collective bargaining represents the biggest change to New Zealand's (NZ) labour law in decades and the policy has sparked significant debate.[1] This dissertation will explore the FPA proposal and evaluate it through prominent labour law scholar Guy Davidov's ('Davidov') 'purposive approach'. The purposive approach provides a methodology to ascertain purposes or 'goals' (used interchangeably) of labour laws that can be then used to evaluate the 'means' of said laws.[2] Applying this methodology, this dissertation will ascertain the descriptive and normative purposes of the FPA to provide a yardstick for evaluation. An implicit purpose of this dissertation is to demonstrate how labour law theory can assist in facilitating a coherent and purpose-based evaluation of politically controversial labour laws such as the FPA.

The rest of Part 1 will introduce the development, rationale, structure, and debate surrounding the FPA. Part 2 will provide historical and political context by outlining the trajectory of NZ's labour law, through the Industrial Conciliation and Arbitration Act 1894 (IC&A Act), Employment Contracts Act 1991 (EC Act) and the Employment Relations Act 2000 (ER Act). Part 3 will introduce traditional labour law theory and Davidov's methodology. Part 4 will apply Davidov's methodology. Drawing from policy documents, labour law, labour law scholarship, and sociological theory, the goals of raising working standards, promoting collective bargaining, dignity, redistribution, democracy and productivity will be ascertained. The means of the FPA will then be evaluated against these goals. Part 5 will provide a summary, outline strengths and weaknesses, and conclude. It will be shown that the means of the FPA have significant connection to the policy's descriptive and normative goals. Much of the critique presented against the FPA can be defended. However, it will be shown that the determination process and lack support for union membership may inhibit the FPA from achieving its purposes.

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[1] Nigel Haworth "Commentary: On the Bright Side: Covid-19, a Perverse Once-in- One-Hundred Year Opportunity" (2020) 45 New Zealand Journal of Employment Relations 47 at 48.
[2] Guy Davidov *A Purposive Approach to Labour Law* (Oxford Scholarship Online, 2016).

B. Development of the Fair Pay Agreement

The FPA policy was introduced by the Labour-led coalition Government in 2018. A Fair Pay Agreement Working Group (FPAWG) comprising employer, worker, and community representatives and academics, was tasked with developing a potential FPA system. The FPAWG report was delivered late 2018 and instantly caused social and political debate. In 2019 further public consultation demonstrated a divide in opinion between employers and workers.[3] Among submissions 86% of employees and 91% of unions were generally positive, and 76% of employers and 89% of employer associations were generally negative.[4] However, notwithstanding the policy's controversy, in May 2021 the current Minister for Workplace Relations and Safety, Michael Wood (from now on 'the Minister'), obtained Cabinet approval to draft legislation to implement FPA based on the FPAWG report. The bill is expected to be released late this year (2021), with enactment into legislation in 2022.

C. Sector Wide Collective Bargaining

FPA is shorthand for an occupation or industry wide (often called 'sector wide') collective employment agreement (CEA) made through collective bargaining. Generally speaking, collective bargaining is a negotiation between an employer or employers and worker representatives (often trade unions) to establish terms and conditions of work. Sector wide collective bargaining is this process applied to employers and workers in a whole sector.[5]

D. Rationale for the Fair Pay Agreements

The Minister said that FPAs are "the cornerstone of … workplaces that are fair, safe, and productive".[6] The Minister has identified "systemic weaknesses" [7] within the Employment Relations and

[3] Avalon Kent "New Zealand's Fair Pay Agreements: A New Direction in Sectoral and Occupational Bargaining" (2021) 31 Labour & Industry 1 at 4 note: the consultation itself also demonstrates controversy because it is unusual for a policy developed by a representative working group to then be referred for further public consultation.
[4] Cabinet Briefing Paper "Initial summary of submissions on the Fair Pay Agreements discussion document" (19 December 2019) 1866 19-20 at 4.
[5] Ganesh Nana "M4king Sen5e of 7he Numbers; Sector wage bargaining – a literature review" (Beryl, New Zealand, 2019)
[6] Interview with Micheal Wood, Minister for Workplace Relations and Safety (National Business Review, 'Fair pay legislation likely to be introduced this year', 04 March 2021)
[7] Cabinet Paper "Fair Pay Agreements: Approval to draft" (7 May 2021) at [11] to [13].

Employment Standards (ERES) such as poor working conditions,[8] low wages,[9] low productivity,[10] wages not keeping up with productivity,[11] and low collective bargaining.[12] The Minister claimed that these weaknesses could be mitigated through FPA by addressing the "lack of a key feature" which was sector wide collective bargaining.[13] This claim was drawing from an Organisation for Economic Co-operation and Development (OECD) recommendation that sector wide collective bargaining is associated with "reduced inequality" and "reduced employee vulnerability".[14] The Government's vision is to stop the "race to the bottom"[15] of terms from lack of standardisation and create a "highly skilled and innovative economy that provides well-paid, decent jobs, and delivers broad-based gains from economic growth and productivity".[16] Some predicted initial utilisers of the FPA are "supermarkets, cleaners, healthcare workers and security guards".[17]

E. Outline of the Fair Pay Agreements

The current outline of the FPA system is contained in the Minister's Approval to Draft which largely reflects the FPAWG recommendations.[18] To initiate FPA bargaining, a registered union with at least one member within proposed coverage can apply to the Ministry of Business, Innovation, and Employment (MBIE) if they met the "representation test" (10% or 1,000 workers within coverage supporting initiation) or the "public interest test" (where there are significant labour market issues).[19] The initiating union must specify whether the FPA will cover a specific role (occupation) or multiple roles within an industry (industry).[20] There is default coverage of all employees (including non-union members) and their employers within the defined coverage.[21] FPAs will not initially apply to contractors, but the Government plans to include contractors eventually.[22] Unions are to represent all employees (including non-union employees) and employers are to be represented by an employer

[8] At [12.1].
[9] At [12.2].
[10] At [12.3].
[11] At [12.4].
[12] At [12.6].
[13] At [14] to [19].
[14] Cabinet Paper, above n 7, at [15]
[15] At [18].
[16] Fair Pay Agreements Working Group "Fair Pay Agreements: Supporting workers and firms to drive productivity growth and share the benefits" (Ministry of Business, Innovation and Employment 2018) at 2
[17] Justin Giovannetti "The government's fair pay agreements plan is a big deal" *The Spinoff* (New Zealand, 8 May 2021) <https://thespinoff.co.nz>
[18] Cabinet Paper, above n 7, and Cabinet Minute "Fair Pay Agreements: Policy Approval" (7 May 2021) CAB-21-MIN-0126.
[19] Cabinet Paper, above n 7, at [35].
[20] At [39].
[21] At [40] and Annex A.
[22] At [31.1].

institution in FPA bargaining.[23] There are specific notification and communication requirements so that all parties have the chance to be involved in FPA bargaining. There are to be four categories of terms that can be bargained on; "mandatory to agree",[24] "mandatory to discuss",[25] "other" and "exemption".[26] Mandatory to agree terms include base wages, how wages will be adjusted, superannuation contributions, hours, overtime, penalty rates, and coverage, duration, and governance of the FPA.[27] The mandatory to discuss terms include redundancy, leave, skills and training, health and safety and flexible working.[28] FPA bargaining must be conducted in "good faith"[29] and will be facilitated by a government funded facilitator. Bargaining parties and "peak bodies" will receive funding to facilitate coordination and bargaining.[30] If there is a dispute during bargaining the parties can go to mediation at Employment Mediation Services.[31] If mediation does not assist then either side may apply to the Employment Relations Authority ("the Authority") for a non-binding recommendation.[32] Once a FPA is initiated the agreement must be concluded.[33] Therefore, if parties cannot agree after mediation and receiving a recommendation, the Authority can fix terms through "determination".[34] At no stage is industrial action permitted as part of the FPA bargaining process.[35] Once a FPA is agreed upon, it will be "vetted" for compliance to the FPA Act and other law by the Authority.[36] Once vetted, a FPA will become "ratified" if it wins a simple majority of votes from both employee and employer sides.[37] If the FPA fails ratification the parties will return to bargaining. However, if the FPA fails ratification twice it will proceed to determination. The resultant FPA (ratified or determined) will be enacted as secondary legislation by the Secretary for Business, Innovation and Employment and will create minimum standards for that sector.[38] Once implemented, there is access to the regular employment dispute resolution system for FPA disputes.[39] Breaches of

[23] At [45].
[24] At [71].
[25] At [71].
[26] At [74].
[27] Cabinet Paper, above n 7, at [71].
[28] At [71].
[29] At [62].
[30] At [64], [68] and [69].
[31] At [77].
[32] At [78].
[33] At [82].
[34] At [83].
[35] At [26].
[36] At [89].
[37] At [91].
[38] At [97] to [98].
[39] At [100] to [101].

the FPA can be penalised by the Authority[40] and the FPA also creates new minimum standards that are enforceable by the Labour Inspectorate.[41]

F. The Debate

FPAs have divided opinion and commentators note that a "heated debate" has broken out.[42] NZ Council of Trade Unions (NZCTU) president Richard Wagstaff states that FPAs are "what working people in unions have been campaigning for … putting people back at the centre of employment".[43] However, criticism of the FPAs has included claims of the FPAs being unfair, illegal, uneconomical, creating unemployment, and being undemocratic.[44] Business groups have said that FPAs "will strangle the economy, give unions too much power and stifle innovation".[45] Some commentators have lauded the policy as positively "transform[ing] the lives of hundreds of thousands of workers now and in the future"[46] and having the potential to "raise wages across the country… and do away with precarious work".[47] On the other hand ACT leader David Seymour said "[h]e'll tear up the agreements if he is ever close to prime minister's office".[48] A flash-point of the critique has been the compulsory nature of the bargaining system; this element of the FPAs engages domestic and international human rights principles regarding the freedom of association and voluntary collective bargaining.[49] National's Scott Simpson said that "[m]aking unionism all but compulsory infringes on a person's right to freedom of association".[50] Business representatives even within the FPAWG said that they could not support the compulsory nature of the system.[51] Concerned with the compulsory nature, MBIE produced a Regulatory Impact Statement indicating a preferred approach of improving current collective bargaining and the Government setting new minimum standards in problematic

[40] At [103].
[41] At (7 May 2021) at [105].
[42] Giovannetti, above n 17.
[43] Giovannetti, above n 17.
[44] Henry Cooke "Fair Pay Agreements: How does it work and what will it mean for you" (2021) Stuff Limited https://www.stuff.co.nz and Justin Giovannetti, above n 17.
[45] Justin Giovannetti, above n 17.
[46] Matthew McCarten "Fair pay agreements — a victory for all workers" *E-Tangata* (New Zealand, 9 May 2021) <https://e-tangata.co.nz>
[47] Justin Giovannetti, above n 17.
[48] Ibid.
[49] Relevant international human rights obligations are from the ILO's Freedom of Association and Protection of the Right to Organise Convention 1948 (Convention No. 87); the ILO's Convention No. 98; article 22 of the International Covenant on Civil and Political Rights 1966 (ICCPR); and article 8 of ICESCR. New Zealand has not ratified ILO Convention No. 87. However, because it is one of the ILO's fundamental conventions, we are expected to abide by its principles as a member state of the ILO.
[50] Cooke, above n 44.
[51] Fair Pay Agreements Working Group, above n 16, at 3.

sectors (but MBIE did not provide details of this approach).[52] The Minister himself acknowledged many of these risks[53] but considered that "these risks are outweighed by the intended benefits of the [FPA], including better standards of living for workers, improved productivity and a fairer distribution of the benefits of productivity, and better engagement between employers and workers".[54]

In Part 2, this dissertation will explore the history, political nature, and ideology of NZ labour law to give context to these polarising opinions. Then, in Part 3 and 4, this dissertation will articulate and apply the purposive approach methodology to show how labour law theory can assist in addressing this heated debate.

II. Part 2: Contextualising the Fair Pay Agreements

A. Historical Context

NZ has experienced "dramatic swings" in labour law policy resulting in two main legislative overhauls.[55] The first was the IC&A Act of 1894, and the second was the EC Act of 1991. These legislative developments will be explored to contextualise the current ER Act and contemporary collective bargaining.

1. Industrial Conciliation and Arbitration Act 1894

The IC&A Act was enacted following a period of industrial conflict, namely the 1890 trans-Tasman maritime strikes.[56] Employers were ultimately successful in quelling the action but were left rattled as the conflict had threatened to close down nationwide transportation.[57] This simultaneously left unions in a weakened position, and willing to accept government intervention, and left employers fearful of industrial action.[58] Labour historian James Holt writes that this created "a climate of opinion" open to accepting compulsory arbitration.[59] The IC&A Act's purpose was to "encourage

[52] Ministry of Business, Innovation and Employment "Fair Pay Agreements - Regulatory Impact Statement" (July 2021)
[53] Cabinet Paper, above n 7, at [118] to [121]
[54] At [123].
[55] Margaret Wilson "A struggle between competing ideologies" in Erling Rasmussen (ed) *Employment Relationships : Workers, Unions and Employers in New Zealand* (ProQuest Ebook Central, 2010) 9 at 9.
[56] James Holt *Compulsory Arbitration in New Zealand: The First Forty Years* (Auckland University Press, New Zealand, 1986) at 20.
[57] At 21.
[58] Ibid.
[59] At 21-25.

formation of Industrial Unions … and to facilitate settlement of industrial disputes by conciliation and arbitration".[60] This was transformative as labour had long been denied the right to organise at law.[61]

(a) The Arbitral Process

The arbitral process of the IC&A Act involved a registered union bringing an 'industrial dispute' through a 'log of claim' to a conciliation council who would bargain for an 'award'.[62] Conciliation councils had equal representatives from worker and employer unions.[63] If agreement could not be reached, then it would progress to the Court of Arbitration which would create the award.[64] Awards were delegated legislation providing minimum terms.[65] The system created a statutory mechanism for compulsory arbitration where unions and employers worked together to create multi-employer collective agreements.[66] The Court of Arbitration also made "Standard Wage Pronouncements" and "General Wage Orders" which set national standards and lowered or raised wages.[67]

The Court of Arbitration's decisions were generally stable and predictable and this meant conciliation awards were set in "the shadow of the courts".[68] The system provided protection of wages and conditions, but also relatively low wages and standardised labour costs.[69] This created "a status quo … generally endorsed by worker and employer unions"[70] and law professor Simon Deakin noted this system "delivered a century or so of relative industrial peace and social stability".[71] It was an area of

[60] Industrial Conciliation and Arbitration Act 1894, long title.
[61] Gordon Anderson *Reconstructing New Zealand's Labour Law: Consensus or Divergence?* (Wellington: Victoria University Press, 2011) at 16 and 25.
[62] Anderson, above n 61, at 31 and Industrial Conciliation and Arbitration Act 1894, ss 2, 3 and 74.
[63] Margret Wilson "The Politics of Workplace Reform: 40 Years of Change" in Gordon Anderson, Alan Geare, Erling Rasmussen and Margret Wilson (eds) *Transforming Workplace Relations in New Zealand 1976-2016* (Victoria University Press, Wellington, 2017) 44 at 48 and Gordon Anderson, above n 61, at 30.
[64] Industrial Conciliation and Arbitration Act 1894, s 47 and 52.
[65] At, s 21 and Gordon Anderson, above n 61, at 32 and Gordon Anderson, Dawn Duncan and John Hughes *Employment law in New Zealand* (2nd ed, LexisNexis, Wellington, 2017) at 424.
[66] Simon Deakin "Thirty Years On: Labour Market Deregulation and its Aftermath in New Zealand and the United Kingdom" (2019) 50 Victoria University of Wellington Law Review 193 at 195.
[67] Anderson, above n 61, at 33 to 34. See: Holidays Act 1944 and the Minimum Wage Act of 1945.
[68] Anderson, above n 61, at 22 and 34.
[69] At 22.
[70] Kevin Hince "From William Pember Reeves to William Francis Birch: from conciliation to contracts" in Raymond Harbridge (ed) *Employment Contracts: New Zealand Experiences* (Victoria University Press, Wellington, 1993) 7 at 8.
[71] Deakin, above n 66, at 195.

tight regulation of the labour market and NZ society was highly egalitarian.[72] NZ has been called "one of the developed world's more equal societies" at this time.[73]

(b) Unions

Unions had a supported but restrained position under the IC&A Act.[74] Unions were "bestowed significant legitimacy" by the system[75] and from 1936 to 1961 compulsory union membership provided steady economic support.[76] Industrial action was theoretically prohibited.[77] William Pember Reeves, principal author of the IC&A Act, wrote that unions "may not strike… however much it may do legally and peacefully".[78] However leading NZ labour law scholar Gordon Anderson writes that it was eventually realised that a strike-free NZ was unachievable and temperate striking was not penalised.[79] Serious industrial disputes, such as the "waterfront dispute",[80] were responded to with coercive state power not labour law.[81]

(c) The Breakdown of the System

The late 1960s onwards was a "confused and difficult" time for industrial relations and the arbitral system started to falter.[82] The Court of Arbitration's notorious 1968 "nil-wage order" which declined to adjust awards to reflect inflation eroded union and worker faith in the Court and "second tier" direct enterprise level bargaining started to overtake the award system.[83] NZ law professor and former politician Margret Wilson notes how "[w]ork stoppages rose from 71 in 1961 to 523 in 1979"[84] and this increase in industrial action has been attributed to the shift to "second tier" bargaining.[85]

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[72] Ibid.
[73] Max Rashbrooke "Inequality in New Zealand" in Max Rashbrooke (ed) *Inequality: A New Zealand Crisis* (ProQuest Ebook Central, 2013) 20 at 23.
[74] Anderson, Duncan and Hughes, above n 65, at 422.
[75] Chris Wright and Colm McLaughlin "Trade Union Legitimacy and Legitimation Politics in Australia and New Zealand" (2021) 60(3) Industrial Relations 338 at 356.
[76] Industrial Conciliation and Arbitration Amendment Act 1936.
[77] JHolt, above n 56, at 15.
[78] William Pember Reeves *State Experiments in Australia and New Zealand* (Macmillian, Melbourne, 1968, first published 1902) vol 2 at 112 and James Holt, above n 56, at 17.
[79] Gordon Anderson, above n 61, 38.
[80] See generally: NZHistory "The 1951 waterfront dispute" (2017) New Zealand History Online <https://nzhistory.govt.nz/politics/the-1951-waterfront-dispute>
[81] Anderson, above n 61, 39 and Public Safety Conservation Act 1932.
[82] Noel Woods "The Industrial Relations Situation in New Zealand" (1970) 12 Journal of Industrial Relations 360 at 360.
[83] Anderson, above n 61, 42.
[84] Wilson, above n 55, at 12.
[85] Anderson, above n 61, 47.

In 1973 the Industrial Relations Act was enacted and in 1984 Compulsory Arbitration was repealed. Oil shortages raised inflation throughout the 1970s and the economy, overly reliant on the now slowing meat exports to Britain, struggled.[86] These economic factors,[87] combined with the sudden ideological dominance of neo-liberalism, led to the Lange-Labour Government's "breathtaking in scale" switch from "social democratic … to a radical neo-liberal economic policy" in 1984.[88] Simon Deakin writes "[i]deology and economics converged on the view that an "efficient labour market" would be one stripped of any trade union influence".[89] In 1987 the Labour Relations Act was enacted and collective bargaining was shifted to the enterprise level.[90] While the Act purported to facilitate unionism[91] and to recognise striking,[92] it begun "a serious transition of employment relations practice to reflect the new neoliberal public policy".[93]

2. Employment Contracts Act 1991

In 1991 the Bolger–Shipley National Government enacted the "radically deregulatory"[94] EC Act. The EC Act was a culmination of the previous neo-liberal reforms and its aim was "decollectivisation and decentralisation"[95] to "individualise the employment relationship and de-unionise workplaces".[96]

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[86] Rashbrooke , above n 73, 26 to 27 and Paul Dalziel and Ralph Lattimore *The New Zealand Macroeconomy: A Briefing on the Reforms, Oxford* (University Press, Auckland, 1999) at 16–19.
[87] Nana, above n 5, at 2 drawing from Jelle Visser "What happened to collective bargaining during the great recession?" (2016) 5 IZA Journal of Labor Policy 9. Note: Jelle Visser and Ganesh Nana warn that the economic rationale for the move away from collective bargaining has been overstated; they claim that the decline was predominately driven by political and ideological change
[88] John Reardon and Tim Gray "`About Turn': An Analysis of the Causes of the New Zealand Labour Party's Adoption of Neo-liberal Economic Policies, 1984-1990" (2007) 78 The Political Quarterly 447 at 447 reforms included: "the following measures: deregulation of financial markets; removal of exchange rate regulations; … abolition of price controls and interest rate controls; relaxation of overseas borrowing; abolition of import licensing; reduction of trade barriers; abolition of industrial production controls; removal of agricultural subsidies; a general sales tax (to move the burden from direct to indirect taxation); privatisation of state assets including NZ Steel, Telecom and the national rail network; restrictions on trade unions; public-sector reform (including short-term contracts, performance management and private-sector consultants in the civil service); and the removal of consultative organisations from economic policy-making."
[89] Deakin, above n 66, at 197.
[90] Kent, above n 3, 1 at 2-3.
[91] Anderson, above n 61, at 16.
[92] Anderson, Duncan and Hughes, above n 65, at 426.
[93] Kent, above n 3, at 2-3.
[94] David Peetz "Awards and collective bargaining in Australia: what do they do, and are they relevant to New Zealand?" (2020) 44 New Zealand Journal of Employment Relations 58 at 66.
[95] Hince, above n 70, at 10.
[96] Anderson, Duncan and Hughes, above n 65, 427.

(a) Individual Employment Contracts

Individual employment contracts (IEC) became the primary regulating instrument of the working relationship. Apart from minimum standards, IEC were the "free choice" of the two parties.[97] As Gordon Anderson and Lucy Kenner write "[t]his, of course, left many workers vulnerable to exploitation.".[98] Substantial changes occurred to the contents of employment contracts including flexible work practices, performance pay, a wider spread of pay scale, and a drop of overtime and penal rates.[99] Gordon Anderson and others, write the power in the employment relationship was "unequivocally shifted in favour of employers".[100]

(b) Collective Bargaining and Unions

The EC Act "profoundly reduced the influence of trade unions and collective bargaining"[101] and "swept away virtually all remnants of the arbitration system".[102] Employer-union agreements were not legally recognised and the EC Act's purpose of "freedom of association" prohibited requirement of union membership within a employment contract, eroding union funding.[103] Gordon Anderson writes that this undermined unions "under the cloak of a spurious legal neutrality".[104] Trade unions were denied independent legal status, could no longer be registered, and lost all the rights they were once afforded.[105] The word union was not even included in the EC Act.[106] Scholars Chris Wright and Colm McLaughlin write that central to the 1992 reforms was the "explicit delegitimation of unions" to "portray them as having too much power …. and the cause of New Zealand's poor productivity".[107] Legal scholar and Legal Officer of NZCTU Avalon Kent writes that "[i]n the wake of these changes,

[97] Wilson , above n 63, at 46.
[98] Gordon Anderson and Lucy Kenner "Enhancing the effectiveness of minimum employment standards in New Zealand" (2019) 30(3) The Economic and Labour Relationship Review 345 at 346
[99] Parliamentary Library Background Paper No. 16 "The Employment Contracts Act and its Economic Impact" (Andrew Morrison, Economist, November 1996) at 4.
[100] Anderson, Duncan and Hughes, above n 65, at 427.
[101] Gordon Anderson, Peter Gahan, Richard Mitchell, and Andrew Stewart "The Evolution of Labour Law in New Zealand: A Comparative Study of New Zealand, Australia, and five other Countries" (2011) 33 Comparative Labor Law & Policy Journal 137 at 138.
[102] Gordon Anderson "'The Sky Didn't Fall In': An Emerging Consensus on the Shape of New Zealand Labour Law?" (2010) 23 Australian Journal of Labour Law 94 at 96.
[103] Employment Contracts Act 1991, long title, s 5 and 6.
[104] Anderson, above n 61, at 77.
[105] Hince, above n 70, at 11.
[106] Ibid and Employment Contracts Act 1991.
[107] Wright and McLaughlin, above n 75, 356.

trade union density collapsed… from about 70% of employees in 1980 to just over 20% by the late 1990s" the "largest decline in union density of any OECD country over this period".[108]

B. Current Law

1. Employment Relations Act 2000

In 2000 the ER Act was enacted by the Clark Labour-led Government[109] and remained "largely untouched" by the following Key National-led Government.[110] The ER Act remains the governing statute of NZ ERES, along with minimum standards legislation[111] and International Labour Organisation (ILO) standards.[112] The ER Act aimed to assuage the policies of the EC Act and "better balance"[113] the employment relationship by "acknowledging and addressing the inherent inequality of power".[114] However, despite the National Party proclaiming at the enactment of the ER Act that it was to take "industrial relations back to the Jurassic area" it was "a relatively moderate reform".[115] As Gordon Anderson writes, the ER Act "does not threaten, but largely retains and consolidates… the [EC Act's] underlying framework".[116]

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[108] Avalon Kent, above n 3, at 3. Drawing from Organization for Economic Cooperation and Development (2021). "Employment and Labour Force Statistics." Available at: https://www.oecd-ilibrary.org/employment/data/oecd-employment-and- labour-market-statistics_lfs-data-en [Accessed 26 February 2021]
[109] Wilson, above n 63, at 55.
[110] Wright and McLaughlin, above n 65, at 357.
[111] See: Holidays Act 2003; Minimum Wage Act 1983; Wages Protection Act 1983; Equal Pay Act 1972; Parental Leave and Employment Protection Act 1987; Home and Community Support (Payment for Travel between Clients) Settlement Act 2016; Volunteers Employment Protection Act 1973 (also, to some extent the Immigration Act 2009 and Crimes Act 1961)
[112] International Labour Organisation "Collective Bargaining: A Policy Guide" (2015) <https://www.ilo.org/travail/whatwedo/instructionmaterials/WCMS_425004/lang--en/index.htm> - as a member state NZ has an obligation "to respect, promote and realize – in good faith" the ILO standards.
[113] Wilson, above n 63, at 56.
[114] Employment Relations Act 2000, s 3(a)(ii).
[115] Anderson, above n 61, at 132.
[116] At 134.

(a) Unions

The ER Act permits a qualifying incorporated society[117] to become a registered union.[118] Registration affords "symbolic legitimacy"[119] and the ER Act recognises a unions role in promoting their members' interests and representing members in collective bargaining.[120] This promotes observance to ILO Conventions 87 on Freedom of Association and Protection of the Right to Organise and 98 Right to Organise and Collective Bargaining.[121] When given authority by an employee, unions may also represent that employee regarding their individual employment rights.[122] The ER Act also provides for unions to access workplaces[123] and paid meetings[124] and delegate work,[125] and since 2018 employers must provide new employees with union information.[126]

However, as Mark Harcourt and others write "workers are defaulted to non-union status… then have to take the positive, proactive step to seek and gain membership".[127] Furthermore, drawing from *Eketone v Alliance Textiles,*[128] Gordon Anderson notes that "employers in [NZ] are not required to be neutral in relation to union membership".[129] Evidence shows that employer perspective is that "workplaces should remain union free" and this is a major obstacle to union membership.[130] Under the Key National-led Government there was further deregulations including "weakening union access

[117] See: Incorporated Societies Act 1908, s 4 "Any society consisting of not less than 15 persons associated for any lawful purpose but not for pecuniary gain may, on application being made to the Registrar in accordance with this Act, become incorporated as a society under this Act."
[118] Employment Relations Act 2000, ss 13, 14, 15. The incorporated society must not be affiliated with an employer; have the object is to *inter alia* "promote its members' collective employment interests"; and has legal, reasonable, democratic, inclusive, rules.
[119] Anderson, Duncan and Hughes, above n 65, at 440.
[120] Employment Relations Act 2000, ss 12(a) and (c), 18.
[121] International Labour Organisation Convention 87 on Freedom of Association and Protection of the Right to Organise (opened for signature 17 June 1948), International Labour Organisation Convention 98 on Right to Organise and Collective Bargaining (opened for signature 18 Jul 1951, entered into force 9 June 2003).
at 11.
[122] Employment Relations Act 2000, s 18(3).
[123] Employment Relations Act 2000, ss 20, 20A, 21.
[124] At, s 26.
[125] At, s 18A.
[126] At, s 62A.
[127] Mark Harcourt, Gregor Gall, Margret Wilson, Korey Rubenstein and Sudong Shang "Public support for a union default: Predicting factors and implications for public policy" (2020) 1 Economic and Industrial Democracy 1 at 3.
[128] *Eketone v Alliance Textiles (NZ) Ltd* (1993) 2 ERNZ 783 (CA) at 787.
[129] Anderson, Duncan and Hughes, above n 65, at 437.
[130] Wright and McLaughlin, above n 75, at 358.

rights"[131] and union legitimacy was politically attacked by National to maintain popularity with the employer voter base.[132]

(b) Collective Bargaining

The ER Act objectives includes promoting collective bargaining [133] and observance of ILO Convention 98 on Right to Organise and Collective Bargaining.[134] The ER Act provides a framework for collective bargaining underpinned by the obligation of good faith.[135] Good faith includes *inter alia*, being active and constructive, meeting and communicating, not misleading or deceiving, continuing to bargain, providing necessary information, and to conclude a CEA; subject to a genuine reason, on reasonable grounds, not to conclude a CEA.[136] A CEA must contain coverage, rates of pay, resolution process, variation and expiry within 3 years.[137] Bargaining can be initiated by either a union after a simple majority of covered members[138] or an employer.[139] There are three common modes of CEA; enterprise (single employer) level agreements (SECAs), multi-party agreements (MECAs), and multi-union agreements (MUCAs).[140] Though it is permitted in law, multi-employer bargaining is rare, and very little industry-wide bargaining occurs.[141]

(i) High Threshold for Dispute Resolution

If there is conflict within the bargaining process mediation is available[142] and if there are specific "serious difficulties" the Authority can provide facilitation.[143] The Authority can make non-binding recommendations on process and/or provisions[144] that must be considered.[145] However, there is a "high threshold" [146] for facilitation. For example, in *PMP Print* a 24 hour stoppage, pickets, 17 days

[131] At 357.
[132] At 358.
[133] Employment Relations Act 2000, s 3(a)(iii).
[134] ILO Convention 98 and International Labour Organisation, above n 112, at 11.
[135] Employment Relations Act 2000, s 4, 31, 32, 35 and Ministry of Business, Innovation and Employment "Code of Good Faith in Collective Bargaining" (2 May 2019).
[136] Employment Relations Act 2000, ss 4, 23, 33, 34 and MBIE, above n 135.
[137] Employment Relations Act 2000, ss 52, 54.
[138] At, s 45.
[139] At, s 40.
[140] Anderson, Duncan and Hughes, above n 65, 452.
[141] Kent, above n 3, at 7.
[142] MBIE, above n 135, at 4.1.
[143] Employment Relations Act 2000, ss 50A, 50B.
[144] At, ss 50G, 50H.
[145] Ibid.
[146] See: *Service & Food Workers Union Inc v OCS Ltd* EmpC WC20/05, 5 September 2005

of strike action, police involvement, and issuing of trespass notices, were not sufficient to satisfy the "serious difficulties" test.[147] If specific difficulties exist and all other alternatives have been exhausted, a party may apply to the Authority for a "determination fixing" of the CEA.[148] However, this is for "exceptional cases"[149] and is an "extraordinary test".[150] Fixing will only be done if it is the "only option to remedy the breach of good faith".[151]

(ii) Passing On

A CEA covers employees who are members of the union who come within the coverage clause and all new employees under the coverage for 30 days.[152] However, in practice, terms of the collective employment agreement are regularly "passed on" to non-union members.[153] The only restriction is that terms cannot be passed on to specifically undermine the CEA.[154] As Erling Rasmussen writes "the problem of 'passing on'" is that it is "a major disincentive to join the union(s)" as the employee is already getting the benefit at no cost.[155] Furthermore, to ensure freedom of association, the ER Act states that any action conferring specific benefit on a union member is prohibited.[156] This rule against preference does not restrict a CEA from having different terms between union member and non-union members.[157] However, Gordon Anderson writes that "any attempt to prevent these being passed on to non-members would be an unlawful preference" as it would be prevention *on the basis* of lack of union membership.[158]

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[147] Judith Scott "Mechanisms for Resolving Collective Bargaining Disputes in New Zealand" (2014) 39(2) New Zealand Journal of Employment Relations 62 and *PMP Print Ltd and Anor v New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc* CA162/04, 22 December 2004.
[148] Employment Relations Act 2000, ss 50J(1), 50J(3).
[149] *Assoc of University Staff v Vice-Chancellor of the University of Auckland* (2005) ERNZ 224 (2005) 2 NZELR 227 (EmpC) at [61]
[150] *New Zealand Public Service Assoc Inc v Secretary for Justice* (2010) NZEMPC 11, (2010) 7 NZELR 215
[151] *First Union v Jacks Hardware and Timber Ltd, t/a Mitre 10 Mega Dunedin and Mitre 10 Mosgiel* [2015] NZEmpC 230 and Employment Relations Act 2000, s 50J.
[152] Employment Relations Act 2000, ss 56, 62.
[153] Anderson, Duncan and Hughes, above n 65, at 434.
[154] Employment Relations Act 2000, s 59B.
[155] Erling Rasmussen "Introduction" in Erling Rasmussen (ed) *Employment Relationships : Workers, Unions and Employers in New Zealand* (ProQuest Ebook Central, 2010) 1 at 3.
[156] Employment Relations Act 2000, s 9(1).
[157] *National Union of Public Employees (Inc) v Asure New Zealand Ltd and New Zealand Public Service Assoc* (2004) 2 ERNZ 487 (EmpC) at [50].
[158] Anderson, Duncan and Hughes, above n 65, at 434 [my emphasis].

(iii) The Self-Help Regime

Gordon Anderson writes that the ER Act only "partially restored the right to effective collective bargaining" as unions are required to develop the ability to organise and bargain collectively themselves.[159] This is often called a "self-help" and "competitive" model, rather than one of state facilitation and support.[160] The ability of unions to help themselves is undermined by the features of the ER Act such as the ability to pass on terms and permissiveness of employer hostility. Avalon Kent writes that the ER Act regime is actually "one of the most hostile to collective bargaining of any industrial country".[161] This is borne out in the very low rates of collective bargaining in NZ by OECD standards, particularly in the private sector.[162] There currently 456 collective agreements covering 60% of the public sector, but 1600 collective agreements covering a mere 10% of the private sector workforce.[163] Coverage of MECAs is low outside of the public sector.[164] Furthermore, Avalon Kent writes that NZ "is one of only a handful of OECD countries in which collective bargaining coverage is *lower* than union density – reflecting the difficulties of building and maintaining collective agreements at any level".[165]

2. Indicators of Change

While union legitimacy was attacked during the Key National government, Chris Wright and Colm McLaughlin write that unions increased their "moral legitimacy" at this time by "being a social voice against inequality and injustice".[166] For example, then NZCTU president Helen Kelly was a strong support for the families of the victims of the tragic 2010 Pike River mine explosion.[167] There was also significant union driven changes at this time, including the gender pay equity settlement for care and support workers, minimum wage for care workers during sleep-over and on-call periods, paid travel time for home support workers, and amendments to limit zero-hour contracts.[168] Throughout this time unions were also developing a stronger relationship with the Labour Party, who then came into power in 2017 with the Labour-Greens-NZ First coalition. Once in power, the Labour-led Government

[159] Anderson, above n 61, at 17.
[160] Ibid.
[161] Kent, above n 3, 3.
[162] Ibid.
[163] Fair Pay Agreements Working Group, above n 61, at 32
[164] At 32
[165] Kent, above n 3, 3.
[166] Wright and McLaughlin, above n 75, 357.
[167] Ibid.
[168] At 359.

reserved National's amendments to the ER Act, announced the Screen Industry Workers Bill 2019, and tripartite (union/employer/Government) forums were introduced.[169]

3. Political and Ideological Nature of Labour Law

As exemplified by the debate regarding the FPA in Part 1, and this historical exploration of NZ labour law, there is consistently divided opinions on what makes appropriate labour law. As Gordon Anderson writes[170]

> Labour law has always been, and remains, an area of considerable political and social tension. The reason is obvious: labour law structures are a major determinant of the distribution of wealth and income in a society, and consequently of the economic welfare of a great majority of the population.

Divergence of opinion often falls down party lines. Margret Wilson emphasises this point when she states that "[t]he main drivers of regulatory change have been … the ideological position of the government of the day".[171] The extent and consistency of the ideological demarcation of the dominant political parties in NZ, National and Labour, is not always clear cut; especially when considering the cross-party support of neo-liberalism throughout the 1980s. However, generally it can be said that Labour is ideologically centre-left and National centre-right. This ideological difference is shown by Labour's pluralist approach to labour law, recognising multiple interests in the workplace, and Nationals unitary approach based largely on supporting managerial prerogative.[172] For example the National governments have been supportive of "a minimum role for the state and individual wage fixing through the contract of employment" compared to Labour governments supporting "a more active role for the state and collective bargaining".[173]

In politics parties express their disapproval of the other's labour law policy vociferously. For example, in the 1975 election National campaigned with images of unionists depicted as dancing Cossacks, implying Labour was under communist influence.[174] This vocal disapproval can also be exemplified in the FPA debate. Such as National's Scott Simpson claiming FPA were simply

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[169] At 360 to 361; Screen Industry Workers Bill 2019; Ministry of Business, Innovation and Employment "Future of Work Tripartite Forum Strategic Assessment" (November 2019).
[170] Anderson, above n 61, at 256.
[171] Wilson, above n 63, 44 at 44.
[172] At 46 to 47.
[173] At 47.
[174] Wilson, above n 55, at 20.

"payback for Labour's union mates"[175] and should be repealed.[176] This contesting nature of the political system can lead to a culture of criticism for criticisms sake. For example, despite the relatively moderate reform of the ER Act, the National strongly attacked the ER Act with a campaign which has been called "ill-informed and at worst active disinformation".[177] For example, within the FPA debate, ACT and National have scolded Labour for not following the expert advice of the MBIE Regulatory Impact Statement.[178] However, the advice of MBIE was to legislative higher minimum standards and strengthen collective bargaining which are policies that ACT and National are apposed to.[179] This ideological and political nature of labour law creates complication in evaluating labour law and ascertaining meaningful critique compared to criticism for criticisms sake. Part 3 of this dissertation will illuminate how labour law theory can be used to evaluate labour law in a coherent and purpose-based manner.

III. PART 3: Methodology

A. The Theory of Labour Law

1. The Crisis of Labour Law

Outlining a coherent theory of labour law is complicated given labour law's ideological and political nature. As Hugh Collins and others write labour law is an "area of law that often appears to dispense with coherent legal principles in favour of a patchwork of regulations … to satisfy short-term political agendas".[180] This has contributed to what many labour law scholars have referred to as the "crisis" of labour law.[181] This crisis includes *external* challenges, where labour law is attacked for impeding the free market, flexibility, efficiency and ultimately creating unemployment and harming workers. This *external* challenge questions the very existence of labour law and makes the case for deregulation and restriction of labour law to simply the "legal enforcement of contracts".[182] This challenge was at large during the EC Act, remnants exists within ER Act, and is echoed throughout the FPA debate; as

[175] Wright and McLaughlin, above n 75, 360 to 361.
[176] Zane Small "Labour accused of being 'stuck in 1970s' as Business NZ calls for Fair Pay Agreements to be terminated" *News Hub* (New Zealand, 7 Many 2021) quoting National MP Scott Simpson
[177] Anderson, above n 61, 132.
[178] Cooke, above n 44.
[179] See: MBIE, above n 52.
[180] Hugh Collins, Gillian Lester, and Virginia Mantouvalou *Philosophical Foundations of Labour Law* (Oxford Scholarship Online, 2019) at 2 to 3.
[181] See generally: Guy Davidov and Brian Langille *The Idea of Labour Law* (Oxford Scholarship Online, 2011).
[182] Collins, Lester, and Mantouvalou, above at 180, at 3.

discussed the business community claimed the FPA would "strangle the economy … and stifle innovation" creating unemployment.[183] This crisis also includes *internal* challenges, where labour law is attacked for not having coherent legal principles.[184]

2. The Traditional Theories of Labour Law

However, labour law does have a rich and informative scholarship and seminal traditional theories. The traditional theory and "main object" [185] of labour law, expressed by Otto Kahn-Freund, is "to be a countervailing force to counteract the inequality of bargaining power" within the working relationship.[186] Other pinnacle tenets of the traditional theory, articulated by Hugo Sinzheimer,[187] are that "labour is not a commodity" and that "dignity" of the worker, which is threatened by dependency within the working relationship, must be protected.[188] These traditional theoretical tenets assist in clarifying what 'labour law' is and give an indication of its ultimate purpose. These tenets are all closely related to one another and indicate that labour law's purpose is to be protective of workers. As Gordon Anderson writes "[c]apital does not need labour law, workers do".[189] Therefore, 'labour law' is not confined to the narrower concept of 'employment law'. As Gordon Anderson writes, employment law governs the employment contract and "reflects the neoliberal agenda that employment should be viewed purely as a matter of contract between two individual parties".[190] Whereas labour law is the "law that regulates the labour market interactions of the workforce as a whole" and wider context of labour relations. [191] Labour law theory focuses on this wider and more holistic view of labour law, seeing that it is artificial and damaging to restrict labour law to the contract of employment.

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[183] Giovannetti, above n 17.
[184] Guy Davidov and Brian Langille "Understanding Labour Law: A Timeless Idea, a Timed-Out Idea, or an Idea Whose Time has Now Come?" in Guy Davidov and Brian Langille (eds) *The Idea of Labour Law* (Oxford Scholarship Online, 2011) 1 at 1.
[185] Anderson, above n 61, at 11.
[186] Paul Davies and Mark Freedland *Kahn-Freund's Labour and the Law* (3rd ed, Stevens, London, 1983) at 18.
[187] Summarised in English by Manfred Weiss "Re-Inventing Labour Law?" in Guy Davidov and Brian Langille (eds) *The Idea of Labour Law* (Oxford Scholarship Online, 2011) 43 at 44.
[188] Weiss, above n 187, at 44 drawing from Hugo Sinzheimer "Das Wesen des Arbeitsrechts" (1927) in Hugo Sinzheimer (ed) *Arbeitsrecht und Rechtsso-ziologie*, vol 1 (Bund Verlag, 1976) 108 at 110 to 112.
[189] Anderson, above n 61, at 11.
[190] Gordon Anderson "Labour law under stress: some thoughts on Covid-19 and the future of the labour law" (2020) 45 New Zealand Journal of Employment Relations 33 at 35
[191] Ibid.

B. The Purposive Approach

Referring back to the crisis of labour law, one viewpoint is that the crisis exists because traditional theories and paradigms of labour law are fundamentally lacking and need to be reformulated.[192] Davidov calls this a "crisis at the level of *goals*".[193] However, the other viewpoint is that "labour law does not need to be reinvented" but that the crisis of labour law is because some labour laws fail to achieve their traditional labour law purposes.[194] Davidov calls this a "problem in the realm of *means*" and to avert the crisis and justify labour laws "we have to restore the connection between labour laws and the goals behind them".[195] An example of a potential disconnection between a goals and means can be seen in the FPA debate; the Minister claims the FPA will "reduced employee vulnerability"[196] however opponents claim that the most vulnerable will suffer through the creation of unemployment.[197] To consider which view point is correct, Davidov claims that the purposive approach methodology can be applied to show existence of connection between goals and means, or otherwise.

1. Methodology

The purposive approach has a two-step methodology. First, the purpose of the labour law "at the deepest possible level" must be ascertained to provide "a clear view of what the law is supposed to achieve" and a "basic yardstick" for evaluation.[198] The second step is evaluation of the means of that law in advancing those goals.[199] Aligned with the holistic focus of labour law generally, the goals of labour law are to be ascertained from various sources. In regard to specific labour laws, such as the FPA, the first source would be the legislative documents which describe and explain the law.[200] However, Guy Davidov notes that these descriptive goals are not sufficient in ascertaining the goals

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[192] Brian Langille "Labour Law's Theory of Justice" in Guy Davidov and Brian Langille (eds) *The Idea of Labour Law* (Oxford Scholarship Online, 2011) 101 at 110, drawing from the work of Amartya Sen "Human Capital and Human Capability" (1997) 25 World Development 1959, Brian Langille argues that labour law should instead be conceptualised as a subset of our law which structures human capabilities and the idea of human freedom, outside of the normal paradigm of the working relationship.
[193] Guy Davidov "Introduction" in *A Purposive Approach to Labour Law* (Oxford Scholarship Online, 2016) 1 at 1.
[194] Weiss, above n 187, at 46 to 56.
[195] Davidov, above n 193, at 4
[196] Cabinet Paper, above n 7, at [15]
[197] Roger Partridge and Bryce Wilkinson "Work in Progress: Why Fair Pay Agreements would be bad for labour" (Report, The New Zealand Initiative, Wellington, 2019) at 28.
[198] Guy Davidov "Articulating Labour Law's Goals: Why and How" in *A Purposive Approach to Labour Law* (Oxford Scholarship Online, 2016) 13 at 15.
[199] Davidov, above n 193, 4
[200] Davidov, above n 198, at 29.

of the law at a deeper level.[201] The wider body of labour law, the fundamental goals of labour law (as articulated by the traditional labour law theories), and social goals, are the purposes which provide normative justifications of the law. To ascertain these social goals, it is sometimes necessary to look "*outside* the confines of doctrinal law" to "economics, sociology, psychology, philosophy, political science and more."[202]

2. Levels of Abstraction

Goals of labour law exist at different levels of abstraction. At the first, and most general, level of abstraction are "broad values" of labour law drawn from labour law theory and scholarship, such as human dignity, democracy, voice, and redistribution (level 1).[203] We see here references to the tenets of traditional theories of labour law, such as dignity [204] which is closely related to anti-commodification.[205] At the second level of abstraction, there are the goals of labour law to regulate the broad characteristics of labour markets (level 2).[206] Here Davidov specifically refers to features such as the inequality of bargaining power in the labour market, another traditional law tenet.[207] At the third level of abstraction there are the goals of labour law to regulate the "unique characteristics of employment relationships that put the employee in a vulnerable position" [208] for example "subordination and dependency" (level 3).[209] Once again we can see a connection to the traditional theories of labour law of countering dependency.[210] The last level, the fourth level of abstraction, is the most concrete and specific and relates to the goal of the precise law that is being considered (level 4). Where the goal of the law is to regulate and prevent some "concrete results that society finds unacceptable" such as low collective bargaining or low wages.[211]

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[201] Ibid.
[202] Ibid.
[203] Guy Davidov "Re-Matching Labour Laws with Their Purpose" in Guy Davidov and Brian Langille (eds) *The Idea of Labour Law* (Oxford Scholarship Online, 2011) 179 at 179.
[204] Weiss, above n 187, at 44 drawing from Sinzheimer, above n 187.
[205] Ibid.
[206] Davidov, above n 203, at 180.
[207] Weiss, above n 187, 43 to 44.
[208] Davidov, above n 203, at 180.
[209] Davidov, above n 198, at 31.
[210] Weiss, above n 187, at 44 drawing from Sinzheimer, above n 187, at 112.
[211] Davidov, above n 203, at 180.

The goals of labour law can span multiple levels of abstraction. There is no "general formula that can point to the best level of abstraction"[212] and "levels do not contradict each other"[213] but overlap.[214] For example, when considering a specific law, which may have a seemingly concrete goal, it is simultaneously important consider the general values of labour law.[215] This is because any consideration of the goals at the concrete level (level 4) will "raise the question of *why* these results are unacceptable, and perhaps the best way to explain that would be by going back to the most general level of values."[216] Furthermore, Davidov writes that drawing from general goals of labour law ensures "coherence and consistency in the system".[217] Therefore, in ascertaining the goals of the FPA the specific (level 4) goals such as promotion of sector wide collective bargaining, will be explored to ascertain the related goals on a higher level of abstraction such as addressing inequality of bargaining power (level 2). This will provide a deeper level evaluation of the policy and provide a normative and coherent process of evaluation.

C. Assistance from the Theories of Labour Law

This brief enquiry into labour law theory indicates that the neo-liberal deregulatory ideology of the of the EC Act (largely retained by the ER Act) presents an external challenge to labour law in NZ. This challenge can be seen writ small in the FPA debate. Davidov states that to answer this challenge, "avert the crisis" and justify labour laws "we have to restore the connection between labour laws and the goals behind them".[218] Therefore, to evaluate the FPA, and ascertain whether it can be justified against those opposing it, a purposive approach evaluation is needed to assess whether the FPA will achieve its purported purposes and the deeper purposes of labour law.[219] The purposive approach can therefore provide a coherent and purpose-based way to evaluate the FPA and provide clarity despite the divisive political debate surrounding the policy.

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[212] Davidov, above n 198, at 31.
[213] Ibid.
[214] Guy Davidov "The Values and Interests Advanced by Labour Law" in *A Purposive Approach to Labour Law* (Oxford Scholarship Online, 2016) 55 at 55.
[215] Davidov, above n 198, at 23.
[216] At 32.
[217] At at 24.
[218] Davidov, above n 193, at 4
[219] Cabinet Paper, above n 7, at [123]

IV. PART 4: Evaluation of the Goals and the Means

A. The Purposes of the Fair Pay Agreements

1. Concrete Purposes from Legislative and Policy Documents

The first step of applying the purposive approach two-step methodology is ascertaining the FPA's goals. The first point of enquiry is the legislative documents. As the FPA legislation is not yet drafted, the enquiry can focus on the various "background papers"[220] including *inter alia* the FPAWG Report and Cabinet Papers and Minutes. The Cabinet Paper states the "objective of the FPA system is to improve labour market outcomes by enabling employers and employees to collectively bargain industry or occupation-wide minimum employment terms".[221] Therefore, the most concrete level purposes (level 4) of the FPA are to promote sector wide collective bargaining and improve market outcomes through raised minimum terms. Poor market outcomes identified by the Minister include the prevalence of poor working conditions,[222] low wages,[223] low productivity[224] and wages not keeping up with productivity.[225] Therefore, further concrete purposes (level 4) can be identified; including better working conditions, higher wages, workers getting their fair share of productivity, and increased productivity. These goals are also reflected in the Minister's comment that FPA will produce "better standards of living for workers, improved productivity and a fairer distribution of the benefits of productivity, and better engagement between employers and workers".[226] These goals can also be found in the FPAWG Report which noted the "vision" for NZ to have a "highly skilled and innovative economy that provides well-paid, decent jobs ... economic growth and productivity."[227] Another concrete (level 4) goal was the standardisation of wages to prevent and "race to the bottom" so "good employers are not disadvantaged by paying reasonable, industry-standard wages"[228]

[220] Davidov, above n 198, at 29.
[221] Cabinet Paper, above n 7, at [34].
[222] At [12.1].
[223] At [12.2].
[224] At [12.3].
[225] At [12.4].
[226] At at [123].
[227] Fair Pay Agreements Working Group, above n 16, at 2.
[228] Ibid.

2. Higher Level of Abstraction Purposes

(a) Dignity and Redistribution

Drawing on Davidov's work, it is clear that the goal of improving labour market outcomes, specifically establishing new minimum terms, encompasses other goals at a higher level of abstraction. There other goals include countering subordination and dependency (level 3) by protecting "the dignity of employees" (level 1) and to "redistribute resources" (level 1).[229] Indirect references to these goals can also be found within the FPA documents, including references to dignity through the language of "fair wage", "better standards of living" and "decent jobs" and to redistribution through notions of a "fair share" of productivity gains.[230]

(b) Inequality of Bargaining Power and Workplace Democracy

The goal of promoting collective bargaining has been shown by labour law scholarship to encompass the goals of *inter alia* addressing the inequality of bargaining power (level 2) and promoting workplace democracy (level 1).[231] Here we see direct connection to Otto Kahn-Freund's main object of labour law, to countervail the inequality of bargaining power.[232] Again, indirect references to these goals can be found within the FPA documents, including references to workplace democracy through the goal of "stronger employer-worker dialogue" and "better engagement between employers and workers" and the "value in the process of collective bargaining as a participatory mechanism".[233]

(c) Efficiency

The goal of increasing productivity is connected to the goal of labour market efficiency (level 2).[234] However, the extent that productivity and efficiency are goals of labour law is debated in scholarship. While, this goal will be explored by this dissertation, it will be shown that it is not a paramount goal.

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[229] Davidov, above n 198, at 29.
[230] Fair Pay Agreements Working Group, above n 16, at [123].
[231] Davidov, above n 198, at 30.
[232] Davies and Freedland, above n 186, at 18.
[233] Fair Pay Agreements Working Group, above n 16, at 2 and 17 and Cabinet Paper, above n 7, at [123].
[234] Davidov, above n 203, at 180.

3. Purposes from Wider Labour Law and Scholarship

The FPA is a marked change from the underlying framework of individualised employment contracting retained by the ER Act.[235] As the Minister has said there is "no mistaking that this will be a significant shift in the way that we bargain for employment standards across our labour market".[236] However, this does not mean that the FPA is not aligned with identifiable purposes of wider labour law and labour law scholarship in NZ.

(a) Collective Bargaining and Inequality of Bargaining Power

The FPA may further the stated objectives of the ER Act including "acknowledging and addressing the inherent inequality of power in employment relationships" [237] and "promoting collective bargaining".[238] Gordon Anderson claims that the ER Act "purports to acknowledge and address the inherent inequality of power" however it " fails to achieve that object".[239] As shown in Part 2, NZ has low rates of collective bargaining by OECD standards.[240] Therefore, if the FPA succeeds in its goal of addressing the inequality of bargaining power, and promoting collective bargaining, it will not only be aligned with the ER Act but also give better effect to its objectives.

(b) More Effective Minimum Standards

NZ labour law scholarship has identified the need for higher wages and better compliance with minimum standards in NZ ERES. The "working poor" phenomena is a growing concern in NZ where low-wages mean "many workers and families are struggling financially".[241] Richard Wagstaff states that "[w]ages have been driven down simply to improve profit margins".[242] A related issue is the lack of enforcement of minimum standards and worker exploitation, particularly for vulnerable workers such as migrant workers.[243] The Covid-19 pandemic has created a situation where the ERES is being

[235] Anderson, above n 61, at 134.
[236] Interview with Micheal Wood, above n 6.
[237] Employment Relations Act 2000, s 3(a)(ii)
[238] Section 3(a)(iii).
[239] Gordon Anderson "Transforming Workplace Relations: The Way Forward" (Victoria University of Wellington Legal Research Papers, Victoria University, 2018) 1 at 7.
[240] Kent, above n 3, at 3.
[241] Jens Lind and Erling Rasmussen "In support of a New Zealand 'living wage': reflections on Danish 'working poor' trends and issues." (2014) 38(2) New Zealand Journal of Employment Relations 17 at 17
[242] Luke Malpass "Government announces 'Fair Pay Agreements' plan in radical overhaul of New Zealand employment laws" *Stuff Limited* (New Zealand, 07 May 2021) <https://www.stuff.co.nz>
[243] See generally: Anderson and Kenner, above n 98.

"stress-tested" and "long-standing deficiencies" in the protection provided by minimum standards and entitlements are being illuminated.[244] Specifically, in the areas of redundancy, holiday and sick leave, and contractual variation.[245] The FPA may assist mitigate these wider labour law issues identified by the scholarship if it achieves its goals of creating better market outcomes and redistribution.

(c) Just Transition and Tripartite Solutions

The FPA goals of redistribution, collective bargaining, and workplace democracy, have also been identified as key features of a "just transition" and "tripartite solutions".[246] A "just transition" refers to supporting workers through the changes and uncertainty brought about by globalistion, technological advances, demographic and climate change.[247] The Government has indicated the need for tripartite solutions to these challenges. As stated by the 2019 Future of Work Tripartite Forum (FWTF) "business, workers, and the government will create better solutions for economic challenges if they work together in partnership".[248] "Tripartite solutions" is connected to Nigel Halworth's "new accommodation" approach, which tenets include, *inter alia*, a fairer distribution of resources, tripartism, reassertion of collective bargaining, industrial democracy, and a commitment to fairness;[249] all of which are echoed throughout the purposes of FPA. Indeed, Nigel Haworth has noted that "commitment to Fair Pay Agreements, and the anticipation of their enactment, are important" for the potential success of "new accommodation".[250]

4. Purposes from Social Goals

A brief enquiry into sociological theory in NZ demonstrates a pressing need to address inequality and in particular income inequality in NZ. Drawing from MSD statistics, Max Rashbrooke notes that "[s]ince the 1980s, the number of people who are poor in New Zealand has doubled, with many families living in severe hardship. Yet at the same time, [NZ] is now a country where, across all

[244] Anderson, above n 190, at 33.
[245] At 37 to 40.
[246] Ministry of Business, Innovation and Employment "Future of Work Tripartite Forum Strategic Assessment" (November 2019)
[247] At 7 and Fair Pay Agreements Working Group above n 16, at 8
[248] MBIE, above n 246, at 2.
[249] Halworth, above n 1, at 53.
[250] Ibid.

adults, the top 1 per cent owns three times as much wealth as the poorest 50 per cent".[251] While attributing causation is complex, the trajectory of inequality appears to *prima facie* follow the course of the neo-liberalisation, and labour law reforms of the 1980s.[252] Scholars have noted that "shrinkage of collective representation and bargaining is the expression of, and a contribution to, the observed rise in inequalities in the labour market and in society".[253] These scholars have pointed to citizens being "genuinely able to participate" and where the "rewards of work are fairly shared"[254] and "well paid jobs" as essential for the reversal of this inequality.[255] While this enquiry has been brief, it *prima facie* supports the FPA purposes of raising standards, redistribution, and workplace democracy.

B. The Means of the Fair Pay Agreements

The second step of applying the purposive approach two-step methodology is evaluating the FPA's means for achieving its purpose. This section will evaluate the goals ascertained in step one: raising minimum terms, worker dignity, redistribution, promotion of collective bargaining, addressing the inequality of bargaining power, workplace democracy and productivity.

1. Raising Minimum Terms and Working Conditions

Avalon Kent writes that "FPAs have much potential to improve wages and conditions in sectors and occupations that have experienced low-paid and insecure work for decades".[256] The FPA will exist alongside minimum standards legislation which will remain the "floor" of terms and it is hoped that FPAs will "significantly improve" minimum standards for the sector.[257] The means of the FPA collective bargaining, determination, compliance, and application to contractors will be considered for their ability to achieve this goal.

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[251] Max Rashbrooke "Why Inequality Matters" in Max Rashbrooke (ed) *Inequality: A New Zealand Crisis* (ProQuest Ebook Central, 2013) 1 at 1. Drawing from Bryan Perry "Household Incomes in New Zealand: Trends in Indicators of Inequality and Hardship 1982 to 2011" (Prepared for the Ministry of Social Development, 2012) at 105 and 87.
[252] At at 27 notes that "The strong correlation between the structural reforms and this 'great divergence' bears careful examination. For some economists there is a 'prima facie' case for connecting the reforms with rising income inequality, while for others the causations are more complex."
[253] Visser, above n 87, at 9 drawing from Florence Jaumotte and Carolina Osorio Buitron "Inequality and Labour Market Institutions" (International Monetary Fund, Staff Discussion Note 15/14, Washington DC 2015)
[254] Paul Barber "Reducing Inequality" in Max Rashbrooke (ed) *Inequality: A New Zealand Crisis* (ProQuest Ebook Central, 2013) 167 at 168.
[255] At 177.
[256] Kent, above n 3, at 7.
[257] Cabinet Paper, above n 7, at [20] and [105].

(a) Collectively Bargained Terms

Drawing from a variety of scholarship, Davidov states that "[i]t is undisputed that through collective bargaining employees can and do achieve better terms and conditions".[258] Both the OECD and ILO have found that collective bargaining is associated with the raising of low-earners' income and reducing income inequality.[259] This position is also supported by NZ economist, Ganesh Nana.[260] However, scholar and lawyer Simon Mitchell warns that this type of collective bargaining regime creates uncertainty as to the decency of the terms and means the terms are heavily reliant on the strength of the bargaining parties.[261] Therefore, the success of raised terms through collective bargaining will be reliant on the ability of the FPA to support robust and effective bargaining. This will be considered more thoroughly when the goal of promoting collective bargaining is assessed.

(b) Authority Determination

Whether the FPA will significantly improve on the minimum standards may depend on the precedent set by the Authority in determination. If after facilitation and mediation the parties cannot agree on terms, or if the FPA has filed ratification twice, the Authority can "fix terms" through "determination".[262] MBIE warned that FPA reaching this determination stage is likely due to resistance from employers.[263] Once the Authority sets precedents on its decisions it is possible that FPA negotiations will be set in "the shadow of the courts" as under the IC&A Act.[264] Therefore, the precedent that the Authority sets for determination will be very influential. While the Minister has sought delegated authority to develop policy of this determination process, no information has been released yet.[265] The high threshold for access to determination during collective bargaining under the

[258] Guy Davidov "The Goals of Specific Labour Laws: Some Examples" in *A Purposive Approach to Labour Law* (Oxford Scholarship Online, 2016) 72 at 89 to 90. Drawing from: Peter Kuhn "Unions and the Economy: What We Know; What We Should Know" (1998) 31 Canadian Journal of Economics 1033; Erik Bengtsson "Do Unions Redistribute Income from Capital to Labour? Union Density and Wage Shares Since 1960" (2014) 45(5) Industrial Relations Journal 389; Lawrence Mishel "Unions, Inequality, and Faltering Middle-Class Wages" (Economic Policy Institute Issue Brief No. 342, 2012).
[259] OECD "Employment Outlook 2018" (2018) https://read.oecd-ilibrary.org/employment/oecd-employment-outlook-2018_empl_outlook-2018-en#page1 and ILO, above n 112 at 4.
[260] Nana, above n 5, 9.
[261] Simon Mitchell "Can Collective Bargaining Deliver Decent Work?" (2015) 39(2) New Zealand Journal of Employment Relations 15 at 15.
[262] Cabinet Paper, above n 7, at [83].
[263] MBIE, above n 52.
[264] Anderson, above n 61, at 22 and 34.
[265] Cabinet Paper, above n 7, at [88] and Hamish Rutherford "MBIE recommended Government drop Fair Pay Agreement warning of 'bargaining stalemate'" NZ Herald (New Zealand, 08 July 2021) <https://www.nzherald.co.nz>

ER Act means that there is no guidance from previous Authority decisions.[266] For the purpose of significantly improving terms the Authority must be willing to set terms at a decent rate to establish a precedent for future bargaining. The Minister indicated that eventually a new regulatory institution will undertake this role. However, even less details known about that new body, so these concerns remain the same.[267]

(c) Mandatory to Discuss Terms

In a deviation from FPAWG recommendations, redundancy, leave, skills and training, flexible working and health and safety terms were relegated to mandatory only "to discuss" in a FPA.[268] Considering the resistance from employer groups to the FPA generally, non-mandatory terms may be met with heightened resistance. The Authority may, but does not have to, make determination on mandatory to discuss terms on application from a bargaining side.[269] Therefore, inclusion of these terms may depend on the position taken by the Authority and there is the potential that important terms such as health and safety, leave, and redundancy will not be included. The exclusion of redundancy is particularly problematic as NZ law currently provides "very limited protection to redundant workers"[270] and the FWTF has noted that some of the most vulnerable workers are those who are unprotected.[271] Scholars have noted that the current redundancy "consultation protections" was not particularly effective during the Covid-19 crisis and "do little more than delay redundancy".[272]

(d) Application

The FPA will initially only apply to employees but there are plans for contractors to be included in the next phase of policy work.[273] Commentators, such as the New Zealand Law Society (NZLS), have warned that including contractors could "significantly change" NZ employment law and risks undermining "law premised on determining the real nature of working relationships".[274] However,

[266] Anderson, Duncan and Hughes, above n 65, at 502 and Employment Relations Act 2000 s 50J.
[267] Cabinet Paper, above n 7, at [9].
[268] At [71].
[269] At [86.2].
[270] Anderson, above n 190, at 38
[271] MBIE, above n 246, at 12.
[272] Anderson, 190, at 38
[273] Cabinet Paper, above n 7, at [46] and [31.1] and 1 footnote 1
[274] New Zealand Law Society "Designing a Fair Pay Agreements System" (Discussion Paper Response, New Zealand Law Society, Wellington) at [23] and [24]; Fair Pay Agreements Working Group, above n 16, at 40.

labour law scholarship has been generally critical of the employee contractor binary [275] as often the "characteristics that require the protection of labour law … has not changed".[276] There is the phenomena of dependent or vulnerable contractors and misclassification of employees as contractors to avoid employer obligations.[277] As Gordon Anderson writes "[l]egal categories should not be allowed to defeat basic entitlements and protections" [278] Therefore the proposed inclusion of contractors is a significant step in the right direction for protecting vulnerable workers. From a purposive approach, the raising of minimum standards should apply to all workers, regardless of their classification.

(e) Compliance

Davidov writes, regardless of the purpose of the law, when "employers fail to comply with labour laws, and society fails to enforce them, the goals behind these laws are frustrated."[279] As discussed in the purpose section, the Covid-19 pandemic has illuminated that enforcement and compliance with current minimum standards "can often be fraught and difficult" with issues of the capacity of the Labour Inspectorate and the over reliance on individual enforcement.[280] The reliance on individual enforcement is further complicated by employees who fear retaliation or do not know their rights.[281] The FPA will retain the compliance and enforcement mechanisms of the ERES and the compilation of key minimum terms in a FPA may assist in knowledge of the terms. However, the biggest potential compliance mechanism within the FPA is the involvement of unions.[282] As Davidov writes, a unions "very presence helps to ensure compliance with labour standards" either by actively assisting workers or simply their presence as a reminder to employers.[283] An example of the unions compliance enhancing ability is the NZCTU initiative of online and freephone complaint lines for employment issues during the Covid-19 pandemic.[284] However, the ability for unions to have this compliance role

[275] Guy Davidov "The Idea of Labour Law as Addressing Vulnerabilities or Labour Market 'Problems" in *A Purposive Approach to Labour Law* (Oxford Scholarship Online, 2016) 34 at 36 and see generally: Weiss, above n 187; Davidov, above n 203; Anderson above at 239;Tonia Novitz "The Perils of Collective Begging: the case for reforming collective labour law globally and locally too" (2020) 44(2) New Zealand Journal of Employment Relations 3.
[276] Davidov, above n 275, at 36
[277] Cabinet Paper, above n 7, at [135] and Cabinet Briefing Paper "Advice on contractors in the Fair Pay Agreements system" (4 December 2020) 2021-1541 at 2
[278] Anderson, above at 239, at 6.
[279] Guy Davidov "Addressing the Compliance/ Enforcement Crisis" in *A Purposive Approach to Labour Law* (Oxford Scholarship Online, 2016) 224 at 224.
[280] Anderson and Kenner, above n 98 at 357 and Anderson, above n 190, at 39 to 40.
[281] Davidov, above n 279, at 238.
[282] Note: while unions may not seek the enforcement mechanisms of the Labour Inspectorate, they can bring personal claims on behalf of the employee (see Part One) and can provide information of the Labour Inspectorate to the employee.
[283] Davidov, above n 297, at 238.
[284] Dawn Duncan "COVID-19 and Labour Law: New Zealand" (2020) 13 Italian Labour Law e-Journal 1 at 3

relies on them having the resources and communication channels with workers. Without steps to increase union membership, and worker engagement with unions, this compliance enforcement potential of the unions may not be reached.

(f) Means for Raising Minimum Terms and Conditions Evaluated

A purposive approach analysis shows that the FPA has multiple means to promote the goal of raising minimum terms and conditions. These include creating a new sector wide minimum, collective bargaining, presence of unions to support compliance, and the proposed inclusion of contractors. However, there are some points of uncertainty that the FPA policy must address to achieve the desired purpose to "significantly improve" minimum standards. To realise the benefits of collective bargained terms, there must be a focus on promoting robust and effective collective bargaining. The Authority, or a new regulatory body, must be willing to set terms at a decent rate to establish a precedent for future bargaining. The Authority must also be willing to include "mandatory to discuss terms" as there are important terms such as health and safety and redundancy no longer included in mandatory to include terms. Alternatively, considering the need for better protections in these areas, a purposive approach would compel that these terms are included in "mandatory to agree" as recommended by the FPAWG. Finally, further encouragement of union membership and union support is needed to reach the compliance potential that unions obtain.

2. Protection of Worker Dignity

Human dignity is widely considered to be "central to labour law".[285] As articulated by Hugo Sinzheimer, labour law must protect worker's dignity as the 'dependency', 'submission' and 'subordination' within the labour relationship creates vulnerability that dignity will not be respected.[286] These principles have both been encompassed in ILO declarations, constitutions, and agendas.[287] A primary goal of the ILO in 2011 was said to promote "decent and productive work, in

[285] Pablo Gilabert "Dignity at Work" in Hugh Collins, Gillian Lester, and Virginia Mantouvalou (eds) Philosophical Foundations of Labour Law (Oxford Scholarship Online, 2019) 68 at 68
[286] Weiss, above n 187, at 44 drawing from Sinzheimer, above n 187, at 112 and Hugh Collins "Is the Contract of Employment Illiberal?" in Hugh Collins, Gillian Lester, and Virginia Mantouvalou (eds) *Philosophical Foundations of Labour Law* (Oxford Scholarship Online, 2019) 48 drawing from Davies and Freedland, above n 186, at 18.
[287] Declaration concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia) (ILO, 10 May 1944); ILO Constitution (International Labour Organization Constitution (Adopted by the Peace Conference in April 1919, the ILO Constitution was Part XIII of the Treaty of Versailles)) Annex 1; [287] International Labour Organisation "Decent Work" (2020) ILO <https://www.ilo.org/global/topics/decent-work/lang--en/index.htm> see Davidov, above n 214, at 62.

conditions of … human dignity".[288] The FPA aims to protect human dignity by creating better working terms, "fair pay" and better standards of living for workers.[289] However, as discussed in Part 1, critics of the FPA have said that the means of the FPA undermine dignity through impeding freedom of association and voluntary bargaining principles.

(a) A Dignified Fair Pay

Davidov writes that minimum standard regulations are "designed to ensure respect for our *dignity*" as they assert that human labour should not be sold for under a certain minimum amount.[290] Taking a dignitarian purposive approach, what is "fair pay" requires a consideration of the importance of "making a living" in all aspects of life. Including, "self-esteem, self-respect.. ability to provide for oneself and one's family" and for participation in "community and … broader political life".[291] This consideration is principally separate to considerations of the economic value of the work done. As Max Rashbrooke writes "if a job is worth doing – as many low-paid jobs clearly are – then people should be able to do it and enjoy a decent life".[292]

As discussed in step 1 of this methodology, NZ is facing a working poor phenomena.[293] The NZCTU Rūnanga have indicated that Māori are overrepresented in jobs where liveable pay rates are lacking.[294] Living Wage Aotearoa economists argue that the minimum wage ($20.00 per hour (adult, before tax)) [295] is inadequate relative to the actual costs associated with a decent and dignified standard of living.[296] Instead, those economists claim that the living wage ($22.75 per hour (adult, before tax))[297] is "necessary to provide workers and their families with the basic necessities of life… to live with dignity and to participate as active citizens in society".[298] As discussed in the above section, the amount of actual increase to wages within FPA system is uncertain. From a dignitarian purposive

[288] International Labour Organisation "Decent Work for All." (2010) <http://www.ilo.org/global/About_the_ILO/Mainpillars/ WhatisDecentWork/lang-en/index.htm>.
[289] Cabinet Paper, above n 7, at [123]
[290] Davidov, above n 258, at 82.
[291] At 83.
[292] Rashbrooke, above n 251, at 9.
[293] Lind and Rasmussen, above n 241, at 17
[294] Cabinet Paper, above n 7, at [151.2]
[295] Minimum Wage Order 2021
[296] Charles Waldegrave, Peter King and Michaela Urbanová "Report of the Measurement Review for a New Zealand living wage" (Family Centre Social Policy Research Unit, report prepared for Living Wage Movement Aotearoa NZ, March 2018) and Alison Pennington "Workplace Policy Reform in New Zealand: What are the Lessons for Australia?" (The Centre for Future Work at the Australia Institute, Australia, March 2019).
[297] Waldegrave, above n 296.
[298] Waldegrave, above n 296.

approach, there is a strong argument that the increase should at least be to the amount of the living wage.

(b) Compulsion & Freedom of Association

Part of the concept of dignity is personal autonomy and lack of compulsion.[299] Labour law must protect workers against compulsion as the 'submission' and 'subordination' within the labour relationship creates a dynamic where the worker's autonomy could be overborne.

(i) Compulsion

A criticism directed at the FPA is that because the bargaining is compulsory after initiation, it therefore infringes personal autonomy. Furthermore, compulsory bargaining also impacts the ILO principle of collective bargaining being voluntary.

The ILO has confirmed that their conventions taken together establish a principle that "[c]ollective bargaining must be free and voluntary, and respect the principle of the autonomy of the parties".[300] However, the ILO policy guide also acknowledges that "fragmentation or weakness" of bargaining parties may undermine frameworks of voluntary negotiations and in such cases governments may take further measures to support collective bargaining.[301] As shown in Part 2 of this dissertation, unions are in a weak position and employers in the private sector engage in very little collective bargaining. The Minister considered that compulsion was needed because of the employer resistance to collective bargaining, otherwise it would "significantly reduce the instances of successful initiations".[302] Furthermore, the ILO also notes that an exception to the general principle of voluntary bargaining has been made to "allow workers' organizations to initiate compulsory arbitration for the conclusion of a *first* collective agreement".[303] This is because the "first collective agreements are often one of the most difficult steps in establishing a bargaining relationship".[304] Therefore, while the compulsory nature of the FPA does run contrary to this principle of the ILO, it appears to be justified for establishing collective bargaining or where there is fragmentation or weakness of the bargaining

[299] Mark Freedland and Nicola Kountouris *The Legal Construction of Personal Work Relations* (Oxford Publishing Online, 2011) at 373.
[300] ILO, above n 112, at 13.
[301] At 28.
[302] Cabinet Paper, above n 7, at [166].
[303] ILO, above n 112, at 62 drawing from International Labour Organisation "Giving globalization a human face. General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization 2008, Report III (Part 1B)" (International Labour Conference, 101st Session, Geneva, 2012) at [247] and [250].
[304] Ibid.

parties as in the case in NZ. However, the FPA would be brought into closer compliance with the ILO standards if the FPA system was to progress to voluntary bargaining after the first FPA.

Regarding voluntariness, the narrative that workers are free to choose their own terms now, but will not be with compulsory collective bargaining, is misleading. In the majority of case, especially for those in low paid work, individual contracting is on a take it or leave it basis. Entering an IEC is often an act of "submission" not a voluntary bargain. As Hugh Collins writes "[s]ubmission occurs when a person enters a contract of employment on terms dictated entirely or almost entirely by the employer and where there may be no reasonable alternatives to earn an income but to take this job".[305] As will be explored in the following sections, through the FPA system, it is likely that many workers will actually have more say in their contract of employment than they do currently. Therefore, the FPA does not appear to offend workers autonomy in the way that some commentators claim.

(ii) Freedom of Association and Blanket Coverage

Worker dignity and autonomy is often cited to justify the freedom of association.[306] A criticism of the FPA is since unions will be bargaining for terms to cover non-union membership this infringes freedom of association. Freedom of association is contained in numerous international conventions of which NZ has either ratified,[307] or is expected to abide by,[308] as well as domestic law.[309] However, despite rhetoric to the contrary, union membership is not made compulsory under the FPA. Instead, the terms will effectively be "passed on" or "extended" to non-union members. Extension of CEA is a common process and noted by the ILO as having significant benefits such as making sure employers who collectively bargain are not disadvantaged and encouraging workers to organise.[310] Considering that the FPA cannot reduce worker's employment terms, it is unlikely to have any practical unwanted effect for workers. As employment lawyer Susan Hornsby-Geluk, has said FPAs "will enable

[305] Hugh Collins, above n 286, at 51.
[306] Alan Bogg and Cynthia Estlund, 'Freedom of Association and the Right to Contest: Getting Back to Basics' in Tonia Novitz and Alan Bogg (eds), *Voices at Work: Continuity and Change in the Common Law World* (OUP 2014) 141.
[307] International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) (opened for signature 16 December 1966, entered into force 28 December 1978), art 8; International Covenant on Civil and Political Rights 1966 (ICCPR) (opened for signature 16 December 1966, entered into force 28 December 1978), art 22; International Labour Organisation Convention 98 on Right to Organise and Collective Bargaining (opened for signature 18 Jul 1951, entered into force 9 June 2003).
[308] ILO 87; Cabinet Paper, above n 7, at [158] "New Zealand has not ratified ILO Convention No. 87. However, because it is one of the ILO's fundamental conventions, we are expected to abide by its principles as a member state of the ILO." The convention is also recognised in Employment Relations Act 2000, s 3(b).
[309] New Zealand Bill of Rights Act 1990, s 17.
[310] ILO, above n 112, at 69.

employees to receive the best of both worlds."[311] Furthermore, dignitarian labour law scholar Pablo Gilabert has noted some default connection to unions, while it may technically limit freedom of association, the limitation is "all things considered justified because it is necessary for, or strongly contributory to, the protection of workers' rights (including other liberties, or their freedom overall)".[312]

(c) Lack of Important Terms for Dignity

As discussed above, terms on health and safety may not be included in FPA. Terms regarding privacy are not even included in mandatory to discuss terms. This creates a troubling inconsistency with the purpose of promoting worker dignity. For example, the FWTF notes increasing privacy issues with developing technology, noting that "technology can enable a type of 'digital Taylorism' in which employees are closely monitored and have little to no discretion on how to perform a task".[313] Regarding health and safety, Jonathan Barrett and Leigh Thomas write that NZ workers experience "high levels of occupational accidents and workplace death, particularly in the mining industry where, it appears, profit commonly takes precedence over safety".[314] The current health and safety ERES generally can be said to require a balance between physical and psychological safety against costs of prevention. Jonathan Barrett and Leigh Thomas state that this creates a "subordination of respect for human dignity and life to financial considerations" and "shows insufficient respect for human dignity".[315] Therefore, this is an area where standards should be raised. The demotion and lack of attention to these important terms by the FPA fails to achieve its purpose of promoting dignity at work.

(c) Means for Protecting Worker Dignity Evaluated

A dignitarian purposive approach analysis of the FPA has shown that the means of the FPA engage and appear to impede ILO principles such as voluntary bargaining and freedom of association. However, this analysis has shown that on a deeper enquiry, the ILO policy guide justifies compulsion in promotion of collective bargaining when there are significant impediments to establishing a

[311] Susan Hornsby-Geluk "The Fair Pay Agreements system still faces significant challenges"*Stuff Limited* (New Zealand, 30 June 2021) <https://www.stuff.co.nz> - note: she was saying this in a disparaging way
[312] Gilabert, above n 285, 72 to 73
[313] MBIE, above n 246, at 14.
[314] Jonathan Barrett and Leigh Thomas "Returning Dignity to Labour: Workplace Safety as a Human Right" (2012) 37(1) New Zealand Journal of Employment Relations 82 at 82
[315] Ibid.

voluntary system. It has also shown that unionism will not become compulsory, but instead the terms of the FPA will be extended. Furthermore, even if there is some compelled connection with unions, dignitarian scholars have indicated that this may not be as problematic for advancing for dignity as it sounds, because of the benefits and dignity enhancing attributes unions bring. This analysis has also considered that the current minimum wage in NZ is not sufficient from a dignitarian purposive approach. There is a compelling argument that to achieve its purpose of establishing a "fair" and "decent" wage the FPA means must be able to establish a minimum living wage rate for workers covered. Lastly, analysis has also shown that the means of the FPA which allow a potential lack of privacy and health and safety terms are misaligned with the purpose of promoting worker dignity.

3. Redistribution

Encompassed in the goal of increased wages and workers receiving a "fair share" of productivity is the goal of progressive redistribution. The goal of progressive redistribution is also encompassed within the goal of collective bargaining[316] and is regarded in sociological literature as necessary for addressing income inequality in NZ.[317] This is sometimes called "distributive justice" and has been called "a major goal of labour law".[318] Redistribution can encompass redistribution of "resources, power, and risks"[319] however this section will look solely at resources. Simply put, progressive redistribution is where resources from those in society who have more than enough is redistributed to those who are in need. The basic assumption of the FPA is that since it aims to raise minimum terms the redistribution will be progressive, as workers who were previously on the statutory minimum are the lowest paid in society. However, an argument purported against the FPA is that it will instead produce regressive redistribution, which where something is redistributed from a party who is even more vulnerable. It is claimed that the FPA will do this by creating unemployment.[320] Therefore, the primary enquiry is where the redistribution has come from; as Davidov writes "who pays for this".[321]

[316] Davidov, above n 258, at 89 to 90.
[317] See: Max Rashbrooke (ed) *Inequality: A New Zealand Crisis* (ProQuest Ebook Central, 2013)
[318] Davidov, above n 214, at 57
[319] Ibid.
[320] Partridge and Wilkinson, above n 197.
[321] Davidov, above n 258, 77 to 78

(a) Cost to Employers

In their Regulatory Impact Statement MBIE noted that "[e]mployers would likely face higher costs as a result of increased worker terms and conditions".[322] There is international empirical evidence that an increase in the minimum wage causes a "modest reduction in profits" for businesses.[323] Virginia Nicholls, Otago Southland Employers' Association chief executive, has said that the cost of FPA will fall directly upon employers.[324] Generally speaking it is assumed that employers are better off than their workers and therefore shifting resources from employers to workers is positive redistribution.[325] This assumption is supported by the FPAWG Report which identified that "workers' share of the national income has fallen since the 1970s, with a particularly large fall in the 1980s … This reflects wages growing slower than returns to capital, rather than wages falling".[326] Nigel Haworth writes that in NZ "[t]he last thirty years have seen a marked shift in power and rewards away from ordinary workers to owners and managers."[327] Therefore, the identification of costs being borne by the employer is not a concern from the redistributive purposive evaluation.

Unsurprisingly, many in the business community do not agree that this redistribution would be fair. Kirk Hope from Business NZ has claimed the wage increase could "put people out of business"[328] and employment lawyer Susan Hornsby-Geluk, said that there is "a significant risk for small businesses that terms will be imposed on them that they simply cannot afford".[329] However, as Davidov writes "a business that can only survive by paying meagre wages is a burden on society rather than an asset"[330] and workers and society "should not be forced to subsidize such activities".[331] There is indication that society at large has been subsidising the payment of low wages in NZ. For example, Max Rashbrooke wrote that "income of a typical single-person household, in the middle of

[322] MBIE, above at 52, at 4.
[323] Davidov, above n 258, at 80 drawing from Sara Lemos "A Survey of the Effects of the Minimum Wage On Prices" (2008) 22 Journal of Economic Surveys 187; Mirko Draca, Stephen Machin, and John Van Reenen "Minimum Wages And Firm Profitability" (2011) 3 American Economic Journal: Applied Economics 129
[324] Simon Hartley "Clash over fair pay agreements" *Otago Daily Times* (New Zealand, 1 February 2019) <https://www.odt.co.nz/>
[325] Davidov, above n 214, at 57
[326] Fair Pay Agreements Working Group, above n 16, at 12
[327] Nigel Haworth "The Rewards of Work" in Max Rashbrooke (ed) *Inequality: A New Zealand Crisis* (ProQuest Ebook Central, 2013) 198 at 198
[328] Interview with Kirk Hope, BusinessNZ CEO (National Business Review, 'Disagreement on whether fair pay agreements will lift productivity, prices', 28 April 2021)
[329] Hornsby-Geluk, above n 311.
[330] Davidov, above n 258, at 84.
[331] Ibid.

the income distribution … has increased by less than 20 per cent since 1984" when considering income from "work (wages and salaries) and through welfare (tax credits and benefits)" (to 2011); whereas the "income from work has not increased for these households *at all* since 1987" (to 2011).[332]

(b) Cost to Consumers

Roger Partridge and Bryce Wilkinson write that "consumers face a serious risk of harm from firms increasing prices of goods and services to recoup higher labour costs arising from FPAs".[333] The Minister has also acknowledged that "FPAs could indirectly increase the price of goods and services"[334] and international empirical evidence shows a "modest rise in prices" from minimum wage increase.[335] However, cost to the consumer is actually "benign … from a redistributive point of view"[336] as consumers will bear "a small fraction of the cost so that the few lowest-paid workers will have a meaningful raise".[337] Regarding raised wages through collective bargaining in particular, there is the argument that unionised workers can be better off than ordinary consumers, so redistribution from the consumer may not be progressive.[338] However, this concern is somewhat mitigated by the FPA system as is focused on non-unionised underpaid private sectors. This focus is supported by the "public interest test" where "market issues" such as low pay, long hours, low bargaining power are needed to be established to initiate a FPA.

(c) Cost to Workers

Cost to other workers can be either progressive or regressive depending on which employees are affected by the transfer of resources. MBIE noted that other workers could bear part of the cost of raised wages from the FPA if employers "reduce hours of work, reduce the size of their workforce or do not hire as many workers in order to remain competitive".[339] Commentators have claimed that the FPA will cause job losses and make gaining employment harder for the most vulnerable

[332] Rashbrooke, above n 73, at 30 drawing from Omar A. Aziz, Matthew Gibbons, Chris Ball and Emma Gorman "Fiscal Incidence in New Zealand: The Distributional Effect of Government Expenditure and Taxation on Household Income, 1988 to 2010" (53rd New Zealand Association of Economists Annual Conference, Palmerston North, 2012)
[333] Partridge and Wilkinson, above n 197.
[334] Cabinet Paper, above n 7, at [121.1].
[335] Davidov, above n 258, at 80 drawing from Sara Lemos "A Survey of the Effects of the Minimum Wage On Prices" (2008) 22 Journal of Economic Surveys 187; Mirko Draca, Stephen Machin, and John Van Reenen "Minimum Wages And Firm Profitability" (2011) 3 American Economic Journal: Applied Economics 129
[336] Davidov, above n 258, at 80.
[337] At 78
[338] At 89 to 91.
[339] MBIE, above n 52, at 4.

"unemployed, particularly inexperienced (i.e. young) and unskilled workers".[340] This theory is aligned with the conservative view that "minimum wage … harms the most vulnerable workers (who will lose their jobs)."[341] If so, this would be regressive redistribution. However, this conservative view has been largely refuted, and that the cost of reasonable minimum wage increases are borne instead by employers.[342] Simon Deakin writes, that of vast empirical evidence on raising the minimum wage and employment "a single message … when set at a certain level in relation to average wages, the minimum wage does not cause unemployment"[343]

There are positive effects from union involvement and collective bargaining on progressive redistribution between workers. The ILO has noted that collective bargaining can "compresses wage structures"[344] and the OECD has noted that collective bargaining is associated with "reduced inequality".[345] A compressed wage structure means that there is reduced wage inequality. It has been argued that wages raised by collective bargaining poses the risk is that there will be increased "wage in-equalities between unionized and non-unionized workers".[346] This is from the cost of unionised workers meaning that employers pay their non-unionised workers even less. However, the sector wide level of the FPA and blanket coverage application will protect from wage in-equalities between union members and non-union members. However, this highlights the need for vulnerable contractors to be included within the FPA.

(d) Means for Creating Progressive Redistribution Evaluated

The redistributive means of the FPA have been evaluated and the criticism that the FPA will cause harm to the most vulnerable workers has been addressed. This evaluation has shown that the literature and empirical evidence rejects the conservative view that moderate minimum wage increases will cause unemployment. It has shown that cost borne by employers is progressive redistribution, and that a moderate rise in cost to consumers likely to be progressive redistribution because of the targeted nature of the FPA to low paid sectors. Collective bargaining has been shown to reduce inequality through wage compression and that the sector wide and blanket coverage of the FPA reduces concerns

[340] Partridge and Wilkinson, above n 197.
[341] Davidov, above n 198, at 30.
[342] Ibid.
[343] Deakin, above n 66, at 206 "See the special issue of the British Journal of Industrial Relations (volume 47, issue 2), devoted to this question."
[344] ILO, above n 112, at 5.
[345] Cabinet Paper, above n 7, at [15]
[346] See: Milton Friedman *Capitalism and Freedom* (University of Chicago Press 1962)

about wage-inequalities between union and non-union members. In conclusion, the FPA will have a positive effect on progressive redistribution and will assist in the goals of workers receiving a "fair share" of firm gains and assist in addressing the wider inequality issue highlighted in social literature.

4. Promoting Collective Bargaining

Avalon Kent writes that the "successful introduction of FPAs could reinvigorate a spirit of collectivism in employment relationships" in NZ.[347] However, while the FPA system clearly facilitates sector wide collective bargaining, the effectiveness of this facilitation in reinvigorating collective bargaining is not so straightforward. Specific features of the FPA including initiation, good faith, bargaining parties' capabilities, and the representation gap, will be considered in light of the purpose of promoting collective bargaining.

(a) Initiation

A registered union with at least one member within proposed coverage can initiate bargaining if they meet either the "representation test" (10% or 1,000 of workers supporting initiation) or the "public interest test" (where there are significant labour market issues).[348] These thresholds are significantly lower hurdles than those which currently exist to initiate collective bargaining in NZ. Under the current law a union needs a simple majority from members within proposed coverage to initiate bargaining.[349] However the real barrier is lack of union membership all together. The "representation test" will enable bargaining to be initiated in sectors with low union membership and the "public interest test" will enable it in particularly vulnerable sectors with no union membership. This is vitally important for the purpose of promoting collective bargaining due to the very low rates of union membership in NZ, especially in the private sector. Notwithstanding its controversy, the compulsory nature of the bargaining after successful initiation is another important feature for promoting collective bargaining. As Minister has said, "if employer consent in some form was required … this would significantly reduce the instances of successful initiations.".[350]

[347] Kent, above n 3, at 7.
[348] Cabinet Paper, above n 7, at [35].
[349] Employment Relations Act 2000, s 45.
[350] Cabinet Paper, above n 7, at [166].

(b) Good Faith

The good faith requirements within the ER Act will govern the bargaining of the FPA. As outlined in Part 2, good faith includes *inter alia*, being active and constructive, meeting and communicating, not misleading or deceiving, respecting the role of each other's representative, and providing necessary information.[351] The ILO states that embedding good faith into the bargaining requires respect for both sides.[352] The necessary element of mutual respect for bargaining representatives may be a challenge within the FPA system. Both employers and employer peak bodies have expressed resentment regarding the compulsory nature of the FPA.[353] Unions have also been questioned regarding their ability to represent non-members.[354] Furthermore, Chris Wright and Colm McLaughlin write that the "challenge to union legitimacy has been a defining feature of recent industrial relations reform in liberal market economies".[355] The ILO notes that "[p]ublic authorities have an important role to play in encouraging parties to engage in good faith in constructive and informed negotiations."[356] Therefore, considering the tension between the bargaining sides, the Government may need to take further steps to legitimise the unions to facilitation good faith bargaining.

(c) Bargaining Capabilities

As discussed in the above section on increased minimum terms, the success of many features within the FPA will be reliant on the capabilities of the bargaining parties to engage in effective bargaining. Avalon Kent notes that effective bargaining will depend on "union bargaining strength: to organise the requisite number of workers to initiate an FPA, compile and advocate for key demands, and bring pressure on employers".[357] The ILO notes that effective bargaining requires skilled and knowledgeable negotiators who have a good attitude and commitment to the process.[358] However, as Nigel Haworth writes the "tripartite institutions and practices in New Zealand have been sorely weakened since the 1980s"[359] and the "three parties are each, in their different ways, inexperienced

[351] Employment Relations Act 2000, ss 4, 23, 33, 34 and Ministry of Business, Innovation and Employment "Code of Good Faith in Collective Bargaining" (2 May 2019).
[352] ILO, above n 112, at 43.
[353] Rutherford, above n 265.
[354] Cabinet Briefing Paper "Draft Cabinet paper 'Fair Pay Agreements: Approval to draft'" (26 March 2021) 2021-2519 at 2 – concern expressed by MSD
[355] Wright and McLaughlin, above n 75, at 338.
[356] ILO, above n 112, at 42.
[357] Kent, above n 3, at 7.
[358] ILO, above n 112, at 76 and Fair Pay Agreements Working Group, above n 16, at 33.
[359] Haworth, above n 1, at 54.

and tentative about renewed tripartite arrangements".[360] For example, employers are to be represented in FPA bargaining by an employer representative institution which has not yet established. However, the FPA system makes significant steps to attempt to address the current gap in capabilities. The government is providing $250,000.00 per year for three years to peak bodies to build capabilities. As well as $50,000.00 to $75,000.00 to unions and employer representatives during FPA bargaining. The bargaining will also be a facilitated process with an expert 'bargaining support person' to "support constructive and efficient bargaining.".[361] This support is a welcome commitment by the government for the purpose of promoting collective bargaining. However, unions are not well supported for building their own capabilities within the system. While commentators have noted that the FPA will give unions increased "institutional importance"[362] there is no active support of unions growing their membership base. This will provide difficulties for unions to know and communicate with those who they are representing, and unions will also not have the financial support of membership fees. The active support for unions to build their capabilities, and for employer institutions to be established who are willing and committed to the FPA process, is essential for the promotion of effective collective bargaining.

(d) The Representation Gap

There is currently a representation gap between workers who wish to be to a part of a union and those who are.[363] As discussed in the above paragraph, this lack of union membership provides difficulties for unions in effective bargaining. As discussed, this also creates difficulties for unions to reach their compliance potential. Reasons why this gap exists has already been discussed in Part 2 of this dissertation. In summary, the reasons include, the dominant neoliberal individualist framework, employer hostility, passing on of union terms, the non-union default, and hostility from centre-right and conservative politicians.[364] These factors, coupled with evidence that workers wish to join union, has led to prominent NZ labour scholars advocating for a union default.[365] A union default would automatically enrol workers in a union but allow them to opt out.[366] There is resistance to the concept of default union membership. BusinessNZ Kirk Hope stated the entire concept was flawed and that it

[360] Ibid.
[361] Cabinet Paper, above n 7, at [68].
[362] Malpass, above n 242.
[363] Novitz, above n 275, at 13 and Harcourt, Gall, Wilson, Rubenstein and Shang, above n 127, at 2.
[364] See generally: Harcourt, Gall, Wilson, Rubenstein and Shang, above n 127, at 2.
[365] At 3.
[366] Ibid.

interfered with individual choice.[367] However, the other view is that a union default more meaningfully recognises the freedom of choice. This is because, as NZCTU's Richard Wagstaff noted, there are significant barriers to joining a union, that would not be influencing factor on the decision opt-out.[368]

(e) Means for Promoting Collective Bargaining Evaluated

The FPA facilitation of sector wide collective bargaining has the potential to "reinvigorate a spirit of collectivism" in NZ.[369] Specific means within the FPA which aid in it achieving its purpose of promoting collective bargaining include the low threshold for initiation and the funding and facilitation for bargaining. However, because of the historic and current undermining of unions, lack of bargaining experience on either side, and explicit employer and political hostility to unions the FPA system may face significant challenges regarding good faith and effective bargaining. A reoccurring issue within the FPA is the lack of promotion of union membership in the face of the current hostility that obstructs membership. It has been shown that a union default could be an effective solution to this issue and could more effectively respect individual choice. For the purpose of promoting collective bargaining, the means of the FPA needs to include more active, and legitimising, support for bargaining parties to foster good attitude and commitment to the process and union membership needs to be more actively promoted.

5. Inequality of Bargaining Power

The FPA promotion of collective bargaining is directly connected to countervailing the inequality of bargaining power within the individual labour relationship. The ER Act objectives include "addressing the inherent inequality of power" in the labour relationship and "promoting collective bargaining".[370]Gordon Anderson writes that this simultaneous emphasis in the ER Act indicates the ER Act's acceptance of collective bargaining addressing this inequality.[371] Bargaining collectively, in any manner, largely redresses the inequality of bargaining power between employers and workers. This is because, as Pablo Gilabert writes, "[u]nless they have rare and highly demanded skills, isolated

[367] Interview with Richard Wagstaff, Council of Trade Unions president and Kirk Hope, BusinessNZ CEO (National Business Review, 'Compulsory unionism - yea or nay?', 05 July 2019)
[368] Ibid.
[369] Kent, above n 7, at 7.
[370] Employment Relations Act 2000, ss s 3(a)(ii), 3(a)(iii).
[371] Anderson, Duncan and Hughes, above n 65, at 450.

individual workers are very vulnerable in the labour market" but collectively associating "increase workers' clout".[372] The FPA through creating a system where workers are collectively represented therefore provides means to addresses this inequality of bargaining power. This will make a significant difference for many workers, as the Minister states "[t]he evidence is very clear that some of those professions [of focus for the FPA] have very weak bargaining power, that some sector level barraging power is an important way of dealings with some of these issues."[373]

(a) Industrial action

A feature of the FPA which undermines its ability to countervail of the inequality of bargaining power is the prohibition of industrial action.[374] Scholar Tonya Novitz writes that "[t]he right to strike is the most powerful and effective way of redressing the almost invariable imbalance of bargaining power between employer and employee".[375] The ILO notes that "generally .. strike action is a measure of last resort" because of the social disruption.[376] However, despite the disruption they cause, many "[l]egal frameworks in many countries provide a right to strike"[377] because of its fundamental importance to worker bargaining power. While the FPA compels employers to engage in bargaining through its compulsory nature, the prohibition on industrial action will degrade the power that unions have while bargaining. The prohibition also infringes art 8 of the International Covenant on Economic, Social and Cultural Rights 1966 and Tonia Novitz states that this right is also "an intrinsic corollary to the right to organise protected by Convention No 87".[378]

Despite the prohibition on industrial action some commentators have claimed that striking will actually increase under FPA.[379] National's Scott Simpson has claimed FPA will take NZ back to "an era of industrial action in the 1970s, when strikes were at an all-time high.".[380] Part 2 of this dissertation has shown that prohibiting striking does not necessarily prevent them from occurring. However, this historical analysis also showed that the late 1960s and 1970s was a period that saw the breakdown of the arbitral and award system. The sharp increase in industrial action was attributed by

[372] Gilabert, above n 285, at 72
[373] Interview with Michael Wood, above n 6.
[374] Cabinet Paper, above n 7, at [26].
[375] Novitz, above n 275, at 16.
[376] ILO, above n 112, 62.
[377] Ibid.
[378] Novitz, above n 275, at 17 quoting International labour Organisation Governing Body Committee on Freedom of Association "Compilation of Decisions on Freedom of Association" (CFA Compilation, ILO, 2018) at [754].
[379] Giovannetti, above n 17, and Hartley, above n 324.
[380] Small, above n 176.

some scholars as being because of the shift to "second tier" direct bargaining.[381] Periods of controlled and centralised bargaining has often been related to periods of low industrial action. Remarking on this fact, First Union hopes that the FPA could "restore some industrial harmony".[382]

(b) Means for Redressing Inequality of Bargaining Power Evaluated

Through creating a system of collective representation for workers to bargain for their employment terms the FPA rebalances the otherwise unequal bargaining power between them and their employer. However, the prohibition of industrial action somewhat degrades this purpose as striking collectively is considered by many as the most powerful and effective way of redressing the inequality of bargaining power between employers and workers.

6. Workplace Democracy

The working relationship is categorised by "democratic deficits" and a goal of labour law is to counter these deficits and promote workplace democracy.[383] Democratic deficits occur because of the "organisational vulnerabilities" within the working relationship where employers "retain a position of *power* over their employees" which is justified by the concepts of efficiency and managerial prerogative.[384] This organisational vulnerability is coupled with the fact that "[w]orkplace decisions have a direct and tremendous impact on employees, affecting their daily lives as well as their long-term aspirations".[385] Therefore, these two factors mean that the working relationship is contrary to the "one of the basic principles of democracy" that every person affected by the decisions of a governing actor should be able to participate in that governance.[386] As Pablo Gilabert writes "it is intrinsically important that workers be able to shape the social process structuring their working conditions as active agents who are protagonists in their own life stories rather than mere recipients of more powerful agents".[387] Concepts such as "worker voice" and "employer-worker dialogue" are key features of countering these deficits and promoting workplace democracy. The FPAWG ascertained

[381] Anderson, above n 61, at 47.
[382] Giovannetti, above n 17.
[383] Davidov, above n 214, at 56 and Davidov, above n 275, at 35.
[384] Davidov, above n 275, 35 to 38.
[385] Ibid.
[386] Ibid.
[387] Gilabert, above n 285, at 72.

that NZ would benefit from stronger employer-worker dialogue and saw that the FPA could be a participatory mechanism for worker voice.[388]

(b) Participation

Once of the reasons that collective bargaining is understood to have a democratising influence on the workplace is that it facilitates worker "voice".[389] Specifically, it facilitates workers voicing "views, concerns, and demands" allowing them to participate in the governance of the workplace and it amplifies workers voice through rebalancing the otherwise unequal bargaining power.[390] The FPAWG said that FPA can "encourage participation and engagement by employers and employees in actively setting the terms of their relationship".[391] Worker participation is facilitated at multiple stages of FPA bargaining process. Employers must inform their workers regarding initiation, ratification, and renewal and also make "mass communication" of terms, coverage, ratification and finalisation.[392] At all of these stages the employer will provide the communication details of the bargaining unions so that the workers can become involved.[393] Employers must pass communication details of worker covered to the bargaining unions so that the unions can communicate with that worker (however the worker can opt out).[394] It will be a breach of good faith if an employer impeded this communication in anyway.[395] Unions will have access to workplaces and workers will have additional paid meetings, including those union meeting permitted in the ER Act.[396] Annie Newman, assistant national secretary of the union E tū, notes that all worker will have the opportunity to be involved in bargaining for an agreement.[397] However, some commentators, including employment lawyer Susan Hornsby-Geluk, has said it is a cumbersome "phone tree" system and that employers and workers may be failed to be notified and therefore be unable to participate.[398] The coordination to ensure effective communication will be a challenge for peak bodies, however if implemented effectively it will have positive implications for workplace democracy.

[388] Fair Pay Agreements Working Group, above n 16, at 17.
[389] Davidov, above n 285, at 86.
[390] At 87.
[391] Fair Pay Agreements Working Group, above n 16, at 17
[392] Cabinet Paper, above n 7, at Annex A.
[393] At Annex A at [39].
[394] At Annex A at [30].
[395] At Annex A at [31].
[396] At [56].
[397] Hornsby-Geluk, above n 311.
[398] Ibid.

(d) Representation

The "representation test" of the FPA has been criticised as being undemocratic because it does not require a majority of workers to support initiation.[399] For example, National's Scott Simpson said that "[t]he idea that one in 10 employees, or 1000 across an industry, can trigger mandatory nationwide employment negotiations is democratically offensive".[400] The Minister has sought and received delegated authority to make "decisions on any requirements for employer bargaining representatives" and stated that "[s]ome of these may also need to be mirrored for union bargaining parties".[401] However, the union will be under the obligation to represent the interests of non-members in good faith. This representation is somewhat similar to the bargaining between the Crown and unions for the successful 2016 Care and Support Workers Settlement.[402] Furthermore, once initiated an unlimited number of other unions with members covered by the FPA can join the bargaining process as well as other representatives that each bargaining side consider appropriate.[403] It would be preferable if a strong negotiating mandate could be held by the initiating and bargaining union. This is another aspect of the FPA which would benefit from increased union membership. However, as Doug Martin, Crown Negotiator for Employment Relations, states "[i]n the current relatively deregulated labour market, the question of how each side will obtain its negotiating mandate … presents as a tricky … issue".[404] Low union rates means that obtaining a higher mandate could be difficult and impede the entire policy.

(c) Means for Promoting Workplace Democracy Evaluated

The working relationship is categorised by "democratic deficits" and a goal of the FPA is to counter these deficits and promote workplace democracy through facilitating stronger employer-worker dialogue and creating a participatory mechanism for worker voice. The means of collective bargaining through the FPA will have a democratising influence on the workplace as it promotes workers voice and the means of specific notification and communication and information sharing further facilitates this. The claim of the FPA being anti-democratic because of the low initiation threshold is overly simplistic and does not consider the wider workplace democracy enhancing

[399] Giovannetti, above n 17, quoting ACT leader David Seymour
[400] Hartley, above n 324.
[401] Cabinet Paper, above n 7, at [52].
[402] Doug Martin "Issues and Challenges for a New Wave of Collective Bargaining" (2018) < https://medium.com>
[403] Cabinet Paper, above n 7, at Annex A at [17] to [19].
[404] Martin, above n 402.

features of the FPA. However, coordination of notifications and communication is essential for participation from all parties. This participation needs to be of paramount importance if worker voice is to be promoted.

7. Productivity

Low productivity was a "systematic weakness" identified by the Minister to be addressed by the FPA.[405] Increasing productivity is connected to the goal of labour market efficiency.[406] However, whether efficiency and productivity should be goals of labour law is debated within labour law scholarship. There are scholars who believe labour law plays an important role in correcting market failures, often called the "law of the labour market" (LLM) approach,[407] and those who claim this "market constituting" view of labour law undermines its "democratic and emancipatory potential".[408] However, generally speaking, it can be said that other goals of labour law (such as democracy, dignity, redistribution, and others) take precedence over efficiency concerns, but that efficiency can be considered an "ancillary goal".[409] Therefore, a finding of efficiency would add further strength to the policy. This is also a useful enquiry in the context of the FPA as a significant amount of the criticism of the policy is that it will inhibit productivity and efficiency.

(a) Productivity

Elements of the FPA have been identified as potentially productivity decreasing. For example, the "delinking of wages" from productivity which occurs when wages are more standardised and lifted across a sector. Delinking has been noted by the OCED and business advocates as potentially de-motivating for worker productivity.[410] Furthermore, it is claimed by some that "restrictive work rules may limit management's ability to utilize the workforce in the most efficient way".[411] However, these productivity theories are not accepted by all of the scholarship and calls for further de-regulation have been warned against by scholars.[412] Nigel Haworth writes that "[c]ontrary to the arguments presented

[405] Cabinet Paper, above n 7, at [12.3].
[406] Davidov, above n 203, at 180.
[407] Ruth Dukes *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford University Press, Oxford, 2014). The term "LLM scholarship" was first used by Ruth Dukes, a critic of the approach.
[408] Deakin, above n 66, at 207
[409] Davidov, above n 198, at 29.
[410] Partridge and Wilkinson, above n 197.
[411] Davidov, above n 258, at 89 to 94.
[412] Haworth, above n 1.

in the 1980s and 1990s" deregulation has "not driven strong growth and improved productivity".[413] Nigel Haworth instead claims that poor productivity in NZ is because NZ has adopted an economic model that is internationally known as the "'low road' to growth".[414] The 'low road' to growth includes cutting costs of labour, low government intervention, weak employee representatives, and a 'low-wage' model, with the idea that this will create higher profits and eventually a stronger economy.[415]

Nigel Haworth advocates for the alternative 'high road' to growth model for a "better paid workforce and a stronger economy".[416] This 'high road' model contains many features of the FPA. For example, key reforms needed to achieve 'high road' model include *inter alia* strengthening of collective bargaining, decent minimum standards, wage compression, democratic workplace organisation and trade unions, and a general shift to "wage-led growth approaches".[417] Benefits identified with the 'high road' model include "motivated staff, greater job security, higher wages… job satisfaction… personal and career development … increased confidence, trust and openness in work relationships; .. ability to work through change and conflict constructively; … improvements in work processes and service delivery; easier staff recruitment and … retention" with "better business performance and long-term viability."[418] The philosophy is that better-paid and more engaged employees "work smarter, are more productive, generate more profits".[419]

While the FPAWG notes that the "[r]esearch globally on collective bargaining and productivity growth … is not clear cut".[420] Overall, Davidov writes that "[t]here is thus ample theory and evidence to suggest that the process of collective bargaining has some efficiency-enhancing attributes. At the very least, the discussion so far seems enough to refute the once-common claim that unions (and collective bargaining) significantly impair efficiency."[421]

[413] Haworth, above n 327, at 199.
[414] Ibid.
[415] Ibid.
[416] At 200.
[417] Ibid.
[418] At 204.
[419] At 201.
[420] Fair Pay Agreements Working Group, above n 16, at 17.
[421] Davidov, above n 258, at 89 to 97

(d) Means for Promoting Productivity Evaluated

This analysis has shown shown that collective bargaining is unlikely to hinder productivity as has been claimed by opponents of the FPA. Indeed, by adopting a 'high road' to growth approach, the means of the FPA may assist in creating a productive and decent future of work. However, it has been noted that productivity enhancements are an "ancillary goal" in labour law. Considering the FPAs have shown potential to promote worker dignity, workplace democracy, and progressive redistribution, negative findings on its effect on efficiency and productivity would not in itself be indicative of the unsuitability of the policy.

V. Part 5: Summary and Conclusions

A. Summary

The FPA policy of sector wide collective bargaining represents the biggest change to NZ labour law in decades. It has laudable aims to create "better standards of living for workers, improved productivity and a fairer distribution of the benefits of productivity, and better engagement between employers and workers".[422] Part 1 of this dissertation introduced the FPAs; traversing the policy development, the Government's policy rationale, and outlining the key features of FPAs. Part 1 of this dissertation also introduced the debate surrounding the FPA; demonstrating that there is heated debate and divergence in opinion regarding the policy.

In Part 2 of this dissertation the FPAs were contextualised through an exploration of the fluctuating, and politically and ideologically charged, history of NZ's labour law. This gave context to the transformative nature of the FPA, compared to the individualised ERES in NZ since the enactment of the EC Act. Part 2 also aided in contextualising the FPA debate.

This dissertation then drew from labour law theory in Part 3 to facilitate a coherent and purpose-based evaluation of the FPAs and the debate surrounding them. The main tenets of seminal traditional law labour theories were outlined and the challenge to labour law, perpetuated by the neo-liberal deregulatory ideology, was introduced. It was shown that this challenge was writ small within the

[422] Cabinet Paper, above n 7, at [123]

FPA debate. Though the work of Davidov, the methodological tools were found to counter the challenge to labour law, and the FPA, and justify the law through the purposive approach.

In Part 4 this methodology was applied. Concrete (level 4) goals of the FPA were found in the Cabinet Papers and policy documents, including: promoting collective bargaining, raising minimum terms, workers getting their 'fair share' of productivity, and increased productivity. These goals were then shown at a higher level of abstraction: dignity (level 1), countering subordination (level 3), redistribution (level 1), inequality of bargaining power (level 2), workplace democracy (level 1) and efficiency (level 2). These goals were situated within wider labour law scholarship and sociological literature which showed a coherent, principled and practical reason for the promotion of those goals. Namely, to give better adherence to objectives within the ER Act, to address ERES issues, addressing social inequality, and supporting a just transition and tripartite solutions. The means of the FPA were then systematically tested against these goals.

B. Areas of 'Connection' and Strength

Evaluating the means of the FPAs in connection to its purposes demonstrated numerous strengths of the policy. Features such as, collective bargaining, compliance through unions, and the proposed inclusion of contractors will assist in meaningfully raising minimum standards. Regarding dignity, dignitarian scholarship indicated that the presence of unions and collective bargaining supported worker dignity. The evaluation also demonstrated that the FPA means of raising minimum standards and collective bargaining is likely to create progressive redistribution. This aspect of the FPA could lead to a more equal society, with compressed wage scales and a better distribution of profits. The means of a low initiation and funding and facilitation of bargaining were supportive of the FPA goal to promote collective bargaining. Collective bargaining in turn aided in addressing the inequality of bargaining power. Workplace democracy is supported by the FPA through collective bargaining and the notification, communication and information sharing requirements. Lastly, this evaluation demonstrated that collective bargaining is unlikely to hinder productivity as was claimed by opponents.

C. Areas of 'Mismatch' and Potential Reform

Evaluating the means of the FPA against its purposes has also illuminated reoccurring uncertainties and potential deficiencies. First is the uncertainty surrounding the Authority's determination process

to achieve the goals of the FPA. To achieve the goal of significantly improved terms, a fair and decent wage, and the inclusion of necessary non-mandatory terms, the Authority will need to show a willingness to determine FPAs with decent and inclusive terms. Alternatively, the non-mandatory terms such as redundancy, privacy, and health and safety, should be reclassified as mandatory. This is because the exclusion of such terms creates a mismatch with the goals of improved working conditions and worker dignity. Second, the lack of support for unions in the face of the historical and current legislative undermining, hostility, and low membership rates may frustrate the goals of the FPA. This is because capable, knowledgeable, and respected unions are needed for effective bargaining in good faith, effective compliance, and workplace democratic engagement through union membership. It has been suggested that further legitimising support for unions is needed. A union default has been suggested for both an effective solution to these issues and to meaningfully respect a worker's choice to join a union.

D. Conclusion

Through applying Davidov's purposive approach to labour law methodology this dissertation has evaluated the means of the FPA against its goals. This evaluation has shown that the FPA has numerous strengths and potential for achieving these goals. Particularly in regard to promoting collective bargaining, redistribution and workplace democracy. It has been shown that opponents of the FPA who claim that it is undemocratic, inefficient, and will create unemployment are misguided. However, for the FPA means to fully realise its goals the Authority needs to show a willingness to determine decent and inclusive terms and union membership needs to be actively supported.

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