



## BRIEFING

### Fair Pay Agreements: Further advice on communication and workplace access rights

<b>Date:</b>	25 February 2021	<b>Priority:</b>	Medium
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2021-2405

Action sought		
	Action sought	Deadline
Hon Michael Wood <b>Minister for Workplace Relations and Safety</b>	Agree to further advice on notification. Agree to explicit privacy safeguards. Agree to our further advice on communication. Agree to our recommendations on workplace access rights for unions.	4 March 2021

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Tracy Mears	Manager, Employment Relations Policy	04 901 8438		✓
Harry Chapman	Senior Policy Advisor, Employment Relations Policy	04 916 6091		

The following departments/agencies have been consulted

Minister's office to complete:

- |   |  |
|---|--|
| <input type="checkbox"/> Approved             | <input type="checkbox"/> Declined            |
| <input type="checkbox"/> Noted                | <input type="checkbox"/> Needs change        |
| <input type="checkbox"/> Seen                 | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn           |

Comments



## BRIEFING

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#### Purpose

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To provide supplementary advice on notification and communication processes and workplace access rights for unions in the Fair Pay Agreements (FPA) system.

#### Executive summary

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##### Notification

The New Zealand Council of Trade Unions is concerned that there is a significant risk that employers will fail to notify workers of the initiation of bargaining or pressure them to opt out of having their details passed to unions. Instead, it proposes that unions should notify workers initially. We still consider the employer-run opt out model is the best approach.

We have considered whether workers opting out of details being passed onto unions provides an adequate opportunity for workers to participate in ratification. We recommend that when workers are given an opportunity to opt out, they can either opt-out of all communications *except those relating to the ratification of the agreement* or they can opt out of all communications. This additional option is likely to be opposed by unions.

If you agree with the above recommendation, we also recommend you remove the second opt out process prior to ratification. This would speed up the ratification process and lead to a faster outcome.

We have received advice from the Privacy Commissioner on the notification process, and his view is that an opt-in process would be the best approach from a privacy perspective. The Privacy Commissioner also recommended that if you do pursue an opt-out approach, then there should be privacy safeguards built into the system. We consider there are two viable options in terms of how strong the privacy safeguards should be, with the difference being to what extent non-FPA related material can be included in the communications with non-members.

##### Communication

We recommend that the bargaining representatives should have an explicit obligation to inform the parties they represent within five working days that the vetting process has been completed and the FPA is ready for ratification or that the Employment Relations Authority has released a determination on the full terms of the FPA.

We also recommend that outside of the notification at the initiation stage, when employers are informing workers at important stages of the FPA bargaining process they should do so within 10 working days.

##### Workplace access

As we have previously advised (2021-1925) we believe that the Employment Relations Act (ER Act) approach to workplace access for unions should be carried across to the FPA system where it is applicable. Workplace access for the purposes of FPA-related matters should be protected by

the same safeguards as are in the ER Act, including that employers must not unreasonably withhold consent and penalties for refusing access without lawful excuse.

We recommend that unions should have access to workplaces without consent during FPA bargaining if there are workers within coverage and the primary purpose of the visit is FPA related. This should not preclude the union discussing other matters while at the workplace.

There is no parallel in the ER Act's workplace access provisions to an FPA being in force in a workplace with workers in coverage but without any union members. The question is whether FPAs should be treated as collective agreements for the purposes of workplace access under the system. You could either decide that unions:

- require consent from the employer – who must not unreasonably withhold it – before accessing the workplace (consistent with FPAs being legislative instruments setting minimum standards)
- be entitled to access workplaces without consent (consistent with FPAs being the equivalent of a collective agreement, even if there are no union members).

We recommend the first option. The second option would be a significant expansion of workplace access rights without consent to any workplace within coverage.

## Recommended action

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The Ministry of Business, Innovation and Employment recommends that you:

### Further advice on notification

- a **Note** that the New Zealand Council of Trade Unions has raised concerns about the employer-run opt out approach to notification because it considers there is a risk that employers will fail to notify workers or pressure them to opt out, and instead it proposes that unions should notify workers initially.

*Noted*

- b **Note** we still consider our previously recommended model of workers having an opportunity to opt out of having their details passed to unions is the best approach to notification.

*Noted*

- c **Note** we have reconsidered whether our previous advice (2021-1925 refers) about the interaction between opting out and voting in the ratification vote and now consider there should be more options on the opt out form.

*Noted*

- d **Agree** that when employees are given an opportunity to opt out, they can either opt out of all communications except those relating to the ratification of the agreement, or they can opt out of all communications.

*Agree / Disagree*

- e **Agree** to remove the second opt-out process prior to ratification (if you agree with our above recommendation).

*Agree / Disagree*

f **Note** we have sought the views of the Privacy Commissioner, who prefers an opt-in system, but who also suggests that if you choose to proceed with an opt-out system then there should be privacy safeguards incorporated into the system.

*Noted*

g **Agree** to one of the following options for how the FPA system should safeguard workers' privacy:

<p><b>Option 1: permissive</b></p> <ul style="list-style-type: none"> <li>• The contact information can be used for the purposes of communicating with non-members about the FPA and other union business.</li> <li>• Communications from the union must contain information about how to unsubscribe (i.e. opt out of communications).</li> <li>• The contact information should only be retained by the unions so long as they have a lawful purpose to retain it.</li> </ul> <p><i>Note this would be incompatible with our recommendation above that workers should be able to opt out except in relation to ratification matters. For those workers who only want to hear about ratification we recommend they be treated in line with option 2 even under this option.</i></p>	<p><i>Agree / Disagree</i></p>
<p><b>Option 2: moderate (MBIE recommendation)</b></p> <ul style="list-style-type: none"> <li>• The contact information should only be used for the purposes of communicating with non-members about the FPA (subject to the below point that some non-FPA information can be included in communications).</li> <li>• The primary purpose of all communications from the union to non-members should be the FPA. This should not prevent unions from including a message to join the union so long as the main part of the message was about the FPA.</li> <li>• Communications from the union must contain information about how to unsubscribe (i.e. opt out of communications).</li> <li>• The contact information should only be retained by the unions so long as they have a lawful purpose to retain it.</li> </ul>	<p><i>Agree / Disagree</i></p>

**Further advice on communication**

h **Agree** that the bargaining representatives should have an explicit obligation to inform the parties they represent within five working days of becoming aware that the vetting process has been completed and the FPA is ready for ratification or that the Employment Relations Authority has released a determination on the full terms of the FPA.

*Agree / Disagree*

i **Agree** that that outside of the notification at the initiation stage, when employers are informing workers at important stages of the FPA bargaining process they should do so within 10 working days.

*Agree / Disagree*

**Further advice on workplace access**

j **Note** we have previously advised (2021-1925 refers) that the ER Act approach to workplace access for unions should be carried across to the FPA system where it is applicable.

*Noted*

k **Agree** that access to workplaces for the purposes of FPA-related matters should be protected by the same safeguards as are in the ER Act, including that employers must not unreasonably withhold consent and penalties for refusing access without lawful excuse.

*Agree / Disagree*

l **Agree** that unions should have access to workplaces without consent during bargaining if there are workers within coverage and the primary purpose of the visit is FPA related, and this would not preclude the union discussing other matters while at the workplace.

*Agree / Disagree*

m **Agree** that where an FPA is in force, and there is a workplace with workers in coverage but no union members, the union should either:

require consent from the employer – who must not unreasonably withhold it – before accessing the workplace <i>(consistent with FPAs being legislative instruments setting minimum standards and MBIE recommended)</i>	<i>Agree / Disagree</i>
be entitled to access workplaces without consent so long as the primary purpose of the visit is FPA related <i>(consistent with FPAs being equivalent to collective agreements, even if there are no union members)</i>	<i>Agree / Disagree</i>



Tracy Mears  
**Manager, Employment Relations Policy**  
 Labour, Science and Enterprise, MBIE

25 / 02 / 2021

Hon Michael Wood  
**Minister for Workplace Relations and Safety**

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## Background

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1. We are providing you with a series of briefings on outstanding issues in the FPA system.
2. In briefing 2021-1925 we provided you with advice on communication, paid meetings and workplace access rights. We discussed this with you at the meeting on 10 February 2021 and indicated we would provide you with a follow up briefing to clarify some matters and confirm your decisions.
3. The NZ Council of Trade Unions (NZCTU) also recently raised concerns about the notification process.
4. This briefing provides you with follow up advice on communication requirements and workplace access.

## Follow up advice on the notification process

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5. In March 2020 we advised that employers should pass workers' contact details onto the union bargaining representatives unless workers opt out. We considered the passing on of contact details would create privacy risks, but these would be mitigated by the opt-out process and overall was justified because it would ensure unions could effectively represent all affected workers (including non-members). The former Minister agreed with our recommendation and you have maintained it.
6. We recently provided follow up advice on the timeframes by which employers must pass on these details and at what point the notification process and opt out should occur (briefing 2021-1925 refers).

## The NZCTU has raised concerns about our recommended approach

7. The NZCTU is concerned that an employer-run notification and opt-out process could result in workers either not being notified at all or being pressured to opt out of the process.
8. The NZCTU therefore recommends that *unions* should be able to directly notify affected workers, and workers should not have an opportunity to opt out of that first communication. This would necessitate employers passing on workers' contact details to unions without giving the ability for workers to opt out. They suggest that this will ensure that workers are not be pressured by their employer to opt out.
9. It also raised concerns about a situation where a large number of employees were never notified and therefore failed to participate in the ratification process. It queried whether, if these employees were discovered later, it could create legal issues.

## We consider the NZCTU has valid concerns but we maintain our previous advice

10. We have reassessed our view that there should be an opt-out process for passing on contact details to unions.
11. We do recognise there is a risk that employers will fail to notify workers or pressure them to opt out of communications.
12. We note the NZCTU's option still requires employers to pass on information to union(s). Employers could still fail to pass on contact information under their proposed option, in which case workers would not be notified by the union.
13. We still consider that an opt-out process is the most appropriate balance between privacy and making sure workers are in touch with the union.
14. You agreed that employers' communications with workers will provide information about the unions involved and how to opt in to communications with the union directly. This will provide

an alternative mechanism for workers to get in touch with unions and opt-in to communications without letting their employers know, so long as workers are actually notified.

15. We are considering in connected work what penalties should apply to employers who fail to notify workers or who put undue influence on their decision, and what should happen in the event of a ratification process which missed a number of workers.

## **The opt-out process and ratification**

*Some employees may choose to opt out of being contacted by the union, this may mean there is a risk that they will not be able to participate in the ratification vote*

16. It is critical that all employees in coverage must be notified about the ratification process so they can participate if they want to. Employees must know when the ratification process is happening, understand what they are voting on and how to participate in the process.
17. We have provided advice on the obligations to be placed on employers and unions in the notification process. We recommended that employers should have an obligation to inform all employees within coverage about critical stages of the FPA process – including ratification (briefing 2021-1725 refers).
18. Employees will be notified by their employer that an FPA has been initiated and that, unless they opt out, their contact details will be provided to the union. The union will then communicate with employees for the purposes of providing information about the FPA being bargained and so that the employee can participate in the process. All employees will be given an opportunity to opt out of having their contact details passed on to the union bargaining representatives.
19. We also advised – and you agreed – that the employer should be required to notify their employees of when the ratification is to occur. Employees would be given the opportunity to opt out of having their contact details passed on to the union (again) at this point.

*We consider workers should be able to opt out of all communications except those that relate to the ratification process*

20. There may be some workers who do not wish to have their details passed on to the union but still want to be informed about the proposed FPA and vote in the ratification process. Under the proposed process this would be impractical in many cases. For example, if a ratification vote was happening at a paid meeting and a worker, who had opted out of communication with the union, attended and wanted to vote, the union would have no evidence that the worker was within coverage.
21. Given the importance of participation in the ratification process, we consider there is an alternative to the stark options of opt-out or receive all FPA-related communications from the union. We recommend that the notification and opt out notice that is provided by the employer at initiation and ratification provides a choice for employees to only receive communications from the union if it contains the details of the ratification process (including relevant paid meetings) and the proposed FPA. In other words, workers would have three options when they are notified:
  - Opt out from all communications from the union(s).
  - Opt out from all communications from the union(s) except those relating to the ratification process (including the details of the agreed FPA, how ratification will work, details of paid meetings, and an opportunity to vote).
  - Opt in to all communications from the union(s) (by either doing nothing or communicating with the union).

22. Note that you have agreed with our recommendation that even if the worker opts out from their details being passed on to the union the workers would still receive information from the employer at important stages of the process.
23. This proposed approach would allow employees to participate in the vote (and any paid meetings) and receive the proposed FPA to make an informed decision, without requiring non-union workers to receive communications from the union outside of the ratification stage of the process.
24. We recognise that this approach will likely result in additional compliance costs for employers and unions, as they would need to maintain different databases of affected workers and what they had opted in to. Nonetheless we consider this approach is justified as it would ensure that employees could still participate in the process even if they wanted limited communication from the union(s).
25. We note that unions are likely to be opposed to this option, as they would likely view agreeing to communication with the bargaining representative throughout bargaining as a necessary precondition to participate in the voting process.

*If you agree with the above recommendation we also recommend you remove the second opt-out process prior to ratification*

26. We originally advised that there should be two notification and opt-out processes – one at initiation and one prior to ratification. The second notification and opt out process was designed to ensure that workers who had earlier opted out or who had recently started a job would have an opportunity to have their details passed onto the union unless they opted out.
27. If you agree with our above recommendation to have an opt-out process with more options for workers we consider this would mitigate the need for a second opt-out process prior to ratification. Your decision to require employers to pass on the contact details of workers who have not opted out every 90 days will also reduce the chance that workers will not have an opportunity to receive information from the union(s).
28. The advantage of removing the second opt-out process is that it would simplify the process and reduce a significant delay between an FPA being vetted and it being ratified. Under the status quo model, after vetting had concluded, there would be a delay of 15 working days as employers notified workers about the imminent ratification, and then workers would have a 20 working day timeframe to opt out. Therefore there would be a minimum of a 35 working day period before unions would have the contact details of all non-members who had not opted out.
29. Importantly we are still recommending that employers should be required to notify workers prior to ratification (without an opt-out process), but this could occur concurrently with other processes and would therefore not cause delays.
30. One potential downside of removing the second opt-out process prior to ratification is that unions may not have up to date information passed onto them from employers about which workers had left coverage (either by leaving their job or moving within an employer outside coverage). This could potentially result in some workers participating in the ratification vote even though they were not eligible to vote. We consider this risk is somewhat mitigated by the minimum statutory requirements for the ratification process run by unions (including recording employees' names, job titles and employer) which we are recommending in a separate briefing (2021-2182).

### **More specific advice on privacy safeguards**

31. We recently requested advice from the Office of the Privacy Commissioner about its views on an opt-in versus opt-out model for workers' details being passed to unions in the FPA system. The Privacy Commissioner advised the following:



The Privacy Commissioner supports the opt-in model as it is considered good privacy practice and enables individuals to exercise control over their personal information. The opt-in model is the preferred option as it will help achieve the intent of the proposal without impacting the privacy of non-union employees.

If the opt-out model is used the Privacy Commissioner suggests that the use and retention of non-union employee contact information should be limited. Unions should use non-union employee contact information only for the intended purpose and unions should not keep non-union employee contact information for any longer than they have a lawful purpose to use that information.

32. The former Minister agreed with our recommendation that “privacy risks should be mitigated where practicable”. In light of this advice from the Privacy Commissioner it would be prudent to be more specific in our advice on the privacy protections which should be built into the system.
33. We consider there are three options in terms of the privacy safeguards which unions could be subject to when they receive workers’ contact details:

Option 1: permissive	Option 2: moderate	Option 3: restrictive
<ul style="list-style-type: none"> <li>The contact information can be used for the purposes of communicating with non-members about the FPA and other union business.</li> </ul> <p><i>This is incompatible with our earlier recommendation that workers should be able to opt out except in relation to ratification. For those workers who only want to hear about ratification we recommend they be treated in line with option 2.</i></p>	<ul style="list-style-type: none"> <li>The contact information can only be used for the purposes of communicating with non-members about the FPA (subject to the below point that some non-FPA information can be included in communications).</li> <li>The primary purpose of all communications from the union(s) to non-members must be the FPA. This would not prevent unions from including a message to join the union so long as the main part of the message was about the FPA.</li> </ul>	<ul style="list-style-type: none"> <li>The contact information can only be used for the purposes of communicating with non-members about the FPA.</li> <li>Communications from the union(s) to non-members can only be about the FPA. This would prevent unions from including a message to join the union.</li> </ul>
<ul style="list-style-type: none"> <li>Communications from the union must contain information about how to unsubscribe (i.e. opt out of communications).</li> <li>The contact information should only be retained by the unions so long as they have a lawful purpose to retain it.</li> </ul>		

34. We recommend **option 2**, which strikes an appropriate balance between flexibility for the unions to provide some non-FPA related information so long as the primary purpose of communications is the FPA. This option would provide a reasonable degree of safeguards that the contact details of workers would be only be used in connection with the FPA.
35. **Option 1** is the most permissive and would allow unions flexibility to communicate with non-members about other union business which they believe will be relevant for the recipients. However, it creates the risk that more workers would opt out if they are concerned that they will receive non-FPA related communications.
36. Option 1 would also be incompatible with our recommendation in the previous section that workers should be able to opt out of communications except those which relate to ratification. If you want to combine the previous recommendation for an expanded set of options for the opt process and option 1, then we recommend that workers who have opted out except in relation to ratification should be subject to the same safeguards as option 2 (i.e. the communications they receive about ratification should be primarily about the FPA).

37. We do not consider **option 3** is viable as it would be overly restrictive and could create unnecessary disputes about whether union communications related to the FPA or not.

## **Follow up advice on communication**

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### **Timeframes for communication requirements from employers to workers outside of the initial notification**

38. We previously advised that employers should have an obligation to inform employees at various stages in the FPA process: at initiation, when coverage is finalised, when a ratification vote is imminent, when an FPA is finalised, and when the FPA comes into force.
39. We did not provide a timeframe in our earlier advice on when this should occur, except for the timeframes relating to initiation (30 working days) and ratification (15 working days).
40. We recommend that outside initiation employers should be required to inform employees at these various stages within 10 working days after they become aware of the stage. This should be feasible after initiation as employers should be aware already of which workers are within coverage.

### **We recommend that the bargaining representatives should have a specific obligation to notify the parties they represent that bargaining has concluded**

41. We have identified that employers will be obligated to inform workers prior to ratification, but there is no explicit obligation for the bargaining representatives to inform the parties they represent prior to this occurring.
42. We recommend that the bargaining representatives should have an explicit obligation to inform the parties they represent within five working days of the vetting process being successful or a determination from the Employment Relations Authority fixing the terms of a whole FPA. This would ensure that the affected parties known to the bargaining representatives would be informed so then employers could inform workers and unions can inform their members.

## **Follow up advice on rights for unions to access workplaces**

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43. At a meeting with officials on 10 February 2021 you indicated:
- you did not want to undermine union rights under the ER Act and
  - you wanted to avoid a situation where union access is unnecessarily restrictive (i.e. if non-FPA matters arise unions should not be penalised).
44. This section provides clarification and seeks your confirmation of policy decisions on workplace access for unions.
45. Below we set out for context how workplace access rights for unions operates under the ER Act.

### **Union access rights under the ER Act**

46. The workplace access rights are contained in sections 19–25 of the ER Act.
47. A representative of a union is entitled to access workplaces for a number of purposes related to (s20):
- the employment of the union's members (including bargaining for a collective agreement, dealing with health and safety issues, monitoring compliance with collective agreements, monitoring compliance with employment-related rights, etc)

- the union's business (including discussing union business with union members, recruiting employees as union members or providing information about the union to employees)
- the health and safety of any employee on the premises who is not a member of the union, if the employee requests the assistance of a representative of the union on those matters.

48. The representative of the union must obtain consent to enter workplaces unless:

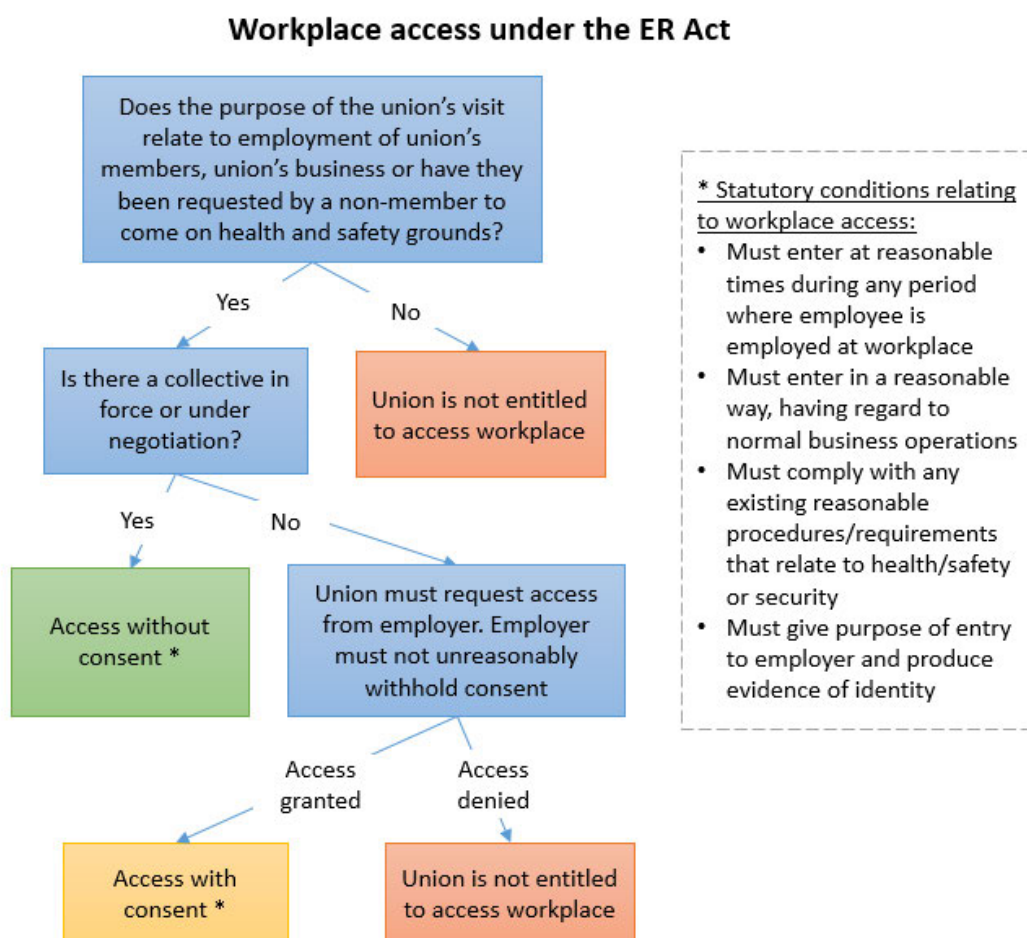
- there is a collective agreement in force and the coverage clause covers the work done by employees at the workplace
- the union or the employer has initiated collective bargaining and intends to cover work done by employees at the workplace.

49. If these above conditions are not met, then unions need the employer's consent to enter the workplace. The employer must not unreasonably withhold consent.

50. There are also conditions relating to access to workplaces. A representative of a union exercising the right to enter a workplace:

- may do so only at reasonable times during any period when any employee is employed to work in the workplace; and
- must do so in a reasonable way, having regard to normal business operations in the workplace; and
- must comply with any existing reasonable procedures and requirements applying in respect of the workplace that relate to safety, health or security.

51. The following diagram summarises the workplace access rules under the ER Act:



## **In the FPA system we recommend unions should have access to workplaces so long as the primary purpose of the visit is FPA related**

52. In general, we consider the approach in ER Act is appropriate and should be carried over to the FPA system. Importantly we are not proposing to alter unions' existing rights under the ER Act.

### Workplace access during bargaining

53. In our previous advice (briefing 2021-1925) we recommended that the approach in the ER Act for workplace access during bargaining should be carried across for FPA bargaining, including existing provisions related to minimising disruption. We also recommended that in addition to these safeguards that the purpose of the visit must be directly related to the FPA.
54. You agreed with our recommendations but indicated that restricting workplace access to where the purpose of the visit "must directly relate to the proposed FPA" was too narrow.
55. We consider some safeguards are needed, but recognise that the standard could be easier to meet. It would be a poor outcome to prevent the union representative from discussing any other matter except for the FPA.
56. Our revised recommendation is that where unions access workplaces during bargaining for an FPA the *primary purpose* of the visit must be related to the FPA. However, we recommend clarifying for the avoidance of doubt that this does not prevent unions from undertaking other union business (e.g. recruitment, gathering information on workplace issues) while in the workplace.

### Workplace access once an FPA is in place

57. Under the ER Act, there must a collective agreement in place (or under negotiation) before unions get access without consent. In the absence of a collective agreement in place or under negotiation unions would need to request access from employers, who must not unreasonably withhold consent.
58. The question for the design of the FPA system is whether a proposed or finalised FPA is the equivalent of a collective agreement for the purposes of workplace access. There are two options for how workplace access in the FPA system may be considered to be consistent with the ER Act where there are workers within coverage at a workplace:
- Option 1: The FPA is a legislative instrument which creates some minimum standards (and not a collective agreement), so a consistent approach would be to require consent for union access.
  - Option 2: The FPA is the equivalent of a collective agreement so once it is in place, unions should be able to access the workplace without consent so long as the primary purpose of the visit is FPA related – even if there are no union members in the workplace.
59. We recommended option 1. We consider option 2 would be a significant expansion of the right for unions to enter workplaces without consent. This expansion would be particularly extensive where there was an occupation-based FPA which affected workers spread across a large number of workplaces.
60. We also recommend that the existing safeguards in the ER Act should be utilised to ensure that employers do not unreasonably withhold consent to access workplaces and there are penalties for interfering with workplace access without lawful excuse.

## **Next steps**

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61. We are providing advice on the remaining aspects of the design of the FPA system required to seek Cabinet approval to draft the Bill and to inform the drafting instructions.