

SUBMISSION ON

Fair Pay Agreement Bill

19 May 2022

To: Education and Workforce Select Committee

Name of Submitter: Horticulture New Zealand

Supported by: Tomatoes NZ, NZ Asparagus Council, • Katikati Fruitgrowers Association, Citrus NZ, Summerfruit NZ, Strawberry Growers NZ, Vegetables New Zealand, New Zealand Kiwifruit Growers Incorporated, Process Vegetables New Zealand, T&G Global, New Zealand Apples & Pears Incorporated

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Our submission

Horticulture New Zealand (HortNZ) is an industry good organisation working in the interests of its members (commercial fruit and vegetable growers). HortNZ thanks the education and workforce select committee for the opportunity to submit on the Fair Pay Agreements bill. We welcome any opportunity to discuss our submission and to continue to work with officials and the Select Committee on this Bill.

HortNZ wishes to be heard in support of our submission.

The details of HortNZ's position are set out in our submission below. This submission is made by HortNZ, supported by the following organisations:

- Tomatoes NZ
- NZ Asparagus Council
- Katikati Fruitgrowers Association
- Citrus NZ
- Summerfruit NZ
- Strawberry Growers NZ
- Vegetables New Zealand
- New Zealand Kiwifruit Growers Incorporated
- Process Vegetables New Zealand
- T&G Global
- New Zealand Apples & Pears Incorporated

HortNZ's Role

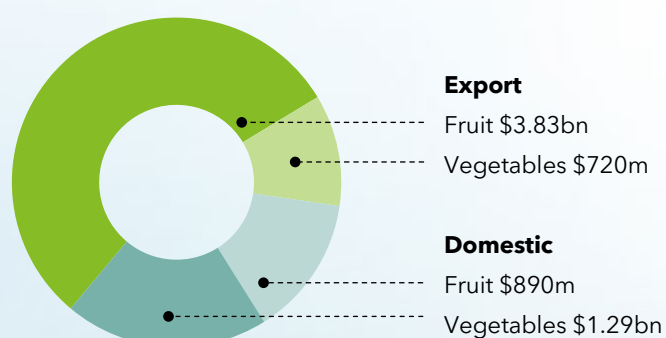
Background to HortNZ

HortNZ represents the interests of approximately 6,000 commercial fruit and vegetable growers in New Zealand who grow around 100 different fruit, vegetables and berries and employ over 40,000 workers.

There is approximately 80,000 hectares of land in New Zealand producing fruit, vegetables and berries for domestic consumers and supplying our trading partners with high quality food.

It is not just economic benefits associated with horticultural production that are important. Rural economies support people in local communities and rural production defines much of Aotearoa's regional landscape. Food production provides a platform for long term sustainability of communities, through the provision of food security.

HortNZ's purpose is to create an enduring environment where growers prosper. This is done through enabling, promoting and advocating for growers in New Zealand.



Industry value \$6.73bn

Total exports \$4.55bn

Total domestic \$2.18bn

Executive Summary

Food production in New Zealand plays a key role in providing career opportunities and horticultural businesses are the backbone of every rural community throughout New Zealand.

HortNZ does not support the Fair Pay Agreements (FPA) Bill and seeks that it is withdrawn for the following reasons:

- FPA's will not improve outcomes for New Zealanders. The proposal as it currently stands (which is complex and difficult for workers, employers and the Government) will have a detrimental and negative impacts including on:
 1. People's prosperity.
 2. Productivity and international competitiveness.
 3. Growth of New Zealand's economy.
 4. Stifling innovation and flexibility, when they are needed now more than ever.
 5. The compromised quality of industrial relations.
 6. Anti-competitive behaviour or unfair terms for small businesses.
- HortNZ support the intended benefits of FPA's 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. Our sector is already a long way into providing this without FPA adding complexities and unnecessarily red tape to growers' businesses. These benefits can be achieved in different ways.
- FPA's are not a proportionate response to the public policy issues identified. This means they will create significant labour market inflexibility and costs for employers and displaced workers.
- The Bill is not well targeted. HortNZ believes that the Government should concentrate its efforts and compliance in sectors where problems exist. This does not include horticulture.
- HortNZ strongly rejects the view that sectors that provide unskilled work, work for untested young people, and seasonal work have an inherent labour market problem. HortNZ is confident our sector plays an important role in the workforce and to the stability and prosperity of New Zealand's economy.
- Growers cannot continue to absorb increased costs. The majority of growers are price takers and unable to pass on the increasing costs of production to consumers (both domestic and export) who are unwilling and increasingly unable to pay more for healthy fruit and vegetables.

- The proposal may result in increased unemployment as a result of higher labour costs – and domino effects of this through loss of productivity without associated investments in capital and technology which lower average costs, loss of growers businesses and lack of re investment in expansion.
- The horticulture sector has an existing fit for purpose structure in place (for example, the Recognised Seasonal Employer Scheme and NZGAP). These schemes mean that horticulture is already world leading. HortNZ believe that the Government should concentrate efforts and compliance in other sectors where there are identified issues.
- The potential inconsistencies with the right to freedom of association (or non-association), and with the International Labour Organisation protocols - specifically Article 4 of the Right to Organise and Collective Bargaining Convention 1949 (C98) which provides that collective bargaining should be free from compulsion to bargain, compulsory arbitration and Government intervention. New Zealand ratified C98 in 2003.
- The approach taken in the proposed Bill is misaligned with supporting a transition to lower-emissions land uses. Diversification to horticulture represents an opportunity to reduce emissions. The Climate Change Commission's advice to Government included recommendations to support alternative, lower emissions land uses (to support this). To enable horticulture growth to continue requires the right regulatory/policy environment. This is the opposite.
- A broader view of the cost impacts of regulatory change is needed. The Government is consulting on other labour-related regulatory change e.g., income insurance, and worker exploitation and modern slavery. The cumulative impact of these proposals on the cost of businesses is likely to be very significant.

Should the legislation proceed, FPAs must only apply when there is evidence of problematic competitive practices that are driving poor terms and conditions for workers – and where this is not addressed by other legislation. If the problem is enforcement of existing legislation enforcement should be examined rather than adding new legislation for a perceived issue.

HortNZ would be open to providing further input as to what would be suitable criteria for defining a labour market problem – as we currently do not support the criteria proposed. HortNZ strongly reject the view that sectors that provide unskilled, unexperienced, and seasonal work have an inherent labour market problem.

HortNZ suggests the Government should make the following policy changes in place of FPA's:

- Protect flexible working - make FPAs voluntary. Individual employers and employees should have the opportunity to opt-out. Voluntary FPAs would

be more consistent with New Zealand's obligations under international law.

- Develop a limited set of legally binding sector-based minimum standards for industries where a clear and significant labour market problem has been identified. As a major employer in some industries where issues are identified, the Government can take a leadership role immediately by committing to best practice employment standards in these sectors.
- Tackle "bad" employers by increasing enforcement and prosecuting those who break the law.

Submission

1. The Horticulture Sector

1.1. Horticulture's contribution

The value of horticulture's export has been steadily increasing. BERL have reported that New Zealand's horticulture exports increased to \$8 billion in 2020, which is significant because it means that horticulture exports are now worth as much as New Zealand's meat exports. The industry is also important in terms of providing employment opportunities. The number of jobs in the sector was in fairly steady decline between 2000 and 2015, but reflecting the growth in exports, the number of FTE jobs picked up from around 30,800 in 2015, to 34,500 in 2020, an increase of 12%. Horticulture now employs many more people than sheep and beef farming.¹

1.2. The Horticulture Workforce

1.2.1. CHARACTERISTICS OF THE HORTICULTURE WORKFORCE

The horticulture sector provides essential work in the regions with on-the-job training and skills development, confidence and responsibilities which help shape thousands of kiwis every year.

The following are some key findings about the horticulture industry workforce from work done by the Ministry for Primary Industries:^{2,3}

- Horticulture has a high number of new entrants; in 2016 there were 19,200 new entrants. This included 13% inflow from 'other' (which refers to a group of people who have no evidence of earning any income), 4% from beneficiaries, 41% from overseas absence, 14% from education, the balance being from other primary industries or other industries. Data from 2013 indicated that a large proportion (28%) of new entrants to the horticulture industry were temporary migrants.
- Horticulture has the largest proportion of workers identifying as Pacific relative to other primary industries, in part due to the Recognised Seasonal Employer (RSE) scheme. Government sets the standards (e.g. minimum wage), for this accredited scheme.
- The production workforce has a very young profile - 57% of this workforce are aged under 35 (compared to 43% for the food and fibre sector workforce. A total of 16% of the workforce is aged 55 years and over.

¹ <https://berl.co.nz/economic-insights/hats-horticulture>

² <https://www.mpi.govt.nz/dmsdocument/29273-primary-industries-subsector-workforce-infographics> (published March 2019)

³ <https://www.mpi.govt.nz/dmsdocument/50932-Food-and-fibre-workforce-Snapshot>

- Self-employment in horticulture was reported as 10.4% (in the Horticulture Industry Workforce factsheet).
- There are seasonal workforce peaks associated with specific activities (e.g. picking fruit). The 2020 Recognised Seasonal Worker survey described that while the majority of employees in horticulture are New Zealanders, RSE scheme workers make up approximately a third of the seasonal workforce. Work visa holders also make a contribution.⁴

Appendix A includes some examples of employment in the horticultural sector.

1.2.2. HORTICULTURE HAS A VALUABLE ROLE IN PROVIDING ENTRY LEVEL EMPLOYMENT

Horticulture is an industry that offers a high proportion of roles that are suited to those starting their careers, offering an entry point to gain experience and skills. These people often move out of these jobs into more skilled roles within or outside of the sector. This is natural progression, and one that must be recognised and valued.

The horticulture sector works closely with Work and Income to provide opportunities, for example the Mana in Mahi⁵ programme provides the opportunity for people to train and work at the same time and provides support to employees and employers to be successful. The nature of the roles are such that their staff move on and take on other roles in the economy, having developed key skills in the horticulture sector.

1.2.3. HORTICULTURE IS A DIVERSE SECTOR

Horticulture is a diverse sector, encompassing many different crop types. The type of work varies depending on factors such as crop type, location, type of role, differing technology etc.

Different remuneration structures (including piece rates) and working arrangements/benefits exist for different roles to cater to this diversity.

1.2.4. NOT ALL WORKERS IN THE SECTOR ARE 'UNSKILLED'

In the sector 8% of employers in the production and 24% in the processing/commercialisation areas have qualifications at Level 7 to 10.⁶

The sector has a network of career progression managers throughout New Zealand to support people to train and upskill across a range of domains.⁷

The use of vocational education programmes and extension to move skills and competencies which in turn lift individual's wages and career opportunities is a key aspect of our industry growth plan and is vital to the ongoing shift to a sustainable industry.

⁴ Recognised Seasonal Worker Survey 2020 (www.nzkgi.org.nz/wp-content/uploads/2020/07/RSE-Doc-June-2020-WEB-FINAL.pdf)

⁵ <https://www.workandincome.govt.nz/products/a-z-benefits/mana-in-mahi.html>

⁶ <https://www.mpi.govt.nz/dmsdocument/50932-Food-and-fibre-workforce-Snapshot>

⁷ <https://gohorticulture.co.nz/contact/>

1.2.5. SEASONAL PEAKS ARE INHERENT TO THE NATURE OF GROWING

Due to the seasonal nature of most of the fruit, vegetables and berries grown in NZ there is contractual uncertainty on seasonal work and short-term contracts are likely to be more prevalent than in other sectors. Short-term contracts and the use of contractors is an essential part of the horticultural workforce, because activities such as harvest and pruning only happen over a defined time period for some crops. There are existing protections within the Employment Relations Act (including restrictions on the use of fixed term and casual employment and the prohibition on zero hour contracts) to protect employees on short-term contracts within the horticulture industry.

Given the seasonal nature of food production, harvest and packing, horticulture offers work outside of 9am-5pm Monday - Friday. The crops do not stop ripening and weather events and other factors mean often people work through weekends and summer holidays, which they are compensated for example with over-time payments. The work includes additional complexities related to the natural systems, for example some roles can only be carried out in certain weather.

1.2.6. THE INDUSTRY PROVIDES COMPETITIVE PAY RATES

Working in horticulture offers fulfilling career opportunities with pay progression. There are a range of opportunities across the value chain, from production through to processing/commercialisation.

The horticulture industry promotes diversity and inclusion and equality.

In the horticulture sector salary and wages are competitive and market based and have progressively increased even for the lower skilled occupations as was reported by NZIER.⁸

As an example, average pay rates for the 2021 kiwifruit season are outlined below - these rates are significantly higher than the minimum wage (of \$18.90/hour as it was at the time, or the current minimum wage \$21.20).⁹

Picking		Packhouse	
Green	Gold	Unskilled	Skilled
\$ 27.03	\$ 29.24	\$ 22.35	\$ 25.63

The 2020 Recognised Seasonal Worker survey report referred to previously outlined that for the 2019 season, the majority of employees (57%) were on an hourly rate, however during harvesting a piece rate was more common.

The horticulture sector must compete on the value of the work being undertaken and the skills and ability of the person carrying out the work.

Many growers spend over 50% of their costs on labour already. Increasing labour costs without increasing production or the price paid for crops to

⁸ NZIER (2019). 'Horticulture labour supply and demand 2019 update'. NZIER report to Horticulture NZ, NZ Kiwifruit Growers, NZ Apples and Pears and NZ Wine.

⁹ Information from NZKGI.

growers, this would stifle business and food production in New Zealand will decrease.

2. Problem definition and benefits assessment

FPA's would represent a large shift for New Zealand's employment regulatory landscape. Yet the size and scale of the problem that Fair Pay Agreements (FPA) would be solving is unclear. It appears this Bill was introduced to address minimum employment terms via bargaining – this is already set in legislation and any current failures are an enforcement issue of the law.

Collective bargaining would not solve the issue and people currently operating outside the law would continue to do so. HortNZ asks that the Government clearly articulate the benefits they foresee from FPA's for all involved.

Government officials (including from MBIE) have described the introduction of Fair Pay Agreements Act 2022 as the biggest change to employment law in New Zealand since the Employment Contracts Act in 1991 (i.e. bigger than the Employment Relations Act 2000).

3. Existing structures are fit for purpose

HortNZ argues that legislation and other structures already exist and are fit for purpose. The Government should deal with unfair employment practices and outcomes through minimum wage, minimum statutory conditions and a robust employment law system.

Fair Pay Agreements are not needed as relevant legislation and industry-led schemes already exist. This is duplication, and effort should instead be put into bolstering Acts that are already in place. Minimum standards already exist for all employees in New Zealand regardless of the type of work they perform.

3.1. National level

Employment law and contracts already exist as well as minimum wage and immigration legislation.

In May 2022, Immigration New Zealand made positive changes to immigration legislation which means permanent and temporary migrant workers will be further protected and there will be auditing requirements for some employees.

3.2. Industry led

HortNZ strongly disputes the need for FPA's when the sector is aware of its workforce conditions and social priorities and is actively addressing these through intentional monitoring and industry lead compliance programmes such as New Zealand Good Agricultural Practice (NZGAP). As an industry, growers are already subject to audit on matters such as how they treat and pay their employees.

New Zealand is not immune to cases of worker exploitation. The horticulture sector is serious about supporting our growers and contractors to operate ethically and within the law. The Fair Pay Agreement would have no impact on

employers that exploit workers. The most effective way to address worker exploitation is with minimum standards and industry certification. Industry certification enables the majority of good employers to demonstrate compliance and enables targeting of employers that are falling below the standard.

Consumers, and therefore retailers, now require assurance for social responsibility in a similar way that food safety (GAP) certification has been required by most retailers over the past 20 years.

To provide context to the robust New Zealand and global compliance programmes which members of the New Zealand's horticulture sector comply with, here is an overview of NZGAP, GLOBALG.A.P and the RSE scheme.

NZGAP Social Practice Add-on

This is an optional add-on for businesses that are NZGAP, NZGAP GLOBALG.A.P. equivalent or GLOBALG.A.P. certified. This enables growers to demonstrate they meet both locally and globally recognised social practice standards for markets and regulators and has been developed to include all relevant New Zealand regulatory requirements, with support from MBIE who have assisted in interpretation of legislation.

The NZGAP Social Practice Standard also includes globally recognised social practice requirements that are included in other social practice standards such as GRASP (GLOBALG.A.P. Risk Assessment on Social Practice). NZGAP has internally reviewed the NZGAP Social Practice add-on against GRASP to ensure that the standards are aligned. NZGAP plans to attain formal benchmarking and recognition of the Social Practice add-on as equivalent to other global social practice standards when those recognition pathways become available (e.g. GRASP). Certification enables employers to demonstrate that they have good social practices in place for their workers, and enables them to supply product to multiple wholesalers, retailers and markets.

NZGAP have assurance processes in place to ensure workers are paid what they should be and social practice standards ensure workers are well looked after. This is not just about hourly rates but also working conditions. This is in early stages of the roll out but is making fast improvements.

Global G.A.P. GRASP Add on

Good agricultural practices are not just about crops; they are also about people. GRASP is the GLOBALG.A.P. Risk Assessment on Social Practice. It is a voluntary, farm-level social/labour management tool for global supply chains, to be used in combination with Integrated Farm Assurance (IFA).

Growers can assess, improve, and demonstrate their responsible social practices through a simple but robust evaluation checklist of four main topics: workers' voice, human and labour rights information, human and labour rights indicators, and child and young workers protection. Legal labour requirements such as minimum wage, age of legal employment, or working hours differ from country to country. National interpretations guidelines are developed in New Zealand by the GAP National Technical Working Group.

NZGAP Contractor Standard-

This has been developed specifically for contractors providing services to NZGAP, Social Practice add-on, GLOBALG.A.P. and GRASP certified growers or supply chain operators. Using NZGAP certified contractors is a means for growers and other supply chain operators to demonstrate the contractors they engage have met the requirements of these standards at both a production and social practice level.

The common practice of using contractors, especially for seasonal tasks, means that certification is an effective pathway for contractors to demonstrate compliance to growers, and for growers to engage the services of contractors with confidence. As a result, supermarkets in New Zealand and overseas are increasingly seeking Social Practice certification in addition to the core GAP (Good Agricultural Practice) Food Safety certification.¹⁰

Recognised Seasonal Employer scheme

New Zealand's Recognised Seasonal Employer (RSE) scheme is fair and equitable.

The RSE¹¹ scheme is New Zealand's world class temporary migration scheme which encompasses pastoral care and accommodation.

The RSE scheme was launched in 2007 to help the New Zealand horticulture and viticulture sectors supplement its local workforce when vacancies were unable to be filled. Employers apply to Immigration New Zealand to be granted RSE employer status, and following this, apply for an ATR allowing them to recruit workers from offshore to perform planting, maintenance, harvesting and packing. Immigration New Zealand oversees and manages the RSE scheme.

The RSE scheme is internationally recognised by World Trade Organisation and International Labour Organisation and has been achieved without unionism.

4. Existing union relationships and collective agreements

A number of HortNZ's members have existing union relationships within their businesses and bargain collectively for generous terms of employment above current minimum standards. The FPA regime does not adequately address the additional time and cost on horticulture employers (and those in other industries) which already have active collective agreements and the existence of those agreements negates the need for any wider industry or occupation bargaining.

HortNZ is concerned that the introduction of FPAs will lead to employers being reluctant to negotiate generous terms during collective bargaining when a FPA may be introduced that will place further costs and minimum terms on businesses. This could lead to a detrimental impact on employees.

¹⁰

https://www.nzgap.co.nz/NZGAP_Public/News/Contractor_Standard/NZGAP_Public/News/Contractor_Standard.aspx?hkey=cd558d15-cf00-4dab-8f4a-2df446816e75

¹¹ [About the RSE scheme | Horticulture New Zealand – Ahumāra Kai Aotearoa \(hortnz.co.nz\)](#)

5. No evidence of an appetite for FPAs

There is no evidence that there is an interest in the private sector for FPAs either at employer or worker level.

Most multi-employer collective agreements are in the public sector. Collective bargaining coverage has decreased proportionately and is not keeping up with growth in the number of jobs in the economy. As reported in the Regulatory Impact Assessment, currently in New Zealand there are approximately 1,600 collective agreements covering 10% of the private sector workforce. There are also 456 collective agreements covering 60% of the public sector workforce.¹²

The Regulatory Impact Assessment itself recognises that while sector and industry-based approaches to collective bargaining may assist in reducing inequality, they are less effective in terms of economic productivity, growth and prosperity. There are a number of policy options already available to the Government to increase low wages including the minimum wage legislation and employment law focused on exploitative and non-compliant practices.

HortNZ has zero tolerance for poor employers. An alternative approach is an strengthen enforcement of current legislation to detect inappropriate activity and enforce minimum labour standards.

The New Zealand labour market has never been more competitive – there is record low unemployment rate and conditions have never been stricter, for example health and safety standards are higher than they have ever been, which HortNZ supports.

6. Comments on the proposed Bill

HortNZ considers the proposal is deleterious to the economy, to people's prosperity, and to the human rights of those involved.

HortNZ believe minimum standards should **not** have to be bargained for – they currently exist in employment law. HortNZ support these being enforced. Instead of implementing further legislation and compliance onto business – direct funds to bolster Work Safe and MBIE employment inspectors to be engaged in areas where industry and members of the public report suspected breaches of the employment law and worker exploitation.

HortNZ believe that all people should have the right to negotiate their own working conditions and pay directly with their employer.

¹² <https://www.treasury.govt.nz/sites/default/files/2021-07/ria-mbie-fpa-apr21.pdf>

Should the legislation proceed, specific comments with respect to the proposed Bill and option proposed are discussed in the table below:

Section of the Bill	HortNZ comments
Good faith bargaining (Section 19)	Section 19 of the Bill sets out the obligation of good faith that applies during bargaining. Given the large number of parties that may be a part of any FPA bargaining process, HortNZ considers that this clause needs to be amended to remove the requirement for parties to continue to bargain even where they have come to a standstill on one or more matters. This provision will lead to protracted bargaining and increased costs where parties are already in disagreement on one or more terms.
Tests for initiating bargaining (Section 29)	HortNZ consider that the Bill should be amended to require a union to satisfy both the representative test and the public interest test before a FPA can be negotiated.
Representation test criteria (at least 1,000 employees or 10% of employees in the proposed coverage).	HortNZ do not agree that individual rights should be eroded because a very small percentage of workers think it is the right thing to do. The issues we have with this criteria include: <u>There is insufficient clarity on how the 10% (or 1000 employee) criteria would be calculated/applied.</u> • HortNZ requests further clarity and definitions of how sector and occupation are defined – for example, how would be horticulture sector be ‘broken up’ (pickers of one crops, any packhouse worker etc.?) if at all. • Transparent definitions and criteria would be required if this legislation proceeds. <u>Horticulture is a diverse sector, we find difficulty with how one approach would be applied across this sector, where there are an array of different growing systems, employers, working conditions and jobs.</u> • Variable working hours, different skill requirements and on the job training needs, and regional differences make it impossible, in the horticulture sector, to have a fair pay agreement that could apply across all businesses throughout New Zealand. This is particularly true when it comes to

	horticulture with its vast range of different crops and growing systems being used. There are a large number of distinct businesses in operation ranging from family run to large corporates. • As explained previously, the nature of some roles in the horticulture sector would make it difficult (if not impractical) to set for example “ordinary” or “normal” hours. • There are a myriad of different roles and skills needed with in ‘horticulture’ even within an apple orchard and packhouse or a field of broccoli – these different levels should and are recognised currently with in our sector to distinguish from someone who joined a company picking fruit a few days ago – to a supervisor of the orchard responsible for worker health and safety and pest control who has been in the role for over 10years – for example. • As an on-the-ground example within one business, different jobs within the sector require differing benefits, for example, transport is more important to a team working in the field, food benefits vary with role and location. Growers need sufficient flexibility to provide the ‘right mix’ of rewards and benefits that meet the requirements for the different roles. <u>We have concerns that the criteria are not representative enough</u> • For example, 1,000 out of a workforce of over 40,000 is a very small proportion of people who could initiate bargaining and cause huge disruption. • The representation test should be significantly higher if this legislation proceeds. • The threshold of the lesser of 1,000 covered employees or 10% of all covered employees is too low. HortNZ submits, that the threshold should increase, or that the 10% threshold be removed (so that it must always be at least 1,000 employees to be covered by the FPA), or than both a representative and public interest threshold be applied.
Public interest test based on specified criteria	<u>HortNZ fundamentally disagree with the criteria proposed</u> HortNZ strongly reject the view that sectors that provide unskilled, inexperienced, and seasonal work have an inherent labour market problem. There is no evidence of systematic ‘labour market’ problem within our sector (in respect to working conditions and compliance with employment law).

Horticultural food production is worthwhile, rewarding, and productive work. Our sector can demonstrate wage growth (for example, one orchard estimates that there has been an estimated 30% wage growth in the last two years¹³), training opportunities and robust systems to hold employers to account for meeting their social practice obligations.

FPA's must only apply when there is evidence of problematic competitive practices that are driving poor terms and conditions for workers – and where this is not addressed by other legislation i.e. employment law. If the problem is enforcement of existing legislation, enforcement should be examined rather than adding new legislation for a perceived issue

HortNZ invite MBIE to work with the horticulture sector to determine criteria for what a “labour market” problem is, and to visit growers and speak with our workforce directly.

Threshold for number of criteria to be met

Section 29(4) sets out the criteria of the “public interest” initiation test. The test is broad, and only requires one of the stated criteria to be met. HortNZ strongly recommends a union should need to satisfy at least two of the listed criteria.

Migrant worker criteria

Section 29(5) sets out the evidence that is required to meet the “public interest” initiation test. The list includes evidence that the proposed FPA will include a “high proportion of migrant employees” or where “most of the covered employees are employed on a temporary basis”.

New Zealand’s horticultural sector engages a large number of fruit and vegetable seasonal workers under the RSE scheme. Employers apply to Immigration New Zealand to be granted RSE employer status, and following this, apply for an ATR allowing them to recruit workers from offshore to perform planting, maintenance, harvesting and packing. Immigration New Zealand oversees and manages the RSE scheme. As part of this, RSE employers are obliged to offer minimum terms to RSE workers (including as to pay rates, hours of work, accommodation and benefits amongst others).

¹³ Pers comms. Richard Palmer in reference to his own orchard business.

	RSE workers (employed under the Immigration NZ RSE scheme) should be excluded from the FPA regime and/or the criteria in Section 29(5) should make clear that an RSE worker is not a migrant worker.
Obligation to notify employees of initiated FPA	Sections 37 and 39 place onerous notification obligations on employers following the approved initiation of a FPA (including that an employer must individually notify and provide significant details to each employee that falls within the coverage clause of the initiated FPA). Individual notification is not only onerous, but impractical in large horticulture workforces, where a significant proportion of employees do not have access to email addresses. In order to individually notify all employees covered by a FPA, employers would need to print letters and give them to supervisors across New Zealand which will be a significant undertaking of time. The employer would then need to collate responses (including as to whether they consent to their personal details being disclosed to the union). The obligation to notify employees (and the collection of personal information) should be on the initiating party (in most cases, this would be the union). Notification should align with the notification requirements for bargaining for a collective agreement which enables notification on a group basis.
Entitlement to attend two FPA meetings	Under section 82 of the Bill, employees are entitled to paid time off to attend up to two (two hour) FPA meetings in relation to a proposed FPA and up to one FPA meeting in relation to a variation. Given that an FPA can cover an entire industry or occupation this could lead to all employees within a workforce being off work for up to four hours during FPA bargaining. For horticulture businesses, this is a significant amount of time and could lead to disruptions in service to suppliers and customers and wasted or disturbed fresh produce. The majority of work in the horticulture sector is time sensitive, with fruit needing to be picked and processed within a certain time frame. Many horticulture businesses also operate shift work, meaning that employees will need to be entitled to time off across different shifts (adding to further disruption). The FPA meetings would also be in addition to existing union meetings, of which employees are already entitled to up to four hours of paid time per year to attend. The allowance for FPA meetings should be reduced to one two-hour meeting.

Mandatory content	Under the proposed Bill, there is a risk that the resulting FPA binding the sector or occupation could result in terms and conditions which mean employers' abilities to compete, adapt to changing market conditions or innovate may be lessened. Section 114 sets out the mandatory content for a FPA (including at least 12 minimum terms). The mandatory content includes terms which are not ordinarily bargained for in individual employment agreements, and terms which are likely to be bespoke to particular workplaces. For example: "normal hours of work", "penalty rates" and "over-time". Flexibility is required in the horticulture sector - in of itself the removal of this will increase costs. It is impractical for a FPA which will cover a large number of employers within an occupation or industry to set out normal hours of work because those hours of work will vary significantly between workplaces. Horticulture businesses often operate shifts, and shift patterns are changed depending on the season and the availability of product. Hours and shift patterns are likely to be different between employers within the horticulture industry. The notion of "normal hours of work" also ignores the practical reality of modern workforces (particularly post-Covid) which are encouraged to promote flexibility. It is unusual for penalty rates and overtime to exist in individually negotiated employment agreements. Instead, employers factor in overtime and availability for additional hours into wage and salary rates. Where this occurs it would be unreasonable for an employer to then be expected to pay penalty or overtime rates on-top of higher wage rates or salaries. This could have an impact on competition if some employers cannot afford to comply with the new standard and decide to exit the industry, or choose to not enter or expand due to the new barriers to entry. Hours of work, penalty rates and overtime should be removed from the list of mandatory content (they could instead form part of section 115 ("Topics that the bargaining sides must discuss").
Delayed commencement provision	Section 129 provides two criteria upon which a delayed commencement to the terms of a FPA must be approved. The criteria is narrow: the bargaining sides must be satisfied that declining the employer's application would result in a less favourable overall outcome and that the delay will allow the employer to arrange its business so that the FPA will not result in a less favourable outcome.

	HortNZ submits that the criteria should be mutually exclusive, and that only one limb of the delayed commencement criteria be satisfied before a delay will be permitted.
Compliance and ratification process	The requirement for a compliance assessment and Authority approval of a FPA adds to the complexity of the process, and will likely add to the overall costs (the employer and employee bargaining parties are likely to want to instruct legal counsel to prepare the FPA and assist with the submission to the Authority). HortNZ submits that a compliance assessment only be required where the parties agree it is necessary.
Relationship between FPAs and collective agreements	The Bill enables employees to fall within the coverage clause of both a collective agreement and a FPA (and employees will be entitled to the terms of whichever agreement is more generous). The Bill does not address in any way the time and cost involved for employers being engaged in bargaining for both a collective agreement and an FPA. Some horticultural employers already have active collective agreements, each with its own bargaining term, and bargaining involves decision makers and employees in a number of different regions. To expect horticulture employers to also bear the time and cost of bargaining for a FPA in addition to annual collective bargaining is excessive.
Bargaining party “back stop”	HortNZ refers to the proposed change to the bill proposed by Hon Michael Wood on 31 March 2022 which introduces the concept of a “back stop”. The backstop is triggered where there is no default employer bargaining party, and enables the Authority to set the terms of the FPA without any involvement from the employers in the relevant sector or occupation (the initiating union can be represented in the Authority and provide input into the FPA terms). The suggested backstop is entirely unreasonable and would lead to most FPAs being set by the Authority without any employer input (given BusinessNZ’s indication that it will not agree to the employer bargaining party under the regime). The backstop must be amended to require involvement of relevant employers to ensure FPAs account for the commercial realities of business.

Option 3 outlined in the RIS (limited set of minimum standards where there is a labour market problem)

We consider that if the legislation is to proceed a more nuanced and targeted approach is required.

Such an approach must only apply to sectors or occupations where there is compelling and substantial evidence of problematic competitive practices that are driving poor terms and conditions for workers in the whole sector – i.e. not a small minority of exploitation occurring which can and should be immediately dealt with under employment law that already exists in legislation.

We do not consider that the horticulture sector should (or would) be captured by this option, as it is likely to focus on low-paid sectors that struggle with “race to the bottom” wage structures.

HortNZ would be open to providing further input as to what would be suitable, evidence-based criteria for defining a labour market problem – as we currently do not support the criteria proposed.

7. Unintended consequences

HortNZ agree with the Regulatory Impact Statement analysis that there will be significant downsides associated with the Government’s preferred option.

We consider that the implementation of the proposed Bill will result in a number of significant unintended consequences. These include:

Compliance burden:

- This will be a burden on the Government to administer and compliance check yet another regulatory instrument being imposed on business. Most business will likely have to employ additional resource to administer the regime – where their margins are already very stretched. It is noted that the Government will provide funding for bargaining costs – a further drain on an already tight budget.
- FPAs will result in additional costs and organisational compliance for growers. Growers cannot continue to absorb increased costs. The majority of growers are price takers and unable to pass on the increasing costs of production to consumers (both domestic and export) who increasingly unable to pay more for healthy fruit and vegetables.
- The regime that would exist under the FPA Act would be cumbersome and inflexible. Businesses would be locked into employment models and would not be able to negotiate variations with their own workers and quickly pivot when times change (The Covid-19 pandemic has demonstrated how important it is to be able to quickly do that).

For equity:

- The various crops and sectors within horticulture industry are vastly different and this determines each business’ remuneration structures – i.e.

high value crops (such as gold kiwifruit) are vastly different to smaller value vegetable crops produced year round where margins are lower.

- A regime like this will not adequately recognise major differences between regions and different crops and tasks carried out (although it is acknowledged that the proposed regime says that there can be differences between employees located in different regions). However, within a region multiple crops are grown.
- Cost of living in one region does not correlate to the cost of living in all areas – for example a worker harvesting vegetables in Pukekohe living in Auckland has a very different cost of living than someone harvesting vegetables in Levin.
- Many growers are deeply committed to helping address social challenges in society, such as offering work experience to disadvantaged members of the community. A 'one size fits all' FPA regime will make these employment relationships unaffordable for most small employers and this may no longer be offered. FPA will hurt and further disadvantage our community's most vulnerable workers. Many growers offer hours suitable for enabling parents and caregivers to collect children from day care and school. This is vital for community wellbeing. The report from James Hart 'From the Community to the Canopy: An Investigation of Pathways to Careers in the Kiwifruit Industry in the Bay of Plenty'¹⁴ explains how growers are filling their labour requirements with rosters to allow staff (particularly mothers with school age children) to start at 9am and finish at 2.30pm. This is a strategy being utilised across many small, medium and large grower businesses and it works remarkably well with only a negligible increase in overheads due to having more staff on the payroll. It has enabled parents to re-enter the workforce.
- There likely to be inflationary effects of higher labour costs. Inflation is already at a 30-year high.

For food security:

- If growers stop producing a variety of fruits and vegetables in New Zealand – or at worse, have to close their businesses – this will result in less local choice (and diversity of produce) for consumers, an increased price of kai for kiwis, and increased reliance on imports (including greater reliance on frozen, processed and canned food), which could potentially create greater food insecurity.
- As a result, the consumption of fresh healthy food would likely further decrease, resulting in poorer outcomes for kiwis, in a country which seeks to address significant health issues (e.g. obesity, heart disease, diabetes). Research indicates that families in New Zealand living in more deprived

¹⁴ [Hart-James Pathways-to-Careers-in-Kiwifruit.pdf \(ruralleaders.co.nz\)](https://ruralleaders.co.nz/wp-content/uploads/2021/04/Hart-James-Pathways-to-Careers-in-Kiwifruit.pdf)

areas substitute fruit and vegetables with cheaper energy-dense nutrient-poor production where there are increases in fruit and vegetable prices.¹⁵

- There are health costs associated with increased fruit and vegetable prices. The University of Otago modelled the potential health impacts of increased vegetable prices and found that an 43-58% increase (in prices)¹⁶ would equate to a 58,300 – 72,800 Quality Adjusted Life Years and health costs of \$490 –\$610 million across the population.¹⁷
- The domino effect of higher wages leading to higher food production costs may mean the business proposition for some growers no longer stacks up and may also create a barrier to entry for new firms.
- In the face of continuing pressures there is a real risk that the exit of only a few large players in the industry would have a significant impact on food supply.

For productivity:

- FPAs will erode productivity. Higher wages come from improved productivity and a more skilled workforce. FPAs will not achieve either of those things.
- Productivity is already a significant issue for New Zealand and the Government is focused on creating a highly productive, skills-based economy. The horticulture sector wants this too. However, in real world terms, under a FPA system, the ability to reward individual excellence in the workplace will be less common. At the same time, budgets will be diminished given increased FPA related costs. The Government should be aspiring to increase worker productivity as well as employers being able to recognise those that excel in their job.
- The growth and productivity of the horticulture sector is reliant on innovation and grower's ingenuity. Removing such drivers will likely result in a less economically vibrant sector with a consequent downturn in productivity.
- The proponents for the Bill put forward the case that productivity could be improved by compelling the payment of higher wages therefore forcing weaker firms out of business while the strongest (usually also the biggest) survive. This simply ignores the economic reality of New Zealand where the backbone of urban and rural New Zealand are small businesses which are often family run. Forcing these businesses to close will have a drastic effect on New Zealand's economy and will not result in increased wages for the many, as there will be fewer jobs.

¹⁵ Rush, E., Savila, F., Jalili-Moghaddam, S., & Amoah, I. (2018). Vegetables: New Zealand Children Are Not Eating Enough. *Front. Nutr.* <https://www.frontiersin.org/articles/10.3389/fnut.2018.00134/full>

¹⁶ Note: The vegetable price increase modelled was based on estimates from Deloitte (2018). New Zealand's food story: The Pukekohe hub.

¹⁷ Cleghorn, Cristina. 2020. The health and health system costs of increasing vegetable prices over time. Wellington: University of Otago, 2020

For achieving strategic objectives:

- The Ministry for Primary Industries' Fit for a Better World strategic roadmap identifies horticultural development as an important transformational opportunity. However progress will be significantly hindered if FPAs are introduced, productivity will be reduced and as a consequence - many growers' businesses will be adversely affected.
- New Zealand's primary sector, including horticulture, was an essential service during COVID-19, helping feed New Zealanders and return export revenues. As noted in the Fit for a Better World strategy, the sector will play a critical role as New Zealand accelerates its economic potential coming out of the pandemic. The FPA will not support this growth.
- The approach taken in the proposed Bill is misaligned with supporting a transition to lower-emissions land uses. Diversification to horticulture represents an opportunity to reduce emissions. The Climate Change Commission's advice to Government included recommendations to support alternative, lower emissions land uses (to support this). To enable horticulture growth to continue requires the right regulatory/policy environment. This is the opposite.

For representation:

- Affected parties will be represented during bargaining by unions or employer organisations respectively. FPAs could therefore be seen to undermine rights to freedom of association (and non-association). As FPAs will be compulsory for businesses - this takes away the freedom of businesses and employees to make an agreement for themselves. Workers' right to freedom of association are valuable and important.
- FPAs will take much more "one size fits all" approach to the employer/employee relationship. It will ignore unique benefits that businesses provide workers. It will ignore the unique circumstances of many workers and businesses that play an important role and the workers reaching a unique deal that works for them.
- As noted previously, we also have concerns that employer will not have representation under the proposal.

For the labour market:

- If an employer is unable meet the "one size fits all" requirements of a Fair Pay Agreement, employees may lose jobs that they value, enjoy and which may provide unique benefits to them.
- The FPA Act may drive up unemployment. Any Government initiative that further reduces the incentive to employ people of all skills levels will result in more unemployment. The Government should be looking to how policies can be attuned to the future work environment.
- The Government has not properly considered implications for business, and many growers and businesses aren't engaged in the process. They are unsure how to have their direct say in a decision that has the potential to

significantly impact them and their most important asset, their people. The FPA may actually decrease pay rates and conditions, making issues worse, including driving some growers out of business and placing more people on job seeker and unemployment benefits.

- Employers may take steps to reduce their wage costs, such as by reducing hours, changing the number/scope of roles, or compressing their wage ladders above FPA-set minimum. This is particularly the case for small growers for whom FPA terms may be harder to comply with. At the same time, many businesses (including family-owned businesses) are already struggling under the weight of increasing Government-led regulatory changes and increasing costs. A potential consequence of this is growers exiting and productive land becoming non-productive or taken over by larger corporates.
- Market conditions, resulting from labour shortages caused by immigration disputation, have driven wages up beyond what many businesses can afford. Many growers have closed, or are operating reduced days or capacity, and they simply cannot pay more. The Fair Pay Agreements Act would represent further change that would go too far too fast, with severe damaging consequences.
- Employers may be incentivised to restructure their business from an employment to a contracting model. Where the nature of the work is genuinely contracting, the employer would not be penalised under the FPA system.
- Employers may seek productivity enhancements to offset increases in labour costs, such as through investing in capital. Productivity enhancements will reduce labour needs in the long run.
- Businesses may decide to exit the market if they cannot operate within new parameters set by an FPA, and do not consider any provision of exemptions sufficient.
- Growers will likely face higher costs than offshore businesses against which they directly compete in international export markets.

8. Fair Payment Agreements replicate the failed system prior to 1990

The key features of the proposed fair payment agreement system replicate the central aspects of the national occupational award system in existence between 1894 and 1991. The way in which people work has changed since then and become more flexible. We do not support reverting back to fair pay agreements. This would re-introduce a dated concept from another time that was largely unsuccessful.

9. Conclusion

Instead of imposing FPAs unnecessarily across all industries, the Government should be focused on achieving better outcomes for workers who most need them.

HortNZ suggests the Government make the following policy changes in place of FPAs:

- Tackle bad employers by increasing enforcement and prosecuting those who break the law.
- Develop a limited set of legally binding sector-based minimum standards for industries where a clear and significant labour market problem has been identified. As a major employer in some industries where issues are identified, the Government can take a leadership role immediately by committing to best practice employment standards in these sectors.
- Protect flexible working - make FPAs voluntary. Individual employers and employees should have the opportunity to opt-out. Voluntary FPAs would be more consistent with New Zealand's obligations under international law.

The last two years have been extremely difficult for all growers battling through the direct and indirect impacts of the pandemic. Growers have dealt with labour market shortages caused by disruption and changes to immigration, two minimum wage increases, accelerating inflation, Covid-related compliance costs, lock-downs, increased sick leave and statutory holiday obligations. Many businesses have only battled through because owners have worked for less than minimum wage and/or poured in their own private savings (or re-mortgaged their homes). This is not the right time to add significant further cost onto growers by introducing new legislation.

Appendix A

Real-life employment examples from the horticulture sector.

EXAMPLE 1: Growing Futures for people leaving corrections

This program is for 30 participants who have a current or past relationship with the Department of Corrections. It is designed to provide participants with pre-employment training, pastoral care as well as on the job work experience in horticulture. The objective is to support the participants into long term sustainable employment.

Growing Futures commenced in March 2021. The number of participants referred to by the end of August 2021 is 34. The program revolves around allowing trainees to transition into full time work at any point during the 12-month period allowing the training provider to continue to work with Corrections for ongoing referrals when trainees leave.

The program is beginning to achieve great outcomes including 5 participants exceeding the 91-day in employment threshold and they are aiming for the next milestone point of 182 days. Five others are participating on an EIT Horticulture supervisory course. Six attended a further upskilling course at EIT whilst 2 have resigned and have found alternative employment and 2 resigned for medical reasons. The 14 others are working hours to suit and receiving intense pastoral support as they work through social barriers that are preventing them from working full time.

EXAMPLE 2: Supporting sole parents into flexible seasonal work

The He Huarahi Hou Project (new pathway) programme is designed to assist and transition sole parents into flexible seasonal work hours that suit their availability. That includes:

- Providing transport to and from work for the first three months
- Working alongside participants to address their broader whanau social responsibilities and barriers
- Developing a workplan that suits their individual availability needs. This includes working on solutions that address tamariki care while they are at work.

- Pre-employment training including first aid, health and safety and planning and budgeting.

The programme is a partnership between the Ministry of Social Development, Māori Wardens (who provide the pastoral care and support) and T&G Global.

EXAMPLE 3: Skilled Overseas Workers, Cherry Grader

Cherry grading is highly skilled work, that requires skilled operators of specialist machinery and software. The cherry industry is an important export sector but the harvest season is short, and skilled cherry graders are only required for 2 months of the year.

New Zealand orchards rely on skilled workers who harvest in New Zealand and go on to work in other countries who also value their specialist skills. The costs of a business of not being able to attract these skilled overseas workers are high. For context, each machine processes 35,000kg of cherries daily with a conservative value \$500,000+. Without an operator, the orchardists must leave fruit unpicked and run the packhouse at half speed, with dire financial consequences.

The FPA proposal incorrectly frames overseas workers as cheap unskilled labour. This is not true, and the FPA will reduce productivity, not increase it.