

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

THE PARTIES	New Zealand Public Service Association (Inc) (PSA)
AND	The Chief Executive in respect of the Ministry of Agriculture and Forestry (MAF)
REPRESENTATIVES	Tanya Kennedy for the PSA Gary Pollak for MAF
MEMBER OF AUTHORITY	P R Stapp
TELEPHONE CONFERENCES	14 and 20 September 2005 and 5 December 2005
INVESTIGATION MEETING	Wellington, 2 and 18 November 2005
SUBMISSIONS	18 November 2005
FURTHER AFFIDAVITS	23 and 24 November 2005
DATE OF DETERMINATION	8 December 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

1. Proceedings have been lodged by both parties and consolidated: PSA statement of problem on 17 August 2005, MAF's reply on 6 September 2005; MAF's statement of problem 26 September 2005 and PSA reply 4 October 2005. The parties have been using mediation services provided by the Department of Labour.
2. The parties have competing claims about good faith relating to MAF initiating bargaining for two collective agreements, the PSA's communications with its members and encouraging members to communicate directly with the Director General, a MAF email found at meetings, the ratification ballot and the PSA not attending mediation.

The details of the parties' claims

3. The PSA is seeking a determination from the Authority on a question about when bargaining for a collective agreement under the Employment Relations Act 2000 ceases. It challenges the right of MAF to cross-initiate for collective bargaining for separate collective agreements that MAF wishes to negotiate. The PSA challenges MAF's good faith in initiating such proceedings when the PSA has initiated bargaining for one collective agreement.
4. MAF claims that the bargaining for a collective agreement initiated by the PSA ceased when PSA members declined to ratify an agreement reached in negotiations. MAF says it is entitled to initiate cross proceedings. It denies that it has not acted in good faith in doing so.
5. MAF claims that the ratification result was flawed because of the conduct of the ballot and in particular the eligibility of members of the PSA who had resigned and subsequently rejoined not being financial members. There is also a question that has arisen in regard to the validity of the ballot on the grounds that some employees who voted in the PSA ballot may not have been covered by the proposed agreement.
6. MAF alleges various aspects of the PSA's communications with its members breach the requirement to act in good faith under the Act. The communications referred to are:
 - the union's update on negotiations, Monday 11 July 2005 document [para 19 & 42 below, document 5 MAF's bundle],
 - "*Union News*" 11 July 2005 and two ballot forms (document 7 MAF'S bundle) [para 21 & 42 below],
 - "*Update 13 July 2005*" (document 8) [para 22 & 46 below] a copy of an email which Christchurch members had distributed (See also documents 9, 10 and 11 MAF's bundle),
 - Alan Davis email (MAF) dated 20 September 2005 (document 1 PSA supplementary bundle),
 - PSA/MAF members meeting kit (document 12 MAF's supplementary bundle) [para 36 below].

The Facts

7. The facts surrounding the issues are essentially not in dispute between the parties. The following is a summary of the facts in this matter.
8. A collective agreement between MAF and the PSA dated February 2003 expired on 30 March 2005.
9. The PSA initiated bargaining for the renewal of this collective agreement. The parties worked on a code of good faith agreement.
10. The code of good faith was agreed on 22 April 2005. The code covered the MAF bargaining team, which included Fergus Small (Quarantine Service) and Nigel Hillind (MAF HR), amongst others.
11. The code also covered the PSA team that included: Mark Fortune (MQS Christchurch) and Dave Gillespie (MQS Christchurch), amongst others.
12. The code of good faith included the following provisions and I quote (without correcting any mistakes):

Communication to Interested Parties

The preferred approach for issuing information about the progress of bargaining is for joint communications to be used. Whenever possible, a joint communication will be drafted by members of the combined bargaining team at the conclusion of the bargaining sessions. Alternatively, a process will be agreed at the conclusion of a session to develop a progress report or other form of agreed communication.

Where communications are to be issued separately, the communication will be subject to consultation with the other party before it is released.

As a principle any statements to the media will be agreed as part of the agreed communication arising from each meeting.

MAF will separately update SSC (and the Ministers if necessary) as part of the ratification. If MAF and or PSA feel the need to communicate with Ministers on issues relating to MAF negotiations they will raise the matters with each other beforehand.

Difficulties and Disagreements

If the bargaining team reaches an impasse the following process will be followed:

- *In the event that the parties are unable to reach agreement on a particular issue or issues, it is agreed that in the first instance the issue will be put to one side until all other matters have been dealt with during the bargaining process (having regard to s.32(1)(c) of the Employment Relations Act).*
- *The parties will reconsider the areas of disagreement in the context of the other matters that have been agreed, and will consider the following options:*
 - (i) *Settlement of the collective agreement and the establishment of a joint working party to investigate the issue and report back to the bargaining representatives;*
 - (ii) *Seeking specialist advice;*
 - (iii) *Refer the matter to the GMHR and a member of the PSA secretariat for suggested options for resolution of issues;*
 - (iv) *Referral of an issue or issues to mediation;*
 - (v) *Referral of an issue or issues to the Employment Relations Authority for facilitation as provided by the Employment Relations Act 2000;*
 - (vi) *Any other options that either party may consider appropriate for the resolution of the issue(s).*
- *The nature of the disagreement should be agreed by the parties, a single statement of the situation, and each parties proposed solution for the issue(s) involved.*
- *A 24 hour cool off period with a conference call between authorised representatives of MAF and PSA;*
- *If mediation is necessary the Employment Relations Service will be used. Wherever possible a joint summary of the matters to be considered at mediation will be provided to the mediator. Where agreement on the issue(s) referred to mediation cannot be reached, then each party will prepare a statement of the issue(s). All documentation should be jointly sent to the mediator along with the partnership for quality agreement, this agreement, and any other relevant documentation that may assist the mediation process. The mediator should be advised that the parties approach is to use the problem solving process wherever practicable.*
- *Facilitation. The parties acknowledge that there may be instances where serious difficulty is encountered in reaching a solution on an issue or issues that prevents concluding a new collective agreement being concluded (sic). Facilitation under s.50 of the Employment Relations Act may be considered by either MAF or the PSA under any circumstances provided for under s.50.*

Breach of good faith bargaining

Where MAF or the PSA believe there has been a breach of good faith in relation to collective bargaining, wherever practicable these concerns will be communicated at an early stage to enable the other party to remedy the situation or provide an explanation.

In the first instance this should be communicated between nominated representatives of MAF and the PSA in the bargaining team, specifying the nature of the alleged breach and the proposed remedies. If, after reasonable opportunity to respond and/or address matter has been given, and the nominated representative of the affected party decides to take matter further, then this situation shall be advised formally orally and in writing to the nominated representative of the other party. The matter will then be jointly raised with the MAF General Manager HR and the PSA Assistant Secretary Sector Representative for their support and suggested options for resolution of the matter. If the matter still remains unresolved, then the matter will be jointly referred to the Director General of MAF and a member of the PSA Secretariat who will take all practicable steps to resolve the matter.

If resolution cannot be reached the party will take such steps as they see fit to formally resolve the alleged breach of good faith including the appropriate steps about in “difficulties and disagreements”.

Completion of bargaining

*MAF and the PSA will consider that **bargaining is completed when the parties either agree that they cannot reach agreement and the appropriate options contained in this agreement have been exhausted, or agreement is reached on the terms of a new collective agreement and these are ratified by PSA members.***

MAF will seek MEB approval once a final agreement is made with the PSA and this should be completed within two weeks of referral. If agreement is outside the State Services Commission bargaining parameters MAF may require additional time to seek approval from the State Services Commission. MAF and the PSA will document the final agreement reached by both parties, including the proposed new or amended wording of each clause in the agreement.

The PSA requires endorsement of any offer for settlement of at least 60% of those PSA members who will be bound by the proposed collective agreement and who participate in the ratification process. The ratification procedure will be implemented when an agreed settlement is reached by the combined bargaining team.

Minor amendments or proposed variations to the proposed settlement identified as a pre-requisite to final settlement will, in general, be resolved by authorised representatives of MAF and the PSA. Matters of a more substantive nature will require the resumption of bargaining with the full bargaining team.

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Notification that full and final settlement has been reached will be confirmed by MAF and PSA no later than 14 days following completion of the ratification procedures.

The collective agreement will be revised by MAF, in discussion with the PSA to incorporate the terms of the full and final settlement.

MAF to ensure that copies of the collective agreement are sent to the Department of Labour.

The collective agreement will be placed on the MAF internet sit (Emphasis added).

13. Bargaining took place between the parties from 17 March 2005 until 22 June 2005.
14. Bargaining was scheduled on 1-2 July with the assistance of a Department of Labour mediator in Auckland. An agreement was reached between the parties during the evening of 1 July.
15. Ian Baldick, an organiser with the PSA, became involved in the bargaining when the previous organiser resigned from the PSA. Mr Baldick was present when a settlement was reached. The Christchurch PSA delegates, however, left early to catch their return flight before the final agreement was reached. MAF says that Mr Baldick and the PSA agreed to recommend the agreement to PSA members (statement of evidence para.12).
16. Fleur Fitzsimmons a PSA organiser, who attended as an observer in all of the bargaining, confirmed that her role included attending the ratification meetings where she says she recommended “*the members accept the proposed terms of settlement, as the PSA had undertaken to do*” (statement of evidence para.8).
17. The parties went through a process of writing up the terms of the new collective agreement that included: adjusting the pay rates and adjusting a number of clauses and provisions and conditions of employment. MAF says that it offered assistance to the PSA in the ratification process and suggested amongst other things a joint PowerPoint presentation. MAF says the PSA indicated that it would consider the offer but it went ahead anyway with its own process after 2 July 2005.
18. On 11 July 2005 MAF sent the PSA the final terms of settlement. This involved inserting new clauses into the collective agreement and a pagination exercise. Updated salary levels

were included. MAF received a response on 11 July, (document 3). Confirmation was received of the changes requested, including the current date to avoid confusion and agreement was reached. A copy of the agreement was produced (document 4). This document was headed “*Proposed terms of settlement 2005 collective agreement 11 July 2005*”.

19. MAF became aware on 11 July of “*an update on negotiations*” for the PSA MAF collective agreement involving a communication to PSA members (document 5). MAF was critical that the email referred to “*best offer*” and that the PSA had:

“...a proposed offer for PSA members to vote on. This is the best offer we believe the employer is prepared to make at this time. As part of the formal mediated agreement, the PSA is required to present and recommend this settlement to members. However, it is up to members to determine whether it is accepted or rejected.”

20. MAF says that this proposed communication did not reflect the PSA’s agreement to recommend ratification of the agreement to its members. MAF’s concerns about this were reflected in further email correspondence between Jeff Osborne and Alan Davis, Assistant Secretary of the PSA and General Manager, Human Resources, MAF respectively.
21. A copy of a document entitled “*Union News*” (document 7) came into MAF’s hands on or about 12 or 13 July. This document included two voting ballot papers. The terms of the “*proposed terms of settlement*” were also attached to the document. MAF was disappointed that the PSA would not agree to a joint communication to employees and MAF took exception to the “*Union News*” of 11 July because there was no reference to the PSA “*recommending*” settlement to its members. In addition, the communication referred to the agreement being an “*offer*” and incorporated a strike ballot paper with it. MAF considered that the original union news was not in keeping with the code of good faith or the spirit of negotiations. MAF also claim that it was not accurate for the document to purport that the PSA was required by the mediator to present and recommend the settlement to members. MAF say that this was especially so where the PSA had agreed to the settlement and represented to the negotiators that it would recommend it to its members at ratification.
22. On or about 14 July, MAF became aware of another document headed “*Update 13 July 2005*” (document 8). This document was signed by Mark Fortune and Dave Gillespie (both on the PSA bargaining team; see document 2, code of good faith agreement), who had met with Ian Baldick and Jeff Osborne regarding concerns over the collective agreement

negotiations and subsequent resignation of many Christchurch staff from the PSA. I will return to the Christchurch resignations shortly.

23. Mr Baldick and Mr Osborne say that they were not aware of the Christchurch July update document until it appeared in MAF's bundle. Mr Baldick was not aware of it previously being brought to either his or Mr Osborne's attention or any views expressed about it. They consider the document was not an official PSA document.
24. Mr Osborne agreed that there were three key documents to be posted to each PSA member. These included the Union News dated 11 July 2005 and two ballot forms. The first ballot form was a ratification ballot form. The paper required the voter to sign that they were a financial member. It included a feedback section and the vote. The second ballot form was a strike ballot form. Its purpose was to make it clear to members that the terms of settlement were considered to be the best the PSA could achieve at the time and that collective action would probably be necessary to achieve a significant change if they decided to reject the offer.
25. The purpose of the ballot was to ensure that this alternative was explicitly discussed at meetings and considered by other members so that they knew the likely consequences of a "no" result. The secondary purpose was to save time if the ratification failed. The PSA would not have to run a second meeting and ballot process to gain authorisation for the negotiating team to consider further strike action and ensure the PSA's mandate.
26. Mr Osborne says the package was provided to MAF for consultation. He acknowledged that MAF advised its concerns about the wording and agreed to meet with MAF on 12 July to discuss the concerns. The PSA revised the Union News of 11 July which was finally distributed.
27. In the meantime, a number of Christchurch members resigned from the PSA. Mr Osborne was advised of this on 12 July 2005. On 12 July 2005, Mr Fortune notified MAF of an attached list of Christchurch staff who had formally resigned from the PSA and requested union fee deductions to cease. The Authority was told by Mr Davis that this matter was brought to his attention and upon considering it decided to action the request. He says that he considered the request and situation "*unorthodox*". He did not rush but held off and was sure that he raised the matter in a conversation with Mr Osborne. Action was taken to cease the deductions from the next pay period.

28. In the meantime, Mr Osborne wrote and sent out an email to the MAF employees and staff who had received the Christchurch email: (See documents 9, 10 and 11 MAF's bundle.) He was trying to resolve the membership issue and wanted to retain the members in the PSA.
29. At this point, Mr Osborne's intention was to prevent further problems and to reinforce the need for members to stay in the union and let their voice be properly heard. He says his effort was an attempt to reinforce the integrity of the ballot process and hold the collective together. Messrs Osborne and Baldick arranged to attend a meeting at Christchurch on 13 July. However, there was a poor turnout to this meeting with only three delegates and one member. Mr Osborne says that he never saw the Christchurch members update of 13 July 2005 that was produced purportedly as a result of that meeting.
30. The next thing to occur was that the Christchurch members who had resigned rejoined the union. Voting for ratification closed at 4pm on 29 July 2005.
31. MAF was orally advised of the outcome of the ratification by Ian Baldick on 29 July. The formal result that ratification had been unsuccessful was conveyed in a letter on 3 August 2005 from the PSA. It subsequently requested more details and has been critical of the PSA for not providing them.
32. On 11 August 2005, MAF provided notice that it was initiating collective bargaining to start a new process for two collective agreements. The MAF position on the circumstances surrounding the resignations and the rejoining of the Christchurch MAF members was that they were encouraged to rejoin specifically for the purpose to vote the agreement down (Hillard para. 40 supplementary written statement). MAF argues that these Christchurch members could not possibly have been financial members of the PSA during the voting process when MAF had ceased deducting their union fees, and that upon rejoining the PSA their union fees would not have been taken out of their wages until after the first pay period in September which was after the ratification vote.
33. Given the dispute on the ratification, the returning officer provided the following information:

“The ballot seeking ratification of the MAF PSA collective agreement failed to reach 60% of all voters in favour. A breakdown of the results are as follows:

Ballot: Terms of settlement

Accept; 244

Reject 248

Percentage result 49.95%

No votes were declared invalid.

If you have further questions on this matter please contact Jeff Osborne on ...”

34. The PSA has taken issue with MAF cross initiating bargaining for two collective agreements. MAF says that one of the consequences has been that the PSA has refused on a number of occasions to meet to discuss any bargaining protocol or any other matter whatsoever to do with MAF’s initiation. MAF arranged dates with the PSA for 16, 20, 21 and 22 September.
35. On 14 September 2005 the PSA’s lawyer gave an undertaking during a telephone conference with the Authority and MAF that the PSA would attend a mediation that had been organised for 16 September 2005. On 16 September, the PSA did not attend as there appeared to be some confusion about what mediation would entail. Following this, during another telephone conference on 20 September 2005 the Authority directed that the parties to attend mediation and the parties consented to attend. The PSA is critical of an email sent by Mr Davis concerning the PSA being ordered to mediation (document 1 of the PSA’s supplementary bundle). The parties met on 21 September with a Department of Labour mediator. They have continued to meet since and during the course of these proceedings.
36. During this time MAF became aware of the existence of another document: PSA/MAF members meeting kit (MAF’S supplementary bundle document 12). The document has raised another issue about communications. The kit provides details and information for members to contact the Director General directly on “*urging MAF to re-enter bargaining in relation to the April Bargaining Notice*”. At about the same time the Director General started receiving by fax direct communications from PSA members asking MAF to re-enter bargaining.

Findings

37. My findings are:
- There is nothing to preclude MAF from initiating bargaining for two collective agreements. It has not breached its obligation to act in good faith

by doing so, especially since the agreement reached had not been ratified and the PSA was raising the possibility of further claims.

- The PSA has breached its obligation to act in good faith with misleading communications with its members on the ratification of the agreement reached in mediation when it included a strike notice ballot and sought written feedback and referred to the agreement as an offer.
- The PSA's involvement in arranging direct communications with the Director General was a breach of good faith when both parties had teams of negotiators and a communication protocol.
- The PSA did not attend mediation following an undertaking given that it would do so. However, because I accept that there appeared to be some confusion and argument of the legal position on the bargaining and the employment relationship problem, the PSA was not in breach of good faith for not attending mediation on 16 September.
- The code of good faith agreement should continue to apply between the parties involved in bargaining for three separate forms of collective agreement.
- I have not made a declaration on the ratification ballot result but have included some comments on best practice.

My reasons for these findings follow:

Has bargaining ended and is cross-initiation permitted?

38. An agreement reached in bargaining on 1 July was not ratified subsequently. Bargaining has not ceased. It continues until such time as either the parties agree that bargaining has ended or when it ceases upon the signing of a collective employment agreement that has been ratified. There has been no mutual agreement that bargaining has ended given the agreement reached in bargaining has not been ratified, there remains in existence the PSA initiated bargaining and now the MAF initiated bargaining. I am supported in my conclusion with regard to the code of good faith existing between the parties on the completion of bargaining arrangements :

*MAF and the PSA will consider that **bargaining is completed when the parties either agree that they cannot reach agreement and the appropriate options contained in this agreement have been exhausted, or agreement is reached on the terms of a new collective agreement and these are ratified by PSA members.** (Emphasis added).*

*MAF will seek MEB approval once a **final agreement** is made with the PSA and this should be completed within two weeks of referral. If agreement is outside the State Services Commission bargaining parameters MAF may require additional time to seek approval from the State Services Commission. MAF and the PSA will document the final agreement reached by both parties, including the proposed new or amended wording of each clause in the agreement (Emphasis added).*

39. There was no agreement that bargaining had been completed. There is no evidence that the other options in the code have been exhausted. A ratification ballot resulted in the agreement not being ratified. The code refers to “*final agreement*”. There is no evidence of this occurring. Indeed the code seems to envisage that the act of getting an agreement may not necessarily be final. For example the code provides for:

“Minor amendments or proposed variations to the proposed settlement identified as a pre-requisite to final settlement will, in general, be resolved by authorised representatives of MAF and the PSA. Matters of a more substantive nature will require the resumption of bargaining with the full bargaining team”.

40. It also provides for

“Notification that full and final settlement has been reached will be confirmed by MAF and PSA no later than 14 days following completion of the ratification procedures”.

41. The Act does not preclude cross initiating bargaining. I hold that MAF has not acted contrary to the provisions of the Act. Since its action is within the scope of provisions available to it, and an agreement reached in bargaining was not ratified, I hold that MAF has not breached an obligation to act in good faith. The effect of MAF’s action has been to raise another form of outcome to replace the expired collective agreement that it is not precluded under the Act. It was not necessary for it to raise it earlier, since it has put the PSA on notice. The PSA was seeking written feedback from its members on any changed position on its bargaining claims if ratification was not successful anyway.

Communications

The PSA's communications with its members

42. The first issue is the union's update on negotiations dated 11 July and Union News [paras 6, 19, 21 & 23 above] that MAF has objected to. The PSA has clearly qualified its position in the matter. Instead of unequivocally recommending the agreement reached in mediation it has qualified its position by using the words "*best offer we believe the employer is prepared to make at this time*" and the inclusion of the strike ballot (document 5). Following consultation, upon MAF raising its concern about the original communication, the PSA revised the document and changes were made in the Union News which was sent out (document 7). This however continued to refer to an offer and included the strike ballot.
43. The original version of the union news was destroyed and the changed version was authorised by Jeff Osborne for printing and distribution. The code of good faith did not require a joint communication. The code provided for a joint communication being "*the preferred approach*" wherever possible and permitted separate communications by the parties. MAF ideally would have wished for a joint communication. The PSA's decision not to have a joint communication was not a breach of good faith because it was not required by the code and consultation did occur with changes being made.
44. However the PSA's decision to include a strike ballot with the ratification of the agreement reached in mediation, when it agreed to recommend the agreement to its members, was potentially deceptive, and certainly misleading. The presentation was ambiguous leaving me to doubt that the decision to include the strike notice ballot was so that members knew the likely consequences of a 'no' result when the secondary purpose was to save time if the ratification failed. Also, I am supported in this conclusion by Mr Osborne's reaction to retain the Christchurch members in the PSA who had resigned. His action was taken to keep them in the union.
45. The continuing reference to an "*offer*" was also misleading since both parties to the negotiations had reached an agreement. "*Offer*" implies that there might be more from MAF. MAF believed it had reached an agreement on the substance. It is not unreasonable for MAF to have reached a conclusion from the communication that the PSA was setting about to position itself for further negotiations. This is a breach of good faith by the PSA in

its communication with its members and MAF since the bargaining teams had reached an agreement.

46. MAF has every right to be concerned when it believed it had an agreement and this was affected by the issue of the impact of the Christchurch members on the outcome of the ballot, where those members who had purportedly resigned were being encouraged to stay with the union, and vote, and if they did not favour the agreement, vote against ratification. Further the matter is affected by the options of the request for written feed back and the strike ballot during the ratification process if ratification was voted down to save time. MAF have interpreted, not unreasonably, these factors in a negative light and the way in which the PSA has presented them has left it exposed to criticism when it failed to properly recommend the agreement as agreed, and presented it in an ambiguous way. It seems it wants it both ways, i.e. to retain its members (who had resigned and rejoined) and be seen to be recommending the agreement. Its actions in its communications fall short of the latter, I hold. However in the best light its actions could be seen as being informative on the range of possibilities but in best practice that information should have been conveyed much earlier in the process to members.
47. The next matter related to the "*Update 13 July 2005*" (document 8) [para 22 above] that came into MAF's possession on 14 July. This is a document written by individuals from the PSA reporting on a meeting with PSA officials. The individuals had been involved in the bargaining process. Ian Baldick and Jeff Osborne say that they were not aware of the document and say it is not an official PSA document.
48. This document appeared at the same time the Christchurch members of the PSA employed by MAF resigned. It is a damaging document in as much as it reports Ian Baldick and Jeff Osborne advised PSA members that the best chance of not ratifying the agreement was for the Christchurch staff to rejoin the PSA and vote against the ratification.
49. A linkage has been drawn by MAF about the document and the employees subsequently rejoining the PSA and the ratification ballot failing to achieve the 60% threshold required for approval. Until these proceedings it seems that MAF did not take up the document with PSA officials considering that Ian Baldick and Jeff Osborne say that they were not aware of the Christchurch update until it appeared in MAF's bundle. Mr Osborne's choice of words in his email (document 9), however, was unfortunate. This is because the PSA was committed to recommending the agreement while at the same time he was telling disaffected

employees that by belonging to the union the best course of action would be to remain with it if they wanted to vote against the agreement. He balanced his advice with recommending that those in favour should vote to accept it. However such a balance does not address the damage because of the agreement the PSA had with MAF. Moreover, he had in my opinion decided to address an issue of retaining union membership numbers as opposed to addressing in good faith the recommendation of the agreement reached in mediation. This action was not in keeping with the requirement to act in good faith despite the most unusual circumstances resulting from the resignations of the Christchurch members.

50. The two individual members, who I understand were part of the PSA bargaining team and responsible for writing the "*Update 13 July 2005*", would be seriously open to an allegation of a breach of good faith if the document they wrote misrepresents the communication with Ian Baldick and Jeff Osborne, and if it was circulated with a purpose to defeat and undermine the agreement reached in mediation. There is insufficient evidence for me to take this matter any further since they did not give evidence, the matter was not taken up by MAF with PSA official and Ian Baldick and Jeff Osborne say that they were not aware of the Christchurch update until it appeared in MAF's bundle.

The PSA's involvement with direct communications with the Director General of MAF

51. This issue relates to MAF's objection to the PSA MAF members' meeting kit (document 12 in the supplementary bundle) and the claim that there has been a breach of good faith because the PSA has been a party to organising a direct communication with the Director General, outside MAF'S bargaining team, and not envisaged by the code of good faith.
52. As an aside the code of good faith agreement should continue to apply between the parties involved in bargaining for three separate forms of collective agreement. Because the code had been agreed between the parties for the first form of collective agreement, I hold it is reasonable that the terms of the code should continue to apply for the two further forms of agreement that have been initiated and until it is renegotiated or repudiated by one of the parties.
53. The PSA arranged for its members to communicate with the Director General to get MAF to resume bargaining on the basis that the PSA did not have to bargain on MAF's cross initiation for two collective agreements. Such a direct communication without prior consultation outside the code of good faith is a breach of good faith. There was no

consultation with MAF. The information misrepresented MAF's willingness to bargain. There appears to be a genuine dispute on the law as it relates to the question about when bargaining ceases and what the parties should be bargaining on. However given the relationship between the parties there should not have been any direct communication with the Director General when the PSA could be reasonably expected to know who it was properly dealing with in MAF, given previous negotiations, the existence of the code and legal requirements in bargaining. The PSA's involvement in organising direct communication with the Director General is a breach of good faith.

The PSA and the ratification process

54. This comes within the Authority's jurisdiction because it is an employment relationship problem generally relating to the parties conduct relating to good faith obligations and other actions arising from or related to the employment relationship or related to the interpretation of the Act. The resignation of the Christchurch members complicated the process. A question has been raised about the members not following the correct rules of giving notice to resign from the PSA. There is a question also about the financial standing of those members who purportedly resigned. There is also an issue about at least two members who may not have been covered by the collective agreement and their eligibility to vote in the ballot. MAF has asked the Authority to declare the ballot null and void. I am not prepared to do that because the evidence is not sufficient to support the request from MAF.
55. The PSA may wish to reflect on how it has conducted its ballot. Quite properly it has engaged a returning officer. There is an issue about the participation in the ballot. The immediate requirement is that voters must be members of the PSA. Secondly the voters must be covered by the proposed collective employment agreement. The code of good faith agreement makes provision for the following:

*The PSA requires endorsement of any offer for settlement of at least 60% of those **PSA members** who will be **bound by the proposed collective agreement** and who participate in the ratification process. The ratification procedure will be implemented when an agreed settlement is reached by the combined bargaining team (Emphasis added).*

56. There are no prescriptive rules regarding conducting ratification ballots. It is most unusual for an employer to request details about the ballot. But in the circumstances of the PSA agreeing it would recommend the agreement, and the members resigning in Christchurch, MAF had an interest. It would be good practice for a union to be able to support the ballot

being run democratically and to ensure there is a voting or meeting attendance record kept. Any failure to produce a roll of eligible voters or record of voters or attendance lists at meetings could be in breach of good faith, particularly if there are defects found in the balloting process. It would be good practice for the union to be able to satisfy the ballot being conducted properly.

57. The arrangement in this case has created a difficulty. The returning officer says that a check was made of each member's worksite and that the employee was a PSA member from a declaration given on the ballot paper. No supporting evidence has been produced to support these checks and to show a correct roll against who voted. I have to accept the evidence of the checks being done. The issue surrounding the Christchurch resignations has raised an issue about their standing as PSA members at the time and if they could be still categorised as members (in arrears). Also, MAF has raised the issue of the two members voting who may not have been covered by the agreement. There was no detail provided of their circumstances. I make no declaration about the ballot result because of the above issues; suffice to say that at some point given the negotiations now taking place for a form of collective agreement, another ballot will be required on such terms for ratification applicable at the time.

The PSA and mediation

58. The failure of the PSA to attend mediation given the existence of an undertaking to the Authority has been raised by MAF. I must say that I was concerned upon being given an undertaking that the PSA would attend mediation that it did not do so. It says it would only do so on the basis of negotiations for a single collective agreement when MAF was trying to mediate on its initiation for bargaining of two collectives.
59. The PSA lodged an application in the Authority to resolve an employment relationship problem. Notwithstanding the bargaining issues the parties had an obligation to attend mediation, and it was not until the Authority directed the parties, and by consent the parties agreed to attend without any pre conditions and without prejudice, and they did so. It may be that the PSA had some confusion about what mediation would cover. I would have expected the PSA to have known that mediation would be required and that its lawyer's undertaking be fulfilled.

60. The PSA has also raised an issue about a MAF email reporting on the events of the Authority's telephone conference on 20 September. It was apparently left for members to see but without more details of how it was found and the circumstances of it being left, nothing turns on it. I conclude that the document is incidental. Nothing turns on it given that the parties did go to mediation. Given the parties' subsequent attendance at mediation there is nothing much in this matter. I do not intend to pursue it further. However this highlights that care does need to be taken with documents and their use.

Concluding remarks

61. MAF feels let down by the circumstances it has found itself in. The PSA will need to consider its approach to communications and organisation. The situation the parties have put themselves in requires some imaginative thinking and strategic purpose. I can only reinforce that these parties must come to grips with the reality they find themselves in beyond these issues. Despite these issues, they must continue to face each other, bargain, settle and ratify an appropriate outcome to meet their needs that is the responsibility they have to their members/employer. Mediation services being offered by the Department of Labour will I am sure assist in such endeavours.
62. Costs are reserved. Because of the two lodged applications, the importance of the issues to both parties and because the employment relationship problem is a shared bargaining problem I am inclined to let costs lie where they fall.

P R Stapp
Member of the Authority