



15 May 2009

Hon Kate Wilkinson, Minister of Labour

## **POLICY OPTIONS ON UNION ACCESS TO WORKPLACES**

### **Purpose**

- 1 This paper provides you with a summary of the Department's review relating to union access to workplaces, particularly around the issue of consent. The purpose of this review was to identify and scope any issues around current arrangements that govern union access to workplaces and consider whether there is an appropriate balance in terms of fairness to all parties (employers, employees and unions) under the current arrangements.
- 2 The change in union access to workplaces as signalled by the National Party's 2008 policy statement is included in this assessment, as one of the policy options explored.
- 3 To do the review, we have examined what these present arrangements are, how they work in practice, New Zealand case law, how such arrangements were determined under the previous employment relations framework, how our international obligations affect union access provisions, and how our current arrangements compare with those of other countries.
- 4 As a result of this review we have set out policy options for your consideration in relation to union access to workplaces. Following your consideration of these options, and any feedback to us, we will draft a paper for submission to Cabinet to give effect to your decision on these matters, if you agree.
- 5 The Department notes that the policy work on opening collective bargaining to non-union groups is closely linked to the policy work on union access to workplaces. Future decisions around the opening of collective bargaining to non-union groups may have implications in respect to access by worker representatives to workplaces. Any such implication will be addressed as part of this related work programme.

### **Executive summary**

- 6 This paper provides you with a summary of the Department's review relating to union access to workplaces, particularly around the issue of consent.
- 7 Our review found that:
  - a There does not appear to be widespread evidence of union representatives exercising their current rights to enter workplaces in an inappropriate way, resulting in disruption for business operations or adversely impacting on the employment relationship between employer and union members.
    - i The current practice widely followed by union representatives is that they voluntarily notify the employer (although practice varies from no notice to a range of notice practices depending on the circumstances) before

entering the workplace and they also often volunteer information on the purpose of their visit.

- ii There is some case law in this area – these cases tend to consider what is “reasonable” access. Access is restricted to reasonable times in reasonable ways, having regard to normal business operations and complying with existing health and safety requirements and security procedures. The Department has no evidence to suggest that unions are not, in general, meeting this requirement, or that employers are dissatisfied with current arrangements and practices.
- b The provisions of other jurisdictions were examined to provide insight into how other countries address union access to workplaces. The research included: Australia, Canada, the United Kingdom (UK), the United States of America (USA), Ireland and Sweden.
  - i Comparatively, New Zealand’s current provisions appear to be the least restrictive (for unions) amongst countries researched. However, the practice of how union access is gained may differ in reality from the formal legislative requirements of that country, i.e. in practice it may be less formal.
- c During the course of our review we consulted with Business NZ and the New Zealand Council of Trade Unions (NZCTU).
  - i The issue of union access is not a high priority for Business NZ and they indicated that they do not receive many complaints from employers regarding workplace access by unions. They do have some views on other aspects of union access provisions but these are not covered by this review (para 3 in appendix A refers).
  - ii The NZCTU opposes any change to current provisions around union access to workplaces. They raised a number of concerns if changes were introduced to the status quo and suggest that changes to current provisions are likely to lead to an increase in compliance costs for employers who will not have the systems to grant access.
- 8 Three possible options were assessed against a criteria to address the advantages and disadvantages of these options and the proposed policy intent in the employment and workplace relations election statement.
  - i National Party’s 2008 policy statement - require union representatives to gain consent from the employer before entering the workplace but that consent cannot be unreasonably withheld. Business NZ supports this option, but the NZCTU is strongly opposed to this option.
  - ii Status quo – this option would require no change to the current workplace access provisions. Business NZ and the NZCTU support this option.
  - iii Two tier approach – this option proposes that consent is required only when the purpose of the visit is unrelated to an employment relationship matter for a union member, but that consent may not be unreasonably withheld. This option is supported by Business NZ but is strongly opposed by the NZCTU.

- 9 The review suggests that the current policy settings around union access are working well for both employers and employees, and providing an appropriate balance of fairness to employers, employees and unions under current arrangements. The Department recommends no change to current provisions relating to union access to workplaces (status quo – option 2).
- 10 The Department notes that the policy work on opening collective bargaining to non-union groups could have implications for union access to workplaces in general.

## **Background and Context**

- 11 The National Party's 2008 election policy statement outlined a number of policies that relate to the Employment Relations Act 2000 (the Act). One of these policy intentions concerns union access to workplaces. The change signalled around union access is to introduce a requirement that access to workplaces is dependent on employer consent but that this consent cannot be unreasonably withheld. Officials understand that the intent is to address the process and not the reasons for access.
- 12 This work is linked to other work that identifies and scopes issues in relation to the employment relationship problem resolution institutions and collective bargaining, as outlined in the Government's policy intentions for employment and workplace relations [09/84579 refers], which is a part of the Government's wider Regulatory Review Programme for 2009 and 2010 [CAB Min (09) 6/5A refers].
- 13 Policy options to arise from work currently underway on the policy intention regarding opening collective bargaining to non-union groups may have an impact on the policy options discussed in this paper. Any such impacts will be assessed and addressed in due course through the related work. We are due to report to you on policy options with respect to this policy work in July 2009. Any access issues will be considered as part of this related work.

## ***Historical Context***

- 14 Historically, provisions for union access to workplaces were covered under national awards and agreements. Whilst it was not the objective of the Employment Contracts Act (ECA) 1991, it had the effect of ending the award system. The ECA did not have provisions for unions as such, but it treated all bargaining agents the same, although access depended on their representation and the bargaining situation. For example, unions could not enter as of right to recruit.
- 15 From the mid-1990s, in general, the practice was that union representatives would announce that they were on-site (for example, at reception), and were there to visit a specified employee(s). They would then ask to speak to the manager. If the manager was not available, they would leave their business card to advise that they were on site, and would let them know they were leaving. Prior to the case law that clarified these practices, the way access was gained was highly variable. This practice as described above continued until the ECA was repealed in 2000. From 1991 until 2000, the rules generated a lot of conflict.
- 16 The Employment Relations Act 2000 (the Act) established unions registered under the Act as the recognised agents of collective bargaining and representation together with associated rights of workplace access, subject to some limitations and obligations in exercising those rights. The intent behind

the policy change in 2000 was to enable the effective collective representation of workers by unions in the workplace and promote collective bargaining. The Act widened union rights of access by including access for recruitment purposes and for a wider range of employment-related purposes. The changes were also intended to normalise unions' presence in the workplace in terms of the overall objectives of the Act, which includes building productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment.

### ***Current legislative requirements***

- 17 The provision of union access to workplaces is specifically provided for in sections 19 to 25 of the Act. Under these sections, a union's representatives are entitled to enter workplaces for purposes related to the employment of its members and/or purposes related to the union's business. Both of these purposes are further defined under the Act. Union access must be in accordance with the conditions set out in section 21 of the Act.

### Exceptions to the right of access

- 18 Employers may deny access where a union representative has not complied with the requirements of sections 20 and 21 of the Act. Other specified reasons to deny access to enter a workplace include access that might prejudice the security or defence of New Zealand; or the investigation or detection of offences; or, under certain circumstances, specified in the Act, on religious grounds<sup>1</sup>.
- 19 A union representative is not permitted to enter a workplace if it is a dwelling house.

### Dispute resolution

- 20 If the parties experience difficulties around the exercise of union access to a workplace, they can seek redress via the Department's mediation services, the Employment Relations Authority or Employment Court. Where there has been a breach of the Act, a penalty is imposed on the parties who fail to comply<sup>2</sup>.

### ***Current workplace practices in relation to union access to workplaces***

- 21 The Department understands that most collective agreements detail how union access will be gained but that the method of notice in the collective agreements is not detailed explicitly. The current practice widely followed by union representatives is that they voluntarily notify the employer (although practice varies from no notice to a range of notice practices depending on the circumstances) before entering the workplace and they also often volunteer information on the purpose of their visit. In essence, the method of notice to the employer will be by custom and practice and reflective of the state of the general employment relationship (which in many cases has developed over time with employers by existing and generally well established union groups).

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<sup>1</sup> The denial of access on religious grounds can only take place if the employer holds a certificate of exemption from the Department of Labour that the employer is a practising member of a religious society or order whose beliefs prevent membership of an organisation other than the religious society. Provided the employer holds such a certificate, none of the employees in the workplace is a member of the union and there are no more than 20 employees in the workplace, then a union may be denied access to that workplace.

<sup>2</sup> The Act provides for penalties of up to \$5,000 for an individual employer and \$10,000 for a company.

- 22 Where access is being used in “greenfield” workplaces (places with no union members), and there is no collective agreement or custom and practice in place, the Act’s provisions on union access become even more important as they ensure that workers have the opportunity to consider joining a union.
- 23 There are approximately 332,000 union members (representing about 10 percent of the workforce). There are 2,684 collective agreements<sup>3</sup>. Of these agreements, about 98 percent have access provisions.
- 24 There are 165 registered unions in New Zealand. The Public Service Association, Service and Food Workers Union and the Engineering, Printing and Manufacturing Union are the largest unions in New Zealand. Union membership has been growing over the past nine years with union membership being higher in the State Sector, although union membership has significantly increased in the private sector to about 150,000 employees.

#### Problems encountered with workplace access

- 25 There does not appear to be widespread evidence of union representatives exercising their current rights to enter workplaces in an inappropriate way, resulting in disruption for business operations or adversely impacting on the employment relationship between employer and union.
- 26 There have only been a small number of incidents since 2000 that involve disputes around access issues<sup>4</sup>. Some of these incidents include exposure of union representatives to confidential business information or negative impacts on health and safety procedures for the workplace.
- 27 Most workplace access disputes that go to employment institutions are largely addressed through the Department’s mediation service. We have found nine cases have gone onto the Employment Relations Authority and/or Employment Court, and one instance that has proceeded to the Court of Appeal.
- 28 All of these cases reflect to some extent the issue of what is “reasonable” access. There is case law available, which provides a test for what is “reasonable” access. For example, in *McCain Foods (NZ) Ltd v SFWU Nga Ringa Tota Inc [2008]* in reliance on dicta in *Carter Holt Harvey v NDU Inc [2002]* it was found that access could be refused where there is a serious risk of “loss of valuable commercial information”. Decisions have found that access should be restricted to reasonable times in reasonable ways, having regard to normal business operations and complying with existing health and safety requirements and security procedures.

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<sup>3</sup> This data was obtained from Victoria University’s Industrial Relations Centre’s annual report on “*Employment Agreements: Bargaining Trends & Update 2007/2008*”.

<sup>4</sup> The Departments records on mediation do not go into sufficient detail to allow us to quantify mediation services around access issues.

## **International context and International Obligations**

### ***Overseas provisions***

- 29 The provisions of other jurisdictions were examined to provide insight into how other countries address union access to workplaces. The research looked at: Australia, Canada, the United Kingdom (UK), the United States of America (USA), Ireland and Sweden (these are countries that we typically tend to compare ourselves with i.e. other western democracies). The UK, Ireland and Sweden's employment frameworks are also covered by employment laws and conventions of the European Union.
- 30 Caution needs to be exercised in making any direct comparisons with other countries given that union or bargaining agent access to workplaces is inextricably linked to how each state's industrial relations system is structured around collective bargaining takes, and what particular rights apply to the parties in each system. Access cannot be seen in isolation from these factors.
- 31 Our findings suggest that internationally, there are varied approaches for addressing workplace access by union representatives. The different employment relations framework of each country influences how access provisions are provided. In some countries, unions require consent before entering a workplace. However, the purpose of the visit is usually not dependent on consent by the employer but is often disclosed, such as the case in the UK.
- 32 "Access" in the United Kingdom is perceived as access to workers and not access to the worksite. The UK, Canada and the USA have ballot processes whereby the union representatives will have access to the workers if they are selected after a balloting process.
- 33 New Zealand's current provisions appear to be the least restrictive (for unions) when compared to those of the other countries researched. Countries whose union access provisions appear to be more restrictive include the UK, Canada and the USA where consent is required before accessing the workplace. However, we understand that the practice of how union access is gained can differ in reality from the formal legislative requirements of that country, i.e. in practice it may be less formal. New Zealand's system of access is similar to that of Sweden, where unions have a right of access to the workplace but often negotiate requirements for access with the employer, i.e. a suitable time for accessing the workplace. Australia is also similar in that unions do not have to seek consent every time they go into a workplace but they require a validation permit (obtained once a year) to enable them to access the workplace.

### ***International Labour Organisation (ILO) Conventions***

- 34 Any consideration of change to the Act's current provisions for union access to workplaces must be consistent with New Zealand's obligations under international conventions.
- 35 In this respect, there are two relevant ILO Conventions regarding union access to workplaces - Convention 87 (Freedom of Association and Protection of the Right to Organise) and Convention 98 (Collective Bargaining). Both Conventions are regarded, and enforced, by the ILO as 'Fundamental Conventions', under the 1998 Declaration on Fundamental Principles and Rights at Work, whose principles bind all ILO members, whether or not the actual conventions have been ratified by the country concerned.

- 36 New Zealand has ratified Convention 98, but not Convention 87. However, given its special status as a Fundamental Convention, New Zealand is bound by the principles of Convention 87 and required to report annually to the ILO on how these principles are observed by the Employment Relations Act. Promoting observance of the principles of Conventions 87 and 98 is an objective of the Employment Relations Act.
- 37 The ILO's Committee of Experts, which make binding rulings on the applications of the Conventions, has examined a number of cases with respect to union access and Convention 87. They found that workers' representatives should enjoy such facilities as may be necessary for the proper exercise of their functions, including access to workplaces. The Committee states that, "*Governments should guarantee the access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers in order to apprise them of the potential advantages of unionisation*". This means that access to the workplace for union representatives should be provided, but due consideration should be given to property rights and the employer's right to manage their business. New Zealand's current arrangements are consistent with these ILO Conventions.
- 38 Any policy option for a change to the current union access provisions need to be assessed against the Principles of Convention 87 as identified by the ILO's Committee of Experts for consistency, as well as the Conventions generally.

## **Policy Options**

- 39 Three policy options are outlined below which could address some of the issues raised in this paper and the intent signalled by the National Party's 2008 policy statement. While option three (the 'two tiered' approach) is somewhat out of scope, as it proposes a consent requirement for reasons relating to the purpose of the visit, officials considered it useful to provide an assessment of this approach at this stage because it could be seen as an 'in between' option between an automatic right of access and access on consent.
- 40 The policy options have been assessed against the following criteria to identify risks, unintended consequences and the advantages of each option:
- a Fairness to employees, employers and unions  
  
Does the option provide a balance of fairness when considering the interests of employees with regards to representation; the union's ability to conduct their business; and the employer's rights with regards to their property and management.
  - b Improving workplace productivity  
  
Any policy option should not diminish but preferably enhance workplace productivity. This is consistent with the Government's goals with respect to their employment and workplace relations policy statements and referred to in the Regulatory Reform Programme for 2009 and 2010 [CAB Min (09) 6/5A refers].

Workplace productivity, however, is not just about "business' growing" but encapsulates other factors such as decent work, skills development and good training arrangements.

c Consistency with ILO Conventions

Any policy option should ensure that ILO Conventions are not breached in the implementation of the policy option and the principles of Convention 87. Any substantive changes would need to be assessed against the guidance provided by the ILO's Committee of Experts.

d Likelihood that change could increase the level of disputes between parties

New Zealand in recent years has had a favourable record in terms of a low rate of industrial disputes. Any change to the current system should consider the potential impact on industrial disputes.

e Simple in implementation

The nature of any policy option should consider the potential cost, resources and simplicity of the policy option (including design of framework).

f Likelihood of unintended consequences

Any policy option should mitigate the risk of unintended consequences resulting from any change in practice and to ensure a seamless transition to new arrangements accepted (including the impact of the restrictive nature of the option, compliance costs for the parties and where it sits comparatively with other countries).

g Test of reasonableness

The provisions require a clear definition for the test of what is "reasonable" when understanding the rights and obligations of workplace access for both parties.

- 41 Union access rights are closely connected to the role and representation of parties in collective bargaining. We are currently examining issues around a proposal for opening collective bargaining to non-union groups. As these two pieces of work have the potential to be closely linked, future decisions around the opening of collective bargaining to non-union groups will have implications in respect to access by worker representatives to workplaces. Any such implications will be addressed as part of this related work programme.

***Option 1: National Party's 2008 policy statement – change current access provisions so as to require union representatives to gain consent from the employer before entering the workplace but that consent cannot be unreasonably withheld***

- 42 This option is supported by Business NZ but is opposed to by the NZCTU.
- 43 The change sought around union access is that access to workplaces is dependent on employer consent but that consent cannot be unreasonably withheld.
- 44 We understand that the policy intent is not about changing the content of the union access provisions concerning the *purpose* of the visit but is based on how access is granted in addressing the perceived unfairness of employers not knowing who and when a union representative is on their premises. This option would provide a balance of fairness in regards to employers, employees and union interests.

- 45 A possible approach for addressing this option could be that if a union representative intends to visit a workplace, he/she must inform the employer in writing first. If there is no response, then it could be assumed the consent has been granted. If the employer does not provide permission, they must state in writing the reason why access has been denied. In the case, where a union representative has been denied access but still proceeds to access the workplace, they could be considered to be trespassing.
- 46 The assessment against the policy criteria indicates that this change would not deviate greatly from what is already current practice but would still require a policy shift. It does add to compliance costs for both parties by ensuring permission is granted to union representatives before entry to the workplace. It may restrict the ability of union representatives to meet with members in a timely manner and it could also be seen as reducing the 'right of association' where employees may not have ready access to unions. Timeliness is particularly important where health and safety issues are concerned.
- 47 Providing more discretion to employers over union access to workplaces could result in stronger working relationships between employers and unions as employers would feel in control of who is accessing and when their workplace is accessed. However, it could also have the opposite effect (unions consider that this negative effect occurred under the ECA).
- 48 Providing discretion could also enable employers to undertake better business planning. For example, avoiding any unforeseen stoppages and potentially rescheduling activities around employee availability.
- 49 As with any change, it may take time to settle down, with court precedent and accepted work practice taking time to develop. This option may yield uncertainty initially and it could increase industrial disputes.
- 50 If progressed, this option would need to be carefully drafted to ensure that it remained consistent with international obligations.
- 51 There would be a shift in policy from voluntary 'good practice' by unions in notifying employers of their intention to visit, to being required to seek consent first before entry to a workplace. Therefore a change would require the term of what is "reasonable" to be clearly defined to address the shift in policy. It may be that guidelines or a code of practice are developed on what is "reasonable" in this context.

***Option 2: Status quo – maintain current provisions, but possibly develop educative resources for employers and unions on the interpretation of the Act***

- 52 This option would require no changes to current workplace access provisions. This option is supported by Business NZ and the NZCTU.
- 53 The method by which notice is currently provided is not explicitly detailed in collective agreements. The method of notice appears to be by custom and practice and reflective of the state of the general employment relationship. The Department's examination of current practices and current provisions does not indicate that there is a problem with the current framework for union access to workplaces. In practice, union representatives voluntarily notify employers (although, practice varies from no notice to a range of notice practices depending on the circumstances) before accessing the workplace and also often volunteer information on the purpose of their visit.

- 54 The status quo option appears to be the least restrictive mechanism for all parties in exercising provisions for union access to workplaces, and would not have any compliance costs. Current arrangements provide a balance of fairness in regards to employers and employees and union interests.
- 55 Industrial disputes regarding workplace access have remained low over the past nine years. Most disputes are resolved through the Department's mediation service or in some instances (nine cases) have proceeded to either the Employment Relations Authority or Employment Court and one instance to the Court of Appeal. Of the nine cases that have proceeded to employment relationship problem resolution institutions some of the access issues have included the potential disruption to workflows in an open plan office, commercial sensitivity around business information and health and safety requirements of a workplace.
- 56 Some of the issues raised by employers indicate that there may be a lack of awareness by some employers of their rights and obligations under the present Act. It may be that educative resources could assist in building a better level of understanding of the current provisions.
- 57 The current provisions are consistent with ILO Conventions. The test of what is "reasonable" has been addressed by the Courts and case law developed to assist interpretation of the definition.
- 58 The objective of the Act is to help build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment. The impact of productive employment relationships should improve workplace productivity due to collegial behaviour between parties and a mutual understanding of workplace matters.

***Option 3: Two tier approach - this option proposes that consent is required only when the purpose of the visit is unrelated to an employment relationship matter for a union member, but that consent may not be unreasonably withheld.***

- 59 This option is somewhat out of scope, as it proposes a consent requirement for reasons relating to the purpose of the visit, officials considered it useful to provide an assessment of this approach at this stage because it could be seen as an 'in between' option between an automatic right of access and access on consent. This option would have two tiers of consent relating to union access rights for the purposes of a visit. The first tier would have no change for union access rights in relation to employment matters concerning union members. The second tier would require a change to access rights for the purposes of union related business in the workplace. This option is supported by Business NZ but is strongly opposed to by the NZCTU.
- 60 The two tier approach would impose restrictions on union representatives when accessing the workplace and add significant compliance costs for businesses (particularly small businesses) and unions. It represents a greater policy shift than the National Party's 2008 policy statement. This option would not provide a balance of fairness in regards to unions accessing the workplace to meet employees and union members.
- 61 Establishing a two tiered approach would mean that the purpose of the visit would be more evident to employers (depending on whether consent was sought or not sought). This raises privacy issues for employees who may wish to seek union support around an employment matter, and this may have the effect of making some employees reluctant to seek union representation.

- 62 Requiring the employer's consent for the conduct of union business may also have the effect of limiting employees' access to unions where there are no existing union members ("greenfields" situations). While such consent could not be unreasonably withheld, it is likely that the number of disputes arising around what is "reasonable" in such situations could increase.
- 63 A policy decision to create different access provisions dependent upon the purpose of the visit could affect current provisions that enable union access for purposes related to the union's business. The second tier could require the employer's consent before a union representative accesses the workplace to conduct union business means the employer can ensure such access occurs at a time that does not impact on the firm's business or productivity. Others would argue that enabling the union to freely conduct its business is in the interests of both employers and employees as it supports a productive employment relationship.
- 64 A policy decision to create different access provisions dependent upon the purpose of the visit in regards to the second tier has the potential for creating confusion for employers and unions and as such the proposal in practice may be difficult to implement. It may be that educative resources need to be developed (depending on the complexity of the changes) to ensure a level of understanding of the new provisions.
- 65 This option may increase the likelihood of disputes between employers and employees. Changing the current provisions for access related to union business will have an adverse effect on the rights and presence of unions in the workplace. There may also be an increase in disputes about the purpose of the visit.
- 66 This option appears unlikely to be consistent with ILO Conventions.
- 67 This option would require union representatives to disclose *what* the purpose of their visit is to the workplace. This would establish a mechanism by which an employer may deny access to the union on the grounds that it was conducting union business if they felt this was reasonable. Currently, the employer is not, necessarily, privy to the purpose for the visit (an important point for unions even though they will often volunteer this information). This does not appear to be the government's intention as the National Party's 2008 policy statement does not signal a desire to change this component of access rights.
- 68 If you would like to progress this option, we will give you further advice about what sort of matters could be covered under each of the different access provisions.

#### What is reasonable?

- 69 If you would like to progress either option one or option three, a decision would need to be made about whether what is "reasonable" should be an objective test or whether it should be left to the employer to determine (subjective test). A subjective test is unlikely to be consistent with ILO Conventions.

#### **Consultation**

- 70 The Department has discussed with the social partners their views of the issues behind the policy intentions in this paper and possible options to address any issues. More information on the consultation with social partners is attached as appendix A.

### ***Business New Zealand***

- 71 The issue of union access to workplaces is not a high priority for Business NZ. They indicate that as there is no clear problem, they are not particularly worried as to whether there is a compulsory requirement for unions to seek consent before entering the workplace or not. They would support the National Party's 2008 policy statement if it were to proceed, otherwise they would be comfortable with the status quo.
- 72 They do have some views on other aspects of union access provisions which are not covered by this review. Business NZ considers that any proposed changes to union access to workplaces should have a focus on improving workplace productivity. They suggest changes could be made with respect to the content of access provisions in the Act. They believe it is timely that the Act introduces a productivity component to its objectives. This would be consistent with the same emphasis in all other aspects of the economy. They suggest that if a productivity element is introduced, it may then be appropriate to distinguish between access for purposes related to the workplace and access for purposes related to the organisation entering the workplaces.
- 73 They indicated that they have not received many complaints from employers regarding workplace access by unions. Business NZ believes a poor understanding of the current law by employers has been the source of disputes. They suggest that educative resources may be of value in raising a better level of understanding of the Act for employers.

### ***New Zealand Council of Trade Unions (NZCTU)***

- 74 The NZCTU strongly oppose any change to current provisions around union access to workplaces. They view current practice and provisions as being adequate and not difficult for either party to administer. They consider the current legislation is working well and is simple in practice for both employers and unions.
- 75 They indicate that only nine cases have come to light since 2000 on issues related to workplace access. Access was found to be reasonable in many instances and these cases recognised that the union had complied with health and safety requirements, protected commercially sensitive information and security of employees of the workplace, monitored strike action appropriately, and that access was not disruptive to the workflow of the organisation.
- 76 They highlight a number of concerns if changes were introduced to the status quo and as such recommended leaving current provisions intact. They indicate that changes to current provisions, are in their view, likely to lead to an increase in compliance costs for employers who will not have the systems to grant access.

### ***Other government agencies***

- 77 The Department has not consulted with other government agencies at this stage but would do so for the preparation of any Cabinet paper about this matter. These agencies would include: The Treasury, Ministry of Economic Development, Ministry of Health, Ministry of Justice and the State Services Commission.

### **Conclusion**

- 78 On balance the review finds that the current policy settings around union access are generally working well for both employers and employees. Current arrangements provide a balance of fairness for employers, employees and

unions as does the National Party's 2008 manifesto policy. However, the two tier option would not provide a balance of fairness in regards to unions accessing the workplace to meet employees and union members.

79 Should you wish to introduce an arrangement by explicit consent, in our view such an arrangement could be introduced in a way that does not breach ILO conventions. An introduction of a "consent" arrangement is not out of step with other countries. It would, however, introduce a compliance requirement for both parties that does not currently exist.

80 In our view the two tier option should not be progressed as it would represent a considerable policy shift that goes beyond what was signalled in the National Party's 2008 policy statement.

### **Additional information**

81 The following additional information is available to you on request:

- a Terms of Reference
- b Case Law
- c International Research
- d International Conventions, and
- e Policy Options Assessment Matrix.

### **Recommendations**

I recommend that you:

- 1 **note** the Department's review of issues concerning union access to workplaces and whether there is an appropriate balance of fairness to employers, employees and unions under current arrangements

**noted**

#### **Policy options**

2 **either**

- 2.1 **agree** to progress option 1 – National Party's 2008 policy statement (this option is supported by Business NZ but is strongly opposed to by the NZCTU).

**agree / do not agree**

**or**

- 2.2 **agree** to option 2 – maintain status quo (this is the Department's preferred option and is supported by Business NZ and the NZCTU)

**agree / do not agree**

**or**

2.3 **agree** to progress option 3 – the two tier approach (this option is supported by Business NZ but is strongly opposed to by the NZCTU)

**agree / do not agree**

3 **instruct** the Department of Labour to develop a paper (in consultation with the social partners and relevant government agencies) to reflect your decisions on this paper, for submission to Cabinet, if you agree

**agree / do not agree / discuss**

Paul Barker  
Acting Group Manager –  
Workplace Policy  
for Secretary of Labour

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Hon Kate Wilkinson  
Minister of Labour

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## **APPENDIX A: SOCIAL PARTNER CONSULTATION**

- 1 The Department has discussed with the social partners their views of the issues behind this policy intention and possible options to address any issues.

### ***Business New Zealand***

- 2 The issue of union access to workplaces is not a high priority for Business NZ. They indicate that as there is no clear problem, they are not particularly worried as to whether there is a compulsory requirement for unions to seek consent before entering the workplace or not. They would support the policy statement if it were to proceed otherwise they would be comfortable with the status quo.
- 3 Business NZ indicate that whilst it is perfectly reasonable for unions and employers to agree how, when and where unions can access a workplace, legislation however, represents a minimum requirement and should, therefore, be even handed in respect to both unions and employers – as the current open access is not.
- 4 They do have some views on other aspects of union access provisions which are not covered by this review. Business NZ considers that any proposed change to union access to workplaces should have a focus on improving workplace productivity. They believe it is timely that the Act introduces a productivity component to its objectives. This would be consistent with the same emphasis in all other aspects of the economy. They suggest that if a productivity element is introduced, it may then be appropriate to distinguish between access for purposes related to the workplace and access for purposes related to the organisation entering the workplaces.
- 5 They indicate that employers have always believed that access should be with permission and if a union proposes entry at a reasonable time and in reasonable circumstances there would be no reason for that permission to be withheld. If one of the government's aims is to improve productivity, requiring a union to behave in a reasonable manner by first seeking permission to enter can only promote that aim.
- 6 They would not support a framework similar to that of the ECA but would prefer a framework that considers the lessons from both the ECA and the current Act to influence a more productive workplace.
- 7 Business NZ have identified issues, which can be of concern for employers such as the impact union access may have on health and safety, food safety, security, commercial sensitivity, confidentiality, continuity of production, disruption of operational requirements and interference with customer servicing.
- 8 However, they indicated that they have not received many complaints from employers regarding workplace access by unions. In some instances where access to workplaces has been an issue, Business NZ believes poor understanding of the current law by employers has been the source of the dispute. They suggest that educative resources may be of value in raising a better level of understanding of the Act for employers.
- 9 Business NZ does not suggest changing the definition of the current test of what is "reasonable". Business NZ considers that there is adequate case law to provide justification on the test of "reasonableness", and any change could be confusing for all parties.

- 10 They also consider that any change should be assessed against the potential impact of policy outcomes that might arise from the current work underway on opening collective bargaining to non-union groups.

***New Zealand Council of Trade Unions (NZCTU)***

- 11 The NZCTU strongly oppose any change to current provisions around union access to workplaces. They view current practice and provisions as being adequate and not difficult for either party to administer. They consider the current legislation is working well and is simple in practice for both employers and unions.

- 12 They indicate that only nine cases have come to light since 2000 on issues related to workplace access. Access was found to be reasonable in many instances and these cases recognised that the union had complied with health and safety requirements, protected commercially sensitive information and security of employees of the workplace, monitored strike action appropriately, and that access was not disruptive to the workflow of the organisation.

- 13 They highlight a number of concerns if changes were introduced to the status quo:
- any change could be seen as a pre-cursor for a return to the ECA, under which, unions did not have right of access to the workplace
  - a potential negative impact on the rights and employment conditions of certain groups of workers such as vulnerable workers. These workers require the most protection but often face the most difficulties in accessing worker representation
  - employer behaviour may adversely change where they delay but not technically deny access for the sake of “stalling” the consensual process of workplace access
  - employers may control the process of union engagement with members. For example, directing union representatives to a room and meeting union members in that space only so employers can maintain ‘watch’ on the meeting
  - the impact on union membership and access to non members
  - a breach of ILO Conventions
  - opening collective bargaining to non-union groups and the consequences this would have for access to workplaces for union and non-union representatives, and
  - the ability to enter is paramount to the success of a campaign often in workplaces where no union exists. This ensures employers are not able to intimidate workers before they have a chance to talk to a union representative.

- 14 The NZCTU considers that union presence and collective organisation in the workplace can have positive spin-offs in terms of workplace productivity. They suggest that there is some evidence on the correlation between workplaces being ‘high performing’, having high union membership and having good training arrangements in place especially via the role of bargaining and also through the

activities of union learning representatives. The NZCTU has been involved in the tripartite focused Workplace Productivity Agenda over the past four years, which is focused on improving workplace productivity of organisations.

- 15 The NZCTU recommend leaving current provisions intact. Changes to current provisions are likely to lead to an increase in compliance costs for employers who will not have the systems to grant access.