IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 225/08
5126169

BETWEEN	NEW ZEALAND RESIDENT DOCTORS ASSOCIATION Applicant
AND	AUCKLAND, BAY OF PLENTY, CANTERBURY, CAPITAL & COAST, COUNTIES MANUKAU, HAWKES BAY, HUTT, LAKES, MARLBOROUGH, MIDCENTRAL, NELSON, NORTHLAND, OTAGO, SOUTH CANTERBURY, SOUTHLAND, TAIRAWHITI, TARANAKI, WAIKATO, WAIRARAPA, WAITEMATA, WEST COAST, WHANGANUI DISTRICT HEALTH BOARDS Respondents

Member of Authority:	Robin Arthur
Representatives:	Bill Manning and Anna Paton for Applicant Peter Chemis and Mark Donovan for Respondents
Investigation Meeting:	24 June 2008 at Auckland
Determination:	30 June 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This determination concerns the operation of s32(1)(e) and s34 of the Employment Relations Act 2000 ("the Act") regarding provision of information during bargaining for a collective agreement and the jurisdiction of the Authority in respect of the good faith obligations to provide information under those sections.

[2] The matter arises during the course of bargaining between the Applicant ("the Union") and the Respondents ("the Boards") for a multi-employer collective agreement.

[3] The Union seeks:

(i) a declaration that the Boards have breached good faith obligations under s32(1)(e) and s34(3) to provide requested information and under s4(1A)(b) to be active, constructive, responsive and communicative in their dealings over the information at issue; and

(ii) an order requiring the Respondents to comply with their obligations under those sections and provide the Union with information requested in a letter on 9 May 2008; and

(iii) costs.

[4] The Boards oppose the application on a number of levels which include the following objections or questions:

(i) the information requested is not reasonably necessary to substantiate claims made by the Boards during bargaining, that is it is not within the scope of s32(1)(e); and

(ii) if the Boards must provide the requested information, such information is reasonably considered confidential so that it should be provided to an independent reviewer for assessment of how the information is to be treated and whether it substantiates claims made in bargaining by the Board (referring to s34(3)-(6) of the Act); and

(iii) whether or to what extent the Authority has jurisdiction to determine some or all of the issues raised by the Union's application.

[5] In turn the Union challenges the Boards' assertion of confidentiality regarding the information requested and submits that the Authority has jurisdiction to determine that and other issues raised in the Union's application.

The investigation

[6] This matter was dealt with under urgency. Bargaining is incomplete and its further progress is being hampered by disagreement between the parties over the issue of information. The Boards, between them, operate every public hospital in the country. Strikes by members of the Union have disrupted the functioning of those hospitals. There is a clear public interest in having the Authority consider the issue regarding information as quickly as possible so that the parties could continue bargaining with that issue resolved one way or another.

[7] By consent the parties' positions on this matter were presented by way of written submissions with any necessary evidence provided by way of affidavits from the lead advocates for the Union and the Boards. Oral argument on the issues and evidence was heard over three hours on 24 June 2008.

[8] The evidence comprises one affidavit from the Union's lead advocate Deborah Powell ("Dr Powell") and two affidavits from the Boards' lead advocate Mick Prior ("Mr Prior"). Mr Prior's first affidavit also affirmed an earlier written statement from him lodged with the Boards' statement in reply. Each party also provided relevant background documents.

[9] This determination does not fully record the evidence or the submissions but only those facts and findings of law needed to decide the issues and any necessary orders.

[10] I note here some acronyms and 'short-hand' phrases used in this determination. The Union's members are resident medical officers ("RMOs") or "junior doctors". The union of senior medical officers (SMOs) or "senior doctors" is the Association of Salaried Medical Specialists ("ASMS").

The Act

[11] The sections at issue here are in Part 5 of the Act on collective bargaining. The objects of this part of the Act including promoting orderly collective bargaining (s31(d)). All are subject to the general object of the Act to promote good faith in all

aspects of the employment environment and relationships, including by promoting collective bargaining (s3(a)).

[12] Under the heading of "good faith in bargaining for collective agreement" and as part of a list of minimum requirements to meet the duty of good faith, section 32(1)(e) requires each party to provide to the other, on request and in accordance with s34, "*information that is reasonably necessary to support or substantiate claims or responses to claims made for the purposes of the bargaining*".

[13] The key elements to meet the requirements of this section are that there be:

(i) claims or responses to claims that have been made or are to be made for the purposes of the bargaining; and

(ii) information requested must be reasonably necessary to support or substantiate a claim or response; and

(iii) such information must be provided in accordance with the process set by s34.

[14] The claims referred to in this context are not the formal demands for particular terms advanced by each party to the bargaining but rather the various assertions of fact and opinion made across the table in advocating their respective positions.

[15] The requirements of s32(1)(e) and s34 for the provision of certain information in certain circumstances for the purposes of bargaining were described in discussion with counsel as establishing a legislative "scheme". The scheme does not impose an onerous general regime of disclosure of every aspect of the other party's business or operations but is clearly intended to be a specific and focussed process for providing information genuinely needed by either party during bargaining.

[16] While s32(1)(e) refers to information that supports or substantiates a claim or response, the scope of the information cannot be limited to that which positively confirms the assertion of the party making it. That would not be consistent with the duty of good faith not to mislead or deceive the other party (s4(1)(b)). Rather it must be taken to mean all the information available to the party from whom it is requested that would verify or disprove an assertion or response to an assertion. That

information may then be assessed by the other party and discussed between the parties as to whether it supports or substantiates assertions or responses made.

[17] I note too that s32(1)(e) does not says requests for information may only be made to the party that is making the assertion or response. It simply refers to either party providing information reasonably necessary to support or substantiate an assertion or response. It may be that information held by one party is reasonably necessary to support or substantiate an assertion or response made by the other party and that other party may request that information from the party holding it. The hypothetical example discussed with counsel was where sick leave was at issue in bargaining and a union sought information held by the employer on sick leave patterns and costs in order for the union either to support a claim it was making or to substantiate some response it was making to the employer's assertions on the issue.

[18] Information provided is subject to the detailed and specific requirements and protections set out in s34.

[19] Once a written request has been made, specifying firstly the nature of the information requested, secondly the claim or response for which it is sought to substantiate, and thirdly a reasonable timeframe for provide it, the requested information must be provided (s34(2) and (3)).

[20] The information must be provided either directly to the requesting party unless the party providing it "*reasonably considers*" the information should be treated as confidential and invokes the statutory provision for independent review (s34(3)).

[21] An independent reviewer may only be appointed by the parties only after they have agreed who should act in that role. While the Act does not specify what should happen in the event that the parties could not agree on who to appoint as a reviewer, a party's obstinate refusal to agree or consider suitable candidates for the role would likely amount to a breach of good faith obligations.

[22] The advantage of party selection of the reviewer is that the person appointed to the role will presumably enjoy the confidence of the parties and may be chosen for her or his expertise on the particular information at issue.

[23] The reviewer has specific duties and powers to deal with information provided to her or him. Firstly the reviewer must assess whether the information should be treated as confidential and if so, to what extent (s34(5)). Although not expressly stated, the implication of the section is that where a reviewer decides information provided for review should not be treated as confidential, the information would then have to be provided directly to the requesting party.

[24] Where the reviewer decides information should be treated as confidential, her or his duties then include assessing whether the information substantiates a claim or response and advising the parties of that assessment in a way that maintains confidentiality. The reviewer may also answer questions from the requesting party (s34(6)).

[25] Throughout this process – whether information is provided directly to the requesting party or filtered through the advice and answers of the reviewer – there are express limits on the use of that material. It may only be used for the purposes of bargaining. It must be treated as confidential by the persons conducting the bargaining. It must not be disclosed by the advocates or bargaining team to anyone else, including those workers or employers who would be bound by the collective agreement once bargaining and ratification are completed (s34(7)).

[26] As a general observation, the 'scheme' for providing reasonably necessary information for bargaining purposes is clearly intended to assist reasoned discussion between the parties. It is a means by which their assertions and replies can be assessed against the facts or at least the best-available information. It is intended to make such information readily available, provided it is actually related to the bargaining.

[27] The broad or open approach of this scheme comes with two specific protections for the provider. One protection is the providers' ability to invoke the independent review process (s34(5). The other protection is the narrow range of uses and people for which the information is made available (s34(7)).

[28] Another significant feature of the scheme is the standard of reasonableness imposed at two steps in the process. Firstly, the information requested must be "*reasonably necessary*". Secondly, invocation of the independent review process is open where the provider "*reasonably considers*" that the information should be treated as confidential.

[29] That reference to reasonableness must be read as intended to require both the decision to ask for information (s32(1)(e)) and the decision to refer information provided to an independent reviewer (s34(3)(b)) to be for some objectively identifiable reason and not merely the subjective assessment of the party making that decision. Applicant counsel referred to the need to establish a "prima facie" case of reasonableness. I would not put such a requirement higher than a relatively low threshold of a party making a decision at either step of the scheme being able to provide a cogent explanation of either the necessity (s32(1)(e)) or the consideration (s34(3)(b)). While that explanation might be disputed, the way such a dispute is to be resolved is through the operation of the steps of the scheme enacted by Parliament. As the Report of the Select Committee on this legislation in 2000, and the Department of Labour's summary of submissions to that committee both show, the scheme set by s32(1)(e) and s34 were the legislature's considered response to strongly expressed concerns about initial legislative proposals on how information was to be provided in bargaining. If Parliament has intended parties to be required to go through processes other than those set in this scheme, it would have said so.

The facts

[30] The Union initiated bargaining on 2 May 2007 with negotiations beginning in late June 2007. At negotiations held on 29 April 2008 Mr Prior provided a written one-page summary of the Boards' latest offer to settle the collective agreement ("the offer summary"). It included the following statements:

- *This offer represents the full extent of the financial parameters available for RMOs and more than the funding available to DHBs.*

- *The offer is consistent with the financial parameters of other health settlements including that of the senior doctors.*

- *There are challenges with other health workforces not just RMOs. They have settled and agreed to continue work cooperatively to address those challenges; again this includes the senior doctors.*

- *RMOs do not work in isolation – they are part of a team and we have* (sic) *consider the context of the senior doctors who teach and mentor them when we generate solutions to issues brought to the bargaining table by the RDA.*

- *DHBs want to resolve and settle these negotiations and today offer a short or medium term solution consistent with the parameters afforded your SMO colleagues.*

[31] Also provided that day were two other documents that the Union says contained statements relevant to its present application.

[32] Firstly a letter dated 19 April 2008 from the Boards' lead chair for employment relations, Dennis Cairns, addressed to "all DHB Chairs" included this comment:

> *Junior doctors have been offered a fair and reasonable settlement in line with their colleagues. What signal would it send the other 57,000 DHB employees if we settled at a higher level with a group that won't work collaboratively with us?*
>
> *The current claim is significantly more than the settlement with nurses and the one currently being considered by senior doctors ...*

[33] Secondly, a letter dated 29 April 2008 from Director General of Health to the Boards' lead chair for bargaining, David Meates. The letter stated the Ministry of Health's support for establishing an independent commission to investigate workforce issues for resident medical officers. It is included this statement:

> *Proposing a commission of this nature is consistent with the outcome of recent negotiations between the DHBs and the Association of Salaried Medical Specialists.*

[34] Mr Prior, during discussion with the Union representatives at the 29 April negotiations, referred to the financial parameters of the offer now made by the Boards as being consistent with the employment agreements they had settled with other unions, including the senior doctors' union, ASMS.

[35] There is some dispute in the affidavits of Dr Powell and Mr Prior as to the scope of the financial parameters referred to and to what that must be taken as meaning. The extent to which that difference needs to be resolved for the purposes of this determination, if at all, is dealt with elsewhere in this determination.

[36] During negotiations on 29 and 30 April Dr Powell asked for further information about the SMO settlement so that the Union could compare it with the Boards' latest offer to the RMOs. Mr Prior did not agree to supply that information.

[37] By letter to the Union dated 4 May Mr Prior restated the Boards' position regarding how its latest offer compared to other settlements:

> *As indicated at the negotiating table the financial parameters for the RMO negotiations are consistent with the DHB parameters for other health settlements including the senior doctors.*
> …
> *DHBs have indicated to the RDA that the financial offer provided to RMOs is already more than it can afford and is consistent with other settlements.*

[38] The Union provided the Authority with a compilation of print media articles for the period from late April to early May reporting comments from Mr Meates, other District Health Board representatives and the Minister of Health. These refer to offers made to the junior doctors as being "*in line*" and "*in keeping*" with settlements reached with "*other health professionals*", with specific references to nurses belonging to the Public Service Association ("PSA") and senior doctors.

[39] The Union made a written request (9 May) for the "*employer costings for the SMO settlement*" and "*all other settlements for health practitioners achieved by the employers over the last 12 months*".

[40] It said the request for "*costings*" was prompted by the reference in the Board's offer summary to that offer being "*consistent with the financial parameters of other health settlements*". It also said that the Union considered those costings was information "*reasonably necessary to support or substantiate the employer claims and responses in bargaining*".

[41] Mr Prior's written response to the request (20 May) said the Boards did not consider providing the Union with the costings for recent settlements would enable it to substantiate the Boards' position that the offer was "*consistent with the DHB funding available for the SMO (or other recent health practitioners) settlements*". He gave these reasons for not providing the information requested by the Union:

> *As you will appreciate, the other settlements are for different timeframes, have different workforce profiles and cost drivers. Further, the costing models used by the DHBs for other negotiations reflect prices set by negotiation in good faith with other unions. We are also concerned that the information could be misused to the detriment of the relationship between DHBs and other employees and unions.*

[42] Mr Prior proposed an alternative course to "*provide independent verification*". He suggested meeting with the assistance of a mediator "*to discuss what comparisons there are that may usefully be drawn between the costings of the SMO settlement and the DHB's current RMO offer*". He said such a process would "*hopefully go some way to satisfy [the Union] that the offer made is consistent with the DHB funding of other health settlements*".

[43] In reply (23 May), Dr Powell stated that the Union considered the costings of other settlements to be "*the best – and perhaps the only – means of assessing objectively how the employers' bargaining position compares to other settlements in the sector*".

[44] While agreeing to meet with the mediator, she put the Union's position this way:

> *… the point of consistency which has been raised by the employers is a critical element of the bargaining and indeed it appears it could be one of the primary obstacles to a settlement.*

[45] The Union also stated its opposition to the mediator having any role as an "*independent reviewer*" under s34(4) of the Act.

[46] Shortly after the Union lodged its application in the Authority (4 June).

[47] The matter was referred to mediation on an urgent basis. That meeting was held on 10 June but did not resolve the matter.

[48] Accompanying the Boards' statement in reply (12 June) was a statement from Mr Prior. Subsequently adopted and confirmed through his first affidavit, Mr Prior explained that the "*claim*" regarding "*financial parameters*" referred to the "*percentage per annum provided to the [Boards'] advocates … for the purposes of bargaining and settlement of collective agreements*".

[49] He said the Boards were "*comfortable standing by this 'claim'*" but the information should be treated as confidential and "*should be provided to a third party*" under the process provided in s34 of the Act.

[50] He drew a distinction between information about "*financial parameters*" and the information sought by the Union about "*the detailed annual costings of every settlement in the sector*". He said that as no claim had been made about annual costings, such information could not be requested under the Act to support or substantiate it.

[51] He also stated that if the parties could agree on an independent reviewer, information about "*financial parameters*" could be provided "*without delay*".

[52] Mr Prior's first affidavit (18 June) further developed the distinction between the kind or scope of information that the Boards understand the Union seeks because of the assertion made by the Boards about consistency with other settlements.

[53] He again describes the phrase "*financial parameters*" as referring to the "*percentage per annum*" that the Boards' advocates are provided for the purposes of bargaining. He explains those parameters are then expressed (once a settlement is due to go to ratification) as "*an annualised ongoing cost of settlement to DHBs*". He says this is "*the ongoing annual cost after the MECA expires, expressed as a percentage of the current costs for employees covered by the settlement*".

[54] In argument this was described as the 'narrow' range of information which the Boards regard as having been referred to in bargaining.

[55] In his second affidavit (23 June) Mr Prior refers to that information – being "*parameters*" that "*become the ongoing costs of settlements to the DHBs*" – and says

"*that is what the DHBs are offering, because it is these figures that will substantiate its 'claim'* ".

[56] That range of information is contrasted by Mr Prior with what was described in argument as the 'broad' scope of information about "overall costings" of settlements and whether they are 'consistent'.

[57] Mr Prior's first affidavit explains the distinction between what I have called the 'narrow' and 'broad' range of information in this way:

> *... [I]n some settlements there has been a difference between the DHBs "financial parameters" and therefore the ongoing cost of settlement to the DHBs on the one hand, and the total cost of the settlement on the other. For instance, where the Government has provided extra funding for a settlement, that funding may affect the overall cost of the settlement, but not the cost to the DHBs themselves.*

[58] He says that the Boards have not made any 'claim' that the overall cost of settlements were consistent with its 29 April offer to the Union.

[59] Mr Prior says that if the Authority ascribes what I have called the 'broad' meaning to the earlier assertion of consistency that he made on behalf of the Boards, then he is authorised to withdraw that claim.

[60] On the basis that they would withdraw any assertion of consistency between its offer to the Union and settlements with other health professionals – if it were based on a comparison between this 'broad' overall cost, rather than solely the 'narrow' annualised costs to the Boards – the Boards argue that the Union's request for 'costings' cannot be information reasonably necessary to support or substantiate a claim because even if such a claim were made (which is denied), it is now no longer being made.

The issues

[61] The issues for resolution is this matter include the following:

(i) whether the Authority has jurisdiction to determine the Union's application; and

(ii) if so, whether the information requested is "reasonably necessary" for bargaining purposes (considering the extent of the Board's claim regarding consistency with settlements reached with other health professionals); and

(iii) if so, whether the Boards are entitled to invoke the independent review process, on the basis that they "reasonably consider" the information requested should be treated as confidential; and

(iv) what orders, if any, should be made.

Jurisdiction

[62] The Authority's jurisdiction to determine employment relationship problems includes, under s161(1)(f) of the Act, matters about whether the good faith obligations imposed by the Act have been complied with in a particular case. That sub-section specifically refers to that jurisdiction being over those obligations "*that apply where a union and an employer bargain for a collective agreement*".

[63] That specific reference is an exception to the general bar on jurisdiction over matters relating to bargaining or fixing terms and conditions found at s162 of the Act.

[64] It is jurisdiction to ensure compliance with good faith provisions. This includes s32 which has a heading referring to good faith in collective bargaining and states minimum requirements of the duty of good faith in that context.

[65] Put baldly the jurisdiction under s32 and s34 is to do with the conduct of parties in bargaining rather than the content of that bargaining.

[66] The Authority's jurisdiction under ss32(1)(e) and s34 does not, however, extend to exercising the powers, functions or duties of the independent reviewer under s34(5) and (6).

[67] Accordingly I find the Authority may determine issues around the reasonable necessity of information requested under s32(1)(e) – that is whether a party has acted in good faith in requesting or refusing to provide information – but cannot resolve

questions of whether a party providing information has reasonably considered that information should go to an independent reviewer and be treated as confidential information.

[68] Parliament has clearly set steps for another decision maker – the reviewer – to decide whether some or all information provided should be treated as confidential, with the power to find to the contrary. Such a decision would have the implied consequence that some or all the requested information must then be provided directly to the requesting party. It is that process and not the Authority that regulates the reasonableness of the providing party's 'consideration'.

What information is reasonably necessary?

[69] The Union's letter of 9 May met the requirements of s34(2), including specifying the nature of the information requested in sufficient detail to identify the requested information and the claim to which it related.

[70] The substance of the Boards response has not been that it does not know what is being talked about but rather its subjective assessment that such information is in fact not necessary for the purposes of bargaining, that it would be inappropriate to provide it, and that such information is not sufficiently related to its own claims so as to require production of it.

[71] The Boards are prepared to provide information which show the costs of settlements to them, showing percentage movements ("financial parameters") and their ongoing annual costs for the collectives settled with other health professionals, provided the information goes to an independent reviewer for assessment of its confidentiality and the other steps of the scheme under s34(5) and (6). Putting aside the confidentiality and review questions for the moment, the issue is really whether more information than offered by the Boards is reasonably necessary in light of the claim made and the Boards subsequent explanation of it.

[72] As the facts set out above show the Boards claim of consistency between its offer to the Union and settlements with other health professionals was not a casual or rash comment made 'off the cuff'. It was made across the bargaining table, verbally

and in writing, by its experienced and professional advocate, who I have no reason to believe on the basis of available evidence was acting in anything other than a frank and open manner, that is consistently with the good faith obligations. It was the same message repeated publicly on the Boards behalf in the media and government.

[73] I accept that a close reading of the wording used by Mr Prior, with the assistance of his subsequent explanations, supports an interpretation that the reference to consistency was with the Boards' financial parameters and their ongoing annual costings.

[74] However the matter does not end there. The Union's submission is essentially that the Boards put the principle of consistency on the table and it is entitled to the information needed to properly respond to it. Even if the Boards 'narrow' exposition of the claim is accepted, they have 'opened the door' regarding consistency and a 'broad' range of information may be required for the Union to be properly enabled to respond to that claim. The 'narrow' information may, in fact, substantiate the Board's claim but the Union is entitled to have the 'broad' information which may substantiate its own response – or an assertion of its own – that if consistency is to be considered, then it should be assessed against the overall costs rather than solely the Boards' costs of settlement.

[75] I find that approach congruent with s32(1)(e). Mr Prior's suggestion, expanded by counsel in argument, that the Boards can simply withdraw any assertions which might require them to provide information that might not support their position does not accord with the general good faith obligations or the scheme of s32(1)(e) and s34 designed to promote reasoned and orderly bargaining.

[76] Whether the information that the Boards are required to provide can or will ultimately make any difference to the progress or content of subsequent bargaining is not for the Authority in supervising good faith operation of the scheme or the party providing the requested information to attempt to assess in advance.

[77] As Dr Powell stated in her affidavit:

> *If the provision of information requested should reveal the DHBs' claims of consistency to be erroneous, then that could be a factor in persuading the DHBs to move from their current bargaining position.*

> *Conversely, if the DHBs' claim of consistency should be verified by the costings provided, then that too may be a significant influence in [the Union's] bargaining position.*

[78] While the Boards' submissions took umbrage with a notion expressed in the Union's submissions that the information provided could be used to the Union's "advantage in the negotiations", that is not a factor to be weighed whether the information is reasonably necessary but simply the nature of bargaining and part of the purpose for which the Act requires provision of information in certain circumstances.

[79] One reason given by the Boards for not so far providing the information was a concern that the information would give a competitive advantage to the Union and other small health sector unions of which Dr Powell is an official (Prior affidavit, 18 June at paragraph 17). In earlier correspondence (20 May) Mr Prior expressed a related concern that such information could be misused to the detriment of the relationship between the Boards and other unions. These concerns are not sufficient reason to withhold information required under the scheme. The scheme includes express protection against misuse of information (s34(7)). Misuse of information provided solely for the purpose of bargaining between the Union and the Boards would breach that section. The Union will have to take suitable measures to ensure any information provided, either directly or through a reviewer, is used only for bargaining of its collective agreement, treated as confidential by its negotiators, and not disclosed to others, including both members of other unions and its own. To do otherwise would be a breach of its obligations.

[80] I turn now to an aspect of the scope of the information requested. The 9 May request is for "employer costings" for all settlements for health practitioners achieved by the Boards over the 12 months from May 2007. Dr Powell's affidavit refers to settlements with the SMO, Nurses Organisation ("NZNO"), PSA, Service and Food Workers Union ("SFWU"), and three groups of technicians represented by APEX. A press release from the Boards on 4 May referred to a settlement with "PSA Nurses".

[81] As noted in discussion with counsel, Dr Powell is national secretary of APEX and may be presumed to be in possession of considerable detail regarding settlements reached for those groups of members. To the extent that further information might be

available about costings of those settlements I do not accept that the evidence or argument would support a conclusion that they are sufficiently relevant – that is reasonably necessary – for the purposes of the arguments in bargaining about the extent or otherwise of ‘consistency’ of settlements with health practitioners.

[82] Similarly, without any disrespect intended to the essential work of hospital service staff, they are not health practitioners or professionals and do not fall within the scope of the Boards assertion – whether read broadly or narrowly – regarding consistency with the offer to the Union. Costings of the SFWU settlement are not necessary.

[83] What does fall within the scope of the information requested, and is required in compliance with good faith obligations, are the costings of settlements with ASMS, PSA nurses and NZNO.

[84] From the evidence and arguments heard I understand the elements of “overall costings” include the annualised ongoing costs to the Boards of each settlement. Mr Prior’s evidence referred to this as expressed as a percentage of the current costs for employees covered by the settlement. Other elements include extra funding provided by the Government for particular settlements (Mr Prior’s affidavit of 18 June 2008 at paragraph 6) and other Government ‘top-ups’ for specific purposes and additional funding for meeting targets for elective procedures (Dr Powell’s affidavit at paragraph 34).

[85] As noted in the Union’s oral submissions, in this particular case regarding other settlements, the information need not be provided in the form of source documents but may be by way of summaries of the “overall and all up” costs containing sufficient information to establish percentage movements and how they were calculated.

Reference to review

[86] The Boards seek to exercise the election provided by s34(3) to have any information which it must provide go to an independent reviewer. They do so on the grounds that they reasonably consider the information requested should be treated as

confidential. They say their detailed commercial and financial information capturing precise costings of settlements with other unions is reasonably considered confidential (Boards' reply submissions).

[87] The assessment of that assertion is not within the jurisdiction of the Authority in the present matter. It is for the independent reviewer to consider the confidentiality question and advise the parties of her or his decision.

[88] The parties are obliged to act constructively and responsively in attempting to agree who should act as their independent reviewer. If that exercise were not carried out in good faith, by acts such as unreasonable delay or refusal to agree suitable candidates, the matter may be amendable to compliance orders under s137(1)(a)(ii) of the Act. However in this particular case counsel for both parties told me that if required to proceed with appointing an independent reviewer, the parties expect to be able to do so without assistance from the Authority.

Declaration and orders

[89] For the reasons given I find that the Boards have:

(i) not met their good faith obligations under s32(1)(e) to provide requested information for the purposes of bargaining; and

(ii) not breached good faith obligations by electing to refer any information they are required to provide to an independent reviewer under s34(3).

[90] The Union is entitled to a compliance order under s137 of the Act. The Boards are to comply with their obligations by providing the requested information to a mutually agreed independent reviewer within 21 days of the date of this determination.

[91] In setting this time period I have taken account of Mr Prior's evidence that information regarding annualised costings for the Boards will already have been prepared prior to ratification of other settlements. While Boards are compiling the

additional information required, the parties will also have an opportunity to attend to arrangements for the appointment of an independent reviewer.

[92] Leave is reserved to the parties to apply at short notice to the Authority for further orders regarding the application of the compliance order.

Costs

[93] If costs are an issue, the parties are encouraged to resolve the matter between themselves. If the Authority were asked to resolve costs, my preliminary view would be that this matter has been something of a test case – as evidenced by an apparent dearth of case law on the operation of sections 32(1)(e) and s34 in nearly eight years since enactment – and costs should lie where they fall. However if the parties have a different view, either party has 28 days from the date of this determination to lodge and serve a memorandum applying for an Authority determination of costs. The other party may then lodge and serve a memorandum in reply within 14 days.

Robin Arthur
Member of the Employment Relations Authority