



BRIEFING

Fair Pay Agreements: Default bargaining parties and the ongoing role of bargaining parties once a Fair Pay Agreement is in force

Date:	30 July 2021	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2021-3938

Action sought		
	Action sought	Deadline
Hon Michael Wood Minister for Workplace Relations and Safety	<p>Agree to the recommendations on default bargaining parties and whether FPA bargaining can cease</p> <p>Agree to the recommendations on the retention of employee contact details and workplace access once an FPA is in force</p>	6 August 2021

Contact for telephone discussion (if required)			
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The following departments/agencies have been consulted
None

Minister's office to complete:

Approved

Declined

Noted

Needs change

Seen

Overtaken by Events

See Minister's Notes

Withdrawn

Comments



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Purpose

This briefing sets out options, and our recommendations, on the role of bargaining parties and default bargaining parties, in particular situations that have not yet been covered in previous decisions:

- Section A considers whether there should be situations where bargaining parties can decide to stop being a bargaining party, whether default parties should be permitted or required, and whether there should be any further mechanisms for Fair Pay Agreement (FPA) bargaining to cease.
- Section B sets out what role unions or union bargaining parties should have once an FPA is in force, and what that means in relation to the retention of employee contact details and workplace access.
- Section C considers whether any change is needed to the current system for the Employment Relations Authority (ER Authority) or the Employment Court's (the Court) ability to ask parties to intervene in proceedings, or act as a third party, as well as who should have standing to seek a determination on coverage relating to an FPA.

Executive summary

Cabinet has made a number of decisions on the rights and obligations of bargaining parties during FPA bargaining in the Cabinet paper *Fair Pay Agreements: Approval to Draft* [refer CAB-21-MIN-0126] (the FPA CAB paper). These include the application of good faith, notification requirements, the role of BusinessNZ as a default bargaining party once an FPA has been initiated, workplace access, the sharing of employee contact details and communications. You have also made some decisions on the process and requirements relating to variations and renewals. This briefing builds on these decisions.

Section A considers the possibility that one or more bargaining parties chooses to, or is unable to, continue as a bargaining party. It proposes that bargaining parties can decide to stop bargaining for any reason, rather than requiring that certain criteria be met.

If there are no bargaining parties left on the employer side during FPA bargaining, we recommend that BusinessNZ is required to be the default bargaining party (in line with the FPA Cabinet paper recommendation that BusinessNZ is required to be the default bargaining party at initiation). We also recommend that BusinessNZ:

- could choose to be the default bargaining party during the bargaining for a **variation** of an FPA, or if the employer association that initiated a **renewal** of an FPA, and all employer bargaining parties had ceased to be bargaining parties
- would be required to be the default bargaining party if the employee side initiated a **renewal** of an FPA and there was no suitable employer association willing to bargain on behalf of the employers within coverage.

If there are no bargaining parties left on the employee side during FPA bargaining, we recommend that the New Zealand Council of Trade Unions (the CTU) could choose to be the default bargaining party. If they chose not to step in, then bargaining would cease. This reflects the fact that it was the employee side that initiated bargaining. Mirroring the employer side, we propose that the CTU could choose to be the default during bargaining for a **variation**, and would be required to be the default if the employer side had initiated a **renewal**.

Allowing (or requiring) BusinessNZ and the CTU to be the default bargaining parties exacerbates the freedom of association and voluntary bargaining issues in the FPA system. However, we consider that the decisions to date have been based on the view that the curtailment of freedom of association rights is necessary for the achievement of the objectives of the FPA system.

If you approve the proposals relating to default bargaining parties, we recommend that you confirm with BusinessNZ and CTU that they are willing to be the default bargaining party in the additional situations specified and consider whether you are able to use your delegated authority from Cabinet in order to do so.

Aside from the situations where we have recommended that the relevant default bargaining party could choose to be the default, we believe enabling another other mechanisms where the bargaining of an FPA could cease would be inconsistent with the objectives of the FPA system.

Section B considers the definition of a 'relevant union' for the purposes of workplace access once an FPA is in force (which implies unions have an ongoing role) and also looks at whether unions need to retain the contact details of employees who did not opt out from having their contact details passed to the unions.

In terms of workplace access once an FPA is in force, we propose that only union bargaining parties are able to have access without consent.

We recommend that union bargaining parties are able to retain employee contact details once an FPA is in force. Communication will be constrained by the purpose for its use and employees will continue to be able to opt out of communications at any time.

Section C considers the CTU's proposals that:

- the CTU should have the right to intervene in proceedings relating to the interpretation of a term in an FPA and that union bargaining parties should have a right to be joined to proceedings relating to an FPA term that they negotiated, if they elect to do so
- unions (with members in coverage of an FPA) should be able to specify a class of employees (union or non-union) that they think should be covered by an FPA when seeking a determination on whether an employer is in coverage.

Our initial view is that we would not recommend any changes to current processes or principles where:

- the ER Authority or the Employment Court can invite a party to intervene or have third party status
- consent from an employee (union or non-union) is required to take an action on their behalf, ie to seek a determination on coverage.

We consider that these proposals would require a significant amount of work to clarify and assess the potential implications in order to provide recommendations.

Recommended action

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

Section A: Default bargaining parties and ceasing FPA bargaining

Circumstances to stop being a bargaining party

a **Agree** to one of the following options:

<u>Option 1 (recommended)</u> : Bargaining parties can decide to stop being a bargaining party without providing any reasons.	<i>Agree / Disagree</i>
<u>Option 2</u> : Bargaining parties can only stop being a bargaining party under certain circumstances (more work would be required to determine what these circumstances should be).	<i>Agree / Disagree</i>

b **Agree** that bargaining parties would be required to notify MBIE in order to give effect to a decision to stop being a bargaining party

Noted

Default employer bargaining party

c **Note** that Cabinet decided in the Cabinet paper *Fair Pay Agreements: Approval to Draft* [refer CAB-21-MIN-0126] that BusinessNZ will be the default employer bargaining party at the point of initiation

Noted

d **Agree** that BusinessNZ will be the default employer bargaining party if all employer bargaining parties cease to be bargaining parties during FPA bargaining and there is no suitable employer association willing to be a bargaining party

Agree / Disagree

e **Agree** that BusinessNZ will be required to step out of the default bargaining role if there was an eligible employer association that had members in coverage of the FPA and was willing to be a bargaining party

Agree / Disagree

Default employee bargaining party

f **Agree** to one of the following options for when an initial FPA is being bargained:

<u>Option 1</u> : The CTU is required to be the default employee bargaining party when there is no bargaining party left on the employee side.	<i>Agree / Disagree</i>
<u>Option 2 (recommended)</u> : The CTU can choose to agree to be the default employee bargaining party when there is no bargaining party left on the employee side, otherwise bargaining ceases.	<i>Agree / Disagree</i>
<u>Option 3</u> : It is not permissible to have a default bargaining party on the employee side, so bargaining ceases when there is no bargaining party left on that side.	<i>Agree / Disagree</i>

g **Agree** that the CTU will be required to step out of the default bargaining role if there was an eligible union that had members in coverage of the FPA and was willing to be a bargaining party

Agree / Disagree

Default bargaining parties in the case of a variation or a renewal

h **Agree** that BusinessNZ and the CTU are unable to agree to initiate bargaining of a variation unless they were the bargaining party for their respective side when the FPA came into force

Agree / Disagree

- i **Agree** that BusinessNZ and the CTU can choose to be the default bargaining party if all parties leave the relevant bargaining side during the bargaining of a variation, otherwise bargaining for the variation would cease

Agree / Disagree

- j **Note** that either bargaining side can withdraw their agreement to bargain a variation at any time and bargaining of the variation will cease [refer briefing 2021-3120]

Noted

- k **Note** that you have agreed and confirmed with the CTU that they are required to be the default bargaining party if there is no union (with members within coverage) willing to bargain a renewal initiated by an employer association [refer briefing 2021-3120]

Noted

- l **Agree** that BusinessNZ is required to be the default bargaining party if there is no eligible employer association willing to bargain a renewal initiated by a union

Agree / Disagree

- m **Agree** that BusinessNZ or the CTU can choose to be the default bargaining party where their own side initiated a renewal and the bargaining parties on their side have all ceased to be a bargaining party

Agree / Disagree

- n **Agree** to confirm with BusinessNZ that they are willing to undertake the role set out in recommendation d, i, l and m

Agree / Disagree

- o **Agree** to confirm with the CTU that they are willing to undertake the role set out in recommendation f (option 1 or 2), i, and m if you agree to any of those recommendations

Agree / Disagree

Ceasing bargaining for any other reason

- p **Agree** to one of the following options:

<u>Option 1 (recommended)</u> : There is no further mechanism for bargaining of an FPA or a renewal to cease (ie in addition to the possibility of bargaining ceasing under recommendation f (option 1 or 2), and m.	<i>Agree / Disagree</i>
<u>Option 2</u> : Bargaining sides are able to agree that bargaining should cease if a majority of employers and employees represented in FPA bargaining agree to this (using the same formula for each bargaining side as for the ratification vote).	<i>Agree / Disagree</i>
<u>Option 3</u> : Bargaining sides are able to agree to cease bargaining (no requirement to gain the agreement of a majority of employers or employees).	<i>Agree / Disagree</i>

- q **Agree** that the CTU or BusinessNZ would not be able to step in as a default bargaining party, if you agree to option 2 or 3 under recommendation p

Agree / Disagree

Default bargaining parties – bargaining obligations and human rights issues

- r **Note** that we consider that BusinessNZ and the CTU would be able to fulfil the bargaining party obligations required to undertake FPA bargaining set out at Annex One, for example, notification, using best endeavours to represent affected parties, information sharing, and workplace access

Noted

- s **Note** that there are freedom of association and voluntary bargaining issues associated with BusinessNZ and the CTU being default bargaining parties

Noted

Cabinet delegated authority to make decisions

- t **Note** that the approval of the proposal in the following recommendations require that you consider whether you are able to use your delegated authority from Cabinet in the Cabinet paper *Fair Pay Agreements: Approval to Draft* [refer CAB-21-MIN-0126]:
 - a. recommendation f, options 1 and 2
 - b. recommendation p, options 2 and 3

Noted

- u **Direct** officials to prepare a Cabinet paper, if you agree to any of the recommendations set out in recommendation t and you consider that approval is outside your Cabinet delegated authority

Agree / Disagree

- v **Direct** officials to liaise with the Parliamentary Counsel Office on the process for seeking approval from the Attorney-General to draft in advance, if you agree to any of the recommendations set out in recommendation t and you consider that approval is outside your Cabinet delegated authority

Agree / Disagree

Section B: Communicating with non-union employees and allowing workplace access to 'relevant unions' once an FPA is in force

Communicating with non-union employees

- w **Agree** to one of the following options:

<p><u>Option 1</u>: Clarify the purpose of collecting non-union employee contact information is primarily for FPA-related communication during bargaining and to inform employees about how to participate in the FPA ratification (unless the employee opts out). That is, the purpose for which the information is collected does not include communication with non-union employees once an FPA is in force.</p>	<p>Agree / Disagree</p>
<p><u>Option 2 (recommended)</u>: Clarify the purpose of collecting non-union employee contact information is FPA-related communication during bargaining and throughout the duration of that FPA. That is, if non-union employees do not opt out of sharing their contact details with union bargaining parties, the unions will be able to communicate during bargaining and through the life of the FPA for FPA-related purposes.</p>	<p>Agree / Disagree</p>
<p><u>Option 3</u>: Give employees a choice about the purpose for which their contact details are collected. That is, when they are notified at the initiation and ratification stages, non-union employees are given the opportunity to either:</p> <ul style="list-style-type: none"> • opt out of sharing their contact information with bargaining unions both during bargaining and when the FPA is in force OR • opt out of bargaining unions communication once the FPA is in force (ie the employee is comfortable for unions to receive their contact details for communication during bargaining and for ratification, but not after). 	<p>Agree / Disagree</p>

Workplace access

x **Note** that a decision has been made that once a FPA is in force and there are workplaces with employees in coverage of the agreement (even if they are not union members) **relevant unions** will be entitled to access workplaces without the employer's consent if the primary purpose of the visit is related to the FPA [refer CAB-21-MIN-0126, rec 26]:

y **Agree** to one of the following options:

<u>Option 1 (recommended)</u> : 'Relevant unions' for FPA workplace access purposes are unions that were bargaining parties to an FPA	<i>Agree / Disagree</i>
<u>Option 2</u> : 'Relevant unions' for FPA workplace access purposes are any union that has at least one member in coverage.	<i>Agree / Disagree</i>

z **Note** if you agree to option 1 in rec y, that the CTU has also suggested that non-bargaining party unions who represent workers covered by the FPA should be able to access workplaces which have at least one employee in coverage of an FPA but with consent

Noted

aa **Agree** either that:

<u>Option 1(CTU proposal)</u> : Any union that is not a bargaining-party and has at least one member in coverage of an FPA is able to access workplaces <u>with consent</u> once an FPA in force, even if there are no union members at that workplace.	<i>Agree / Disagree</i>
<u>Option 2 (recommended)</u> : No additional access is needed as the provisions of the ER Act enable unions who reasonably believe that the union's membership rule covers an employee who is working or normally works in the workplace to access workplaces <u>with consent</u> to discuss union business.	<i>Agree / Disagree</i>

bb If you agree to option 2 in recommendation aa above, **agree** employers are able to consider the impact of multiple union visits (for the primary purpose of discussing an FPA) when determining whether to consent to union access

Agree / Disagree

Section C: Right to intervene and standing to seek a determination on coverage

cc **Note** that under the current system, the Employment Relations Authority or the Employment Court can invite parties to intervene in a proceeding or to have third party status

Noted

dd **Note** that we do not recommend any change to allow bargaining parties, the CTU or BusinessNZ to have a right to intervene in proceedings which involve the interpretation of an FPA term

Noted

ee **Note** that we do not recommend any change to the general requirements as to who should have standing to make a complaint, where the complaint is in relation to seeking a determination as to whether employees should be in coverage of an FPA

Noted

ff **Direct** officials to report back to you on options relating to the issues set out in recommendations dd and ee if you would like further work done on these issues.

Agree / Disagree



Tracy Mears
Manager, Employment Relations Policy
Labour, Safety and Enterprise, MBIE

30 / 07 / 2021

Hon Michael Wood
Minister for Workplace Relations and Safety

..... / /

Background

1. Cabinet has made a number of decisions on the rights and obligations of bargaining parties during FPA bargaining in the Cabinet paper *Fair Pay Agreements: Approval to Draft* [refer CAB-21-MIN-0126] (the FPA CAB paper). This includes the application of good faith, notification requirements, the role of BusinessNZ as a default bargaining party when an FPA has been initiated, workplace access, the sharing of employee contact details and communications. You have also made some decisions on the process and requirements relating to variations and renewals.
2. This briefing sets out options, and our recommendations, on the role of bargaining parties and default bargaining parties, in particular situations that have not yet been covered in previous decisions.

Section A: Default bargaining parties and ceasing FPA bargaining

3. The current decisions relating to obligations on bargaining parties assume that once identified as meeting the requirements, the bargaining parties remain part of the bargaining side for the duration of FPA bargaining. However, we need to consider the possibility that one or more bargaining party chooses to, or is unable to, continue as a bargaining party. This section considers the following issues:
 - whether bargaining parties can stop being a bargaining party
 - whether default bargaining parties should be permitted or required if there were no bargaining parties left on a bargaining side
 - whether FPA bargaining can cease for any other reason.
4. The options in this section are assessed against the following criteria:
 - *balance between certainty and flexibility* – whether the option provides the right balance between parties being able to make decisions in their best interests and certainty as to how the system will operate
 - *minimal disruption to bargaining* – the impact of the option on FPA bargaining, including the balance of rights and obligations on either bargaining side
 - *consistency* – whether the option is consistent with the overall design and objectives of the FPA system
 - *workability* – whether the option is feasible and supports the smooth operation of the FPA system.
5. A summary table of our recommendations on when BusinessNZ or the CTU would be required, or could choose, to be the default bargaining party at particular stages of the FPA process is set out at Annex One.
6. The approval of proposals that would permit BusinessNZ and the CTU to be a default bargaining party in additional situations require that you consider whether you are able to use your delegated authority from Cabinet in order to do so. This is discussed in a later section.

Should a bargaining party be able to stop being a bargaining party?

7. Any party that meets the representation criteria to be a bargaining party and has been verified by MBIE can join the bargaining side at any time during bargaining [refer FPA CAB

paper and briefing 2021-3525]. However, it is possible that during FPA bargaining, a bargaining party may wish to leave an FPA bargaining side, ie stop being a bargaining party. There are a number of reasons why a bargaining party may want to leave the side. For example, a party may become insolvent, or cease to operate, or they may decide that they no longer have the capacity or financial resources to undertake the functions required to participate in FPA bargaining (ie information gathering, communications, advocacy) or may wish to direct their efforts towards bargaining of another FPA or focus on general collective bargaining.

8. In the extreme, if all bargaining parties from a bargaining side wanted to leave, the bargaining side may be left with no bargaining party. If no bargaining party remained on one bargaining side, it raises the question of whether and how bargaining should proceed. It is possible that the default position is that bargaining could cease. This would not be consistent with the expectation that once an FPA is initiated then an FPA will be created. If bargaining is not to cease, there needs to be some mechanism for a bargaining party to be identified. This is discussed further in the sections below on the situations in which a default bargaining party should be required or permitted.
9. We have considered two options for the circumstances in which a party can stop being a bargaining party:
 - Option one (recommended): Bargaining parties can decide to stop being a bargaining party without needing to provide any reasons.
 - Option two: Bargaining parties can only stop being a bargaining party under certain circumstances (more work would be required to determine what these circumstances should be).
10. We do not recommend the option of preventing a party from ever ceasing to be a bargaining party as it would always be possible for an entity to cease to exist or fail to continue to meet the eligibility criteria for FPA bargaining.
11. Under both the options below, bargaining parties would be required to notify MBIE in order to give effect to a decision to stop being a bargaining party.

Option one (recommended): Bargaining parties can decide to stop being a bargaining party without needing to provide any reasons

12. MBIE recommends this option as it would provide maximum flexibility for a bargaining party to decide to stop being a bargaining party whenever they saw fit, and if it was in their members' best interests, without needing to provide reasons to do so – BusinessNZ prefers this option.
13. It would be possible that bargaining for an FPA that covered a large industry with multiple occupations could take a number of years. A bargaining party that considered it had the resources, time and capacity to participate in FPA bargaining when it joined a bargaining side, may find that it no longer does so after a period of time. It would not seem reasonable to require an entity to continue to bargain when they are financially unable (particularly if it caused them to be insolvent) to or unwilling to do so (ie an entity may want to focus on providing other services to its members).
14. However, allowing parties to leave for any reason means that a bargaining side could be left with very few, or no, bargaining parties while FPA bargaining is in train. This could disrupt the bargaining process, and create uncertainty, by the loss of expertise or knowledge on a bargaining side. It could also create a larger workload for the remaining parties.

15. If only one bargaining party remained¹, it could mean that only one entity (which may represent a portion of a sector or occupation, or be a very small entity) would be responsible for representing and negotiating an FPA on behalf of the entire sector. However, it is likely that bargaining sides for FPAs will vary in their representativeness and it would be possible for only one entity to comprise a bargaining side even from the outset.
16. There may also be a risk that a union could initiate bargaining and thus encourage other unions to become bargaining parties, but then leave the bargaining side as long as at least one other union has joined, or if a default party was required or permitted to continue bargaining in their absence (see next section on default bargaining parties).

Option two: Bargaining parties can only stop being a bargaining party in specified circumstances

17. The CTU considers that there needs to be a high threshold in order to stop being a bargaining party, and that parties should not simply be allowed to choose to leave, given their obligations to use their best endeavours to come to an agreement on the terms of the FPA in an orderly, timely and efficient manner.
18. This option would need to specify the circumstances when a bargaining party could be allowed to stop bargaining in specified circumstances, ie they have been put into liquidation. If this was your preferred option, we would need to do further work on what these circumstances should be.
19. Only being allowed to stop being a bargaining party under certain circumstances could disincentivise parties from initiating an FPA in the first place, or volunteering to be a bargaining party – this may be particularly relevant for small unions or small employer associations. This may in turn affect freedom of association if it acts as a barrier to employers or employees having their chosen representative on the bargaining side.
20. The CTU considers that this option would not result in bargaining parties representing employers being disincentivised to participate as they are likely to want to be part of the bargaining side to represent the interests of their constituency.
21. An entity considering being a bargaining party would need to carefully consider the volume and nature of work that could be expected over the duration of FPA bargaining, the people required to do the work, as well as the financial resources needed to cover the cost of performing that work. These are decisions that any potential bargaining party would need to make. However, only being able to stop being a bargaining party in certain circumstances could mean that an entity may want to be more certain about these variables before deciding to be a bargaining party, than they would otherwise if they could leave the table for any reason. It will be difficult to have a clear picture of all of these variables from the outset as the duration of bargaining is inherently uncertain.
22. MBIE does not recommend this option as we do not consider that it is reasonable to expect a bargaining party to remain at the table until they become insolvent, or other such high threshold. A bargaining party should be able to decide that continuing with FPA bargaining is unsustainable before this point.
23. However, this option could result in more certainty that a bargaining side would continue intact throughout the bargaining process and result in less disruption to bargaining.

¹ The recommendations in the briefing *FPA: How the Public Service, Education Service and District Health Boards should interact with bargaining* [refer briefing 2021-4436] mean that for FPAs that cover both the private sector and the specified public sectors, on the employer side there would always need to be two bargaining parties – the delegate of the Public Service Commissioner and a further employer representative.

24. We also considered, and discounted, the following options:

- *Setting a lower threshold for leaving as a bargaining party* - We thought that it would be difficult to anticipate all the reasons that a party might want to leave the bargaining table that were less onerous than a criteria such as insolvency. It would also be difficult to set a threshold for different factors, such as what would qualify as a lack of capacity or financial resources.
- *Allowing bargaining parties to leave if they had 'reasonable grounds'* - In practice, we consider that this option would lead to a similar result as option one but it would cause uncertainty as parties would be unsure as to whether their reasons for leaving would be challenged.

Should a default bargaining party be required or permitted if there was no bargaining party left on one side during bargaining of the initial FPA?

25. Our recommendation that a bargaining party does not need to provide reasons to leave a bargaining side leads to the consideration as to whether a default bargaining party should be permitted or required if all bargaining parties leave a particular bargaining side.

If there are no parties left on the employer side during FPA bargaining, BusinessNZ should be required to be the default

26. In the FPA Cabinet paper, Cabinet agreed that BusinessNZ will be the default representative for employers after initiation of FPA bargaining, if it is unable to find a willing or a suitable representative within three months. As a union is required to initiate FPA bargaining, there will always be a union employee bargaining party at this point.
27. We consider BusinessNZ should be required to become the default bargaining party if there were no party left on the employer bargaining side during FPA bargaining. This is a logical extension of Cabinet's decision that BusinessNZ should be the default bargaining party if there were no employer representation at the point of initiation as it is already possible that BusinessNZ could be in the position of having to carry out FPA bargaining on the employer side.
28. The rationale for requiring BusinessNZ to be the default is that one of the risks with the FPA system is that it does not incentivise employers to participate. The system, therefore, needs to include a mechanism to overcome the risk that bargaining cannot commence due to a lack of willing and suitable employer representation. The same risk applies during FPA bargaining.
29. BusinessNZ has advised that, if there ceased to be any employer bargaining party during bargaining for an FPA, they would be willing to be the default bargaining party, if they were unable to find any other entity that was suitable and willing to be a bargaining party on the employer side (after a period of time). BusinessNZ considers that it may be difficult for them to commit to being the default in every case, but that there is no other practical alternative for the system to work and for parties to be able to continue bargaining.
30. At any stage of the bargaining process, if another employer bargaining party met the requirements (including having a member with employees in coverage) and was willing to undertake FPA bargaining on the employer side, BusinessNZ should be required to step out of the default role.
31. We have considered the ability for BusinessNZ to fulfil the functions and meet the obligations of being a bargaining party (see table at Annex Two). A later section also canvasses the human rights issues this may pose.

32. If you agree that Business NZ should be the default bargaining party where there are no bargaining parties left on the employer side, then we recommend that you confirm with BusinessNZ that they are willing to be the default employer bargaining party during FPA bargaining in this situation.

Should a default bargaining party be required or permitted if there was no bargaining party left on the employee bargaining side?

33. The initiation of an FPA requires a union to apply, thereby requiring the employer side to participate in bargaining.
34. We have considered three options relating to what should happen if there were no bargaining party left on an employee bargaining side during bargaining for an initial FPA:
- Option one: The CTU is required to be the default employee bargaining party when there is no bargaining party left on the employee side.
 - Option two (recommended): The CTU can choose to be the default employee bargaining party when there is no bargaining party left on the employee side, otherwise bargaining ceases.
 - Option three: It is not permissible to have a default bargaining party on the employee side and bargaining ceases when there is no bargaining party left on that side.
35. If you agree to either option one or two we recommend that you confirm with the CTU that they are comfortable to play that role.
36. We have considered the ability for the CTU to fulfil the functions and meet the obligations of being a bargaining party, if options one or two were chosen (see table at Annex Two). A later section canvasses the human rights issues this may pose.

Option one: The CTU is required to be the default employee bargaining party when there is no bargaining party left on the employee side

37. This option would mean that, if there was no bargaining party left on the employee side, then the CTU would be required to be the default bargaining party. This mirrors the requirement for BusinessNZ to be the default employer bargaining party (ie BusinessNZ must be the default if there are no employer bargaining parties left).
38. The CTU has told us that they would be willing to step in as the default to complete bargaining as long as there was a reciprocal obligation on BusinessNZ to fulfil the same function on the employer side.
39. The CTU also told us that they would like to be able to delegate their role as the default bargaining party to other union affiliates where possible. We consider that if there was a union who had members in coverage of the FPA, and they were willing to undertake bargaining, then the CTU should step out of the default role. If there was a union that wanted to provide the CTU with support during the bargaining, the CTU should be able to accept that support but the bargaining obligations would remain with the CTU.
40. This option does not provide the flexibility for the CTU to decide whether it had the capacity to be the default bargaining party as it would be required to be the default in every case. There is a risk with this option that unions may initiate an FPA and then decide to stop being a bargaining party, ie if they considered that bargaining or the ratification process was too costly, knowing that the CTU would be required to be the default in every case. If this did occur it could put pressure on the CTU's resources. The risk increases if the option one is chosen from the above section, ie that a bargaining party can stop being a bargaining party for any reason, rather than only in specific circumstances.

41. However, this option would provide less disruption and more certainty to bargaining compared with the other options, and it would be consistent with the design of the FPA system, as there would be default bargaining parties on each side to continue bargaining.

Option two (recommended): The CTU can choose to agree to be the default employee bargaining party when there is no bargaining party left on the employee side, otherwise bargaining ceases

42. This option would mean that, if there was no bargaining party left on the employee side, the CTU could choose whether to be a default bargaining party. If the CTU declined to be a default bargaining party, then bargaining would cease.
43. We consider that the initiation test provides the mandate for bargaining and, as long as there is also employee representation (either through a union in coverage or the CTU as default), then there should be an opportunity for bargaining to continue. If the CTU declines to step in as the default, and there is no entity able to represent employees, bargaining should cease. This would be the first scenario in the FPA system where there is a possibility that bargaining could cease.
44. On the face of it, allowing the CTU to *choose* whether to be the default does not mirror the *requirement* for BusinessNZ to be the default party during FPA bargaining. In order to balance the rights and obligations between the CTU and BusinessNZ, we consider that, if you choose this option, BusinessNZ should be able to *choose* whether to be the default during bargaining for a renewal, if the employer side had initiated the renewal and all employer bargaining parties had left (this is canvassed in the later section on default bargaining parties in relation to a variation or a renewal).
45. MBIE recommends this option as it allows the employee bargaining side, through combination of union and CTU decisions, to decide where to focus their efforts to get the best outcomes for employees. This could include ceasing to bargain a particular FPA (by union bargaining parties ceasing to be bargaining parties and the CTU deciding not to step in as default) and focusing on another FPA or on general collective bargaining, such as Multi-Employer Collective Agreements. It would reduce the risk of a union initiating an FPA with the expectation that CTU would bear the costs associated with bargaining and ratification.
46. This option has the potential to disrupt bargaining as there is the possibility that bargaining will cease if the CTU declines to be the default bargaining party.
47. There is a risk that the CTU may make inconsistent decisions relating to when they decide to be the default, decisions based on their own interests or membership, or decisions that some consider to be unfair.
48. Another risk is that it may increase the incentive for litigious behaviour. Under FPA bargaining, there is the potential for some employer bargaining parties to be litigious to delay an FPA being negotiated. If an employer bargaining side considered that they did not want FPA bargaining to continue, they could adopt a litigious approach which could result in financial pressure on employee bargaining parties and impact on union capacity to continue bargaining. If the CTU decided not to be the default bargaining party in this case, then bargaining would cease. The bargaining obligations could mitigate this to some degree, but are unlikely to remove the risk.

Option three: It is not permissible to have a default bargaining party on the employee side and bargaining ceases when there is no bargaining party left on that side

49. This option would mean that bargaining would cease if there were no bargaining party left on the employee bargaining side – the CTU would not be permitted to be a default bargaining party. The rationale for this option is that, considering that a union with at least one member in coverage of the FPA is required to initiate an FPA, bargaining should only continue if a union that meets the requirements is willing to represent employees in bargaining, ie union representation is an essential ingredient for FPA bargaining to continue.

50. This option is more likely to disrupt bargaining as it is more likely that it could cease given that a default bargaining is not permitted on the employee side. As such it could increase the risk of litigious behaviour on the employer side in order to force the union to cease being a bargaining party and try to avoid an FPA in that occupation or industry.
51. Under this option, unions would have the flexibility to cease to be a bargaining party but the consequences are significant (ie bargaining would cease) so it may result in some union bargaining parties continuing as bargaining parties even where it may not be in the best interests of their organisation.
52. We do not consider that this option is consistent with the intent of the FPA system.

We considered a further option, but discounted it

53. The CTU also mentioned a further option in discussions with us but did not set it out in their formal response. The CTU suggested that the bargaining side that remains in existence should be able to seek a determination from the ER Authority to fix the terms and conditions of the FPA.
54. We do not consider this option to be workable for the following reasons (and have not considered it further):
 - It is not clear who would represent the side at the ER Authority that was no longer represented by any bargaining parties.
 - Under this option, it would be possible for an FPA to go to the ER Authority for a determination, where bargaining had not been underway for very long. If this was the case, the parties are unlikely to have done much ground work to base negotiations on, or thought about the terms and conditions they may be willing to agree on, at least in some areas. This could leave the ER Authority without much information on which to base a determination to fix terms.
 - Seeking a determination from the ERA to fix the terms and conditions of an FPA should be a high threshold as the parties are no longer able to have any control over negotiating terms and conditions that they can both agree on. This option would mean that either bargaining side could relatively easily trigger a determination by simply withdrawing from bargaining.

Should there be a default bargaining party in the case of a variation or renewal?

Variation

55. In the briefing on variations and renewals [refer briefing 2021-3210] you agreed that the agreement of both bargaining sides is required to initiate a variation. The briefing specified that the bargaining parties that could initiate a variation would be those that were involved in bargaining the initial FPA, including those who may have joined as a bargaining party during bargaining (further parties could join in to bargain the variation once it had been initiated).
56. If BusinessNZ or the CTU was the bargaining party at the time the FPA came into force, then the above recommendation would mean that they would be able to agree to bargain a variation. However, if all the bargaining parties on a particular side ceased to exist after the FPA had come into force, we do not consider that BusinessNZ or the CTU should be able to step in as a default to agree to bargain a variation – we consider this is more consistent with the decision only to allow the original bargaining parties to decide whether bargaining for a variation should be agreed.

57. Consistent with the decision that bargaining sides can agree to stop bargaining for a variation at any time during the process [refer briefing 2021-3210], we consider that BusinessNZ and the CTU should be given the option to choose whether to step in as the default bargaining party if all bargaining parties leave a particular side during the bargaining of a variation. If they did not choose to step in as the default, then bargaining of the variation would cease.
58. The risk with this approach is that there may be no 'safety valve' to enable bargaining for a variation to be agreed if there is an economic shock and there are no parties left on a bargaining side (or both), either before or during bargaining for a variation. Parties would need to wait until the FPA could be renewed before any changes could be made. This should incentivise bargaining parties to remain as bargaining parties during the duration of an FPA.

Renewal

59. We consider that the approach to default bargaining parties for a renewal should mirror our recommendations in relation to default bargaining parties for FPA initiation and bargaining.
60. You have agreed and confirmed with the CTU that they are required to be the default bargaining party if there is no union (with members within coverage) willing to bargain a renewal *initiated by an employer association* [briefing reference 2021-3120].
61. In order to mirror this requirement, we consider that BusinessNZ should be required to be the default bargaining party if there is no eligible employer association willing to bargain a renewal *initiated by a union*. We consider that this would be a logical extension of the Cabinet decision for BusinessNZ to be the default bargaining party at initiation and would fall under your Cabinet delegation of authority.
62. During the bargaining of a renewal, we consider that BusinessNZ or the CTU can choose to be the default bargaining party if the renewal was initiated by their side and all the bargaining parties on their side withdraw during bargaining the renewal.
63. There is a risk that allowing BusinessNZ to choose whether to be the default (if the employer side had initiated a renewal) could result in bargaining for a renewal to cease, where all employer associations leave bargaining and BusinessNZ declines to step in. However, this is, consistent with the approach recommended in relation to bargaining of the initial FPA (where the CTU would be able to choose whether to be the default). If bargaining for the renewal did cease, and the employee side wanted to continue, they could then initiate the renewal themselves – which would mean BusinessNZ would be required to be the default bargaining party.

Can bargaining cease for other reasons?

64. The options above which would allow the CTU to choose whether to be a default party or not on the employee bargaining side (plus allowing the CTU or BusinessNZ to choose not to be the default for a renewal initiated by their side) already provide mechanisms for the possibility for FPA bargaining to cease. We consider that there may be other situations why bargaining parties, including union parties, may consider that bargaining should cease. However, we do not have concrete examples. This section considers whether there should be any further mechanism for bargaining to cease, for example, if bargaining sides agree that it is in both their best interests.
65. We consider that there are three options:
 - Option one (recommended): There is no further mechanism for bargaining to cease.
 - Option two: Bargaining sides are able to agree that bargaining should cease if a majority of employers and employees represented in FPA bargaining agree.

- Option three: Bargaining sides are able to agree that bargaining should cease (no requirement to gain the approval of employers or employees).
66. If you wanted to choose options two or three, we consider that the CTU or BusinessNZ would not be able to step in as a default bargaining party.

Option one (recommended): There is no further mechanism for bargaining to cease

67. The purpose of the FPA system is for parties to collectively bargain minimum employment terms and conditions across an occupation or an industry. The expectation is for an FPA to result once one has been initiated. Therefore, not providing a further mechanism for bargaining sides to cease bargaining would be the most consistent with the system's objective. It would also provide more certainty and minimal disruption to bargaining.
68. This option would provide less flexibility than the other options as bargaining sides would have to turn their minds, and negotiate, both the mandatory to agree and mandatory to discuss terms.
69. Bargaining sides could simply agree to existing statutory minimum employment entitlements for the 'mandatory to agree' terms, and they could agree to no changes to the 'mandatory to discuss' terms. However, an FPA that makes no changes to statutory minimum entitlements may be unlikely to pass a ratification vote, making a determination more likely.
70. Under this option, if bargaining sides did want to agree to stop bargaining (even though the legislation would not provide a mechanism for this), they would need to consider the risk of the other side changing their mind and wanting to resume bargaining at some stage. If this happened, they could make a complaint to the ER Authority - this would create uncertainty.

Option two: Bargaining sides are able to agree that bargaining should cease if a majority of employers and employees represented in FPA bargaining agree

71. This option would mean that FPA bargaining would cease where a majority of the employers and employees that they represented in coverage agreed (applying the vote weighting and threshold for ratification of an FPA). This would require bargaining sides to put the matter to a vote. Requiring the agreement of employers and employees would better ensure that any agreement between the bargaining sides to stop bargaining was supported by the people they represented.
72. If you were to choose this option we would recommend that the same formula for weighting the ratification votes of employers and employees for a vote to approve an FPA be used for this situation.
73. This option would provide more flexibility for bargaining parties than option one. It would also alleviate any further freedom of association issues that would arise by requiring parties to continue bargaining, potentially while represented by BusinessNZ or the CTU as default bargaining parties. However, this option would provide less certainty that bargaining wouldn't be disrupted and would therefore be less in line with the objective of the system.
74. This option has high compliance costs as undertaking a ballot would take a lot of time and resource. We consider that the importance of the decision and ensuring that it is supported by employers and employees, would outweigh these compliance costs. The compliance costs would also help to ensure that bargaining parties thought very carefully about whether ceasing to bargain was the right decision, compared with option three.

Option three: Bargaining sides are able to agree that bargaining should cease (no requirement to gain the approval of employers or employees)

75. This option is the most flexible for bargaining sides but has the most potential to disrupt bargaining as bargaining parties would be able to agree to stop bargaining for an FPA

without needing to seek the views of the employers or employees that they represented. We consider this option to be the least consistent with the FPA system and its objective.

76. We consider that there are considerable risks with this option in relation to not requiring approval from the people the bargaining sides represent, which is contrary to the principles of the system and we do not recommend it.

There are freedom of association and voluntary bargaining issues associated with default bargaining parties

Freedom of association

77. The FPA Cabinet paper already recognised the freedom of association issues relating to the FPA system not requiring bargaining sides to demonstrate their ability to represent employers and employees. It was noted in that paper that tightly construed representativeness requirements for a bargaining side could frustrate the entire FPA system, if sufficiently representative parties did not exist.
78. These freedom of association issues may be exacerbated by providing for default bargaining parties on either side as they will be one step further removed from the employees within coverage than the original union bargaining parties. For example, employees would have no choice but to be represented by the CTU – even those who had supported the initiation would have done so on the understanding that the initiating union, at a minimum, would be representing them in bargaining.
79. However, without this requirement for a mandatory default bargaining party, then it is possible that very little FPA bargaining would go ahead due to the lack of incentives in the system for employers to participate. The decisions to date have been based on the view that the curtailment of freedom of association rights is necessary for the achievement of the objectives of the FPA system. The recommendations in this briefing apply the same rationale.
80. We have proposed that the default bargaining parties be the umbrella employer and employee representative organisations (ie BusinessNZ and the CTU. These organisations are recognised in the ILO as the single most representative organisations of employers and workers in New Zealand.

Voluntary bargaining

81. The FPA Cabinet paper recognised that the FPA system would challenge the principle of voluntary collective bargaining. Once FPA bargaining had been initiated, the intention is that an FPA will result, either through successful ratification, or by having its terms fixed by the ER Authority. Initiation also only requires assent from employees – employers would not have a say.
82. As the Cabinet paper recognises, if employer assent were required to initiate FPA bargaining, it is likely to significantly reduce the instances of successful initiations. Likewise, if a default bargaining party was not required or permitted, where all bargaining parties on a particular side had left the table, it could increase the situations where an FPA is initiated but not able to be finalised.

You need to consider whether your delegated authority from Cabinet enables you to make certain decisions

83. The approval of the policy proposals that would permit a default bargaining party require that you consider whether you are able to use your delegated authority from Cabinet in order to

do so. The Department of the Prime Minister and Cabinet's guidance on items that need consideration by Cabinet states that 'Ministers should put before their colleagues the sorts of issues on which they themselves would wish to be consulted. Ministers should keep their colleagues informed about matters of public interest, importance, or controversy' and that the 'following matters must be submitted to Cabinet: a) significant policy issues...'

84. If you choose to approve the policy under your delegated authority from Cabinet, and later confirm the proposal at Cabinet Legislation Committee, we can provide drafting instructions to the Parliamentary Counsel Office to draft the legislation in reliance on your authorisation of the policy. However, there would be a risk that if Cabinet did not agree to the proposal at that stage, PCO would need to redraft a number of sections of the legislation (incorporating any decisions on default bargaining parties or stopping bargaining will also have an impact on current drafting).
85. If you do not consider that these decisions are within your delegated authority, PCO would need to ask the Attorney-General for approval to draft in advance of Cabinet decisions or you will need to go back to Cabinet to get authorisation. In the project plan, we have already accounted for the potential to have to go back to Cabinet for further decisions. If you decide to seek Cabinet's authorisation for any of the proposals outlined above, you could schedule this for the 8 September Economic Development Committee and the 13 September Cabinet meetings.
86. We have set out some considerations for deciding whether the decisions relating to default bargaining parties, and the potential for bargaining to cease, fall within Cabinet's delegated authority:
 - As there is already a Cabinet decision to have BusinessNZ as the default on the employer side, we need to consider whether there needs to be a default bargaining party on the employee side to make the system work, ie to enable the employee side to continue to be represented and keep bargaining where an FPA has been initiated. This is consistent with the objective of the system to improve labour market outcomes by enabling employer and employees to collectively bargain industry of occupation wide minimum employment terms.
 - Cabinet agreed in the FPA Cabinet paper that only registered unions with at least one member in coverage can represent union and non-union employees in FPA bargaining. The rationale for this decision is that it is part of a union's core functions to represent employees in bargaining (their own members) and that they are therefore the most appropriate entity to represent all employees in FPA bargaining. Allowing the CTU to be the default employee bargaining party would mean that an entity that did not directly represent employees would be bargaining an FPA on their behalf. However, the CTU is recognised in the ILO as the single most representative organisation for workers in New Zealand and has access to bargaining capability.
 - Approval of any option that could result in bargaining ceasing would be the first point in the system that this has been considered.
 - The CTU would have an obligation to act both in its member unions' interests, as well as the interests of all employees in coverage of an FPA it was bargaining for.

Section B: Retaining employee contact details and allowing workplace access once an FPA is in force

87. Once an FPA is in force, it has already been decided that 'relevant' unions will have access without consent to workplaces with workers within the coverage of the FPA even if there are no members of the union at the workplace. The ability of unions to access workplaces without consent implies that relevant unions will have an ongoing role in the representation of non-union members in respect of the FPA. This section considers whether unions need to retain the contact details of employees who did not opt out from having their contact details passed to the unions in order to fulfil their ongoing role and the definition of a relevant union for the purposes of workplace access.

We have considered whether union bargaining parties should be allowed to retain contact information once an FPA is in force

88. Cabinet agreed that employers will be required to pass on contact details of each employee within coverage of the proposed FPA to the union bargaining side within a specified timeframe unless the employee opts out of having their contact details passed on. The FPA Cabinet paper outlines that during bargaining of an FPA, employers must pass on the details of those newly in coverage to the union bargaining party representative periodically as specified (for example, each 90 days).
89. It is important for the workability of the system that during bargaining, union bargaining parties are able to communicate with both union and non-union members so that they can participate if they want to and are aware of the content of the FPA before voting in ratification.
90. The CTU has advised that union bargaining parties will expect to continue to have a role communicating with employees within coverage while an FPA is in force in order to:
- communicate the terms of the FPA so non-member employees are aware of what they are entitled to, ie letting people know when an increase in wages should take place
 - seek information about whether people are experiencing problems with the implementation of terms in the FPA
 - seek information on peoples' key issues with the FPA to inform processes for any variation or renewal.
91. The CTU has indicated they believe unions should be able to retain non-union employee contact details to enable them to undertake this communication.
92. BusinessNZ highlighted employers are likely to inform their staff about FPA entitlements. However, once an FPA is in force, employers are only required to notify employees when the FPA is set to be renegotiated or renewed. There is no requirement for an employer to notify employees of a change in their entitlements that occurs in line with the FPA (ie when an increase in wages is set to take place) but the employer will need to make the change in order to be compliant with the FPA. BusinessNZ recognised that unions may want to provide their own updates to employees. BusinessNZ were not opposed to union bargaining parties retaining non-union employee contact information.
93. The key question is whether the benefit of these roles is sufficient to justify the retention of contact information that had been provided to the unions for the purpose of communication during bargaining.

Criteria

94. We have used the following criteria to assess the proposed options as to whether or not a union bargaining party should be able to retain non-union employee contact details once an FPA is in force.
- *Privacy* – employees privacy is not compromised
 - *Accessibility* - the ability for employees to be informed about issues relating to the FPA
 - *Workability* – the option supports the smooth operation of the FPA system
 - *Compliance costs* – compliance costs are reasonable.

Options

95. The following options were assessed against the criteria:
- Option one: Clarify the purpose of collecting non-union employee contact information is primarily for FPA-related communication during bargaining and to inform employees about how to participate in the FPA ratification (unless the employee opts out). That is, the purpose for which the information is collected does not include communication with non-union employees once an FPA is in force.
 - Option two (recommended): Clarify the purpose of collecting non-union employee contact information is FPA-related communication during bargaining and throughout the duration of that FPA. That is, if non-union employees do not opt out of sharing their contact details with union bargaining parties, the unions will be able to communicate during bargaining and through the life of the FPA for FPA-related purposes
 - Option three: Give employees a choice about the purpose for which their contact details are collected. That is, when they are notified at the initiation and ratification stages, non-union employees are given the opportunity to either:
 - opt out of sharing their contact information with bargaining unions both during bargaining and when the FPA is in force
- OR
- opt out of bargaining unions communication once the FPA is in force (ie the employee is comfortable for unions to receive their contact details for communication during bargaining and for ratification, but not after).

Analysis

Should the purpose of collecting non-union employee information provide for union bargaining parties to communicate with non-union employees throughout the duration of a FPA?

96. Before considering all three options, it is important to determine whether there are good reasons for union bargaining parties to be able to communicate with non-union employee contact details throughout the duration of the FPA for the primary purpose of communicating about the FPA. That is, the merit of option one versus options two and three.
97. As mentioned, relevant unions will have access to workplaces which assumes an ongoing role once an FPA is in force. Requiring union bargaining parties to cease communication with non-union employees does not support this implied role. Rather it could increase the frequency of workplace visits as unions would not have other means to communicate directly with non-union employees.

98. Enabling unions to communicate with non-union employees once an FPA is in force will support the smooth operation on the FPA system. Both options two and three enable bargaining unions to communicate with employees within coverage of an FPA regardless of whether they are a union member. Maintaining open lines of communication will assist bargaining unions with renewals or the need for a variation. In addition, unions will have the opportunity to raise awareness around any entitlements employees should receive under the FPA.
99. During bargaining, it is important for the workability of the system that bargaining representatives can communicate with both union members and non-union members. While the workability of the system will not be compromised by preventing unions from communicating with non-union employees once an FPA is in force it may reduce employee access to information from unions about the FPA.
100. Enabling unions to communicate with non-union employees while an FPA is in force would align with privacy principles provided there is a specified purpose (and length of time) for communication and non-union employees would be given the opportunity to opt out of their contact details being shared under options two and three.

We considered requiring union bargaining parties to dispose of non-union employee information once an FPA was in force

101. We considered requiring unions to dispose of non-union employee information under option one. However, we understand it would be unusual to have a provision that requires disposal of information. Instead, it is more common to specify the purposes for which information can be required or used. Option one will require unions to implement a process that ensures once an FPA is in force, non-union employees do not receive communications. This process aligns with standard client information management and we do not envisage that this would significantly increase the workload of bargaining unions.

If bargaining party unions are able to communicate with non-union employees once an FPA is in force, should employees be given more choice at the-opt out stage/s?

102. There is very little difference between options two and three. Both options give non-union employees the opportunity to opt out of sharing their contact details with bargaining unions at any stage of FPA bargaining. The key difference between the two options is that under option three, at the ratification stage, employees are given a specific choice about how long the unions are authorised to communicate with them.
103. Under option two, employees are given a single opt out approach from sharing their contact details with unions before ratification. When considering the opt-out model, the Privacy Commissioner suggested the use and retention of non-union employee contact information should be limited. Specifically, unions should not keep non-union employee information for any longer that they have lawful purpose to use that information.
104. It is more in line with privacy principles to provide employees with a choice as to whether a union can retain their details only during FPA bargaining, or also once an FPA is in force. Under option three, employees will be given the choice at ratification as to whether union bargaining parties are able to continue communicating with them once an FPA is in force. Providing employees greater choice around opting out at the ratification stage balances the workability of the FPA system, against empowering employees to exercise control over their own privacy. If an employee specifies that they did not want the union bargaining party to communicate with them once the FPA was in force, the union would need to ensure they cease communication with that employee at that point in time.
105. In addition, the employee would continue to have the option to opt out from union communications or make a complaint under the *Privacy Act 2020*.

106. In terms of workability for unions, option three will require unions to implement a process that keeps track of whether they need to stop communicating with non-union employees when the FPA comes into force or once it expires. This process aligns with standard client information management and we do not envision it significantly increasing the workload of bargaining unions.
107. Option three will also require employers to implement a process that allows them to differentiate between employees who have selected different opt out options. While this would result in higher compliance costs for employers, it is unclear how much of an increase this would be.

We recommend if non-union employees do not opt out of sharing their contact details, union bargaining parties will be able to communicate with them once an FPA is in force for the purpose of FPA-related communication

108. Overall, we recommend option 2 – it should be made clear to employees that if they do not opt-out of having their contact details passed to the union, then the union will be able to contact them both about FPA bargaining and with information once the FPA is in force.
109. We believe this option strikes an appropriate balance between an individual's ability to exercise control over their own personal information and enabling bargaining unions to communicate with non-union employees who do not opt out of sharing their contact details in a low-cost way as they will already have those contact details.
110. Option two does not impose any additional compliance costs on employers to keep track of different opt out choices. Non-union members would be able to request that they stop receiving communication from the relevant unions at any time while the FPA is in force but that would require a positive action from them.

We propose applying the same communication safeguards that are in place during bargaining

111. We recommend communication with non-union employees once an FPA is in force will have the following safeguards that are applied during bargaining:
- the primary purpose of communication must be about the FPA (although it will be possible to include other supplementary information that is not FPA related)
 - contact details are not used for any other purpose
 - unions should not keep non-union employee contact information for any longer than the non-union employee has authorised the union to use it for.

We have considered who qualifies as a 'relevant' union for accessing a workplace without consent once an FPA is in force

112. In the FPA Cabinet paper, Cabinet agreed that, once an FPA is in force, and there are workplaces with employees in coverage of the agreement (even if they are not union members) 'relevant' unions would be entitled to access workplaces without the employer's consent (if the primary purpose of the visit is related to the FPA).

Workplace Access under Employment Relations Act

113. Under the Employment Relations Act, unless there is a collective agreement being bargained or in force, and the coverage covers the work done by employees at the workplace, a union must request and obtain consent of the employer (or representative) before entering a workplace.

114. Before entering a workplace, a union representative must believe on reasonable grounds, that member of the union is working or normally works in the workplace, or that the union's membership rule covers an employee who is working or normally works in the workplace (ie a non-unionised workplace).
115. The provisions under the Act mean that union representatives can enter a non-unionised workplace to recruit members and discuss union business. Unions cannot enter a non-unionised workplace to monitor health and safety or compliance with employment legislations.

Approach to workplace access under Screen Industry Workers Bill

116. The approach to workplace access under the Screen Industry Workers Bill (SIWB) differs from the ER Act. Representatives from worker organisations may enter a workplace for similar purposes as set out in the ER Act, however, consent must be obtained to access a workplace. The approach taken by SIWB considers the nature of film production and allows employers to refuse access if production activities would be unreasonably impeded.

CTU advised on what they consider to be a relevant union

117. CTU advised that for the purpose of access, a relevant union should be any union bargaining party to an existing FPA and that they should be able to access a workplace without having to obtain prior consent from the employer. The CTU also suggested that unions that are not registered bargaining parties who have members in coverage should be able to access workplaces with employees in coverage of the FPA if they obtain consent.
118. CTU advised the purpose of accessing a workplace primarily for an FPA, would be to monitor compliance, representation and other union business.

Options and criteria

119. We have considered two options and an additional option that reflects CTU's suggestion:
 - Option one (recommended): 'Relevant unions' for FPA workplace access purposes are unions that were bargaining parties to an FPA
 - Option two: 'Relevant unions' for FPA workplace access purposes are any union that has at least one member in coverage.
120. We have assessed these options against the following criteria:
 - ability for employees to be informed about issues relating to an FPA
 - potential disruption to an employer's business
 - workability.

Option one: Relevant unions' for FPA workplace access purposes are unions that were bargaining parties to an FPA

121. Under option one, only union bargaining parties (at the time an FPA goes into force) will be able to access workplaces that have employees in coverage of an FPA without consent, including when there are no union members at that workplace. Enabling bargaining unions to enter workplaces without consent where there are no union members is an expansion of rights of access to workplaces under the Act. However, existing safeguards in the ER Act would apply, including conditions of entry (eg accessing the workplace at reasonable times with regard to business operations).
122. Bargaining party unions are likely to have a greater justification than non-bargaining party unions in accessing workplaces once an FPA is in force in order to gather information to

inform whether they consider a variation is required, the key issues for negotiation during a renewal process, or whether the FPA is working or being applied as intended.

123. It is very likely that there would be more unions with members in coverage of an FPA than were bargaining parties. The limit on the pool of unions able to access workplaces without consent does mean that the role of communicating with employees at workplaces about the FPA once it is in place falls on fewer unions.
124. We think option one is workable as the union bargaining parties of an FPA need to be registered with MBIE. Our expectation is that this information will be made publicly available (ie the bargaining parties could be listed in the FPA or they could be listed on MBIE's website), employers would be able to verify that a union that would like to enter their workplace without consent has the authority to do so. Please note, no decisions have been made around whether, and how, this information will be publically available.
125. Section 20 of the ER Act sets out the purposes for union workplace access and includes purposes relating to a 'union's business'. We assume that unions will assert that discussion relating to an FPA is covered by 'union business'. Specifying this in the ER Act would make this clear. However, if we were to expand the provisions in the ER Act to explicitly account for FPA-related visits, this could have implications for other legislation (ie the Equal Pay Act 1972, where discussion of pay equity is not specified in the ER Act workplace access provisions).

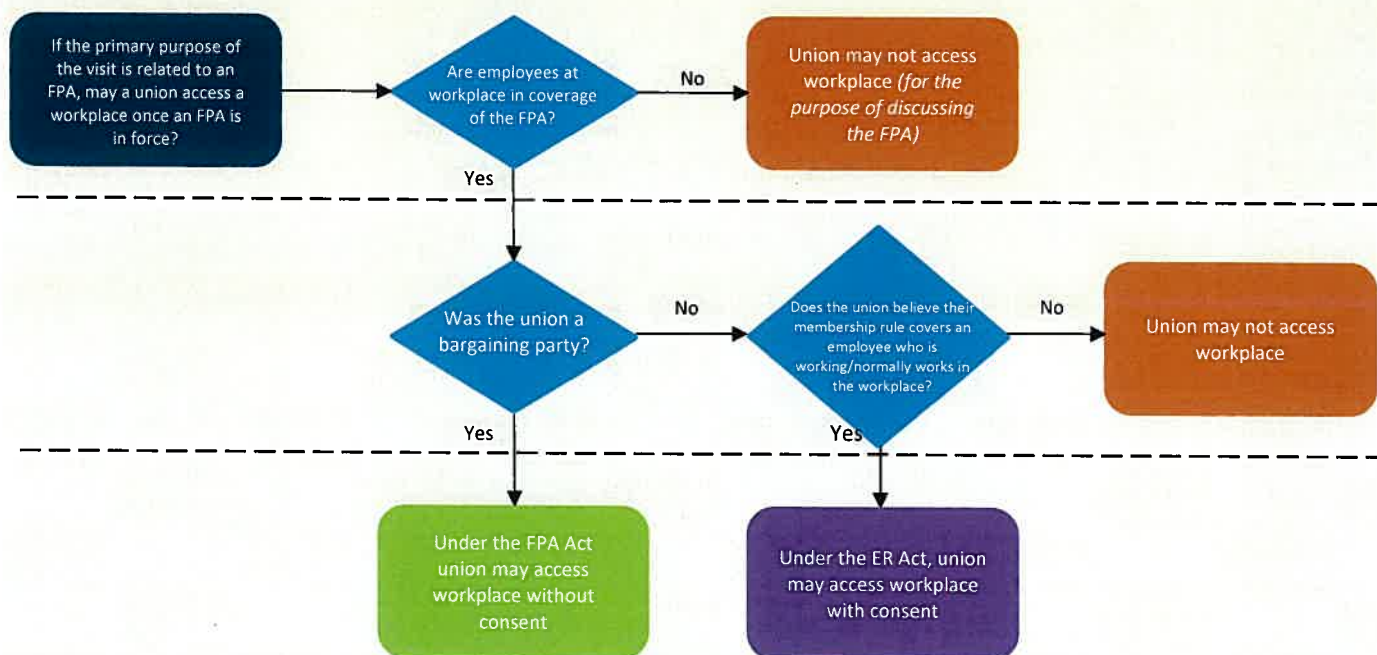
Option two: 'Relevant unions' for FPA workplace access purposes are any union that has at least one member in coverage. Under option two, any union with a member in coverage of the FPA would be able to enter a workplace (that had employees within coverage) without the employer's consent once the FPA is in force.

126. Extending these rights to include non-bargaining party unions would mean that unions that did not play a role in negotiating the FPA would have a significant extension of workplace access rights.
127. Expanding the pool of unions able to access workplaces without consent is likely to be more disruptive to an employer's business than option one. Under option two, multiple unions may want to access a specific workplace and the cumulative effective of this could significantly disrupt an employer's business.
128. We also consider that it would be difficult to make this option workable as it would be difficult for employers to know whether a union that wasn't a bargaining party had members within coverage of the FPA. Employers would need to find out the types of employees the union covered (which may be covered in the union's constitution) and then compare this with the occupation or industry covered by the FPA.

We recommend option one: Only bargaining unions may enter a workplace without consent, non-bargaining unions must obtain consent to enter a workplace under the existing provisions

129. We recommend option one as it provides a balance between employees' ability to be informed about an FPA and potential disruption to an employers' business. As discussed, bargaining unions are more likely to have interest in accessing workplaces once an FPA is in force.
130. We consider that the existing conditions around workplace access in the ER Act should apply. That is, employers will not be able to unreasonably withhold consent, and unions will have to apply considerations around time of entry, normal business operations and comply with procedures and requirements that relate to health and safety or security.
131. We do not recommend option three as we do not believe it is necessary to satisfy access to workplaces given the existing provisions under the ER Act. However, we recognise that while employers will not be able to unreasonably withhold consent, if multiple unions request

consent to access a workplace, the cumulative effect may begin to disrupt the employer's business. In this case, it would be reasonable to withhold consent. We recommend applying this consideration to an employer's right to withhold consent. The diagram below outlines the recommended approach.



The CTU has also suggested that non-bargaining party unions who represent workers covered by the FPA should be able to access workplaces which have at least one employee in coverage of an FPA, but with consent

132. The CTU suggested this as an addition to option one. That is, unions with at least one member in coverage of an FPA will be able to enter workplaces (with at least one employee in coverage of an FPA) with consent for the primary purpose of discussing an FPA. This may include to monitor compliance with the FPA, representation and other union business such as recruitment.

133. There are two options to consider:

- Option one (CTU proposal): Any union that is not a bargaining party, and has at least one member in coverage of an FPA, is able to access workplaces with consent once an FPA in force, even if there are no union members at that workplace.
- Option two (recommended): No additional access is needed as the provisions of the ER Act enable unions who reasonably believe that the union's membership rule covers an employee who is working or normally works in the workplace to access workplaces with consent to discuss union business.

134. Under option one, there may be cases where a union will have access to a wider pool of workplaces, as they will be able to ask for consent to enter any non-unionised workplace with employees in coverage of an FPA, rather than only those workplaces with employees that the union membership rule covers. Employers may be concerned about the ability of multiple non-bargaining party unions seeking access with consent, in addition to the bargaining party unions who can access a workplace without consent. The effect of this expansion of access

in practice is unclear. This may not result in a significant increase in union visits as unions are only likely to seek access to workplaces where there are employees that the union does collective bargaining on behalf of.

135. If this is the case, then current ERA provisions relating to workplace access with consent are likely to be adequate (a union may enter a workplace for the purposes specified under section 20(3) of the ER Act, if the union believes on reasonable grounds, the union's membership rule covers an employee who is working or normally works in the workplace – section 21(1)(b)).
136. As discussed in the above section, we also consider it would be difficult for employers to know whether a union that wasn't a bargaining party had members within coverage of the FPA.
137. Accordingly, we recommend option two. If you agree to option one, to mitigate the concern from employers about the risk of disruption from multiple unions, we recommend that employers are able to consider the impact of multiple union visits (for the primary purpose of discussing an FPA) when determining whether to consent to union access.

Section C: Right to intervene and standing to seek a determination on coverage

Intervening or acting as a third party in ER Authority or Court proceedings

138. Under the current system, the ER Authority or the Court is able to invite parties to intervene in a case or to have third party status. Parties are usually appointed by the Court in relation to a question of law, on the basis of the issues going beyond the interest of the parties to the proceedings, ie wider public interest, assisting the Court.
139. Schedule 2, clause 2 of the ER Act allows "any party or person involved in a matter" to appear personally and be represented. Under the ER Act, the ER Authority can also call for information from "parties or from any other person" (section 160) during the process of investigating any matter. The ER Authority can order any person to appear before it or be represented before it.
140. Therefore, in relation to the FPA system, the ER Authority would be able to seek information from parties not directly party to a case that relates to an FPA, including unions, employers or employer associations if they consider that their expertise is needed.
141. The outcome of an ER Authority determination relating to a complaint of a breach of the term of an FPA, or relating to the interpretation of a term of the FPA, could set a precedent for other employers or employees, and across the FPA as a whole. Therefore, an employer or union bargaining party, the CTU, or BusinessNZ, may have an interest in the outcome of a determination even if they were not party to the proceedings, or directly affected by any breach. This is because they may consider they have specific knowledge about how a particular term was intended to be interpreted or applied at the time they were negotiating an FPA.
142. BusinessNZ said that they were comfortable with the current system. The CTU has said that they would like the right to intervene in proceedings relating to the interpretation of a term in an FPA. They also consider that union bargaining parties should have a right to be joined to proceedings relating to an FPA term that they negotiated, if they elect to do so. It is not clear whether the CTU considers that these rights should also be afforded to employer bargaining parties or BusinessNZ.

143. The CTU's proposal would require a significant amount of work to assess the potential implications, including consultation with the ER Authority.
144. Our initial view is that we would not recommend changes in line with what the CTU has proposed for the following reasons:
- It would be a significant departure from current ER Authority and Court processes.
 - It would be likely to expand the issues in proceedings and increase the time and cost of litigation.
 - The ER Authority or the Court is likely to be in a better position to consider whether it would be helpful to the case to grant intervener status than the proposed interveners themselves.
 - It would be difficult to make this system workable as the ER Authority or the Court would need to identify whether a term in dispute was a term in an FPA that covered the occupation or industry involved in the proceedings and then notify the relevant parties - this would slow down ER Authority and Court business.
 - Unions are already able to seek a determination to clarify the terms of an FPA incorporated into a collective agreement that they are a party to.
145. If you would like us to undertake further work on the implications of this proposal and make a recommendation, then we can report back in a subsequent briefing.

Who should have standing to seek a determination on coverage?

146. You have agreed in the briefing *Fair Pay Agreements: How coverage will be determined during enforcement* [refer briefing 2021-3561] that the Labour Inspectorate or the ER Authority is able to make a determination on whether employees should be in coverage of an FPA.
147. Generally, in order to take a court action, there must be a relationship between parties where someone owes a duty or an obligation to the other and one party has been adversely affected by the actions of the other. It is not sufficient that a party may have an interest in how a dispute is resolved, they must have a personal stake in the outcome.
148. Therefore, a union would need to obtain an employee's consent (union or non-union employee) to represent them in seeking a determination, including on coverage, as the union would not be directly affected as a party.
149. BusinessNZ advised that they considered that only the parties to a dispute should have standing to make a complaint (they did not specifically address the issue of who should have standing to seek a determination on coverage).
150. The CTU has said that they consider that a union or an employer should be able to seek a determination on coverage (employees will also be able to seek a determination on coverage).
151. The CTU considers that unions (with members in coverage of an FPA) should be able to specify a class of employees (union or non-union) that they think should be covered by an FPA when seeking a determination on whether an employer is in coverage. In their view, a determination on coverage is related to the interpretation of the coverage clause in the FPA and would be sought on a collective basis. Unions should not be required to identify each employee on behalf of whom a determination is sought.

152. You have previously agreed in the briefing on coverage mentioned above [refer briefing 2021-3561] that unions should not be given standing to take claims unless they have the consent of the employee (union or non-union), consistent with the existing processes under the ER Act.
153. If a union was able to seek a determination on coverage without the consent of an employee for the union to represent them, then the union would be acting in an enforcement-like capacity, ie more akin to the role of a regulator. However, a union can provide information to the Labour Inspectorate if they consider that an employer does have employees in coverage – then the Labour Inspectorate can consider whether it is worth investigating further.
154. In addition, if a determination is made that an employee of a particular employer is in coverage of an FPA, then this would set a precedent for other employees performing the same work in that workplace. However, the applicability of the determination will turn on the facts of each case, ie the nature of the work performed by each employee.
155. This proposal would, again, require a significant amount of work to clarify and assess the potential implications, including consultation with the ER Authority.
156. Our initial view is that we would not recommend any change to the general requirement as to who should have standing to make a complaint, where the complaint is in relation to seeking a determination as to whether employees should be in coverage of an FPA:
- It would be a significant departure from current ER Authority and Court processes.
 - There are likely to be freedom of association issues.
157. If you would like us to work on this proposal further and make a recommendation, then we can report back in a subsequent briefing.

Next steps

158. We will be providing you remaining advice on the FPA system imminently, and will continue to work on drafting instructions for the Bill.

Annex One: Recommendations on when BusinessNZ or the CTU would be required, or could choose, to be the default bargaining party

Annex Two: Bargaining rights and obligations if the CTU and BusinessNZ became default bargaining parties

Annex One: Recommendations on when BusinessNZ or the CTU would be required, or could choose, to be the default bargaining party

BusinessNZ

Stage of process	Required	By choice
Initiation of FPA bargaining by <i>employee side</i>	✓	
During FPA bargaining	✓	
Agreement to bargain a variation	Default not permitted, unless BusinessNZ was a bargaining party when the FPA came into force	
During bargaining for a variation		✓
Initiation of a renewal	Default not permitted	
Renewal initiated by <i>employee side</i>	✓	
During bargaining for a renewal, where the <i>employee side</i> has initiated	✓	
During bargaining for a renewal, where the <i>employer side</i> has initiated		✓

The CTU

Stage of process	Required	By choice
Initiation of FPA bargaining	na	
During FPA bargaining		✓
Agreement to bargain a variation	Default not permitted, unless the CTU was a bargaining party when the FPA came into force	
During bargaining for a variation		✓
Initiation of a renewal	Default not permitted	
Renewal initiated by <i>employer side</i>	✓	
During bargaining for a renewal, where the <i>employer side</i> has initiated	✓	
During bargaining for a renewal, where the <i>employee side</i> has initiated		✓

Annex Two: Bargaining rights and obligations if the CTU and BusinessNZ became default bargaining parties

In order to be a default bargaining party, BusinessNZ and the CTU need to be able to meet the obligations of being a bargaining party and also have access to the rights afforded to bargaining parties in the FPA system.

Obligation / Right	CTU	BusinessNZ
Requirements for bargaining representatives	A union bargaining party is required to have at least one member within proposed coverage, be a registered union and the object or an object of the union must enable it to promote affected parties' collective work interests (including members and non-members) for FPA bargaining. In order for the CTU to be a bargaining representative, there would need to be no requirement for a member in coverage, but the CTU must ensure that an object of its constitution is to represent union and non-union employees in FPA bargaining.	An employer association that wanted to be a bargaining party must have at least one member who is an employer with and employee in proposed coverage, be an incorporated society and the object or an object of the association enables it to promote affected parties' collective work interests (including members and non-members) for FPA bargaining, as well as the rules being democratic etc. BusinessNZ would need to ensure that its constitution could meet these criteria.
Notification	If the CTU became the default bargaining party soon after initiation, they would need to take over some of the notification obligations that the initiating union would have had, ie notifying employers and other unions in coverage of the proposed FPA.	Communication requirements during FPA bargaining fall on employers, ie not the bargaining party.
Duty of good faith – parties in employment relationships covered by an FPA being bargained or in force	The duty of good faith for FPA bargaining mirrors the duty of good faith set out in section 4 of the ER Act. It applies to a representative organisation (eg union) and its members but it has not been extended to cover further parties that the organisation is representing (eg a union representing non-union employees in coverage or an employer association representing employers who are not their members). This relationship is covered by the 'representation' obligation set out in the box below. We do not consider that the duty of good faith should be extended to cover the relationship between a default bargaining party and the parties it will represent in FPA bargaining. The legislation may need to be more specific about what 'best endeavours to represent' means for default bargaining parties' obligations towards those they represent.	
Each bargaining side to use their best endeavours to represent affected parties within coverage (including non-members)	The CTU does not represent employees as its members are affiliate unions. An obligation would need to be created so that the CTU would need to use its best endeavours to represent affected parties, ie all union and non-union employees within coverage. This includes providing regular updates, an avenue for feedback, and informing those in coverage of the ratification vote.	An obligation would need to be created so that BusinessNZ would need to use its best endeavours to represent affected parties, ie all employers within coverage. This includes providing regular updates, an avenue for feedback, and informing those in coverage of the ratification vote.
Information sharing	If the CTU became the default, the legislation would need to provide for the right for the CTU to be passed employee	Employers are required to pass on contact details, ie not the bargaining party.

	<p>contact details, from the union bargaining parties that held this information, so that they could carry out their communication obligations. Employees would need to be made aware at the time that they decided whether to share their contact details with the employee bargaining parties that, if the CTU became the default, that their information would be passed on to them and be used for the same purpose.</p>	
Workplace access	<p>The legislation would need to provide for CTU representatives to access workplaces both during bargaining, and once the FPA is in force, in line with the proposals you agree to in this briefing.</p>	<p>Employers are involved in allowing or granting access to their workplace, ie not the bargaining party.</p>
Ratification	<p>BusinessNZ and the CTU would need to run the ratification process as agreed between themselves (but which met the minimum process requirements).</p>	
Seeking a determination from the ER Authority	<p>The legislation will need to ensure that the CTU and BusinessNZ can seek a determination from the ER Authority during FPA bargaining.</p>	