IN THE EMPLOYMENT COURT
WELLINGTON

WC 18/07
WRC 3/07

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	SERVICE & FOOD WORKERS UNION NGA RINGA TOTA Plaintiff
AND	AUCKLAND DISTRICT HEALTH BOARD AND 15 OTHERS LISTED IN APPENDIX 1 First Defendants
AND	OCS LIMITED Second Defendant
AND	SPOTLESS SERVICES (NZ) LIMITED Third Defendant
AND	ISS FACILITY SERVICES LIMITED Fourth Defendant
AND	COMPASS GROUP NZ LIMITED Fifth Defendant

Hearing: 15 and 16 March 2007
and by written submissions filed on 23 and 30 March and 4 April 2007
(Heard at Wellington)

Court: Chief Judge GL Colgan
Judge CM Shaw
Judge AA Couch

Appearances: Peter Cranney and Anthea Hughes, Counsel for Plaintiff and New Zealand Council of Trade Unions as Intervener by leave
PC Chemis and HP Kynaston, Counsel for First Defendants
Paul McBride (on 15 March) and Tanya Kennedy (on 16 March), Counsel for Second and Fourth Defendants
Shan Wilson, Counsel for Third Defendant
David France, Counsel for Fifth Defendant
TP Cleary and J Verbiesen, Counsel for Business New Zealand as Intervener by leave

Judgment: 1 August 2007

JUDGMENT OF THE FULL COURT

[1] This judgment addresses, as a preliminary question of law, the interpretation of new legislation about collective bargaining. If we find the law to be as the plaintiff contends, then its other issues will continue to trial. If, however, the interpretation favours the defendants' position, it is unlikely that the union's other claims can succeed.

[2] The plaintiff's members include employees of 16 individual district health boards throughout the country and of the four defendant companies that contract to the health boards to provide food, cleaning and associated hospital services. The union wanted all 20 employers to be parties to the same collective agreement. Negotiations for this collective agreement had been going on for more than 16 months to the date of hearing but one of the sticking points was the defendants' resistance to a multi-employer collective agreement ("meca"). While all the defendants originally accepted that they should have collective agreements with the union covering their own employees, they said that these should be single-employer collective agreements ("secas"). More recently all health boards have signalled their willingness to be parties to a meca but say this should not include as employer parties the other defendants, the contracting companies. So although the circumstances have changed, the issue remains for decision.

[3] The union says that the Employment Relations Act 2000 ("the Act") now requires parties to collective bargaining, both generally and such as in this case in the public health sector, to settle a meca if stipulated for by the union so that the defendants were acting contrary to law by refusing to agree to a meca.

[4] We invited the parties to formulate a question or questions for our determination but, having been unable to agree, they adopted the fall-back position of separate questions.

[5] The plaintiff's questions are:

> *Does the obligation to conclude a collective agreement (referred to at s33(1) of the Employment Relations Act 2000) require the Defendants to conclude a single collective agreement (a multi-employer collective agreement) with the*

Plaintiff, having regard to the proper interpretation of section 33(1) and the provisions of Schedule 1B to the Act and, in particular, cl 6?

If each Defendant bargains for and enters into its own single employer collective agreement with the Plaintiff, will that Defendant have met its obligation of good faith under section 33(1) of the Act to conclude a collective agreement?

[6] All defendants pose the following questions:

a) Is offering to enter into a SECA with the plaintiff sufficient to fulfil the defendants' obligations of good faith under s33(1).

b) Does s33(1) require the defendants to conclude the MECA claimed for the plaintiff.

c) Is there an obligation under Schedule 1B clause 6 to conclude a MECA.

[7] This preliminary issue turns on the interpretation of s33 of the Act, both alone and in light of clause 6 of Schedule 1B to the Act. Section 33 is as follows:

> ***33 Duty of good faith requires parties to conclude collective agreement unless genuine reason not to***
>
> *(1) The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to.*
>
> *(2) For the purposes of subsection (1), **genuine reason** does not include—*
> *(a) opposition or objection in principle to bargaining for, or being a party to, a collective agreement; or*
> *(b) disagreement about including in a collective agreement a bargaining fee clause under Part 6B.*

[8] Clause 6 of Schedule 1B ("*Code of good faith for public health sector*") is:

> ***6 Collective bargaining and collective agreements***
>
> *(1) The parties must support collective bargaining, including multi-employer collective agreements, where it is practical and reasonable to do so.*
>
> *(2) The parties must, as far as practical and reasonable, support the definition of coverage that best recognises the parties' commitment to collective employment arrangements.*

Principles of interpretation

[9] The first port of call in any exercise in statutory interpretation is Part 2 of the Interpretation Act 1999. Section 5(1) requires that the meaning of an enactment must be ascertained from its text and in the light of its purpose.

[10] The purposes of the Act starting from the general and moving to the particular of Schedule 1B include:

- to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship including by acknowledging and addressing the inherent inequality of power in employment relationships, by promoting collective bargaining and by protecting the integrity of individual choice: s3(a)(ii), (iii) and (iv);

- that the duty of good faith in s4 of the Act requires parties bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to: s31(aa);

- the provision of codes of good faith to assist parties to understand what good faith means in collective bargaining: s31(b);

- to promote orderly collective bargaining: s31(d).

[11] As in previous cases in which employers have resisted associating with other employers in collective bargaining[1], s6 of the New Zealand Bill of Rights Act 1990 ("NZBORA") is relevant to the Employment Relations Act 2000. Except where the NZBORA otherwise provides, s29 extends its provisions, so far as practicable, to legal persons including corporate employers. Section 6 provides:

[1] For example *Epic Packaging Ltd v NZ Amalgamated Engineering, Printing & Manufacturing Union Inc* [2006] 1 ERNZ 617; *New Zealand Public Service Association Inc v Southland Regional Council* [2005] ERNZ 1008; *Gibbs v Crest Commercial Cleaning Ltd* [2005] ERNZ 399.

> ***6. Interpretation consistent with Bill of Rights to be preferred*** *Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.*

[12] Among the rights afforded are those set out in s17 (*"Freedom of association"*) and, by necessary implication, the freedom to not associate with other persons.

[13] The way in which s6 is to be applied to the interpretation of other legislation has recently been the subject of comprehensive judgments of the Supreme Court in *Hansen v R* [2007] NZSC 7. The majority of the Judges in *Hansen* held that the starting point of interpreting a section for NZBORA consistency is the natural meaning of the statutory provision in question (Blanchard J at paras [57]–[60]; Tipping J at para [88]; McGrath J at para [192]). That meaning is to be found using the ordinary rules of statutory interpretation and (per Tipping J at para [89]), having regard to the proposition inherent in s6 of the NZBORA, that a meaning inconsistent with the rights and freedoms affirmed by the Bill should not lightly be attributed to Parliament. It is only where the natural meaning prima facie limits a guaranteed right that the Court is required to undertake an analysis under s5 of the NZBORA, determine whether the limit is justified (Blanchard J at para [60]; Tipping J at para [90]; McGrath J at para [191]) using the test as outlined in *R v Oakes* [1986] 1 SCR 103; (1986) 26 DLR (4th) 200 (SCC) (summarised by Tipping J at para [104]). If the natural meaning does place an unjustified limit on the right, then it is necessary to consider whether a strained but *"tenable"* or *"genuinely open"* meaning could legitimately be given. If not, the unjustified meaning is nevertheless to be adopted in reliance on s4 of the NZBORA.

[14] Section 33 contains an apparent express constraint upon employers' rights of association in the sense that it requires them to enter collective agreements with unions, that is to associate with unions. Although the issue does not arise for decision in this case because the defendants all accept that they must associate with unions by entering into collective agreements with them, we tend to the view that this limitation on the right not to associate is clearly intended by Parliament.

[15] The resistance to association maintained by the defendants in this case is a resistance to associating with other employers in their necessary associations with the union in collective bargaining and its products, collective agreements.

[16] The NZBORA requires an interpretation of a provision affecting freedom of association or non-association that is consistent with the promotion of that freedom rather than antithetical to it. In particular a statute should not be interpreted to require persons, including employers, to associate with other employers against their wills unless by clear direction of Parliament. That approach to statutory interpretation is reinforced by the Employment Relations Act's emphasis on protecting the integrity of individual choice in s3(a)(iv).

[17] In this case we are satisfied that the natural or prima facie meaning of s33 does not limit the employers' rights of non-association in s17. Further, because Schedule 1B is expressly subject to s33, the Schedule's provisions cannot limit ultimately those same rights and freedoms even if clause 6 of Schedule 1B may require employers to support bargaining activities or processes they may not wish to.

Schedule 1B to the Employment Relations Act 2000

[18] Schedule 1B is, as its title suggests, a code of conduct for parties (employers, unions and employees) in the public health sector. Clause 1 provides an extended definition of the public health sector which includes companies or other entities that contract with district health boards in respect of their public health functions. Schedule 1B applies to all the defendants in their employment relationships in the public health sector: clause 1(1).

[19] The purposes of the schedule are set out in its clause 2 and include to promote productive employment relationships and to require new or ongoing commitments to develop, maintain and provide high quality public health services, to ensure the safety of patients, and to engage constructively and participate fully and effectively in all aspects of employment relationships. Subclause (c) of clause 2 addresses the issue in this case by providing expressly that one purpose of the code is "*to recognise the*

importance of … collective arrangements; and … the role of unions in the public health sector."

[20] Clauses 4 to 7 (inclusive) fall under a heading *"General"*. Clause 4 deals with *"General requirements"*. It addresses a number of aspirational aims for employment relationships but does not refer expressly to bargaining, collective bargaining or multi-employer collective bargaining. Clause 4 states that in all aspects of their employment relationship (including bargaining), such parties must engage constructively and participate fully and effectively. This includes requirements of behaving openly and with courtesy and respect towards each other, the creation and maintenance of open, effective and clear lines of communication including providing information in a timely manner, and other similar behaviours.

[21] Clause 6 is the first provision to deal expressly with collective bargaining and collective agreements and is at the heart of the plaintiff's case. The particular requirements include:

- to *"support collective bargaining"*;
- that such support of collective bargaining includes *"multi-employer collective agreements"*;
- that such support as set out above must occur where it is *"practical and reasonable to do so"*.

[22] The next relevant clause under the heading *"Collective bargaining"* is clause 9 which sets out a number of prohibited behaviours by employers during collective bargaining. Conversely, clause 10 (*"Mutual obligations"*) sets out a number of behaviours required of parties during collective bargaining. So although positive and negative aspects of collective bargaining are dealt with in these clauses, neither address multi-employer collective bargaining in particular.

[23] The balance of Schedule 1B addresses issues that are not involved in this case.

[24] Therefore the only reference to multi-employer bargaining or agreements is the requirement in clause 6(1) to support such agreements and bargaining where it is practical and reasonable to do so.

[25] Agreements are the product of bargaining but are conceptually distinct from the bargaining process itself. Parties bargain for an agreement (including a meca) but there cannot logically be a meca to be supported until that is agreed to and the formalities of implementing a collective employment agreement undertaken. Put another way, it is difficult conceptually to say that a requirement to support mecas is the same as supporting bargaining for mecas as the plaintiff's case contends.

[26] Had Parliament intended parties in the public health sector to support multi-employer collective bargaining, it could and would have said so. Where, as here, there is no current equivalent multi-employer collective agreement that was for renewal or replacement, it is difficult and even artificial to say that the parties must support a concept or construct that may or may not eventuate.

[27] Clause 6 of Schedule 1B is enigmatic on its face. Although entitled "*Collective bargaining and collective agreements"*, subclause (1) requires parties to support collective bargaining where it is practical and reasonable to do so, but appears to include multi-employer collective agreements as part of collective bargaining. The subclause does not say, for example, "The parties must support collective bargaining and multi-employer collective agreements …" or "The parties must support collective bargaining and collective agreements …" or "The parties must support collective bargaining including bargaining for multi-employer collective agreements …".

[28] Where, as here, legislation is unclear on its face, the Court can and must have recourse to conventional principles of statutory interpretation and, if necessary, to extrinsic interpretive materials including records of the legislative process.

The legislative status of Schedule 1B

[29] The unusual, if not unique, legislative status of Schedule 1B to the Employment Relations Act 2000 affects its interpretation and application that are questions at the heart of this case.

[30] Section 100D (inserted by s36 of the Employment Relations Amendment Act (No 2) 2004) provides among other things that:

- the Schedule 1B code of good faith for the public health sector applies *"subject to the other provisions of this Act and any other enactment"*;

- the Schedule 1B code does not prevent a code of good faith approved under s35 or a code of employment practice approved under s100A applying in the public health sector;

- in the case of inconsistency, the Schedule 1B code is to prevail over a code approved under s35 or s100A.

[31] Section 100E addresses amendments to, or replacement of, the code of good faith for the public health sector set out in Schedule 1B. Section 100E(1) allows the Governor-General, by Order in Council made on the recommendation of the Minister of Labour, to amend or replace the Schedule 1B code. Section 100E(2) requires the Minister, before making a recommendation under subs (1), to have a request to do so by no fewer than three-quarters of district health boards and by unions that represent no fewer than three-quarters of union members employed by district health boards. The section also requires the Minister of Labour to consult the Minister of Health *"and such other persons and organisations as he or she considers appropriate"* before making a subs (1) recommendation.

[32] Although Schedule 1B was described by some counsel at the hearing as *"delegated legislation"*, it is probably more correct to refer to it as primary but delegable. That is because, although Parliament (the legislative branch) has established

Schedule 1B and its contents, it has delegated the task of amending or replacing that code to the Governor-General by Order in Council (the executive branch). So primary legislation can be abrogated or amended by the Executive, albeit after certain statutory conditions have been satisfied which are not themselves alterable other than by Parliament.

[33] It is noteworthy that employers and their employees other than district health boards and their employees are affected by Schedule 1B but are not entitled, at least expressly under s100E(2)(a), to be involved in abrogation or amendment of the process that affects them. It may be, however, that under s100E(2)(b), the Minister would be obliged to consult with companies contracting to district health boards such as the non-health board defendants in this case, and their employees, before making a recommendation under subs (1). It is unnecessary for us to determine whether that is an obligation and we do no more than note the possibility in this judgment.

[34] Interpretation of Schedule 1B, especially as it is or may be affected by other statutory provisions, must necessarily take account of this actual and potential legislative status as a code of good faith now and in future. Where a code of conduct, albeit mandated initially by Parliament, can be altered by subordinate legislative process, the Court should be careful to ascribe to an ambiguous provision a meaning that is consistent with the recognised statutory objectives.

Legislative history of clause 6 of Schedule 1B

[35] To ascertain Parliament's intention, we have examined the relevant legislative history materials. There are fewer in respect of Schedule 1B than is usual. That is because it appears that the schedule was conceived only after the first reading of the Bill and its referral to the Select Committee. We were told by counsel, including counsel involved closely in the legislative process, that the schedule was drafted in haste and the first reference to it was in the majority report of the Committee to the House. At pages 16 and following of the report of the Transport and Industrial Relations Committee, the majority recorded the concern of some submitters that a new code of good faith for the public health sector would undermine the then existing code

for this sector developed by the New Zealand Council of Trade Unions ("NZCTU") and district health boards collectively. The report noted:

> *… The majority considers that this code of good faith reflects the good faith objectives of this bill as the intent of this clause as introduced was to help reduce uncertainty over employers' obligations. The majority supports the inclusion of the code of good faith for the public health sector in the bill to reinforce the existing agreement between the New Zealand Council of Trade Unions and District Health Boards New Zealand in the public health sector.*
>
> *The majority recommends an amendment to Schedule 1, inserting new [Schedule 1B] to the principal Act, which outlines a code of good faith for the public health sector based on the code agreed between the New Zealand Council of Trade Unions and District Health Boards New Zealand. …*

[36] This tends to indicate an intention by the Select Committee to adopt, or at least follow closely, the then existing informal code.

[37] The terms of this code between the NZCTU and the district health boards are, in turn, instructive. This *"CONSENSUS DOCUMENT"* provided at clause 3.5:

> *The parties will support collective employment bargaining, including multi-employer bargaining, wherever it is practical and reasonable to do so.*
> (our emphasis)

[38] This favours the interpretation of clause 6(1) advanced by the plaintiff, namely that the parties must support collective bargaining, including multi-employer collective bargaining, where it is practical and reasonable to do so.

[39] Such an interpretation is, however, to ignore the actual word (agreement) used by Parliament and substitute another different word that both corrects an illogicality but is consistent with the previous informal arrangements that the Select Committee recommended be enacted.

[40] We were not referred to any other legislative material that might have thrown light on this question including, for example, ministerial speeches at the second or third reading stages of the Bill.

Interpretation of clause 6 Schedule 1B

[41] As it stands, clause 6(1) is illogical. We conclude that it must have been drafted and enacted erroneously. It is capable of several meanings The two most likely are:

- The parties must support collective bargaining, including [bargaining for] multi-employer collective agreements, where it is practical and reasonable to do so.

- The parties must support collective bargaining [and] multi-employer collective agreements where it is practical and reasonable to do so.

[42] The first hypothesised interpretation tends to favour the plaintiff's position in that it appears to require parties in the public health sector to support bargaining for multi-employer collective agreements. The second hypothesis does not support the plaintiff's position in that it would require support for collective bargaining and of multi-employer collective agreements where these are the result of collective bargaining.

[43] We have concluded that, although using a non sequitur, Parliament intended clause 6(1) of Schedule 1B to the Act to mean that parties must support collective bargaining including bargaining for mecas. Although this interpretation differs significantly from the plain and literal words, it makes sense of them in the way that we consider the legislators intended. This meaning favours the plaintiff's position. It is not, however, the end of the issue but one step along the way to a broader examination of the statutory intent.

Meaning of "*support*" in clause 6(1)?

[44] A legislative requirement to "*support*" something is novel, perhaps unique, in New Zealand employment law, if not in social legislation. Such dictionary definitions as the parties provided to us are of limited assistance: meanings of "*support*" in common parlance are many and diverse. Common usage includes approval, encouragement, or endorsement of a philosophy, group (political, sporting etc) but not

necessarily extending to uncritical or absolute commitment to such. Legislative and judicial usages are little more enlightening.

[45] Beginning with the immediate legislative context, the verb *"support"* appears also in clause 7 specifying that the parties *"must recognise and support Part 3 of the New Zealand Public Health and Disability Act 2000 which, in order to recognise the principles of the Treaty of Waitangi and with a view to improving health outcomes for Maori, provides mechanisms to enable Maori to contribute to decision-making on, and to participate in the delivery of, health and disability services."*

[46] That is to be contrasted with the next provision in clause 8 addressing the agreed identification of a clinical expert or other suitable person as part of an arrangement under s32(1)(a). Clause 8 requires the parties to *"make every endeavour to agree"* on such a person for the purposes of clause 13(1). To make every endeavour to agree on something is arguably a more onerous obligation than to *"support"* a principle.

[47] Our researches indicate that the verb *"to support"* has not been judicially defined, at least in the present context, in New Zealand. Legal words and phrases dictionaries are similarly unhelpful. So, too, is the record of the parliamentary history of the Employment Relations Amendment Act (No 2) 2004.

[48] In Canada, the Ontario Court of Appeal considered the word in a criminal context in *R v Rochon* 2003 CanLII 9600; (2003) 173 CCC (3d) 321 at paras 57-58:

> *… I do not think the word "support" is impermissible in the context of a proper definition of "abet" …. … it is important to note that the word "support" has many meanings. In* The New Shorter Oxford English Dictionary *… the definition of the verb "support" covers almost a full page and is divided into seven principal meanings, including "Strengthen the position of (a person …) by one's assistance or backing", "give confidence or strength to; encourage" and "Occupy a position by the side of (a person) in order to give assistance or encouragement". In my view, these definitions of the word "support" clearly imply an element of action; indeed, they tend to treat "support" and "encourage" almost as synonyms.*

[49] Neither Black's Law Dictionary (8th ed, 2004) nor the Oxford Companion to Law (1980) provide any meaning in the present context.

[50] The Collins English Dictionary and Thesaurus (4th ed, 2006) provides the following relevant meaning:

> *Support … vb … 5 to speak in favour of (a motion). 6 to give aid or courage to. 7 to give approval to (a cause, principle etc.); subscribe to. 8 to endure with forbearance:* I will no longer support bad behaviour. *9 to give strength to; maintain:* to support a business. …

[51] The Oxford English Dictionary provides a miscellany of meanings including *"To endure without opposition or resistance; to bear with, put up with, tolerate … To endure, undergo,* esp. *with fortitude or without giving way; to bear up against. … To strengthen the position of (a person or community) by one's assistance, countenance, or adherence; to uphold the rights, claims, authority, or status of; to stand by, back up. …To uphold or maintain the validity or authority of (a thing); also, to give support to (a course of action).*

[52] None of this is of much assistance in ascertaining what Parliament meant by use of the verb *"support"* in the context of the legislative scheme of the Employment Relations Act 2000.

[53] We have had to take a best guess at Parliament's intention in describing an obligation in bargaining to *"support"* collective bargaining including bargaining for mecas. The notion of support is also, of course, qualified by the phrase *"where it is practical and reasonable to do so."*

[54] We consider that Parliament intended that parties in bargaining affected by the schedule are obliged to take as their starting point and general approach to ongoing bargaining that both collective bargaining generally and bargaining for mecas in particular should be striven for and attained unless it is neither practical nor reasonable to do so. To *"support"* is to have a commitment to, but not an absolute or irrevocable commitment or a commitment at all costs. Put another way, there is to be a presumption of bargaining for collective agreements including bargaining for mecas unless it is neither practical nor reasonable to continue to do so or to achieve that end.

[55] This interpretation tends to favour the plaintiff's position (although not as absolutely as it sought to persuade us) but again it is not the end of the story. Schedule

1B is subject to s33 of the Act or indeed any other enactment: s100D(2)(a). So clause 6 of Schedule 1B must be congruent with s33. If s33 and clause 6 are in conflict, the clause must yield.

Interpretation of section 33

[56] This was a completely new section enacted by s12 of the Employment Relations Amendment Act (No 2) 2004 in substitution for the former s33 that read:

> ***Duty of good faith does not require concluded collective agreement***
> *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.*

[57] It seems clear that Parliament was dissatisfied with the operation of s33 as enacted in 2000. The 2004 legislation not only repealed the previous section but enacted a replacement to the opposite effect, that is requiring a collective agreement to be concluded after bargaining but providing for exceptions to this outcome.

[58] The new s33 set out earlier in this judgment cannot be read in isolation from another new statutory scheme enacted at the same time in 2004 that is now ss50A to 50I (inclusive) under the heading "*Facilitating bargaining*". The express purpose of these sections is to provide a process that will enable parties to collective bargaining, who are having serious difficulties in concluding a collective agreement as is required by s33, to seek the assistance of the Employment Relations Authority in resolving these difficulties.

[59] So as well as requiring (with some exceptions) collective bargaining to conclude collective agreements, Parliament at the same time provided a mechanism for achieving this object.

[60] On its own, s33 goes no further than requiring parties in bargaining for a collective agreement to conclude such, subject to certain other conditions that are irrelevant for the purpose of this judgment. As this Court has previously held, the requirement to conclude a collective agreement does not require the conclusion of any

particular kind of collective agreement or, in particular, a meca. The statutory emphasis is upon encouraging collectivism per se as opposed to individualism, and not particular types of collectivism as opposed to other types of collectivism or as opposed to individualism. That was determined first in *Toll New Zealand Consolidated Ltd v Rail & Maritime Union Inc* [2004] 1 ERNZ 392 at paras [50]-[65] and, in particular, at para [61]. Another full Court, sitting on another bargaining case in the following year, confirmed that finding. That was in *Association of University Staff Inc v Vice-Chancellor of the University of Auckland* [2005] ERNZ 224, paras [40] and [62]. The *AUS* case is significant because it addressed the position after legislative change was effected following judgment in the *Toll* case. The Court in *AUS* concluded that Parliament had, in December 2004, made no relevant change to the principles the Court found in *Toll* underpinned the bargaining regime under the legislation as originally enacted in 2000.

[61] Although the judgment in *AUS* did not address directly s33, the philosophical underpinnings of the bargaining regime were discussed. We have not been persuaded that our approach to collective bargaining/collective agreements in *AUS* was wrong. The newly worded s33 goes further than its predecessor but not as far as the plaintiff wishes. For the plaintiff to succeed, any new legislative provisions and/or legislative provisions for the health sector alone, must be found to alter that meaning that we have previously given to the Act's bargaining obligations.

[62] Unlike clause 6(1) of Schedule 1B, Parliament did not use ambiguous words or phrases in s33(1). It referred to "*bargaining for a collective agreement*" and the conclusion of "*a collective agreement*". In the presumed knowledge of what the full Court had said in interpreting the bargaining provisions in the *Toll* case earlier in 2004, Parliament continued to make its requirements of bargaining applicable only to collective bargaining for collective agreements generally. It did not particularise the expected nature of the bargaining or the resultant agreements as is at the heart of the plaintiff's case here, as indeed it was in the *Toll* case before the legislation changed, and the *AUS* case decided after the new s33 was enacted.

[63] Not only does it require a significant addition to otherwise unambiguous words and phrases, but to read into s33 that the collective bargaining must be for a collective

agreement of the type specified by the union in its notice initiating bargaining, is inconsistent with a number of other indicia in associated sections.

[64] We do not repeat in full the analysis of the statutory bargaining regime enacted by Parliament undertaken by the full Courts in the *Toll* and *AUS* cases, but find that other provisions that assist in determining whether the plaintiff's interpretation of s33 is correct include:

- One of the objects of the Act is the promotion of *"collective bargaining"*: s3(a)(iii).

- Another object of the Act is to promote observance in New Zealand of Convention 98 (of the International Labour Organisation) on the Right to Organise and Bargain Collectively that requires promotion of collective bargaining but not of any particular form of collective bargaining: s3(b).

- References in s31 setting out the object of Part 5 (*"Collective bargaining"*) of the Act refer only to *"collective bargaining"* rather than any particular form of collective bargaining including bargaining for a meca. The only reference to a subset of collective bargaining is in s31(e) which requires employees to confirm proposed collective bargaining *"for a multi-party collective agreement."* Although a meca is a multi-party collective agreement, it is not the sole example: a multi-union collective agreement with one employer (a muca/seca) is also a multi-party collective agreement.

- The original scheme for bargaining encapsulated in ss40 to 50 (inclusive) of the Act contemplates the initiation of bargaining for a collective agreement by one or more unions or by one or more employers: s40(1).

- Section 42(1) provides that bargaining for *"a collective agreement"* is initiated by giving to the ***intended*** party or parties to the agreement a notice that complies with s42(2). (our emphasis)

- Section 44 provides that bargaining for a collective agreement is initiated (if only one notice is required under s42) on the day on which the notice is given: s44(1)(a).

- Section 45 applies to the circumstances in this case, that is where one union proposes to initiate bargaining with two or more employers for a single collective agreement. This is multi-party collective bargaining. Section 45 provides for a secret ballot or ballots of union members employed by each employer ***intended to be a party to the bargaining***: s45(2). (our emphasis)

- Section 49 provides for additional union or employer parties to become parties to bargaining for a collective agreement after bargaining has been initiated but on terms.

- Section 50 provides for "*Consolidation of bargaining*".

[65] Mr Cranney for the plaintiff relied heavily on the statutory ratification requirements to support his argument that the form of a collective agreement to be bargained for is fixed by the identities of the parties to whom notice is given. Section 51(2) requires a union to notify "*the other intended party or parties to the collective agreement*" of the procedure for ratification by the employees to be bound by it that must be complied with before the union may sign the collective agreement or a variation of it.

[66] We conclude that, as re-enacted in 2004, s33 goes no further than to make it an incident of the duty of good faith in s4 that a union and an employer bargaining for a collective agreement conclude such an agreement unless there is a genuine reason, based on reasonable grounds, not to. The requirement is to conclude a collective agreement that may include a meca but, equally, may include a seca or one of the other varieties of collective permutations that the Act allows. Section 33 does not go so far as to mandate the conclusion of a meca even if this has been stipulated for by the union and even if the parties must, as in this instance, "*support*" bargaining for a meca. The distinction may be a fine one but it exists and is important nevertheless. Although the public health sector code requires the employer parties to support bargaining for a meca, s33 does not require them to conclude such an agreement. At the end of bargaining, all that is required is a collective agreement that may include the types of collective agreement to which the employer parties have already committed themselves in this case.

Multiple-initiated bargaining?

[67] During submissions we engaged Mr Cranney in discussion about the logical consequences of his argument in the event that one or more employers against whom bargaining had been initiated by a union, cross- or counter-initiated bargaining but for a collective agreement on different terms including, in particular, having different intended parties. If it had applied to a counter-initiation situation, counsel's primary submission about the act of bargaining initiation fixing the nature of the agreement to be bargained for and the identities of the employer parties to it, would have led to significant logistical problems in the settlement of a collective agreement from such bargaining.

[68] At the close of his submissions in reply, Mr Cranney, perhaps tacitly accepting the logical extension of his argument in the circumstances, altered his stance to submit that the legislation does not contemplate or permit counter-initiation of bargaining by an employer against whom collective bargaining has been initiated by a union. In these circumstances we allowed time for the development of that argument by Mr Cranney and for responses by other counsel.

[69] Although in this case the employers, against whom bargaining was initiated by the union, chose to address their disagreement with the identities of employer parties to the proposed agreement as an issue in the bargaining itself, that has not always happened. For example, in the *AUS* case in 2005, the employer counter-initiated bargaining for a seca/muca in response to the union's initiation of bargaining for a meca/muca. The judgment in *AUS* addressed briefly the practicalities of two sets of bargainings and how these might best be resolved by amalgamation.

[70] The challenge to the lawfulness of what appears to date to have been accepted as a legitimate tactic having been raised by the plaintiff, we must now address it as one of the issues in this case. That is because, unless Mr Cranney is right, the ability of employers to counter-initiate affects significantly the core question for decision. This has added substantially to the issues to be determined in this judgment. It is an important and new question and we have received comprehensive and persuasive

submissions on it from all parties. It has not only added to the length of, but has also regrettably but unavoidably delayed, this judgment

[71] The term "counter-initiation" refers to the giving of notice under s42 and the following of the subsequent statutory bargaining procedures by a party against whom bargaining has already been initiated by the giving of a s42 notice. Although in most cases bargaining is initiated by unions and any counter-initiation is undertaken by employers, the opposite can occur and the principles apply to both situations. The notion of counter-initiation also includes that the bargaining purported to be counter-initiated will be for a collective agreement covering the same employees. So in most instances the differences between the initiated and the counter-initiated bargainings will be about the identities of the intended parties to the collective agreement. Not unconnected with this, the differences will be frequently about the nature of the intended collective agreement, for example whether it will be a seca as opposed to a meca.

[72] The union relies on three alternative arguments. The first is that cross-initiation or counter-initiation is unlawful per se. Second, such a process is unlawful if it undermines or is likely to undermine bargaining. Third, counter-initiation is unlawful in the health sector if it breaches clause 6(1) of Schedule 1B to the Employment Relations Act 2000.

[73] Because of the plaintiff's late adoption of the argument of unlawfulness of counter-initiation, Mr McBride for OCS and ISS sought to adduce what he described as non-contentious evidence in an affidavit of Michael Mulholland. We agreed to read this affidavit, in particular because counsel submitted there was no sufficient evidential background to the new issue. Mr Mulholland's affidavit deposes to the union purporting to give what amounts to a second notice of initiation of bargaining (although not a counter-notice in the sense of being given by the respondent or one of the respondents to previously initiated bargaining). The affidavit is to the effect that the union withdrew its first notice initiating bargaining and purported to replace this with a new notice adding a further intended employer party.

[74] We are not persuaded that what was purportedly done by the union in this case should determine or even affect our consideration of a question of law, namely whether there can be counter-initiation of bargaining by a party against whom the bargaining has been initiated. That such a restriction may affect adversely unions as well as employers (although realistically more rarely so) is irrelevant for the purpose of determining the issue. But in any event, replacement of a notice initiating bargaining with another amended notice is not the same as counter-initiating bargaining as we have defined it so as to create multiple concurrent bargainings for the same work performed by the same employees.

Decision of counter-initiation issue

[75] We accept the plaintiff's arguments on this issue.

[76] We agree that the lawfulness of counter-initiation is a matter of statutory construction. Under the scheme of the Act, bargaining for a collective agreement between the same parties covering the same employees can be initiated only once. The parties are then required to conclude a collective agreement unless there are genuine reasons based on reasonable grounds not to. A process permitting cross- or counter-initiation would give rise to multiple bargaining processes all of which would impose on the parties to them obligations to conclude collective agreements. Although the Act does not exclude expressly cross- or counter-initiation, an interpretation that there can only be one initiation of bargaining for a collective agreement accords more closely with the scheme of the legislation. This includes, most significantly, promoting orderly collective bargaining. To allow for subsequent initiations between the same parties would be inimical to this objective.

[77] Either a union or an employer can initiate bargaining, although a union alive to its entitlements has a statutory head start in most circumstances in the sense that it can initiate bargaining lawfully before an employer can do so. Once initiated, various statutory obligations apply to the bargaining so initiated. These include obligations of good faith and, in particular, that the parties to a bargaining must use their best endeavours to enter into a bargaining process arrangement under s32(1)(a). Notification of a union's ratification procedure is another obligation under s51(2). The

obligation to conclude a collective agreement unless there is a genuine reason based on reasonable grounds not to (under s33(1)), is one of the core and fundamental good faith obligations in bargaining. Section 32(1)(b) requires the parties to meet each other from time to time for the purpose of bargaining. Under s32(1)(c) the parties must consider and respond to proposals made by each other. Such responses must be genuine in the sense that they are not misleading.

[78] The purpose of all of these rules is to advance the process of concluding a collective agreement. Section 32(1)(ca) now provides that if the bargaining is deadlocked on one or more matters, the parties must continue to bargain about other matters on which they may be able to reach agreement. This obligation, introduced by Parliament at the same time as the new s33, is an integral part of the good faith obligation to conclude an agreement and is inimical to a process of duplicate or even multiple compulsory bargaining processes.

[79] There are other relevant elements of the statutory bargaining scheme. These include that the roles and authorities of chosen representatives of parties must be recognised: s32(1)(d)(i). Parties must not bargain directly or indirectly with persons for whom a representative or advocate is acting: s32(1)(d)(ii). Parties must not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining process: s32(1)(d)(iii). Parties must provide information to each other on request in accordance with the rules set out in s34: s32(1)(e). Matters relevant to where the parties are dealing with each other in good faith include the provisions of a relevant code of good faith: s32(3)(a). When agreement is reached it must be ratified in accordance with the notified ratification procedure and the agreement then signed: s51(1). These statutory requirements ensure that bargaining is progressed towards the settlement of a collective agreement but confirm that their repetition in multiple bargaining processes between the same parties for the same employees, would be unduly onerous and disorderly.

[80] Although the legislation does deal with some bargaining multiplicity issues, these are confined to multiple notices being received by one or more employers (s45) and multiple notices being received by one or more unions (s47). These are not the same as

issues of cross- or counter-initiation of bargaining and the consequences of such a practice.

[81] We accept that a scheme of duplicate or multiple co-existing obligations in bargaining and, in particular, to conclude a collective agreement, would run counter to the scheme of ss50A to 50J dealing with the process for parties to collective bargaining who are having serious difficulties in concluding a collective agreement. An assumption underlying the sections can be said to be that there is one bargaining process being undertaken, a collective agreement being bargained for, and that parties involved in this new conflict resolution scheme are to follow a process directed by the Employment Relations Authority.

[82] Although we accept that in the past the various health boards (if not the contracting companies) may have together dealt with 40 separate bargainings, that is not the same as dealing with 40 separate cross- or counter-initiations of bargaining. Prior to the 2004 amendments to the Act the current prescriptive statutory bargaining rules did not apply. Although the pre-2004 position might have been considered an inconvenient but accepted part of collective bargaining by numerous employers of large and diverse workforces, the position is now very different because of legislative change.

[83] We do not accept that the statutory rules of bargaining and, in particular, the requirements of good faith, are sufficient to deal with inconvenience attributable to cross- or counter-initiation. Although such issues arising in parallel bargaining (initiated and counter-initiated) would have to be addressed by the parties in good faith, we consider that even efforts undertaken in best faith would not promote orderly bargaining.

[84] We are reinforced in our conclusion by the advice of Mr Chemis that, anecdotally at least, cross- or counter-initiation does not appear to have become widespread despite the full Court's observations about its potential in the *AUS* case in May 2005. In reality, Mr Chemis submitted that issues about who should be parties to a collective agreement are dealt with around the bargaining table and cross- or counter-initiation is not only not a common occurrence but indeed rare and has not led to litigation. Counsel submitted that cross- or counter-initiation is most likely to occur in a situation

where bargaining has run its course, that is as a circuit or game breaker tactic. As an example, in this case, counsel postulated that the health boards may feel it necessary and appropriate to counter-initiate for a meca involving only them as employers. However, the legislation now provides for facilitated bargaining so that parties in these circumstances are not without a practical strategic remedy. To determine, as we do, that counter-initiation is not allowed for in the Act, will neither disturb an established practice nor leave parties without a way of advancing bargaining that has broken down over a question of the nature of the collective agreement to be settled.

[85] We consider that the absence of statutory reference to counter-initiation of bargaining by an employer or a union against whom a notice of initiation of bargaining has been issued, is a neutral factor favouring neither the existence of the ability to do so nor any prohibition upon it. That is reinforced by the absence of any reference to this question in the parliamentary process of the enactment of both the 2000 Act and the 2004 amendments to it.

[86] We do not agree with the argument advanced for the defendants that the provisions of s50 would be nonsensical if there is no ability in law for a party to counter-initiate bargaining. Section 50 deals with the circumstances where different unions initiate bargaining with the same employer. That is very different from what we have described as counter-initiation. Section 50 can sit alongside, and operate effectually with, a regime in which counter-initiation is not permitted.

[87] Some of the defendants relied on *NZ Air Line Pilots Assn IUOW v Gray and Ors* [1989] 2 NZILR 454 in support of an interpretation of the statute allowing counter-initiation. That case interpreted a very different section (s134) of very different legislation about bargaining (the Labour Relations Act 1987) and is distinguished on that basis. The Labour Court found that the statutory provision contemplated expressly multiple initiations of bargaining.

[88] It is not insignificant, in our view, that the Court in *Gray* also allowed for an argument of multiple initiations of negotiation by *"necessary implication"* from the words used in the statute. In this case, in the absence of express provisions either way,

we are driven to decide the question whether ss42 and following of the Act extend to counter-initiations, by such necessary implication.

[89] The Employment Relations Authority has commented on or decided the question at issue in a number of cases but we are not particularly assisted by these. It is very unlikely that the Authority received the plethora of considered legal submissions that we have or has been able to take the opportunity to reflect on the questions as we have been.

[90] Some defendants relied on our earlier judgment in *AUS* which may be seen to have at least not disapproved of the process of counter-initiation. Although it was a feature of that case, there was not the head-on challenge to its legality as there has been in this and, similarly, the Court was not called on to determine that question with the benefit of comprehensive submissions. On this question, our judgment in *AUS* is not persuasive.

[91] We agree that the only express restrictions on initiating bargaining are that this can only be done by a union or an employer and that an employer cannot initiate for what Mr Cleary described as a *"fresh"* collective agreement under s40(2). Although it is correct that Parliament considered thereby exclusions to an entitlement to initiate, we are not persuaded that this supports an inference that Parliament also thereby permitted, impliedly, counter-initiation by a union or employer against whom bargaining has already been initiated.

[92] As for the argument that a prohibition upon counter-initiation will prevent parties initiated against striking or locking out for a different type of agreement than has been stipulated for by the initiator, we do not accept that this is so. The type of collective agreement is another way of describing the identities of other parties to the agreement or at least the classes of those other parties. So, to use the example of this case, the union having initiated collective bargaining for a meca, any objection to the multi-employer status of that agreement is, in reality, an objection to the other intended employers being parties to the same collective agreement. It is a fundamental bargainable point as to who other parties to any agreement will be and the principle is no less applicable under the statutory employment collective bargaining regime. Parties

against whom bargaining has been initiated are entitled to object to the proposed form of the collective agreement sought (a meca as opposed to a seca for example). So long as the agreement to be settled is collective as opposed to individual, that can be a disputed question in the bargaining over which there can be strikes and lockouts and in respect of which the statutory scheme for facilitating and even fixing bargaining can apply.

[93] We accept that a regime including counter-initiation would not achieve the statutory objective of orderly bargaining. Each counter-initiation would require the parties to embark on the bargaining processes in the legislation including an arrangement for the process of conducting the bargaining in an effective and efficient manner under s32(1)(a), meetings from time to time under s32(1)(b), the consideration of and response to proposals made in the bargaining under s32(1)(c), and the other statutory minima of the bargaining process.

[94] The circumstances of this case illustrate, albeit by extreme example, the potential for disorderly bargaining. Until now, there have been some 40 separate collective agreements between these parties, each separately negotiated for and settled. The prospect of the defendants counter-initiating for 40 separate collective agreements to be bargained for at the same time as the bargaining initiated by the union progresses, with all of the statutory paraphernalia required of each bargaining, would be the antithesis of orderly bargaining in the sector.

[95] That is not to say that in the collective bargaining initiated by the union, some or all of the employers cannot bargain for particular outcomes because they can. But to permit counter-initiation in these circumstances (of which Parliament would have been aware in general) would simply mean delay, cost, confusion, and other consequences of bargaining that is not orderly.

[96] We conclude, therefore, that the statutory scheme does not allow for counter-initiation of bargaining by a party against whom bargaining has been initiated under ss40 and following. The legislation contemplates one set of negotiations for the same parties initiated either by a union or unions or by an employer or employers.

[97] In these circumstances it is strictly unnecessary to address Mr Cranney's fall-back positions but had we been required to do so, we would nevertheless have concluded that even if counter-initiation can be undertaken pursuant to ss40 and following, if the process undermined the bargaining, as well it might, it would be impermissible. It would, at least, require potentially excessive or inappropriate judicial intervention in the process, contrary to one of the objects of the legislation.

[98] So, too, would counter-initiation offend against the requirements of clause 6(1) of Schedule 1B to the Act discussed elsewhere in this judgment, at least if it was undertaken as an immediate reaction to the initiation of bargaining for a meca. Although, as we concluded, s33 makes it clear that parties are not required to agree upon a meca, it would be antithetical to the requirements of clause 6 that the parties support such an arrangement, that cross-initiation for secas or other forms of collective agreement could be undertaken, at least until a very late stage in bargaining. Even then, arguably more than as an immediate response to initiation for a meca, this would create disorderly bargaining. This reinforces our primary conclusion on this issue.

Answers to preliminary questions

[99] For the foregoing reasons we answer the plaintiff's questions as follows:

> *Does the obligation to conclude a collective agreement (referred to at s33(1) of the Employment Relations Act 2000) require the Defendants to conclude a single collective agreement (a multi-employer collective agreement) with the Plaintiff, having regard to the proper interpretation of section 33(1) and the provisions of Schedule 1B to the Act and, in particular, cl 6?*
>
> No.
>
> *If each Defendant bargains for and enters into its own single employer collective agreement with the Plaintiff, will that Defendant have met its obligation of good faith under section 33(1) of the Act to conclude a collective agreement?*
>
> Yes, among other possibilities that may, on the facts, include a multi-employer collective agreement (having all of the health boards as employer parties) and other collective employment agreements to which the other defendants may be employer parties.

[100] We answer the defendants' questions as follows:

> *(a) Is offering to enter into a SECA with the plaintiff sufficient to fulfil the defendants' obligations of good faith under ss33(1).*
>
> Concluding a collective employment agreement or collective employment agreements that may include secas, will fulfil the defendants' obligations under s33(1).
>
> *(b) Does s33(1) require the defendants to conclude the MECA claimed for the plaintiff.*
>
> No, s33(1) obliges the defendants only to conclude a collective employment agreement or collective employment agreements with the plaintiff.
>
> *(c) Is there an obligation under Schedule 1B clause 6 to conclude a MECA.*
>
> Although clause 6 of Schedule 1B obliges the defendants and the plaintiff to "*support*" bargaining for a multi-employer collective agreement or multi-employer collective agreements, this obligation is subject to the obligations under s33(1) defined above so that clause 6 of Schedule 1B does not require any party to conclude a meca.

[101] We add, for completeness, that the statutory collective bargaining process under ss40 and following of the Act does not include what may be described as counter-initiation of bargaining, that is the invocation of the process (involving the same parties) by a party against whom bargaining has been initiated already. Counter-initiation, as we have defined the practice, is not a lawful bargaining tactic.

Consequence of decision

[102] The first defendants have agreed to conclude a meca with the plaintiff. The remaining defendants have indicated their commitment to conclude single employer collective agreements with the plaintiff. Both forms of agreement are collective agreements as defined in the Act. It seems unlikely that the plaintiff's proceeding can

succeed and it would be academic to determine the further questions that the case raises. We consider, in these circumstances, that the plaintiff should have the period of 28 days from the date of this judgment to advise the Registrar and the defendants whether it intends to continue with the proceeding.

[103] We reserve questions of costs on this preliminary issue and invite the parties themselves to attempt to settle any questions of costs. If that is not possible, any party seeking a contribution from another may apply by memorandum filed no earlier than 28 days and no later than 56 days from the date of this judgment with any respondent to such an application having a further period of 28 days within which to respond by memorandum.

GL Colgan
Chief Judge
for the full Court

Judgment signed at 9 am on Wednesday 1 August 2007

Appendix 1

Whanganui District Health Board
Taranaki District Health Board
Counties Manukau District Health Board
MidCentral District Health Board
Hutt Valley District Health Board
Canterbury District Health Board
Waitemata District Health Board
South Canterbury District Health Board
Northland District Health Board
Lakes District District Health Board
Hawkes Bay District Health Board
Wairarapa District Health Board
Otago District Health Board
Bay of Plenty District Health Board
Capital & Coast District Health Board