

Coversheet: Further 100-day Commitments in Employment Relations

Advising agencies	The Ministry of Business, Innovation and Employment
Decision sought	Agreement to amend the Employment Relations Act 2000
Proposing Ministers	The Minister for Workplace Relations and Safety

Summary: Problem and Proposed Approach

Problem Definition
What problem or opportunity does this proposal seek to address? Why is Government intervention required?

These proposals take forward the Government’s 100-day commitment to improve fairness in the workplace by:

- limiting employers’ ability to delay union representative access to the workplace; and
- removing the ability of employers with 20 or more employees to make use of 90-day employment trial periods.

Proposed Approach
How will Government intervention work to bring about the desired change? How is this the best option?

Union access

The proposed approach is to remove the requirement for union representatives to gain consent from employers before being able to access the workplace. Union representatives will still be required to produce union representative identification and only access the workplace for specific representative purposes at a reasonable time and in a reasonable way.

This approach will mitigate the issues around delayed access to workplaces created by requiring written consent from the employer.

Trial periods

The proposed approach is to limit the use of trial period provisions to only employers with fewer than 20 employees. This approach balances the policy objectives to:

- provide employees with security from the outset of employment; and
- reduce the costs associated with hiring for small to medium sized businesses who may be less able to manage the costs and risks associated with the hiring process.

Section B: Summary Impacts: Benefits and costs

Who are the main expected beneficiaries and what is the nature of the expected benefit?

Union access

Unions will benefit from better access to members and workplaces which may allow representatives to address workplace concerns in a more timely manner without the potential for a two day delay.

Employees will benefit from more timely access to union representatives.

Employers will benefit from less administrative compliance regarding consent notice requirements.

Trial periods

New employees in larger firms will benefit from greater certainty and security. Such security and certainty in work should enable workers to participate more effectively in work and society.

Where do the costs fall?

Union access

Employers may find union visits disruptive and reduce operational efficiency where they have not been given advance notice of visits.

Trial periods

For employers the costs and risk of hiring new employees will increase for businesses with 20 or more employees who will no longer be able to rely on a trial period provision to dismiss an employee during the first 90 days. This may increase the costs associated with the hiring process, as businesses may take more time and use more resources to ensure they have the right candidate to perform the role. Further, the cost of dismissing unsuitable candidates will increase as employers will need to go through a full performance management process (where the employee's performance is inadequate) or full dismissal process (where the employee engages in serious misconduct). These processes are likely to more time consuming and costly than being able to dismiss an employee on a trial period.

If larger employers become more cautious about who they employ, this may affect new entrants to the labour market (without skills in the workforce) or marginal workers (returning to the workforce after some time), as some employers take a more risk-averse approach to hiring employees.

What are the likely risks and unintended impacts, how significant are they and how will they be minimised or mitigated?

Union access

The risk is that employers will have less control over when a representative may access the workplace. This is mitigated by the fact that union representatives must enter the workplace at a reasonable time and in a reasonable way. Union representatives also must give their identification (as a union representative) and their purpose for entering the workplace to the employer when they initially access the workplace.

Trial periods

The primary risk is that employers who can no longer use trial periods will take a more risk-adverse approach to hiring employees. This may mean they hire fewer employees or are reluctant to take a chance on employees at the margins of the labour market.

Identify any significant incompatibility with the Government’s ‘Expectations for the design of regulatory systems’.

None identified.

Section C: Evidence certainty and quality assurance

Agency rating of evidence certainty

Union access

The Department of Labour conducted a review of union access provisions in 2010. The review included an international comparison of access provisions in number of countries. An evaluation was also undertaken by MBIE of the changes to union access provisions in 2011 (published in 2014).

Trial periods

The data on trial periods includes:

- the research undertaken by Motu on the effect of trial periods on employment;
- the evaluation conducted by MBIE regarding the short-term outcomes of the 2010 changes to the Employment Relations Act and Holidays Act; and
- the Small Business in New Zealand statistics and fact sheet published by MBIE in June 2017.

Quality Assurance Reviewing Agency:

The Treasury

Quality Assurance Assessment:

The Treasury Regulatory Impact Analysis Team (RIAT) has reviewed the RIS prepared by the Ministry of Business, Innovation and Employment and associated supporting material. Treasury comments are based on revised expectations for RISs covering 100 Day Plan priorities.

Reviewer Comments and Recommendations:

RIAT considers that the RIS clearly sets out the current legislative position, the available evidence of impact and the rationale for change, as regards union representatives' access to workplaces and the use of 90-day trial employment periods. However, as noted in the RIS, time constraints have meant that it has not been possible to consider other possible approaches and therefore it has not been demonstrated that the proposed approaches are the best way of addressing the issues identified.

In finalising the proposed new Bill, RIAT recommends that the cumulative impact of all the individual reforms on the balance of employment relations are also considered, in addition to the issue-specific Regulatory Impact Assessments that have been provided for individual elements of the package.

Impact Statement: Further 100-Day Commitments in Employment Relations

Section 1: General information

Purpose
The Ministry of Business, Innovation and Employment (MBIE) is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing final decisions to proceed with a policy change to be taken by or on behalf of Cabinet.
Key Limitations or Constraints on Analysis
<p>The proposals are part of the Government’s 100-Day Plan. As such, there have been constraints and limitations on this analysis, relating to:</p> <ul style="list-style-type: none">• the timeframes to undertake a thorough analysis or consultation on the proposals, and• the availability of data about the issues at hand.
Timeframes
<p>The proposals in this paper have been assessed in a significantly truncated timeframe. This has limited the ability to robustly test the proposals. A shortened timeframe to undertake the policy analysis was necessary to allow sufficient time for drafting legislation for introduction before the end of the 100-day period.</p>
Data
<p>Key research and data relied on for the purposes of this analysis are:</p> <ul style="list-style-type: none">• the review undertaken by the Department of Labour in 2010 regarding union access provisions• research undertaken by Motu about the effect of trial periods on employment• the evaluation conducted by MBIE entitled ‘Evaluation of the short-term outcomes of the 2010 changes to the Employment Relations Act and Holidays Act’• the Small Business in New Zealand statistics and fact sheet published by MBIE in June 2017
Responsible Manager (signature and date):
<p>Date: /01/2018</p> <p>Jivan Grewal</p>

Employment Relations Policy
Labour and Immigration Policy
Ministry of Business, Innovation and Employment

Section 2: Problem definition and objectives

2.1 What is the context within which action is proposed?

These proposals form part of the suite of changes in the Government's 100-day commitments relating to the *Employment Relation Act 2000* (the Act). Many of the changes were outlined in the New Zealand Labour Party's 2017 election manifesto chapter on workplace relations.

2.2 What regulatory system, or systems, are already in place?

Union representatives' access to the workplace

Union representatives are entitled to enter a workplace for purposes related to the employment of its members and the union's business. The Act outlines the types of activities covered by these purposes.

The purposes relating to the employment of members are:

- to participate in bargaining for a collective agreement
- to deal with matters concerning the health and safety of union members
- to monitor compliance with the operation of a collective agreement
- to monitor compliance with the Act and other Acts dealing with employment-related rights in relation to union members
- with the authority of an employee, to deal with matters relating to an employment agreement or terms and conditions, and
- to seek compliance with relevant requirements where non-compliance is detected.

The purposes relating to the union's business are:

- to discuss union business with union members
- to seek to recruit employees as union members, and
- to provide information on the union and union membership to any employee on the premises.

Under the Act union representatives may only access a business:

- at reasonable times when an employee is working at the workplace,
- in a reasonable way, having regard to normal business operations in the workplace. Case law has since clarified that this includes a reasonable number of requests, and
- in compliance with reasonable procedures relating to security, health and safety.

A discussion between an employee and a union representative must not exceed a reasonable duration. An employer cannot deduct wages for the time spent in these discussions.

The union representative must make themselves known to the employer and give the purpose of entry and evidence of identity and authority to represent the union. If unable to find the employer, the union representative must leave a written statement outlining their identity, and the date, time and purpose of entry.

In 2011, the Act was amended to introduce an additional requirement for a representative to obtain consent from an employer before the union representative could enter a workplace. Employers must not unreasonably withhold consent. Employers are required to respond to a request to access a workplace within one working day. If the union representative does not receive a response to their request within two working days, it is treated as if consent has been granted.

Consent may only be withheld on limited grounds. These include:

- the security and defence of New Zealand,
- when an offence is being investigated, or
- other certain limited grounds, including the exemption for religious organisations.

Trial periods

Currently, an employer may dismiss an employee during a trial period where the employment agreement contains a trial period provision. The provision must state:

- that for a specified trial (not exceeding 90 days) commencing at the beginning of an employee's employment, the employee is serving a trial,
- that during that period, the employer may dismiss the employee, and
- if the employer does so, the employee is not entitled to bring a personal grievance in respect of the dismissal.

The employment agreement must be signed prior to the employee commencing work for the trial period to be valid.

2.3 What is the policy problem or opportunity?

Union representatives' access to the workplace

Under the current law, union representatives must gain consent from employers in order to access a workplace. Consent may only be declined in very limited circumstances.

Case law has demonstrated that some employers may use the notification and consent process to delay access to the workplace. In *New Zealand Meatworkers Union Inc v South Pacific Meats Ltd*¹ access was requested by the Union to the worksite so that there could be a union presence at two induction days. The induction day was regarded as the first day of the season and employees would be provided with a copy of the applicable employment agreement and other information related to their employment (eg workplace policies). The Union wanted to make sure that workers were aware of the collective agreement and the option to join the Union, particularly for new workers. The employer said that this would unnecessarily disrupt the induction and therefore declined the request.

This may be detrimental in circumstances where employees have reported concerns to union representatives and those union representatives cannot access, or are delayed from accessing, the workplace to investigate the concerns (such as non-compliance with the collective agreement) or support members.

¹ [2012] NZERA Christchurch 21

International Context and International Obligations

Overseas provisions

A review was conducted in 2010 by the Department of Labour which included an international comparison of union access provisions. The research looked at Australia, Canada, the UK, the USA, Ireland and Sweden (these are countries that we typically tend to compare ourselves with). The UK, Ireland and Sweden's employment frameworks are also covered by employment laws and conventions of the European Union.

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, and the particular rights apply to the parties in each system. Access cannot be seen in isolation from these factors.

The Department of Labour's findings suggest that there are a variety of international approaches to workplace access for union representatives. The 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.

"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.

In Sweden, unions have a right of access to the workplace but often negotiate requirements for access with the employer, eg (a suitable time for accessing the workplace). In Australia 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. Countries whose union access provisions require consent before accessing the workplace include the UK, Canada and the USA. However, the Department of Labour said that that the practice of how union access is gained can differ in reality from the formal legislative requirements of that country.

International Labour Organisation (ILO) Conventions

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 by the ILO as 'Fundamental Conventions', under the 1998 Declaration on Fundamental Principles and Rights at Work. These principles bind all ILO members, whether or not the conventions have been ratified by the member country.

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.

The ILO's Committee of Experts, which makes binding rulings on the applications of the

Conventions, has examined a number of cases with respect to union access and Convention 87. The Committee 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.

Outcome of the Department of Labour's Review into Union Access Requirements

The review undertaken in 2010 (before the 2011 changes to the Act requiring union representatives to gain consent before accessing workplaces) found that:

- There did 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.
- The practice widely followed by union representatives was to voluntarily notify the employer (although practice varies from no notice to a range of notice practices depending on the circumstances) before entering the workplace. The representatives often volunteered information on the purpose of their visit.
- Case law in this area considers what constitutes "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 of Labour found no evidence to suggest that unions are not, in general, meeting this requirement, or that employers are dissatisfied with current arrangements and practices.

The review also suggested that the policy settings around union access were working well (these provisions did not require consent) for both employers and employees, and provided an appropriate balance of fairness to employers, employees and unions under current arrangements. The Department of Labour recommended not changing the provisions as they were in 2010 relating to union access to workplaces.

Evaluation of the Short-term Outcomes of the 2010 Changes to the Employment Relations Act and Holidays Act²

MBIE conducted an evaluation of the short-term outcomes of the 2010 changes to the Employment Relations Act and Holiday Act that was published in June 2014. The purpose was to understand the extent to which the changes were working as intended, and to identify factors that influence short-term outcomes observed amongst employers, employees, unions and problem resolution providers.

Survey results showed the changes to require unions to request access to workplaces generally had little overall impact on workplaces and arrangements between employers, unions and employees. When queried as to whether any union requests for access had

² <http://www.mbie.govt.nz/info-services/employment-skills/legislation-reviews/pdf-library/short-term-outcomes-2010-changes-era-and-ha.pdf>

been denied, two per cent of the sub-sample that had received requests said they had denied access to their workplace, which indicates the relatively small impact on workplaces this change has had overall.

Unions were asked how much of a difference the law change on union access had made to employment relations at workplaces. Most said this had a minimal impact (see table below). None said it had a positive impact, while seven noted a negative impact because they found it harder to make regular contact with staff. Some union responses noted that the changes meant it took longer and made it more difficult for them to contact staff as they had to go through further channels.

Summary of the effect of changes of union access on unions

Relevant amendment	Number of unions reporting			
	No or minimal effect on employment relations	Negative effect on employment relations	Positive effect on employment relations	New clauses in CEA negotiated as a result of changes
Requiring unions to seek approval for workplace access	30	7	0	4

Source: MBIE 2013 survey of unions

Trial Periods

Under the current law, employers can dismiss employees without recourse within the first 90 days of employment where a trial period is in effect. In all other cases, employers will be subject to the law relating to unjustified dismissals. The policy intent of the current trial period policy was to incentivise employers to take chances on employee's who may be considered to be more risky, such as those employees who are new to the labour market or those returning to the labour market after a long break from employment.

MBIE has limited evidence on the impact of the trial period policy on increasing employment or the frequency of dismissals. Motu (MOTU, an economic and public policy research organisation) researched the effect on employment and found no evidence that the policy affected the number of hires by firms on average, either overall or into employment that lasted beyond the trial period. They also did not find an effect on hiring of disadvantaged jobseekers. They found the main benefit of trial periods was a decrease in dismissal costs for firms, while employees faced increased uncertainty about job security. Evidence from the National Survey of Employers in 2014/2015³ shows that, for employers that hired new employees on the trial period, approximately 24% of employees were dismissed on the trial period. This figure is roughly the same for previous years of the Survey (2013/2014 – 20%, 2012/2013 – 27 %).

The harm to employees currently is insecurity over the duration of the trial period that may lead to anxiety, mistrust, and stress. Where firms do dismiss, this may create significant mental harm, which may be exacerbated when workers are not provided reasons and where they believe the dismissal is unfair. The lack of any process for workers to challenge the dismissal may worsen their experience. Employees may also be risk adverse about moving jobs if they can be dismissed. That may make the overall labour market less flexible. This also harms employers who have less engaged and less productive workers.

Thus, evidence tends to suggest the harm from the insecurity is likely to be greater than the benefits to employment or the economy.

Anecdotal evidence from that report also suggests divergent views between employees and employers. Employers take the view that the trial periods are very important as they assert it allows them to take more risks in employment decisions. Employees, on the other hand, prefer not to be on trial periods because of the insecurity it creates.

Evaluation of the Short-term Outcomes of the 2010 Changes to the Employment Relations Act

MBIE conducted an evaluation of the 2010 changes to the Employment Relations Act 2000, part of which focused on the introduction of trial periods for SMEs and the expansion of trial periods to all employers.

The key findings from the evaluation were that:

- Trial periods are being used by both small and large firms across a range of industries and positions, at higher and lower skill levels. Survey results indicated that the use of trial periods was spread across most groups that started work during

³ <http://www.mbie.govt.nz/info-services/employment-skills/labour-market-reports/national-survey-of-employers/2014-2015/appendix-methodology-and-tables.pdf>

2012, including the more disadvantaged groups such as Māori and youth. Interviews with employers revealed that the main reason for their use is to help manage risk when trialling new staff.

- Employers reported in interviews that trial periods have reduced the potential cost of dismissals (and thereby the risk of new hires), and not added any additional costs.
- In addition, results from the National Survey of Employers (NSE) show that 72 per cent of employers who had used trial periods had not dismissed an employee on a trial period; 27 percent of employers had dismissed at least one employee during or at the end of the trial period.

Business size and number of employees hired

The Small Business in New Zealand fact sheet⁴ released by MBIE in June 2017 shows that out of the total work force of 2.1 million people, 614,850 employees are employed by an SME. This is approximately 29 per cent of the work force.

There are 15,105 enterprises that employ 20 or more employees, 137,088 enterprises that employ between 1-19 employees and 362,856 enterprises with zero employees.

International comparisons

Trial periods are specific to New Zealand employment law, but, many other countries (and New Zealand) have probationary periods that have similar intentions⁵. It is difficult to compare the two practices: probationary periods often require the full procedure when dismissing the employee, however, an employer may point to the fact that the employee was not performing up to standard, similar to a performance management process in New Zealand (which is less intensive when an employee is on a probationary arrangement). Further, in some countries entitlements are not granted to new employees during the probationary period. The trial period, on the other hand, focusses on an employee not being able to bring a personal grievance if dismissed during a trial period.

International probationary periods

In Germany the employer and employee may agree to a probationary period, which is limited by law to a maximum of six months.

In the Netherlands, a probationary period must be in writing. In the case of both an employment contract for an indefinite period and for a fixed period of two or more years, the maximum probationary period is two months. In other cases, the maximum probationary period is one month. A probationary period is not allowed in an employment contract for a fixed period of six months or less.

In Spain, if there is no special provision in an applicable collective bargaining agreement, probationary periods cannot exceed six months for qualified technicians or two months for other workers.

⁴ <http://www.mbie.govt.nz/info-services/business/business-growth-agenda/sectors-reports-series/pdf-image-library/the-small-business-sector-report-and-factsheet/small-business-factsheet-2017.pdf>

⁵ Labour & Immigration Research Centre, *Employers' Perspectives – Part One: Trial Periods*, <http://www.mbie.govt.nz/publications-research/research/labour-market-and-skills/employers-perspectives-part1-trial-periods.pdf>

2.4 Are there any constraints on the scope for decision making?

The proposals have been constrained by the Government's 100 day commitments. This, in large part, is because the Government has committed to making specific changes. Our analysis has focused on the potential impacts of those choices for change and, where relevant, matters of detail that were not specified in the commitments.

2.5 What do stakeholders think?

Union access

MBIE undertook limited consultation with state sector agencies, as well as employer and worker representative groups in November and December 2017. Some unions said that the current consent requirement for union representatives to gain access to workplaces was being misused to delay access. The unions considered this to be a real problem where a workplace issue needed to be dealt with immediately. Business groups made general comments regarding their concern that strengthening bargaining will undermine the ability of firms to innovate and compete, without commenting specifically on issues with the proposed access provisions.

Trial periods

Unions want the trial period removed so that all employees have security of employment from the outset. Employers would prefer to retain the status quo. Employers indicated that they wanted the procedures an employer would be required to undertake to dismiss an employee on the trial period to be minimal.

Section 3: Options identification

3.1 What options are available to address the problem?

Union representatives' access to the workplace

Option: Remove the requirement for union representatives to have to get consent from employers before accessing workplaces

This option proposes to enable representatives to access a workplace where their union members work, or potential members work, for union related purposes. Union representatives would need to do so at a reasonable time, during working hours, and in a reasonable manner. Union representatives would still need to provide their identification to the employer and their reasons for accessing the workplace.

Trial periods

Option: Limit the employers who may use the trial period provisions to only small to medium sized businesses that employ fewer than 20 employees

This option proposes to retain trial period provisions for small to medium sized employers who employ fewer than 20 employees. This will mean employers who employ 20 or more employees will not be able to use trial periods in their employment agreements.

3.2 What criteria, in addition to monetary costs and benefits, have been used to assess the likely impacts of the options under consideration?

Union access

The criteria to assess the likely impacts of the collective bargaining proposals are:

- the impact on union representative access to the workplace
- the impact on risks for employers around managing people accessing the workplace
- compliance costs, and
- consistency with international obligations.

There is a trade-off between reducing the requirements for union representatives to access the workplace and the risk for employers around managing people accessing the workplace. The Government's policy intention is to shift the current balance towards more permissive access for union representatives to workplaces.

Trial periods

The criteria to assess the impacts relating to trial periods are:

- the impact on protection for employees
- the impact on risks for businesses in hiring new staff
- the impact on administrative efficiency.

There is a trade-off between increasing protections to employees and increasing the costs and risks to employers associated with hiring employees. The Government's policy intention is to shift the current balance towards greater employee protection.

3.3 What other options have been ruled out of scope, or not considered, and why?

The scope of the options considered in this analysis is limited by the Government's 100 day commitments. The proposal has been considered against the status quo.

Section 4: Impact Analysis

Marginal impact: How does each of the options identified at section 3.1 compare with the counterfactual, under each of the criteria set out in section 3.2?

Union Access					
	Impact on union representative access to the workplace	Impact on risks for employers around managing people accessing the workplace	Compliance costs	Consistency with international obligations	Overall assessment
No action	0	0	0	0	0
Reinstating a union representative's access to the workplace without needing consent	<p>+</p> <p>Representatives will have more timely access to workplaces. Employee concerns about workplace matters would be more efficiently represented. Should improve fairness and ultimately bargaining position.</p>	<p>-</p> <p>Employers less able to manage continuity of business, confidentiality of information and security.</p>	<p>+</p> <p>No compliance costs as it reduces compliance for unions without increasing it for firms.</p>	<p>0</p> <p>Consistent.</p>	<p>+</p> <p>Better than the status quo. Ensures union representatives have more timely access to the workplace. This may lead to employees' workplace concerns being dealt with quickly and as they arise. Employers have less control over when union representative's access workplaces (representatives are still required to notify the employer when they are at the workplace, provide their union representative identification and access the workplace at a reasonable time in a reasonable way).</p>

Key:

- ++** much better than doing nothing/the status quo
- +** better than doing nothing/the status quo
- 0** about the same as doing nothing/the status quo
- worse than doing nothing/the status quo
- much worse than doing nothing/the status quo

Trial Periods				
	Impact on protections for employees	Impact on risks for businesses in hiring new staff	Impact on administrative efficiency	Overall assessment
No action	0	0	0	0
Limit the employers who may use the trial period provisions to only small to medium sized businesses that employ fewer than 20 employees	++ Restores the right to full employment law protection for those employees hired by employers that employ 20 or more employees (around 71 % of employees). This improves the security and certainty of employment for those employees. Employees employed by SME's will remain governed by the current provisions.	- Those employers who employ 20 or more employees will no longer be able to mitigate the risks associated with hiring employees through use of the trial period. These risks can be mitigated in other ways, such as a more thorough recruitment process or taking on less risky employees. SMEs will be able to continue to mitigate risk through the use of trial period provisions.	0 Businesses who choose to use trial periods will need to be more aware of their current staffing levels at the point of hiring staff to ensure that they come within the SME requirement. Creates an uneven playing field between SME's and larger businesses.	+ Restores the right to full protections for the majority of employees while retaining the benefits of managing the risks and costs associated with hiring employees for employers with fewer than 20 employees. Creates an uneven playing field between SME's and larger businesses, however larger businesses may be more equipped to deal with the risks and costs associated with hiring employees.

Key:

- ++** much better than doing nothing/the status quo
- +** better than doing nothing/the status quo
- 0** about the same as doing nothing/the status quo
- worse than doing nothing/the status quo
- much worse than doing nothing/the status quo

Section 5: Conclusions

5.1 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

Union representative access to the workplace

Preferred option: Remove the requirement for union representatives to have to get consent from employers before accessing workplaces

This option would prevent employers from delaying access for union representatives to enter the workplace. This may be detrimental in circumstances where employees have reported concerns to union representatives and those union representatives cannot access the workplace to investigate those concerns (such as non-compliance with the collective agreement) or support members.

This may impact on an employer’s ability to manage concerns around continuity of work, security and confidentiality of information at the workplace. Anecdotal evidence prior to the current provisions indicates most representatives and employers were able to manage access issues through effective communication.

Union stakeholders support further clarifying case law principles around the right to visit multiple members at once, the right to privacy, access to facilities for meeting workers and the ability to distribute union materials to workers. These issues could be addressed through further guidance to parties in the form of a code of employment practice, which is also supported by stakeholders.

Trial periods

Preferred option: Limit the employers who may use the trial period provisions to only small to medium sized businesses that employ fewer than 20 employees

This option restores the right to full employment law protection for those employees hired by employers that employ 20 or more employees (around 71 % of employees). This improves the security and certainty of employment for those employees. Employees employed by SMEs will remain governed by the current provisions and not be able to bring a personal grievance for unjustified dismissal when hired on a valid trial period.

Employers who employ 20 or more employees will no longer be able to mitigate the risks associated with hiring employees through the use of a trial period. These risks can be mitigated in other ways, such as a more thorough recruitment process or taking on less risky employees. This may mean employees such as those new to the labour market or those that have been out of the labour market for some time may face greater challenges finding employment. SMEs will be able to continue to mitigate risk through the use of trial period provisions.

This option creates an uneven playing field between SMEs and larger businesses, however larger businesses may arguably be more equipped to deal with the risks and costs associated with hiring employees.

Union stakeholders were in favour of removing trial periods completely. Most employer groups were in favour of the trial period provisions remaining untouched.

5.2 Summary table of costs and benefits of the preferred approach

Affected parties (identify)	Comment: nature of cost or benefit (eg ongoing, one-off), evidence and assumptions (eg compliance rates), risks	Impact \$m present value, for monetised impacts; high, medium or low for non-monetised impacts	Evidence certainty (High, medium or low)
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Union access proposal

Regulated parties	There would be minimal costs associated with this proposal. The benefits are that employees may have greater access to their representatives. This may mean that employee concerns about workplace matters would be more efficiently represented. This could lead to better workplace outcomes.	Low	Low
Regulators	May be some cost to the Employment Relations Authority where cases are taken around the boundaries of the legislation.	Low	Low
Total monetised benefit		Low	Low
Non-monetised benefits	Employees will have better access to their union representatives so their workplace concerns and questions can be addressed more efficiently. This may lead to better functioning workplaces.	Medium	Low

Trial periods

Regulated parties	<p>Employers – Employers who employ 20 or more employees will no longer be able to mitigate the risks associated with hiring employees through use of the trial period. These risks can be mitigated in other ways, such as a more thorough recruitment process or taking on less risky employees – at a greater cost to the employer. SMEs will continue to benefit from the trial period provisions if they choose to incorporate them in their employment agreements.</p> <p>Employees – the majority of employees will have improved continuity and security of employment, with full access to personal grievance protections. Employees hired by SMEs may still face being dismissed during the</p>	Medium	Low
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	trial period without the ability to bring a personal grievance.		
Regulators	May be some cost to the Employment Relations Authority where cases are taken around the boundaries of the legislation (regarding whether an employer actually had fewer than 20 employees at the time of hiring).	Low	Low
Total monetised benefit	Unclear.	Low	Low
Non-monetised benefits	The majority of employees will have improved continuity and security of employment, with full access to personal grievance protections.	Medium	Medium

5.3 What other impacts is this approach likely to have?

Overall, the changes broadly revert the law to the pre-2011 (in the case of union access provisions) and pre-2010 (in the case of trial periods) positions.

For union access provisions we expect the impact to be relatively minor.

We expect there to be benefits to a greater number of employees regarding security and continuity of employment where trial periods will no longer be able to be used. This may increase the costs associated with hiring (and dismissing) employees for employers that employ 20 or more employees.

As a total suite of interventions (including the 100-day commitments amending the *Employment Relations Act 2000*), the changes should strengthen the position of unions in bargaining and in turn limit some of the worst employer practices in the market. In doing so, this could limit firm flexibility, which could impact on innovation in and by firms.

5.4 Is the preferred option compatible with the Government's 'Expectations for the design of regulatory systems'?

No incompatibility has been identified.

Section 6: Implementation and operation

6.1 How will the new arrangements work in practice?

The legislative proposals need to be implemented through amendments to the *Employment Relations Act 2000*. MBIE is responsible for administering the Act and provides information for employers, unions and employees through its website, contact centre and other customer services on an ongoing basis. Information provision would be undertaken within MBIE's existing baseline funding.

6.2 What are the implementation risks?

There is a risk that employers with more than 20 employees could seek to access the trial period provisions by restructuring their business so that the number of staff will never be more than 20. There may be some risk around employers gaming the provision by restructuring their company to come within the fewer than 20 employee threshold. We think the size of this risk is minimal, given the cost and time associated with reconfiguring a company.

Further, employers may use trial period provisions regardless of their size, relying on employees being unaware of trial periods applying to employers with fewer than 20 employees. Also, an employee is unlikely to be aware of how many staff members the employer actually employs (especially upon signing the employment agreement and before commencing work).

Further consideration will need to be given to the noted implementation issues.

Section 7: Monitoring, evaluation and review

7.1 How will the impact of the new arrangements be monitored?

MBIE will monitor the Act through media reports, research and the use of mediation services and the Employment Relations Authority.

MBIE will include questions in its annual survey of employers to get information on awareness and impact from changes.

7.2 When and how will the new arrangements be reviewed?

The proposal will be monitored and evaluated as part of MBIE's overarching responsibility to monitor the Act.