

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** NZ Amalgamated Engineering Printing & Manufacturing Union (Inc)  
(Applicant)

**AND** Independent Newspapers Ltd (First Respondent)  
AND Wellington Newspapers Ltd (Second Respondent)  
AND Christchurch Press Company Ltd (Third Respondent)  
AND Waikato & King Country Press Ltd (Fourth Respondent)  
AND Nelson Mail Ltd (Fifth Respondent)  
AND Herald Communications Ltd (Sixth Respondent)  
9. AND Southland Times Company Limited (Seventh Respondent)  
AND Tararaki Newspapers Ltd (Eighth Respondent)  
AND Manawatu Standard Ltd (Ninth Respondent)  
AND Independent News Auckland (Tenth Respondent)  
AND Marlborough Express Newspaper Company Limited (Eleventh  
Respondent)

**REPRESENTATIVES** Mr B Patrick, for the Applicant  
Ms J Gibbs, for the Respondents

**MEMBER OF AUTHORITY** G J Wood

**INVESTIGATION MEETING** 20 June, 3-6 July 2001  
Final submissions received by 27 July 2001

**DATE OF DETERMINATION** 3 August 2001

**DETERMINATION OF THE AUTHORITY**

**Introduction**

The applicant claims that the respondents have breached their duty of good faith toward it in a number of ways after the initiation by it of bargaining for a multi-employer collective agreement. The most fundamental of these concerns is that it believes that the respondents have, by bargaining only on the issue of whether they should be parties to such an agreement, failed to consider and respond to the union's proposals for a multi-employer collective agreement. It seeks compliance orders to remedy the alleged breaches.

The first respondent, Independent Newspapers Limited (INL), a major media organisation in New Zealand, owns each of the other respondents. All of the respondents employ a number of journalists, sub-editors and production staff etc. who belong to the applicant (the Engineers Union.

the union). Some of those workers had been employed under collective employment contracts during the time of the Employment Contracts Act 1991, but by the time of the commencement of the Employment Relations Act 2000, the only current collective contracts related to some members of the union who worked at Taranaki Newspapers Limited (the eighth respondent - Taranaki Newspapers).

In this determination I do not intend to traverse the difficulties both parties have raised about negotiating with each other under the Employment Contracts Act. The duties that the parties both owe each other to deal with each other in good faith came into force on 2 October 2000. Actions by any party before that date are not relevant to the determination of this matter. All parties are entitled to protection, not only under the presumption that they will behave in accordance with the duty of good faith after 2 October 2000, but also under the presumption that any activities undertaken by them before that date which may have breached the new Act are irrelevant. The only comment that I need to make for the purposes of this determination is that, due to a strained relationship between the union and the respondents, neither had much, if any, trust in the other's motives when it came to bargaining under the Employment Relations Act.

### **Multi-employer Collective Bargaining is Initiated**

The union presently represents about 25% of the approximately 3,000 full and part time employees of INL and its subsidiary companies. Pursuant to the new Act the union, supported by its members, determined on a strategy of organising for a multi-employer collective agreement (MECA) with all of the respondent parties. The objective was to negotiate a MECA that covered each of INL's operations throughout New Zealand, by way of a set of core provisions relating to all union members throughout the country and a separate schedule for each separate respondent company. In order to progress this strategy under the Act, the union was required, pursuant to section 45, to hold separate secret ballots of its members employed by each of the respondents intended to become party to the bargaining. The ballots supported collective bargaining for a MECA with respect to each of the respondent companies. Accordingly, pursuant to section 42 and section 45(5), each of the respondent companies was given notice of initiation of bargaining. The respondent companies were also told, pursuant to section 45(6), the results of the ballots. Overall the ballots showed two-thirds support by union members for the initiation of bargaining for a MECA.

Bargaining was properly initiated on 1 February 2001. Representatives of the parties met pursuant to section 32(1)(a), in order to enter into an arrangement that sets out a process for conducting the bargaining in an effective and efficient manner, on 12 February. This meeting involved the key

protagonists in this matter, Mr Andrew Little, the National Secretary of the Engineers Union, and Mr Mark Lochore, INL's Group Human Resources Manager.

### **Disputation Over the Venue for Bargaining**

While a large number of matters were agreed at the meeting, there was disagreement over who should pay for travel and accommodation expenses, where the bargaining should be conducted, communication with staff over bargaining and the provision of information between the parties. Following correspondence between Mr Lochore and Mr Little, April 5 and 6 were agreed as the dates for the bargaining to take place. The only issue that remained unresolved was the location for the bargaining meetings. The union considered that there was no practical benefit in having bargaining take place anywhere other than Wellington. The insistence by the union on Wellington as the venue was based on the fact that many of the negotiators on both sides were based in Wellington and therefore it was the most cost-effective venue. Mr Lochore, on behalf of the respondents, put forward Christchurch, Hamilton and Nelson as possible venues for the bargaining. The companies' concerns about Wellington, as explained to the union, included the companies' belief that having the talks in Wellington could contribute to a belief amongst staff that the outcome was going to be decided by head office management and the head office of the union. Concern was also expressed about high accommodation and venue hire costs in Wellington. The union was told that if the costs of alternative locations were in excess of the Wellington option, the companies would consider making a contribution to the difference.

The companies had a number of other concerns, which were not expressed to the union. One of the most important of those was that the companies did not want the negotiations held anywhere near the offices of the second respondent (Wellington Newspapers), where they believed there were more politically-active unionists employed than in other centres. There was also concern over greater media and political interest if bargaining took place in Wellington. An argument of a rather different nature was that spreading the talks around would share the travel burden for those attending.

Mr Little took a unilateral initiative to book a venue in Wellington for the talks, but this did not lead to any change in the companies' position. Therefore the parties agreed that this issue should go to mediation. As a result the parties agreed that the talks set down for 5 and 6 April would take place in Masterton. However, the union made it clear, by way of letter dated 2 April, of its view that the companies' actions in insisting on a venue other than Wellington were in breach of their good faith obligations. The union reserved its right to rely on these alleged breaches at any relevant time in the future.

## The Parties' Different Approaches to Bargaining

Pursuant to section 5 of the Act, bargaining in relation to the MECA began on 1 February. The companies had, however, already stated their clear preference for company by company collective bargaining. At the Christchurch Press Company Limited (the third respondent - the Christchurch Press) the company had already purported to initiate collective bargaining with the union. The union rejected such initiation on the basis that, pursuant to section 40(2), bargaining for a collective agreement may not be initiated by an employer unless the proposed coverage clause will cover work "*that is or was covered by any other collective agreement to which the employer is or was a party*". In particular, it was also noted by the union that section 244 did not apply to any of the Christchurch Press's previous collective contracts, because none were in force on 2 October 2000 as required.

The situation with respect to the eighth respondent (Taranaki Newspapers) was different, however, as bargaining was later properly initiated for collective agreements for journalists (sub-editors and reporters), photographers and graphic artists and librarians; the design division, press department and publishing; and classified advertising. Thus, for Taranaki Newspapers and its staff in the Engineers Union at least, by 1 March there was bargaining properly initiated for two different sorts of collective agreement, one relating to Taranaki Newspapers alone, and the other relating to the MECA. The ability of different parties to legitimately initiate collective bargaining in respect of different parties and with different coverage was clearly an issue that was expected to occur under the Employment Relations Act. This must impact on how bargaining will occur with respect to each situation where collective bargaining is properly initiated, as analysed below, but it does not mean that the requirements of good faith can be ignored.

I note at this point that it would be quite incorrect to state that the issues that have come to dominate this matter only came about during the bargaining meeting at Masterton, which will constitute the focus of this determination. As early as 18 December 2000 Mr Lochore wrote to Mr Little copying a memorandum for all staff, which stated that in relation to bargaining for a MECA –

*"...the union was told that while INL is prepared to consider their arguments for a multi-employer collective agreement, divisional general managers had got used to negotiating at a local level and that there was little enthusiasm for centralised bargaining. In addition it should be pointed out that while the company will fulfil the Act's good faith obligations, the legislation is clear that the duty of good faith does not require the parties to enter into a collective agreement."*

Mr Little responded on 20 December 2000 stating –

*“The statements in the fourth paragraph of your memorandum suggest an intention on the part of the company to engage in negotiations for a multi-employer collective agreement in a perfunctory manner. Such conduct, were it to occur, would be a breach of the good faith requirements of the Employment Relations Act, specifically section 32(1)(b) and (c). Please note the reference in paragraph (b) of subsection 32(1) to the parties meeting “for the purposes of the bargaining” and note that it is not meeting for the purposes of considering arguments for a particular type of agreement. There is ample North American case law on conduct comprising perfunctory bargaining which, no doubt, you will have been advised about.”*

As accepted by Mr Little at the hearing, this exchange of correspondence highlights the major difference between the parties with respect to good faith bargaining.

### **The Exchanging of Claims**

The parties' claims for the MECA were exchanged on 22 March 2001. The INL companies made only one claim and that was that there ought to be separate site agreements for each of the companies, consistent with their above-stated preference. By contrast, the union's claims were comprehensive, comprising 21 typed pages of core claims, with separate schedules of varying degrees of comprehensiveness pertaining to each of the respondent companies.

Upon receipt of the union's claims Mr Lochore sent a memo to each of the respondent companies attaching the union's claims as it related to each company and stated –

*“Over the next two weeks the response to the union claim will be finalised. It would be appreciated if you could forward responses on both the “core provisions” document and the claims as they relate to your division by Monday April 2.”*

Comprehensive written responses to the union's claims were received from the fourth respondent (the Waikato Times), the fifth respondent (the Nelson Mail), Taranaki Newspapers, the tenth respondent (Suburban Newspapers), the eleventh respondent (the Marlborough Express) and the ninth respondent (the Manawatu Standard). However, the Manawatu Standard's response (set out in a letter over which privilege was not sought) states –

*“Before listing our responses, I must firstly point out that we are not interested in taking part in a MECA, but happy to negotiate another editorial and production collective at MSL where both parties can in good faith produce a document which has relevance to today, tomorrow and beyond – not yesterday. It is ludicrous for such a small minority group of stakeholders (approx. one-quarter of the business) to be given the ability to make such serious business impacts. All provisions must relate to the Manawatu Standard Limited. We are an independent business bearing no relation to any other INL business and must have the ability to be staffed and make profit.”*

The responses from the Christchurch Press and the seventh respondent (the Southland Times) simply emphasised their case against a multi-employer collective agreement. No written responses were received from the second respondent (Wellington Newspapers) or the sixth respondent (Herald

Communications). However, Mr Moir, the Human Resources Manager at Wellington Newspapers, would most likely have been the first to know from Mr Lochore that bargaining at Masterton would be limited to whether there would be multi-employer collective bargaining or local bargaining, and this information was available from 27 March at the latest.

### **The Agenda for Bargaining**

It was while the parties were dealing separately with a mediator over the venue and agenda for the bargaining for a MECA that a major miscommunication occurred, I find. The mediator was dealing separately by telephone with Mr Little and Mr Lochore between 23 and 27 March. I accept Mr Little's evidence that he communicated his view that given that only two days had been set down for the talks, then future venues and dates would have to be sorted out first. This would then be followed by a discussion of the employer's claim, namely for site by site collective bargaining, and that in any time remaining the union's claims would be addressed. This message was left on the mediator's voicemail. By return voicemail message Mr Little was informed that the order of the agenda would be that the companies' claim would be dealt with first. This left Mr Little with the clear impression that the three items for discussion would be the companies' claim, future venues and dates for negotiation, and the union's claims.

However, Mr Lochore's telephone discussions with the mediator left him with an entirely different impression, being one again that I accept without reservation. It was Mr Lochore's evidence that the mediator raised only two topics for the agenda with him, namely the venue and location of further talks and whether there would be a multi-employer collective agreement or local agreements. Mr Lochore told the mediator that it was illogical to set dates and venues for further talks until it was determined whether or not the talks were going to be at multi-employer or local level. The mediator later rang Mr Lochore back to confirm that he had talked to the union and that the order of agenda items was fine. Thus, the employer parties attended the negotiations at Masterton expecting that bargaining would centre on who would be the parties to any collective agreement and, dependent on that matter, how dates and venues for further talks would be handled. I accept the companies' view that if the parties were attending the bargaining talks to determine whether bargaining would be for a MECA or on a site by site basis, then it would make more sense to know the result of that matter before future talks could be arranged.

### **Bargaining at Masterton**

There was a hiccup in the transport arrangements provided by INL for the union bargaining team, which meant that bargaining at Masterton did not commence on time on 5 April. This did not help

matters as the parties were about to commence meeting on an issue of major importance to all concerned.

What was to follow must be seen in the context of the fundamental misunderstanding between the parties of the way matters were to proceed, as set out above. There were two mediators in attendance. I find that they identified two issues for discussion - the type of agreement and, depending on the outcome of that, times and venues for further discussion. This was agreed to.

The INL companies, because they believed that the union was there to further its claim for a multi-employer collective agreement, expected the union to lead off. Because Mr Little saw the first matter to be addressed as being the companies' claim, he believed that the companies, in asking the union to go first, were foregoing their right to set out their position first as the ones putting forward a claim, which is of course normal practice in bargaining. Thus because he saw himself as responding to the employer's claim which had been provided by letter of 22 March, Mr Little wanted to respond to the points made in that letter one by one, by way of a whiteboard presentation. Mr Lochore, on behalf of the INL companies, objected to this because he believed, as was supported by the other employer representatives, that it was incumbent on the union to put forward positive reasons why it wanted a multi-employer collective agreement - not why it did not want site by site bargaining.

While it is clear why there was confusion over this issue, it meant that the parties had only just begun bargaining talks and were at the point of a stand-off. This simply added to the existing tension, and it is thus little wonder that Mr Little became "testy". I note at this point that there was a great deal of evidence about the attitude and behaviour of Mr Little (and to a lesser extent Mr Lochore) during the bargaining at Masterton. I do not intend to go into that evidence in any detail except to note that bargaining can often be a robust environment and that this was an event creating a great deal of tension in itself (refer back to my comments on the troubled history between the parties). Furthermore, this was seen as the first test of multi-employer bargaining under the new Act. Thus a lot was seen as being at stake. Compounded to this was the fact that the parties had different understandings as to what would occur when they were at Masterton. Finally, when it comes to observed behaviour there is an old saying that "perception is reality" and thus people can not simply deny the impact on others of their behaviour, even though they do not intend that impact. In the tension filled atmosphere of Masterton I am sure the above factors explain the concerns that many witnesses had over the behaviour of the "key actors". Such evidence is in any event of little assistance in determining the wider employment relationship problem between the parties over the legislative requirements on them when multi-employer collective bargaining has been initiated.

A "short line-out" was held to try and break the impasse over how bargaining would commence at Masterton. Again this was held in a testy atmosphere. Allegations were made that the union was not properly prepared and Mr Appleby of the Timaru Herald made the comment that if his company was making a claim it would be completely different. I accept Mr Appleby's evidence that this comment was made simply to reinforce his company's strong preference for bargaining at the company level.

Following further initiatives by the mediators it was agreed that Mr Little would commence by not only making a presentation as to why the union wanted a multi-employer collective agreement but also by responding to the companies' claim for site by site bargaining. The INL companies would then be given the opportunity to ask any questions they might have and then to respond to the issues themselves.

Mr Little gave a presentation setting out the reasons why the union wanted a multi-employer collective agreement. Mr Little then set out the union's reasons why it rejected the employer's rationale for wanting site by site bargaining.

After an adjournment to consider the presentation, various members of the employers' negotiating team took turns to ask questions they had about various aspects of the presentation.

Following another adjournment Mr Little responded to each of the questions raised, which of course related to the benefits or otherwise of a multi-employer collective agreement, and how such a system might operate.

After a half-hour adjournment, during which the companies' negotiators fine-tuned their presentation, a number of the companies' negotiators set out the companies' opening position. Many spoke from pre-prepared notes. I make no negative finding against them for being prepared in advance - one would hope that they would have been prepared. The union had also prepared in advance, as its internal publications showed.

Then, following another half-hour adjournment, Mr Little responded with various questions and statements in support of a multi-employer collective agreement and against site by site bargaining. By that stage it was 7pm and it was agreed (as was sensible) that sufficient bargaining had taken place that day. However, a dispute then followed as to when the employers would be ready to respond the next day. Given that the pre-arranged bus transport was to leave Masterton at 1pm, the union wanted negotiations to commence at 8.30am. The employers considered that they would need until 10am to be ready to respond.

Despite starting work on their response at 7am, the employers' response was not ready to be presented until 11am. The mediators were informed throughout the morning of the employers' progress but for some reason they neglected to tell the union about what the employers were doing and when they would be ready. Needless to say, this heightened tension levels even further. When the parties met again (at around 11am) Mr Little indicated his displeasure at events, to which there was a response which was not conciliatory.

On behalf of the employers Mr Don Churchill, General Manager of the Christchurch Press, read a prepared response, copies of which were made available to the union. In it the INL companies responded to most, if not all, of the issues put before them in support of a MECA and against site bargaining, including -

- INL being in essence a single entity,
- the need for consistency in basic common terms,
- that INL had undermined collective bargaining,
- that INL had invoked strategies to drive down conditions,
- that INL adopted a centralised approach,
- that union members want a multi-employer collective agreement,
- that transaction costs would be lower under a multi-employer collective agreement,
- the need for pay increases, transparency and to promote recruitment and industrial stability,
- that INL had driven down conditions, and
- that there were a number of unsettled collectives.

The conclusion of the INL companies' response regarding bargaining for a MECA read as follows -

*"The representatives of our companies have entered into these negotiations and have given careful consideration to the arguments raised.*

*The conclusion is that, for the arguments outlined, we reject your proposal for an INL multi-employer agreement.*

*We see no benefit to our staff and our companies.*

*We wish to retain the status quo, negotiate locally, meet with local EPMU and site delegates and arrive at suitable agreements that work and operate locally.*

*Our managers firmly believe that we can better construct strong employee relationships and strong companies through local negotiations with staff and their representatives."*

After yet another half-hour adjournment, to consider this response, Mr Little replied that the INL companies had not covered the issue of how core claims would or would not apply to each of the sites. He went so far as to say that the INL companies had not analysed the union's proposals or claims at all. He then went on to ask two questions: - one related to how many collective agreements would be sought on each site, and the other related to the issue of coverage.

Another adjournment was then taken, while the differing views of each of the INL companies were discussed. Upon the return of the employer representatives, Mr Lochore stated that it was up to local management to determine how negotiations would be conducted at a local level and that the companies would be happy to discuss those issues with the union at the local level. Mr Little responded that the companies had attended the talks with a clear view and closed minds, but that the issue would not go away and that the ball was in the companies' court. The response from the companies was that discussions at a local level would be welcomed. When one of the mediators asked where negotiations would go to from this point, neither party had any new initiative to make and bargaining at Masterton accordingly ended.

### **No Resumption of Bargaining for a MECA**

Neither party has since then clearly sought to restart bargaining for a multi-employer collective agreement. Bargaining has however, commenced at Taranaki Newspapers, pursuant to that employer's earlier initiation. Although the union has not specifically asked for bargaining for the MECA to recommence it is clear that the INL employers have rejected the proposal for an INL multi-employer collective agreement. That view, combined with the companies' urging of the union to enter into negotiations at the site level, has been repeated on at least two occasions by Mr Lochore in writing and at the highest level of INL, in a conversation between Mr Little and Mr Rick Neville, the Chief Operating Officer of INL. It was clear also, from evidence given at the investigation meeting, that as a result the INL companies are only prepared to meet the union to discuss who the parties to a collective agreement should be, and not all the claims filed for the MECA.

### **Negotiations at the Christchurch Press**

The week after the participants had returned to their places of work, Mr David Broughton, the Deputy General Manager of the Christchurch Press, approached Mr David McManus, an Engineers Union delegate, telling him that they had better "*have a chat about restarting negotiations for the*

*collective*”, or words to that effect. Mr McManus referred Mr Broughton to the local union official, Mr Angel. The next day Mr Broughton phoned Mr Angel and said words to the effect that “*we are still interested in having an agreement here. The door is open. We can’t open the batting. It’s up to you.*” It was clear to both Mr McManus and Mr Angel that Mr Broughton was seeking to promote site negotiations at the Christchurch Press. Mr Broughton was fully aware, as he had been at Masterton, that Mr Little was the union’s advocate for bargaining purposes.

### **Salary costs – Southland Times**

During the negotiations at Masterton Mr Churchill had used salary levels for sub-editors and reporters at the Southland Times in order to demonstrate a point about how well staff had done while on individual contracts. Mr Paul Faucamp, the Engineers Union delegate for the Southland Times, was at the Masterton negotiations. He was surprised at the level of the figures quoted (he is a sub-editor himself) and upon his return expressed that surprise to the Southland Times’ editor. The editor, Mr Tullet, investigated the matter and discovered that the figures included a number of management staff such as the chief reporter, the deputy chief reporter, the sports editor and the features editor. Mr Tullet accepted that that would have given a distorted picture of what most sub-editors and reporters earned. It was Mr Lochore who gave those figures to Mr Churchill to deliver at Masterton. Mr Churchill and Mr Lochore were unaware of the distinction at the time. Further, in respect of the coverage clause sought by the union for the multi-employer collective contract, those management personnel would have been covered and therefore there were some grounds for including those positions in the figures. However, on the face of them, the figures were misleading in terms of who would normally be understood as reporters or sub-editors.

### **Referral of Question of Law**

I have given serious consideration to referring the questions of law central to this investigation to the Court for its opinion under section 177. This employment relationship problem clearly involves important questions of law that are central to the fundamental objectives of the Employment Relations Act and, in particular, the necessity for employment relationships to be built on good faith behaviour and the promotion of collective bargaining. However, I have determined not to do so for a number of reasons -

- Neither party sought to remove the matter to the Court under section 178, presumably because they had confidence in the Authority’s practices and procedures and thus its ability to establish the facts and make a determination according to the substantial merits of the case without regard to technicalities;

- There would be an inevitable delay under the section 177 process and that may not assist the parties in progressing collective bargaining. I do note, however, that somewhere, at some time, the parties are going to have to meet again if progress on collective bargaining is to be made;
- By prioritisation of my work, I am able, in any event, to issue my determination promptly; and
- If any party should wish to challenge my determination they will have the option of doing so either by way of a hearing *de novo* (involving a very different process), or by way of challenge to any of my findings of fact or law.

Thus, by issuing a complete determination at this juncture the parties' interests will be best served, I conclude.

### **The Law**

The Employment Relations Act 2000 is a very different Act to the Employment Contracts Act 1991, which it replaced. That conclusion can be ascertained simply from comparing the long title of the Employment Contracts Act, being an Act to promote an efficient labour market, with the object of the Employment Relations Act, which is to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment, and to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association and Convention 98 on the Right to Organise and Bargain Collectively. Thus there is importance placed throughout the Employment Relations Act on the parties to an employment relationship (which includes unions, its members, and employers) having to deal with each other in good faith and thus not doing anything, directly or indirectly, that will or is likely to mislead or deceive each other. There were no equivalent requirements under the Employment Contracts Act.

There is no comprehensive definition of "good faith" in the Act, but it is clear that it is not limited to actions that are misleading or likely to mislead or deceive others. Further, subsection (4) of section 4 makes it clear that the duty of good faith applies to bargaining for a collective agreement or for a variation of a collective agreement, including matters relating to the initiation of bargaining. It is also important to consider section 5, which defines "bargaining" in relation to bargaining for a collective agreement as meaning all the interactions between the parties to the bargaining that relate to the bargaining and includes negotiations that relate to the bargaining and communications or

correspondence (between or on behalf of the parties before, during, or after negotiations) that relate to the bargaining.

Furthermore, in Part V of the Employment Relations Act, relating to collective bargaining, a number of requirements that the parties must meet in respect of collective bargaining are set out. These are also new.

Section 31 sets out the object of this Part of the Act. It states:

*“The object of this Part is –*

- (a) to provide the core requirements of the duty of good faith in relation to collective bargaining; and*
- (b) to provide for 1 or more codes of good faith to assist the parties to understand what good faith means in collective bargaining; and*
- (c) to recognise the view of parties to collective bargaining as to what constitutes good faith; and*
- (d) to promote orderly collective bargaining; and*
- (e) to ensure that employees confirm proposed collective bargaining for a multi-party collective agreement.*

Section 32 sets out some minimum good faith obligations between the parties when bargaining for a collective agreement -

*“(1) The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to do, at least, the following things:*

- (a) the union and the employer must use their best endeavours to enter into an arrangement, as soon as possible after the initiation of bargaining, that sets out a process for conducting the bargaining in an effective and efficient manner; and*
- (b) the union and the employer must meet each other, from time to time, for the purposes of the bargaining; and*
- (c) the union and employer must consider and respond to proposals made by each other; and*
- (d) the union and the employer –*
  - (i) must recognise the role and authority of any person chosen by each to be its representative or advocate; and*
  - (ii) must not (whether directly or indirectly) bargain about matters relating to terms and conditions of employment with persons whom the representative or advocate are acting for, unless the union and employer agree otherwise; and*
  - (iii) must not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining; and*
- (e) the union and employer must provide to each other, on request and in accordance with section 34, information that is reasonably necessary to support or substantiate claims or responses to claims made for the purposes of the bargaining.*

(2) *Subsection (1)(b) does not require a union and an employer to continue to meet each other about proposals that have been considered and responded to.*

(3) *The matters that are relevant to whether a union and an employer bargaining for a collective agreement are dealing with each other in good faith include –*

*(a) the provisions of a code of good faith that are relevant to the circumstances of the union and the employer; and*

*(b) the provisions of any agreement about good faith entered into by the union and the employer; and*

*(c) the proportion of the employer's employees who are members of the union and to whom the bargaining relates; and*

*(d) any other matter considered relevant, including background circumstances and the circumstances of the union and the employer.*

(4) *For the purposes of subsection (3)(d), circumstances, in relation to a union and an employer, include –*

*(a) the operational environment of the union and the employer; and*

*(b) the resources available to the union and the employer.*

(5) *This section does not limit the application of the duty of good faith in section 4 in relation to bargaining for a collective agreement."*

Section 33 makes it clear that the duty of good faith does not require a concluded collective agreement. It states -

*"The duty of good faith in section 4 does not require a union and an employer bargaining for a collective agreement –*

*(a) to agree on any matter for inclusion in a collective agreement; or*

*(b) to enter into a collective agreement."*

The rest of the Part goes on to deal with how information requested in relation to bargaining for collective agreements must be provided, for codes of good faith, for the initiation of bargaining and for how collective agreements are to be ratified, the form of an agreement and its content, and other related matters.

Of particular relevance to this case are the code of good faith approved by the Minister under section 35 and the specific provisions where unions propose to initiate bargaining with two or more employers for a single collective agreement. In particular, section 45 provides that before bargaining for a multi-employer collective agreement may be initiated under section 42, the union must hold, in accordance with its rules, separate secret ballots of its members employed by each employer intended to be a party to the bargaining. Where secret ballots have resulted in a decision in favour of bargaining for a single collective agreement, as here, then the union may initiate

bargaining by giving a notice in accordance with section 42 to each employer in respect of which a secret ballot has resulted in favour of bargaining for a single collective agreement, as also occurred here.

The relevant parts of the code of good faith are set out below –

<p><i>Development of Agreed Bargaining Process</i></p>	<p><i>The parties must use their best endeavours to enter into an arrangement, as soon as possible after the initiation of bargaining, that sets out a process for conducting the bargaining in an effective and an efficient manner.</i></p> <p><i>The parties should consider the following matters which may, where relevant and practicable, in whole or in part make up any such arrangement;</i></p> <p><i>Advice as to who will be the representative(s) or advocate(s) for the parties in the bargaining process</i></p> <p><i>Advice as to whom the representative(s) or advocate(s) represent</i></p> <p><i>The size, composition and representative nature of the negotiating teams and how any changes will be dealt with</i></p> <p><i>Advice as to the identity of the individuals who comprise the negotiating teams</i></p> <p><i>The presence, or otherwise, of observers</i></p> <p><i>Identification of who has authority to enter into an agreement/limits of authority</i></p> <p><i>The proposed frequency of meetings</i></p> <p><i>The proposed venue for meetings and who will be liable for any costs incurred</i></p> <p><i>The proposed timeframe for the bargaining process</i></p> <p><i>Advice on preferred positions in respect of the type and structure of agreements</i></p> <p><i>The manner in which proposals will be made and responded to</i></p> <p><i>The manner in which any areas of agreement are to be recorded</i></p> <p><i>Advice on ratification and signing-off procedures</i></p> <p><i>Communication to interested parties during bargaining</i></p> <p><i>The provision of information and costs associated with such provision</i></p> <p><i>Appointment of, and costs associated with, an independent reviewer should the need arise</i></p> <p><i>Any process to apply if there is disagreement or areas of disagreement</i></p> <p><i>Appointment of a mediator should the need arise</i></p> <p><i>In the case of multi-party bargaining, how the employer parties will behave towards one another and how the union parties will behave towards one another</i></p> <p><i>When the parties consider bargaining is deemed to be completed.</i></p>
<p><i>Meetings</i></p>	<p><i>The parties must meet each other, from time to time, for the purposes of bargaining.</i></p> <p><i>The frequency of meetings should be reasonable and consistent with any agreed bargaining arrangements.</i></p> <p><i>The meetings will provide an opportunity for the parties to discuss proposals relating to the bargaining, provide explanations of proposals relating to the bargaining, or where such proposals are opposed, provide explanations which the relevant party considers support the proposals or opposition to it.</i></p>

	<i>The parties are not required to continue to meet each other about proposals that have been considered and responded to.</i>
<i>Bargaining</i>	<p><i>To promote orderly collective bargaining, the guidelines set out below should be followed in the course of the bargaining:</i></p> <p><i>The parties will adhere to any agreed process for the conduct of the bargaining.</i></p> <p><i>The parties must consider and respond to proposals made by each other.</i></p> <p><i>A union and employer must provide to each other, on request, and in a timely manner information in accordance with sections 32(1)(e) and 34 of the Act that is reasonably necessary to support or substantiate claims or responses to claims made for the purposes of bargaining.</i></p> <p><i>The parties will consider the other's proposals for a reasonable period. Where a proposal is not accepted, the party not accepting the proposal will offer an explanation for that non-acceptance.</i></p> <p><i>Where there are areas of disagreement, the parties will work together to identify the barriers to agreement and will give further consideration to their respective positions in the light of any alternative options put forward.</i></p> <p><i>The parties should attempt to reach an agreed settlement of any differences arising from the collective bargaining. To assist this the parties should not behave in ways that undermine the bargaining for the collective agreement.</i></p>
<i>Breach of Good Faith Bargaining</i>	<i>5.1 Where a party believes there has been a breach of good faith in relation to collective bargaining the party shall, wherever practicable, indicate any concerns about perceived breaches of good faith at an early stage to enable the other party to remedy the situation or provide an explanation.</i>

Section 39 provides that the Authority may, in determining whether or not a union and an employer have dealt with each other in good faith in bargaining for a collective agreement, have regard to any code of good faith approved under section 35 that was in force at the relevant time.

### **An Approach to Determining Good Faith**

I intend to apply (and I do not consider that this was rejected by any of the parties) the approach of the Supreme Court of Canada in *Royal Oak Mines v Canada Labour Relations Board* 133 DLR (4th) 129 where it was held that –

*"[As] a general rule the duty to enter into bargaining in good faith must be measured on a subjective standard..."*

In this regard I accept the analysis of the learned authors of Mazengarb's Employment Law at ER32.26 where they state -

*"In essence, the subjective test goes to motivation so that – for example - if one party is engaging in "surface bargaining", the test of bargaining in good faith is not met. Inferences may be drawn in this respect, of course, from the totality of the party's behaviour as objectively analysed."*

However, I do not accept that North American case law should be the starting point for analysis of the good faith and collective bargaining provisions in the Employment Relations Act. Rather, as submitted by Ms Gibbs, the meaning of the provisions of the Act are to be ascertained from its text and in light of its purpose.

Failure to act in good faith is not behaviour that is easy to describe. However, it can not simply be defined as bad faith. Parties may do something that is found to be not in good faith that is not necessarily in bad faith. As a Full Court held in *Baguley v Coutts Cars Ltd* (Unreported, Goddard CJ, Travis J, Shaw J, AC25/01, 3 April 2001) at p 48 –

*"It is enough to say that behaviours that were previously sanctioned merely because they were not prohibited by contract may not be able to be relied on any longer."*

It may be that the issue can be put as simply as that it is impossible to adequately define or describe behaviour that does not meet the test of being in good faith. However, the average person knows such behaviour when they see it. As Lawton LJ held in *Western Excavating (ECC) Ltd v Sharp* [1978] 1 All ER713 at 720, in relation to a statute which allowed an employee to terminate a contract "without notice by reason of the employer's conduct" -

*"...I do not find it either necessary or advisable to express any opinion as to what principles of law operate to bring a contract of employment to an end by reason of an employer's conduct. Sensible persons have no difficulty in recognising such conduct when they hear about it."*

Thus in this area of good faith behaviour, as in much of employment law, I hold that little, if any, certainty can be provided by way of direction or even guidelines, but instead each case must be determined on its own merits.

### **The Importance of ILO Conventions 87 and 98**

As noted above, one of the two objects of the Act is to promote observance of the principles underlying ILO conventions 87 and 98. The ILO publishes a digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO entitled "Freedom of Association".

In the 4th (revised) edition, published in 1996, the issue of the level of collective bargaining is dealt with in the following terms –

*According to the principle of free and voluntary collective bargaining embodied in Article 4 of Convention No.98, the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and, consequently, the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case-law of the administrative labour authority.*

*The determination of the bargaining level is essentially a matter to be left to the discretion of the parties. Thus, the Committee does not consider the refusal by employers to bargain at a particular level as an infringement of freedom of association.*

*Legislation should not constitute an obstacle to collective bargaining at the industry level.*

*The requirement of the majority of not only the number of workers, but also of enterprises, in order to be able to conclude a collective agreement on the branch or occupational level could raise problems with regard to the application of Convention No.98.*

*The best procedure for safeguarding the independence of the parties involved in collective bargaining is to allow them to decide by mutual agreement the level at which bargaining should take place. Nevertheless, it appears that, in many countries, this question is determined by a body that is independent of the parties themselves. The Committee considers that in such cases the body concerned should be truly independent.*

Therefore it is clear that it is not necessary to promote freedom of association and the right to organise and bargain collectively to give workers an effective mandate to determine the level of bargaining by legislatively required secret ballots.

### **Conclusion on Wellington as the Venue for Collective Bargaining**

As set out above, section 32(1)(a) requires unions and employers to use their best endeavours to enter into an arrangement as soon as possible after the initiation of bargaining that sets out a process for conducting the bargaining in an effective and efficient manner.

The code of good faith sets out in paragraph 2.2(h) that the parties should consider, as part of the process, the proposed venue for meetings and who will be liable for any costs incurred. The key to the issue of whether the INL companies used their best endeavours to enter into an effective and efficient bargaining process (and therefore acted in good faith) when they rejected Wellington as the venue for the initial face to face talks lies in the words “best endeavours” and “bargaining in an effective and efficient manner”.

I adopt the definition of “best endeavours” set out in Stroud’s Judicial Dictionary of Words and Phrases (6 Ed) 2000. It quotes from *Sheffield District Railway Co. v Great Central Railway Co.*, 27 T.L.R. 451 that -

*“Best endeavours means what it says - it does not mean second-best endeavours.”*

The word “effective”, as used in section 32 of the Employment Contracts Act (which related to alternative personal grievance procedures) received judicial scrutiny by a Full Court in *Tutty v AC Blackmore Ltd* [1999] 1 ERNZ 587. The Full Court noted at p 599 that –

*“The word “efficient” is often found in dictionaries to be synonymous with “effective”, the word used in section 32. Efficiency in this context must be seen as tied to the original purpose of the personal grievance procedure...”*

The word “efficiency” in an expired award was considered by the Employment Court in *New Zealand Airline Pilots Association IUW v Mt Cook Group Limited* [1992] 3 ERNZ 355. The plain ordinary meaning of “efficient” was seen as being “productive, with minimum waste or effort”, “(of a person) capable, acting effectively”. The Court noted that correspondingly the ordinary meaning of “efficiency” is “the state or quality of being efficient”. The Court held that the word “efficiency” should not be evaluated in a vacuum.

I hold that the word “effective” must mean more than efficient - as anyone with a rudimentary appreciation of the difference between economics and political science, would understand, something may be efficient, but not effective. In this case there can be no doubt that Wellington was the most economically efficient venue for bargaining to be conducted. Mr Neilsen from the Taranaki News accepted this and none of the other INL companies’ witnesses had done any research to indicate otherwise. Had they done that research I have no doubt that they would have had to concede that Wellington was the most economically efficient venue. The union’s head office is in Wellington and Messrs Little, Wilton and Tolich from head office all attended the bargaining talks. INL’s head office (which Mr Lochore represented) is in Wellington, as is Wellington Newspapers’, the largest employer in the INL Group. Of Wellington Newspapers’ staff at least Mr Moir and Ms Kennedy attended the talks at Masterton. These are significant factors, even although I accept that INL does operate, to a great degree, at “arms length” from its subsidiaries.

Wellington is also the most central location for travel purposes, with the best airline connections. The only factor against Wellington in this respect is slightly higher accommodation and venue hire costs, but they are only a minor factor, I hold. I accept that Masterton was a compromise venue, but the effect of choosing Masterton was simply to extend the time and cost of travel by another hour and a half each way on all participants. INL’s preferred venues of Christchurch and Hamilton (while not unattractive as venues in their own right) are clearly nowhere near as efficient as Wellington, particularly as the major venue for bargaining.

INL's arguments against Wellington as a venue were not economic ones though. Thus they must relate to the effectiveness criterion. Mr Lochore set out those reasons in an internal document relating to the bargaining process. It states –

*(h) Proposed venue and costs*

*It is proposed that a venue is hired and the cost is shared between INL and the union. Don't want negotiations held at our sites. Potential for disruption. Talks could be held in major provincial centres such as Hamilton, New Plymouth or Timaru or in the three main centres starting in Auckland for the first two days agreed, followed by Christchurch and then Wellington. There will be five South Island sites represented, two lower North Island and three upper North Island.*

*Arguments for spreading the talks around include sharing the travel burden for those attending. The provinces are also attractive because of more reasonable venue and accommodation costs. Not wanting the talks perceived as a return to all decisions being made in Wellington (national award) is also a factor and from a company point of view we don't want the negotiations anywhere near WNL where there appears to be more politically active unionists employed than in other centres. Media and political interest could also be higher in Wellington.*

I have already addressed the issue of venue and accommodation costs. Of the other four reasons set out only the arguments about sharing the travel burden and not wanting talks to be perceived as being centrally controlled were made to the union.

Of those not conveyed to the union, I do not accept that media and political interest would be much heightened in Wellington, or that that would, necessarily, affect the effective conduct of bargaining. The concept of disruption by politically active unionists in Wellington is something that was well within the parties' ability to control by way of protocols or otherwise. Similarly, I do not accept that having talks in Wellington meant that people would perceive a return to centralised control and/or a national award system. Even though I accept that some INL managers genuinely hold such concerns, I believe that this was a matter that could be dealt with by way of communication between the parties, and/or some form of protocol.

I do accept that there are grounds for spreading the talks around, especially to share the travel burden. However, I note that Mr Lochore suggested doing so by starting in Auckland for two days, followed by Christchurch and then Wellington. It would therefore have been very easy for Mr Lochore, on behalf of the INL companies, to have agreed to Wellington as the first, if not the only venue for talks. All indicators pointed to Wellington being the most effective and efficient venue for conducting bargaining, at least in the first instance. That is not to say that Wellington would always have to be the venue for bargaining. However, by rejecting Wellington as a venue, despite acknowledging that it could be a venue in its own internal memoranda, Mr Lochore, on behalf of the INL companies, was in breach of his duty of good faith by not using his best endeavours to enter

into an arrangement that sets out a process for conducting the bargaining in an effective and efficient manner with respect to the venue for bargaining.

I must also take this factor into account when determining whether or not the INL companies have, in the overall scheme of bargaining, dealt with the union in good faith.

### **Conclusion on Approaching Bargaining with a Closed Mind**

There are three factors that, in combination, place the Manawatu Standard in quite a different position than all the other INL companies on this issue. The first is that, like the Southland Times, the Manawatu Standard was represented at Masterton not by a local manager, but by Mr Lochore. However, in complete contrast to the Southland Times, the Manawatu Standard's head office is as close to Masterton as any, if not all of the other INL subsidiaries. This is not a major factor, but in trying to determine what a party's subjective intention may be, the Authority can only really have regard, in the absence of concessions, to the totality of a party's behaviour, as objectively analysed. Failure to be directly represented in these circumstances is one factor that can be analysed, I hold, and construed against the Manawatu Standard.

The second matter with respect to the subjective intention of the Manawatu Standard is provided by Mr Howes' (its General Manager) response to the union's claim provided to Mr Lochore by way of letter dated 29 March. I need not repeat his comments but simply note my conclusion that they show that Mr Howes had a closed mind about bargaining for a multi-employer collective agreement – he was “*not interested in taking part in a MECA*”. However, I do accept that Mr Howes did then go on to make a detailed response to the union's claims.

Third, Mr Howes' evidence showed that he was quite uninterested in the outcome of negotiations at Masterton. While I accept that Mr Howes had received correspondence about the outcome of those negotiations and that he was a nervous witness, his inability to point to any actions on his part to ascertain what had happened at Masterton provides further evidence that he, as the representative of the Manawatu Standard, had a closed mind towards bargaining for a multi-employer collective agreement.

While I accept that there is some evidence that the Southland Times may not have had an open mind on this issue, I hold that there is insufficient evidence for me to conclude that it does not. I have no such reservations in respect of the other employer parties, who have come to a strong preference that is based on considered reasoning (from their perspective). They have also shown that they are amenable to listening to reasons why they should change their preference. Good faith

requires no more than that in respect of keeping an open mind. However, a closed mind, as held by the Manawatu Standard, is not consistent with good faith bargaining.

### **Conclusion on the Effect of the Act on Parties to Multi-employer Collective Bargaining**

The provisions in the Act relating to balloting of union members over the initiation of bargaining for a multi-employer collective agreement have been inserted by the legislature, I conclude, for either one or both of two reasons. The first is that supported by Ms Gibbs, i.e. put crudely, it is a check on unions to stop them acting against their members' best interests by initiating multi-employer collective bargaining when the employees involved may not necessarily agree with that approach. The second is that suggested by Mr Patrick, i.e. that union members have the ability by secret ballot to determine the parties to the bargaining.

The object clause to Part 5 (section 31(e)) supports Ms Gibbs' position. That is because the purpose of the section is to "ensure" that employees "confirm" the "proposed" collective bargaining for a multi-party collective agreement. The clause does not state that the purpose of Part 5 of the Act is to ensure that employees confirm the actual parties to multi-employer collective bargaining. The Concise Oxford Dictionary defines the verb "confirm" to mean "*Establish more firmly (power, possession, person in possession); ratify (treaty, possession, title); certify, corroborate, (statement, evidence).*" In this sense the employees are ratifying, certifying or corroborating something that has to be done by the union. This is more consistent with acting as a check on a union than providing employees with a right to determine the parties to multi-employer collective bargaining.

This conclusion is reinforced by the definition of the verb "ensure", which means to make certain. Again the phrase to make certain relates more to employees acting as a check on their union than allowing the employees to determine parties to that collective bargaining.

Pursuant to section 45, if the secret ballots are in favour of bargaining for a multi-employer collective agreement, then the initiation process is no different than for any other collective agreement, except that certain additional information must be provided.

Further, section 31(d) provides that the object of Part 5 is to promote orderly collective bargaining. It does not distinguish between multi-employer collective bargaining or single employer collective bargaining. Furthermore, section 33 provides that the parties bargaining for a collective agreement do not have to agree on any matter for inclusion in a collective agreement or to enter into a collective agreement. While I accept that the parties clause is fundamental to a collective agreement, section 33 makes it clear that parties are not required to agree on any matter or enter into any collective agreement, consistent with ILO Convention 98.

Although secret ballots may be required pursuant to section 47, even where two or more employers have initiated bargaining for a single collective agreement, that process is in fact controlled by the relevant union or unions. That is because, pursuant to section 47(2), ballots are only necessary if the union considers that a majority of its members employed by each employer would disagree with bargaining for a single collective agreement. I accept that if there are secret ballots, bargaining for a single collective agreement may only continue if the members of the union, or of each union if there are two, or of a majority of the unions if there are more than two, have voted in favour of bargaining for a single collective agreement with the two or more employers, or are considered by the union or each union as the case may be, to be in favour of bargaining for a single collective agreement with the two or more employers, or both (see section 47(6)(b)). Again the process is under the control of the union in the first instance. It need not require a ballot of its members, with its discretion being reasonably unfettered. Again, this is consistent with the "checking" role of employees under this Part of the Act, while still maintaining the union's responsibility for initiating and responding to the initiation of collective bargaining.

Finally, it is necessary to take into account the fact that different parties may initiate collective bargaining over the same groups of workers at the same time. For example, while the union has lawfully initiated bargaining for a multi-employer collective agreement with all of INL's subsidiaries, Taranaki Newspapers has also lawfully initiated bargaining for a collective agreement between the union and itself. If the union's contention that its members have the right to determine the parties to the bargaining is correct, then it would be inconsistent with that right for the legislation to allow Taranaki Newspapers to also lawfully initiate bargaining for a collective agreement, but with different parties.

It is therefore clear, for all the above reasons, that the purpose of secret balloting by union members before multi-employer collective bargaining may be initiated is to act as a "check" on unions. This may seem strange, as section 4 requires unions to act in good faith towards their members. It is not for me to second guess the legislature, but this provision may have been inserted because of the change in the Employment Relations Act, which now allows unions to strike in support of multi-employer agreements, whereas the Employment Contracts Act (in apparent contravention of ILO conventions 87 and 98) made such strikes unlawful.

My conclusion therefore is that the INL companies were and are entitled to treat the issue of whether or not they should be parties to a multi-employer collective agreement or not as a valid issue on which they may bargain over when bargaining for a multi-employer collective agreement.

However, this case involves much wider issues than just that. The key legislative requirements are for the union and the employer to meet each other for the purposes of bargaining and to consider and to respond to proposals made by each other: see section 32(1)(b) and (c). As noted above, the totality of the parties' conduct must be taken into account in this respect. It should also be noted that once initiation has been properly commenced, so has bargaining, pursuant to s.5. Section 32(3)(c), relating to union membership as a ratio to total staff numbers, has no great significance to the fundamental issues at stake here, I hold.

The evidence disclosed that with the exception of the Manawatu Standard, the employer parties did not approach bargaining at Masterton with a closed mind. They had a clear preference not to conclude a multi-employer collective agreement. That is permissible. They have not been persuaded otherwise yet. That is also permissible.

There were difficulties in getting the parties to agree to meet to bargain, but eventually they did. Unfortunately, due to prior miscommunication, as highlighted above, the parties had different perceptions about why they were at Masterton. When viewed from the INL companies' perspective, i.e. that they were there to bargain on whether or not there should be multi-employer or single employer bargaining, nothing they said or did at Masterton could be described as other than in good faith. They engaged in the process of discussing the two proposals, and while much of what they said is unlikely to ever be agreed with by the union, it was clear that the views held and described were ones held in good faith. I also accept that it was incumbent on the INL companies to disclose from the outset that they had a preference for single employer rather than multi-employer collective bargaining. To have done otherwise could have been a breach of good faith in itself.

However, it is clear from the INL companies' rejection of a multi-employer collective agreement at Masterton, combined with its subsequent actions, that they have no intention of bargaining with the union any more on other than the single issue that they bargained on at Masterton. For this reason it is not fatal to the union's claims that it has not formally requested the employer parties to recommence bargaining for a multi-employer collective agreement. Until this matter came to be finally determined by the Authority it was clear that the INL companies would not agree to the union's wish to bargain on all of its claims for a multi-employer collective agreement and not just the claim as to who the parties should be.

Thus, while it can not yet be said that the INL companies (with the exception of the Manawatu Standard) have refused to meet, consider and respond to the union's proposals at all, it is clear that

they intend to do so in a very limited way only. I hold that it is this behaviour that is in breach of their good faith obligations.

My reason for so concluding is that I hold that it is not until the substance of the initiating party's proposals (and any proposals made by other parties) have all been considered and responded to that the type and structure of collective agreement(s) can be properly determined. For example, it may well be that detailed consideration of the union's proposals on core conditions (with company schedules) will clarify whether such proposals are workable and in the interests of all parties. If this were to prove to be the case, then the INL companies may change their position on the desirability of a multi-employer collective agreement. If not, then the union may change its position on the desirability of separate collective agreements with each company.

I also note that clause 4.7 of the code of good faith states that the parties should attempt to reach an agreed settlement of any differences arising from the collective bargaining. To assist this the parties should not behave in ways that undermine the bargaining for the collective agreement. In this respect an impasse over one issue (even one as fundamental as who the parties are) does not equate to an impasse over the whole of the bargaining. Proposals should continue to be raised, considered and responded to. I therefore conclude that the effective intention of the INL companies to refuse to consider and respond to the substance of the union's proposals for a multi-employer collective agreement is in breach of their duty of good faith under section 32.

I have reached my conclusion without the need to quote extensively from North American case law. I am not saying that such case law may not appropriately be referred to in different cases, just that it is not necessary here. However, the parties need to be aware, should there be further difficulties in their collective bargaining, that many of the concepts explored in this body of case law appear to be based on common sense and would be likely to be applied in New Zealand. For example, I accept that "surface bargaining" would be in breach of New Zealand law, as would a refusal to engage on relevant issues, or the "going through the motions" of bargaining in an attempt to avoid true bargaining.

### **Conclusion on the Christchurch Press Initiative**

It is clear that Mr Broughton, in seeking to advance local bargaining, was in breach of the Christchurch Press' duty of good faith to, at least, recognise the authority of the union's advocate, Mr Little, and not seek to bargain with anyone else (section 32(1)(d)(i) and (ii) refers). However, I accept Ms Gibbs' submission that the Authority may exercise its discretion against granting a compliance order where the party against whom compliance is sought has indicated its intention to

comply notwithstanding earlier non-compliance: NZ *Workers IOUW v Puddy* [1989] 1 NZILR 164. In this case it is clear that Mr Broughton has “learnt his lesson” and a compliance order is accordingly unnecessary.

### **Conclusion on the Southland Times Information**

With respect to the claim of providing information on Southland Times sub-editors and reporters pay that was misleading or likely to mislead the union, I find that there was no intent by Mr Churchill or Mr Lochore to do anything that was likely to mislead or deceive the union because they were not aware at the time that the figures included management reporters and sub-editors. Therefore I find that there has been no breach of section 4(1)(b). It is difficult to envisage a circumstance where, without deliberate intent, or recklessness, or gross neglect, a breach of this section could occur by way of providing information that is technically correct because of the coverage clause sought by the union. I therefore dismiss that part of the claim.

### **Compliance orders**

I issue the following compliance orders:

The Manawatu Standard Limited is, from the date of this determination, pursuant to section 32(1), to fully and properly consider the New Zealand Amalgamated Engineering Printing and Manufacturing Union’s claims for a multi-employer collective agreement as lawfully initiated with it, and is to cease and desist from refusing to consider entering into such a multi-employer collective agreement.

Independent Newspapers Limited, Wellington Newspapers Limited, Christchurch Press Company Limited, Waikato & King Country Press Limited, Nelson Mail Limited, Herald Communications Limited, Southland Times Company Limited, Taranaki Newspapers Limited, Manawatu Standard Limited, Independent News Auckland Limited and the Marlborough Express Newspaper Company Limited (the INL companies) are, pursuant to section 32(1), upon request by the New Zealand Amalgamated Engineering, Printing and Manufacturing Union (the union), to meet, within a period of 28 days (unless agreed otherwise) with the union in Wellington (at least in the first instance), for the purposes of bargaining for a multi-employer collective agreement. In so doing the INL companies must consider and respond to all the claims made by the union (i.e. those claims attached to the union’s letter of 22 March 2001 to Mr Todd Moir).