New Zealand Journal of Industrial Relations, **26(1)**: 59-84

The Collective Bargaining Code of Good Faith

John Hughes*

This paper deals with the background to the formulation of the interim Code of Good Faith, and places it in the context of the political and policy debates surrounding the enactment of the Employment Relations Act. The paper also examines the provisions of the Code in light of the current statutory and case law. It concludes that because of a failure to reach consensus in the committee that formulated it, the Code has left a number of key issues for ultimate determination by the courts.

Introduction

The requirement to bargain for collective agreements in good faith proved to be a particularly contentious aspect of the Employment Relations Bill. In addressing fears that an open-ended "good faith" requirement might lead to years of litigation so as to determine the scope of the obligation, those drafting what is now the Employment Relations Act 2000 ("the ERA") adopted three approaches. First, section four of the ERA sets out a general obligation of good faith that infuses all relevant provisions of the Act. Secondly, section 32 of the ERA supplements section 4 in the context of collective bargaining by listing a number of mandatory steps (or "general principles"), such as a duty to meet, to consider and to respond to proposals, and to supply information. These principles have emerged incrementally in overseas, and particularly North American, case law (as to which, see the accompanying article by Ellen Dannin). These are minimum obligations, able to be improved upon. Thirdly, the general principles are themselves supplemented in an interim generic document, the *Code of Good Faith for Bargaining for Collective Agreement* ("the *Code*"). As the Minister of Labour put it, speaking of the Employment Relations Bill:

> The concept of good faith has developed internationally in case law, in the context of very different industrial relations systems. We intend to promote the development of a New Zealand version, to suit our own culture. To do this, the [ERA] provides for . . . a Code of Good Faith to address the specific application of the general principles in the bargaining context . . . [Codes will be developed by a tripartite group] that satisfactorily set out meaningful good faith practices for all New Zealand workplaces. It is an important step towards creating a new culture of co-operative and inclusive employment relations. It provides a model for employers, employees, and unions and it will help to achieve a balance which recognises the practical needs of all the parties (Wilson, 2000a).

* Senior Lecturer in Law, University of Canterbury.

The use of the word "code" in this context should not be misunderstood. The concept of a code as a complete statement of applicable principles for bargaining behaviour is found only in section 68 of the ERA. This section applies only to individual employment agreements. Section 68 "codifies" the judge-made law on unfair and unconscionable contracts for the purposes of what the ERA labels "unfair bargaining" for an individual employment agreement. In contrast, the collective bargaining *Code* is designed to provide working guidelines for the operation of matters listed in section 32 as being required for collective bargaining in good faith.

The various arguments in favour, and against, the use of such codes of guidance as "commendatory rules", fulfilling a facilitative role in employment relations and other fields, have been thoroughly explored elsewhere (Baldwin and Houghton, 1986: 267-268; Ganz, 1987: chapter 4). They will not be re-examined here. Rather, this article will explore the background to the *Code* and examine its provisions in the light of the current case law.

Policy development

Early in the development of the ERA, Cabinet agreed to a proposal by the Ad Hoc Cabinet Committee on the Employment Relations Bill that the Bill would provide for a regime for the development of codes of good faith, dealing with the specific application of general principles (Cabinet, 2000a). The status of the codes was settled in background documents and particularly a Department of Labour paper on the subject (Department of Labour, 2000a). This paper discussed three possible approaches to codes – the "guideline" code (purely voluntary), the "benchmark" code (guidelines that require consideration and which can be supplemented) and the "regulatory" code (regulations made under the Act).

A "guideline" code was seen as possessing the merits of some degree of clarity and a high level of flexibility, but also the disadvantages of low certainty and limited incentives to follow its provisions. The regulatory code (such as the Code of Practice in the Takeovers Act 1993) was seen as possessing the merit of certainty but also the disadvantage of potentially constraining flexibility. In particular, it was argued that it might restrict the parties from further developing good faith bargaining practices to take account of their specific circumstances.

The "benchmark" code, such as those adopted under the Health and Safety in Employment Act 1992, was the preferred option of the Department of Labour as it would:

- provide certainty in regard to what constitutes good faith;
- allow for an environment of greater flexibility in the development and practice of the concept by the parties themselves; and
- provide an incentive for the parties to comply with the Code as the courts would have regard to its adherence in determining whether the good faith duties have been fulfilled.

In summary, the Department stated that:

> Assessment of the various options for the Code highlights that there is an inherent need to balance the objectives of flexibility and certainty. The legislative provisions for good faith bargaining provide a starting point for minimum requirements. However, given that the concept of good faith needs to combine certainty (sic) as well as be a flexible concept that needs to apply to different needs and situations the more appropriate option is to provide a Code that sets a benchmark for good faith while also allows (sic) individuals to take a different/additional course of action that could still be regarded by the Courts as fulfilling the duty.

This was the second time in recent years when officials had considered a code of practice in relation to a controversial aspect of employment law. The Coalition Agreement of December 1996 had required a review of the personal grievance provisions of the Employment Contracts Act 1991, with a particular emphasis on clarifying the principles of procedural fairness. One policy option was a code parallel to that operating in the United Kingdom (discussed in *Harvey*, 2000: paras [980] – [990]). In the political environment of the time, however, the overarching concern was to weaken job security by making it easier for employers to dismiss employees (Anderson, 1998). Officials had recommended rejection of a policy option whereby specific procedural requirements might be outlined. Their reasoning merits examination, being analogous to some criticisms of the good faith bargaining code under the ERA and also being in marked contrast to the arguments that won the day in policy development under the ERA.

In the context of personal grievances, minimum procedural requirements were seen to provide only "direction" and to carry the attendant risk that the inclusion of particular steps would lead to those steps acquiring heightened status, leading to "unanticipated interpretations", a reduction in flexibility and increased legalism. A "safe harbour" option, whereby dismissal would have been deemed to be procedurally fair if certain defined procedural steps had been taken, was also rejected since it was seen as having the potential to lead the institutions to assess the substantive merits of the employer's case more closely and again lead to less "flexibility" (Bradford, 1998). The subsequent, ill-fated, *Industrial Relations Package* of 1998 then contained a sweeping and markedly different approach to the issue of termination of employment (*Symposium*, 1998).

As an historical footnote, at the same time, the Department of Labour had considered, and rejected, the concept of good faith in bargaining (Stockdill, 1997). This had formed part of the election policy of the New Zealand First Party and made its way, in diluted form, into the Coalition Agreement of 1996. The *Industrial Relations Package*, however, indicated that no changes would be made to the Employment Contracts Act in this respect.

The debate on the Employment Relations Bill

The debate on the Employment Relations Bill was marked by an unprecedented level of hyperbole and misrepresentation from the political opposition, employers' organisations and the business press (Hughes, 2000). Initially, the very concept of good faith was questioned by political commentators from the "right" of the political spectrum (see, for

example, Bradford, 2000a; Robertson, 2000). The proposed good faith code, amongst other aspects, was described as being "the high water mark of legislative hubris" by a former National Government minister (Upton, 2000). The leader of the ACT Party described the proposed code as a ministerial "decree" that would have the effect of law, confer powers on the Minister of Labour analogous to war-time controls and contravene the Magna Carta (Prebble, 2000a). Both spoke from a background of administration seemingly at odds with their conclusions – the former commentator had himself been responsible for a detailed code of environmental regulation whilst the latter's transport portfolio had included extensive use of codes. The Minister's ultimate power to approve a non-binding code under section 37 of the ERA (below) was also misrepresented as conferring an ability to "meddle" by issuing "extra ministerial rules and edicts" (Hide, 2000).

The approach adopted by the New Zealand Employers' Federation to codifying the requirements of good faith bargaining contained the same intrinsic contradiction that had marked its approach to codifying procedural fairness three years earlier. Having argued vigorously that each concept was undesirably uncertain, and thus presented significant compliance problems for employers, the Federation nevertheless went on in each case to present submissions opposing "prescriptive" clarification through a code (NZEF, 1997 and 2000a, respectively). The same approach was reflected in submissions by the New Zealand Business Roundtable, which criticised the "minimalist fashion" in which good faith was defined whilst expressing the fear that codes of good faith "could well become a device for forcing complexity on small businesses" (NZBR, 2000).

Whilst opposing the introduction of good faith as a concept, in their respective submissions to the select committee considering the Employment Relations Bill both organisations went on to contend that any code of good faith should be set out in regulations so as to allow the usual process of regulatory review (NZEF, 2000a: 10, NZBR, 2000: 17). Employers' organisations, in particular, suggested that the code(s) be issued in the form of regulations because they considered that the contents of the code could then be subject to the type of public and Parliamentary scrutiny that simple administrative codes could otherwise avoid. In this way, it was argued, accountability would be enhanced. As the Court of Appeal recently observed in another context, publication in the *Gazette* in itself (required for any Code under s.35 of the ERA) provides a measure of accountability (*Tyler v Attorney-General*). In its report to the Select Committee, in response to the submissions favouring regulations, the Department of Labour noted that the codes of good faith were central policy planks of the Bill and that regulations would be unduly rigid, "contrary to the intention that they be guides to be taken into account" (Department of Labour, 2000b: 48).

Employers' organisations, of course, had for nine years enjoyed the benefit of the minimalist bargaining regime under the ECA. These organisations had welcomed Court of Appeal rulings in relation to collective bargaining under the ECA endorsing "take it or leave it" tactics in "negotiation" (*Tucker Wool Processors Ltd v Harrison*) and direct factual communication on matters relating to the bargaining, even if persuasive within limits (*NZ Fire Service Commission v Ivamy; Airways Corporation of NZ Ltd v NZ Air Line Pilots Assn*

Inc). Union organisations had pressed for good faith requirements partly as a reaction to such decisions and the behaviour they engendered (CTU, 1997; TUF, 1998). As one leading employment lawyer put it:

> Anecdotal evidence suggests that the level of enthusiasm for prescription bears a direct correlation with the strength of bargaining position. Employers and unions in strong bargaining positions do not want prescription; employers and unions in weak bargaining positions do (French, 2000: 17).

This was reflected in comments made by Walter Grills, who chaired the Interim Good Faith Bargaining Committee and who agreed, tentatively, with a comment that "unions very much see the good faith code as a means of protection in shoring them up and the employers still see it as a threat" (Grills, 2000b). Union organisations necessarily had to represent the interests of unions in weak, as well as relatively strong, bargaining positions. In contrast to submissions from the major employer organisations, submissions to the select committee from union organisations suggested strengthening the good faith requirements (CTU, 2000; TUF, 2000). As we shall see, this divergence of views came to be repeated when both parties took part in discussions leading to the current code. It should be noted that not all commentators from what might loosely be defined as the "left" of the political spectrum favoured the concept of codes of good faith. Two media commentators, both former union officials, criticised the idea in trenchant terms as misreading "the nature of capitalist social relations" and simply enabling employers to "go through the motions" of fairness (respectively, Trotter, 2000; Duncan, 2000).

Ultimately, other than some grammatical simplification, the Bill as reported back from the select committee contained only one amendment to the clauses dealing with codes of good faith. Under a new sub-clause 40(3), the Minister's power to decline to approve a code now had to be accompanied by notification to the committee and the reasons for the decision to decline. Three employers' organisations had suggested that the Minister should not have the power to reject a recommended code. The Department of Labour reported on this suggestion that the underlying policy of the Bill was that the committee was of a recommendatory nature and that the Minister was to have the ultimate decision-making power (Department of Labour, 2000b, 49).

We can now turn to the resulting legislative framework.

The legislative framework

Section 32(3) of the ERA lists a number of matters described as being relevant to whether a union and an employer are dealing with one another in good faith in collective bargaining. The first listed matter is "the provisions of a code of good faith that are relevant to the circumstances of the union and the employer". Section 31, the objects section to Part 5 of the ERA, states that the role of the code(s) is to "assist the parties to understand what good faith means in collective bargaining".

The process for development of codes is set out in ss.35 to 38. Under s.35, the Minister may approve one or more codes of good faith. The approval is by notice in the *Gazette*. The code(s) are either to be recommended by a committee appointed for this purpose under s.36, or developed by the Minister under s.37. The notice may provide information sufficient to identify the code, specify the date on which it comes into force and state where copies may be obtained, rather than setting the code out in full. Reiterating s.31, subs (3) of s.35 states the purpose of a code of good faith as being to provide guidance about the application of the duty of good faith in s.4 in relation to collective bargaining.

Section 36 states that the Minister may appoint a committee for the purpose of recommending one or more codes of good faith. The committee must comprise at least one person representing unions and one person representing employers, and such other persons as the Minister thinks fit. The balance between union and employer representatives must be equal. The Minister appoints the chairperson. The committee may determine its own procedure, subject to any directions given to it by the Minister.

The Minister may approve a code of good faith under s.37 if the committee has not recommended a code of good faith within the time specified by the Minister under s.36 or if the Minister declines to approve a code of good faith recommended by the committee. Before the Minister approves a code of good faith under s.37, the Minister may consult such persons and organisations as the Minister thinks appropriate. If the Minister declines to approve a code of good faith recommended by the committee, the Minister must notify the committee of this refusal and of the reasons for it.

A code of good faith may be amended or revoked under s.38 in the same manner as the code is approved.

Under s.39, discussed below, in determining whether or not a union and an employer have dealt with each other in good faith in bargaining for a collective agreement, the Authority or the Court may "have regard" to a code of good faith.

The legal effect of the code

Once the legal status of the code had been established, perhaps the primary legal issue was the way in which it was to take effect. Suggestions in the Department of Labour's Options Paper (Department of Labour, 2000a) were adopted, so that s.39 of the ERA echoes the wording of s.20(9) of the Health and Safety in Employment Act 1992. Section 39 states that:

> The Authority or Court may, in determining whether or not a union and an employer have dealt with each other in good faith in bargaining for a collective agreement, have regard to a code of good faith approved under section 35 that –
>
> > was in force at the relevant time; and
> >
> > in the form in which it was then in force, related to the circumstances before the Authority or the Court.

Whilst the ordinary courts have frequently applied health and safety codes in determining issues under the 1992 Act, no decision appears to have examined the boundaries of the formulation that courts "may . . . have regard to" any relevant code. Certainly, in the light of the case law, a statement by the Department of Labour in the Options Paper above, that "the Courts have applied this provision as it was intended, ie that compliance with the Code constitutes compliance with the Act", is highly questionable. In some cases, compliance with the relevant health and safety code has been held to be insufficient in the circumstances (*Mazengarb*, 2001: para [6002.3]). Under the ERA, the *Code* itself emphasises in paragraph 1.5 that "the good faith matters set out in this code are not exhaustive". At most, then, as the Interim Good Faith Bargaining Committee put it, it would seem that:

> Parties who voluntarily follow the guidance of the code in working out their own collective bargaining approach can reduce the potential of litigation and legal intervention. Following the guidance in the code will ensure that in most cases a question of whether or not an action is taken in good faith will not arise (*Consultation*, 2000: 2).

Or, as the Minister of Labour put it in the preamble to the *Code*, "[this] means that if the parties can show that they have followed the guidance in the code, the Authority or the Court may consider this to be compliance with the provisions of the Act".

The Department was on safer ground when it continued in the Options Paper that "this provision allows for the parties to further develop arrangements that suit their specific circumstances and for these arrangements to also be taken into account by the Courts" (Department of Labour, 2000a). In addition to codes, the parties themselves may enter into an agreement about good faith under ss.31(c) and 32(3)(b). By necessary implication, such an agreement may not be incompatible with minimum statutory standards – or the standards in approved codes – in the sense of removing or reducing those standards.

In opting for a "halfway house" between guidelines and regulations, and apparently leaving it to the discretion of the Authority or the Court whether to take the code into account, Parliament seemed to depart from earlier practice with health and safety codes (*Mazengarb*, 2001: para [6020.4]) and corresponding codes in the UK, where tribunals and courts are bound to consider the relevant code (Trade Unions and Labour Relations (Consolidation) Act 1992, s 207(3); *Harvey*, 2000: paras [980]-[990]). The latter issue is not clear-cut, however. Whilst s.39 states that the Authority or the Court "may" have regard to codes, it might be argued from the wider context of Part 5 that the word "may" is not merely empowering but, instead, means "must" (see, by analogy, the reasoning in *Tyler v Attorney-General* and, generally, Burrows: 1999, chapter 9). This is because s.32(3) states that the matters that "are" relevant to whether an employer and a union bargaining for a collective agreement are doing so in good faith include "the provisions of a code of good faith that are relevant to the circumstances of the union and the employer". The Chief Judge of the Employment Court has indicated without further elaboration that, in his view, the ERA "*requires* the Court (and . . . the Authority) to have regard to any code of good faith" (Goddard, 2000, emphasis added). Nevertheless, even if this is so, the words "have regard to", even where expressed as a mandatory requirement, have been held to confer a wide

discretion, enabling the Court to reject all or any of the relevant matters or to give them such weight as the case suggests is suitable (*R v CD*; see also *Tyler v Attorney-General*).

Whatever the correct answer may be, it seems highly unlikely, to say the least, that the Authority or the Court would choose to ignore the provisions of a relevant code. Rather, to paraphrase a recent decision of Judge LH Atkins QC under the Health and Safety in Employment Act 1992, given that the parties have recognised the desirability of a particular matter in promulgating a code, it would appear that a party who does not follow the relevant provisions in practice would be in danger of a finding being made as to not having behaved in good faith (*Health and Safety Inspector v W Crighton & Son Ltd*).

The advisory, rather than directory, effect of the *Code* should serve also to protect it from the potential threat of effective judicial review (Baldwin and Houghton, 1986: 266).

The *Code* as thus developed has also avoided the pitfalls of contentious codes in the UK that have arguably placed an inconsistent gloss on the plain words of the relevant statutory provisions in some respects and that have also been "over-extended in application by the courts and by enforcement officials" (Baldwin and Houghton, 1986: 264-265; see also Lewis, 1981: 198, and Elias, 1980: 211). Most codes in the UK are developed, after consultation, by the Advisory Conciliation and Arbitration Service and some have proved to be highly controversial (*Harvey*, 2000: paras [980]-[990]).

Developing the code: the interim good faith bargaining committee

Prior to the passing of the Employment Relations Bill, an interim committee was formed to look at issues that would need to be addressed by the formally appointed Good Faith Code Committee (Wilson, 2000b). In a note to the Minister, the Department of Labour observed that in order for the Committee contemplated by the Employment Relations Bill to accomplish its task, its objectives would need to include:

- consensus from employers and employees as to what constitutes good faith duties;
- a high degree of buy-in and acceptance of the good faith concept; and
- a fair balance between certainty and flexibility as the code/s need to be responsive to the specific needs and situations of the parties as well as providing certainty (Department of Labour, 2000c: 2)

After earlier discussions between the government and employer and union groups (Wilson, 2000), the eventual interim committee comprised representatives of the NZ Council of Trade Unions and the NZ Employers' Federation supplemented by the State Services Commission (since the Employers' Federation does not represent employer interests in the core state services: Department of Labour, 2000c: 2). The organisations were those recognised under ILO Guidelines as being "most representative" of the groups concerned (Department of Labour, 2000c: 2). The committee met during the months of July and August 2000, chaired by Walter Grills, a member of the Employment Tribunal, with a view to developing a draft code. Employers were represented by Anne Knowles, chief executive of the Employers' Federation, Murray French, manager of Employee Relations Services for

the Employers' and Manufacturers' Association (Central), and (for the public sector) Peter Farrell, as nominee for the State Services Commission. Private sector unions were represented by Paul Goulter, secretary of the Council of Trade Unions, James Ritchie, from the Nurses' Association, with public sector unions being represented by Lynn Middleton of the Public Service Association (NZEF, 2000b). All members of the committee had experience in collective bargaining (Grills, 2000b).

The committee agreed on the following development process for a final code:

- to develop an interim generic code by 2 October 2000;
- to evaluate the generic interim code of good faith over a period of six months;
- to engage in wide consultation during the evaluation period; and
- to recommend a final Code by 2 April 2000 (Interim Committee, 2000b).

Employer representatives, in particular, were keen to have a Code in place by 2 October 2000, when the ERA came into force. One hundred and nineteen collective employment contracts in the Department of Labour's database were due to expire before 31 December 2000 (Department of Labour, 2000e). Union representatives approved of dealing with the matter expeditiously although they had greater reservations concerning the time limit (Interim Committee, 2000a). A detailed time frame for consultation and discussion was agreed, so as to meet the 2 October target (presented as Appendix II to Interim Committee, 2000b).

The consultation process was described in two publicly released documents from the Interim Good Faith Bargaining Committee, *Consultation on Draft Code of Good Faith for Bargaining for Collective Agreement* ("*Consultation*"), containing discussion points for consultation, and *Code of Good Faith: Guide to Document* ("*Guide*"), identifying areas of a draft code on which the committee had not reached consensus. The basis for the consultation document lay in initial position papers prepared by the employer and employee representatives (Interim Committee, 2000b).

Material relating to the deliberations of the committee, and information supplied by those formally consulted, has been withheld under s.9(2)(ba)(i) of the Official Information Act 1982 on the basis that it is subject to an obligation of confidence and disclosure would be contrary to the public interest because it would prejudice the continued supply of such information (Feely, 2001). There was initial reported uncertainty due to the two sides taking diametrically opposed positions on the nature of the code, reflecting the approaches to "prescription" in relation to good faith outlined above (Llewellyn, 2000a). The Employers' Federation had raised this objection to the concept of good faith four years earlier, when it featured in the industrial relations policies of the Labour, Alliance and New Zealand First parties (NZEF, 1996) and reiterated the point vigorously during the passage of the Employment Relations Bill. This was described by the chairperson of the committee as being the "key issue" (Grills, 2000b) and was reflected in the discussion points for consultation, released by the Committee in the following form:

- The parties have made good progress in agreeing on the meaning of good faith bargaining.
- Should the code cite examples to further clarify the meaning of these principles?

- For example good faith bargaining prohibits undermining collective bargaining. Should the code cite examples of how collective bargaining could be undermined in order to provide more specific guidance?
- Should the code provide guidance on good faith bargaining issues that might pertain specifically to multi-employer and multi-union bargaining arrangements? If so, what?
- Should the code pertain solely to the procedural issues related to the bargaining process or should it also deal with issues relating to the attitudes of the parties as they relate to questions of good faith?
- Does the code provide an adequate level of guidance?
- Should the code determine in what circumstances access to information should be deemed relevant?
- Should the code specify what type of information should be considered "reasonably necessary" for collective bargaining? (*Consultation*, 2000: 3)

The response of the interest groups to these issues is discussed below. The group working on the code reached agreement on 22 September 2000. The *Code of Good Faith for Bargaining for Collective Agreement* was approved by the Minister on 2 October 2000 (the date the ERA came into effect). As noted above, this generic *Code* is an interim code, to be monitored by the Interim Good Faith Bargaining Committee over a six-month period commencing from that date (Grills, 2000a). The committee is to evaluate the interim *Code* in the light of its application over that period and consult with interested parties as to any refinements or improvements that can be made (NZEF, 2000b). The Minister of Labour has been reported as stating that a final code is then to be put into place in April 2001 as a "stepping stone" to more specific, supplementary, industry based codes covering such areas as the farm, forest and maritime industries (Llewellyn, 2000a).

The resulting *Code* was described as being "probably an even draw" between employers and unions by Walter Grills, who chaired the committee (Hargreaves, 2000).

The *Code* as guidance

The Department of Labour noted that the committee might use as a starting point for the code, the existing legislative requirements relating to the duty of good faith in collective bargaining. These were described as being:

- Requirement to endeavour to reach agreement on arrangements for the purpose of bargaining;
- Requirement to meet for the purposes of collective bargaining;
- Requirement to consider and to respond to proposals;
- Requirement to recognise bargaining agents;
- Requirement to deal exclusively with the bargaining agents in bargaining;
- Requirement not to undermine the bargaining or the authority of the other party to bargain;
- Requirement to provide information relevant to bargaining

Since s.31(a) and s.32(5) of the ERA clearly state that these are not exhaustive of the good faith obligation, the Department noted that "[a] key consideration for the Committee will, therefore, be the extent to which the content of the code goes beyond the seven listed requirements" (Department of Labour, 2000d).

Since the *Code* is designed to supplement the list of obligations which s.32(1) requires employers and unions to perform as a minimum in relation to bargaining for a collective agreement, the approach adopted from this point will be to follow the order of identified steps in that subsection, commenting on the *Code* at appropriate points.

Agreement on the process for conducting the bargaining

Under s.32(1)(a) the union and the employer must use their best endeavours to enter into an arrangement, as soon as possible after the initiation of bargaining, that sets out a process for conducting the bargaining in an effective and efficient manner. The formulation "best endeavours" was selected to give the parties "flexibility to arrive at their own arrangements", whilst requiring good faith (Department of Labour, 2000b: 41).

Under paragraph 2.2 of the *Code*, a number of matters are listed as those which the parties should consider as matters "which may, where relevant and practicable, in whole or in part make up any such arrangement". Even this wording reflected a compromise. Union representatives on the committee had suggested the formulation "[such] an arrangement should include, where practicable, the following matters . . . ", on the basis that it was important that the parties consider the listed issues. Employer representatives had objected to the "level of prescription" this wording entailed. Employers had suggested, as an alternative introductory wording that would maintain "freedom and flexibility", "[matters] which the parties may discuss with a view to arriving at an arrangement may include . . ." (*Guide*, 2000: 6).

The matters listed in paragraph 2.2 are:

a. Advice as to who will be the representative(s) or advocate(s) for the parties in the bargaining process
b. Advice as to whom the representative(s) or advocate(s) represent
c. The size, composition and representative nature of the negotiating teams and how any changes will be dealt with
d. Advice as to the identity of the individuals who comprise the negotiating teams
e. The presence, or otherwise, of observers
f. Identification of who has authority to enter into an agreement/limits of authority
g. The proposed frequency of meetings
h. The proposed venue for meetings and who will be liable for any costs incurred
i. The proposed timeframe for the bargaining process
j. Advice on preferred positions in respect of the type and structure of agreements
k. The manner in which proposals will be made and responded to
l. The manner in which any areas of agreement are to be recorded
m. Advice on ratification and signing-off procedures
n. Communication to interested parties during bargaining
o. The provision of information and costs associated with such provision
p. Appointment of, and costs associated with, an independent reviewer should the need arise
q. Any process to apply if there is disagreement or areas of disagreement
r. Appointment of a mediator should the need arise
s. In the case of multi-party bargaining, how the employer parties will behave towards one another and how the union parties will behave towards one another
t. When the parties consider bargaining is deemed to be completed

Whilst the introductory words to paragraph 2.2 ensure that none of these matters is mandatory across all cases under this provision, paragraph 4.2 of the *Code* states, in addition, that "The parties will adhere to any agreed process for the conduct of the bargaining".

During the consultation process on the development of the draft code, one or other of the parties expressed concern on the following issues relating to this list. First, on the issue of the "make up" of the negotiating team, union representatives had been concerned to ensure that each party should be able to pick its own negotiating team without interference from the other. Employers' representatives insisted that the composition of such teams should be a matter for discussion. The object was to avoid operational difficulties if all the employees from one particular area in a workplace were appointed to a negotiating team or if the union party appointed a very large negotiating team. The eventual formula "advice as to the identity of the individuals who comprise the negotiating teams" reflected union representatives' proposals whilst enabling discussion on the point, balanced by reference to the size and composition of the team (*Guide*, 2000: 6).

No consensus could be reached on a union proposal for the inclusion of a "reasonable number of representatives from the workplace". Union representatives considered that this was a normal matter for discussion and should thus be included. Employer representatives considered that the issue was already sufficiently covered by including in matters for discussion the composition of the negotiating team and the presence or otherwise of observers (*Guide*, 2000: 7)

The obligation to meet

Under s.32(1)(b), the union and the employer must meet from time to time for the purposes of the bargaining. The reference is to meeting "from time to time" rather than on a timely basis. It might be presumed, however, that failure to meet, or to continue to meet, in a timely manner might itself be treated as a breach of good faith in some circumstances. This has been held to be the case in Canada (Davenport, 1999: 120). Paragraph 3 of the *Code* states at this point that:

> 3.1 The parties must meet each other, from time to time, for the purposes of bargaining.
> 3.2 The frequency of meetings should be reasonable and consistent with any agreed bargaining arrangements.
> 3.3 The meetings will provide an opportunity for the parties to discuss proposals relating to the bargaining, provide explanations of proposals relating to the bargaining, or where such proposals are opposed, provide explanations which the relevant party considers support the proposals or opposition to it.
> 3.4 The parties are not required to continue to meet each other about proposals that have been considered and responded to.

Considering, and responding to, proposals

Under s.32(1)(c), the union and the employer must consider and respond to proposals made by each other. Clearly, an outright refusal to take one or both of these steps will be a breach of s.32. During submissions on the Bill some concern was expressed that, without elaboration, this duty lacked any real substance. The *Code*, however, indicates an acceptance by both employers and unions that the duty extends to weighing merits of proposals and providing reasoned explanations. In this context, paragraph 3.3 states that:

> The meetings [under s.32(1)(b)] will provide an opportunity for the parties to discuss proposals relating to the bargaining, provide explanations of proposals relating to the bargaining, or where such proposals are opposed, provide explanations which the relevant party considers support the proposals or opposition to it.

Paragraphs 4.5 – 4.7 of the *Code* state that:

> 4.5 The parties will consider the other's proposals for a reasonable period. Where a proposal is not accepted, the party not accepting the proposal will offer an explanation for that non-acceptance.
>
> 4.6 Where there are areas of disagreement, the parties will work together to identify the barriers to agreement and will give further consideration to their respective positions in the light of any alternative options put forward.
>
> 4.7 The parties should attempt to reach an agreed settlement of any differences arising from the collective bargaining. To assist this the parties should not behave in ways that undermine the bargaining for the collective agreement.

By implication, then, the parties are under a duty to attempt in good faith to reach an agreed settlement of any differences. Ultimately, the Authority may direct mediation to this end under s.159 (see *Mazengarb*, 2001: para [ER159.2]).

Finally, one aspect of the agreed bargaining process under the *Code* is "The manner in which proposals will be made and responded to" (paragraph 2.2(k) of the *Code*).

Recognition of the role and authority of representatives or advocates

Under s.32(1)(d), the union and the employer must recognise the role and authority of any person chosen by each to be its representative or advocate. Section 12 of the Employment Contracts Act 1991 had provided for recognition of the authority of the representative. The decisions under that section must now be treated with extreme caution as a guide to the operation of para (d)(i) for a number of reasons (*Mazengarb*, 2001: para [ER32.10]). The most significant issue in this respect arises from decisions by the Court of Appeal under the 1991 Act holding that "recognition" prevented direct negotiation between an employer and represented employees, but allowing a wide variety of persuasive communications that were not viewed by the majority in the Court of Appeal as constituting "negotiation" as such (*NZ Medical Laboratory Workers Union Inc v Capital Coast Health Ltd*; *NZ Fire Service Commission v Ivamy*; *Airways Corporation of NZ Ltd v NZ Air Line Pilots Assn IUW Inc*). The resulting problems for those drafting the Employment Relations Bill were dealt with in the sub-paragraph now to be examined.

The prohibition on directly or indirectly bargaining with those represented and on undermining the bargaining process

Under s.32(1)(d) also, the employer and the union must not (whether directly or indirectly) bargain about matters relating to terms and conditions of employment with persons for whom the representative or advocate are acting, unless the union and employer agree otherwise. Nor must they undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining.

The original clause 33 in the Employment Relations Bill had contained a prohibition on negotiating or communicating with those persons "about matters relating to terms and conditions of employment". This clause aroused considerable opposition from employers during the Select Committee hearings, particularly since (if considered outside its context) it appeared to ban all communications on any topic. The clause proved to be one of the "hotspots" in the bill (*Mazengarb*, 2001: para [ER32.11]). An earlier discarded draft had made it clear that the intended scope of the ban on communication had been confined to communicating directly with employees about the bargaining or issues or matters relevant to it (Cabinet, 2000b: 8). The Department of Labour reported to the Select Committee that:

> . . . [the] ban on "communication" (as opposed to bargaining/negotiation) is arguably excessive. However, deleting "communication" gives greater scope for one party to attempt to undermine the integrity of bargaining. This risk can be managed by adding a general requirement for the parties not to do anything to undermine the authority of the other party or the bargaining process, which is the underlying outcome sought by the clause (Department of Labour, 2000b).

Whether the new provision has the effect of prohibiting the type of communication allowed under the Court of Appeal's earlier analysis remains a matter of controversy. Some commentators argue that the wording of what is now s.32(1)(d) effectively codifies the Court of Appeal's reasoning under the Employment Contracts Act 1991 (Davenport, 2000: 122; French, 2000: 18), others argue that legislative history and extended definitions under the ERA mean that it does not (*Mazengarb*, 2001: para [ER32.12]; Swarbrick, 2000: 30; Churchman, 2000: 385). Not surprisingly, then, the issue arose prominently in discussions of the proposed code. In the consultation process on the draft code, it became apparent that the committee could not reach consensus on communication during bargaining.

The chairperson of the committee sought clarification from the Department of Labour as to the policy intent behind the "communication" provisions, in the terms "Is it permitted to have direct communications relating to the bargaining during bargaining by an employer to his/her employees?" The Department replied:

> The intent of the Act is that direct communications relating to the bargaining during bargaining should be permitted **so long** as any such communications:
>
> > Would not directly or indirectly mislead or deceive, or be likely to mislead or deceive, the party that receives them; and
> > Do not constitute direct or indirect bargaining; and
> > Do not undermine the bargaining itself; and

> Do not undermine the authority of any representatives involved in the bargaining
>
> It is implicit in this that the purpose of any such direct communication will be legitimate. For example, if the employer felt that the union was not properly informing the workers, then direct communication with them is not the good faith matter. That is a good faith issue between the employer and the union, which must in exercise of its good faith obligations communicate accurately with its members. That is an obligation owed both to its members and to the employer. (Department of Labour, 2000f).

At the same time, the Department suggested that:

> It should be noted that the overall intent of these provisions is that bargaining representatives should not be able to be bypassed by direct communications. As a matter of good practice and good faith, it is suggested that any communications that one party to bargaining intends to make directly to the people affected by the bargaining should be provided in advance to the representatives of those people. A reasonable opportunity to discuss the purpose and content of the direct communications should also be provided. (Department of Labour, 2000g).

Ultimately, the only reference to communication in the *Code* is a direction to the parties under para 2.2(n) to consider, as a matter that may be included in any bargaining arrangement, "communication to interested parties during bargaining". It is to be assumed that the word "parties" is not used here in its technical sense of the relevant employer(s) and union(s) (who constitute, exclusively, the "parties" to collective bargaining under Part 5 of the ERA).

The chairperson of the Interim Good Faith Committee identified particular concerns from union representatives as being the use by employers of a "captive audience" approach in communicating their view of negotiations to employees. Such tactics had been effectively endorsed by the Court of Appeal under the Employment Contracts Act. On the other hand, employers' representatives were said to be concerned at misrepresentation from unions to their members and "insist[ed] they at least need to be able to put what their offers are to their employees" (Grills, 2000b). An unsuccessful proposal from employers' representatives that the employer should be able to communicate with employees (and unions with members) about the bargaining was explained as follows:

> The employer representatives note that the definition of bargaining includes communications surrounding bargaining. They therefore consider it useful to include these two provisions for the guidance of parties.
>
> The union representatives believe that communication about bargaining is a form of indirect bargaining as defined in the Act. Therefore it is precluded between employers and employees in relation to bargaining. The Act does allow the employer to communicate with employees (including union members) about the employer's business, but not about the bargaining per se. Therefore the inclusion of the above wording, in the view of the Union representatives, could be contrary to the Act (*Guide*, 2000: 8).

The result, in the words of the Chief Judge of the Employment Court, is that "[it] seems inevitable that, in the early months of the new regime, the Court will be asked to rule on the issue whether the boundaries have been crossed" (Goddard, 2000: 118).

The prohibition on undermining bargaining is not confined to direct "undermining". Neither party must do anything that is "likely" to undermine the bargaining or the authority of a representative. During the development of the *Code*, consensus could not be reached on a union representatives' proposal for express provision to be made that:

> An employer should not offer wages, terms and conditions to those covered by negotiations for a collective agreement that are inferior to those offered or intended to be offered to those employed on individual agreements and not on the collective agreement and who perform the same or substantially similar duties.

The intention was to indicate that it would be misleading and deceptive for an employer to agree on a collective agreement when the intention is to induce employees on to an individual agreement separate from the collective. Employers opposed the inclusion of this provision on the basis that it would have the effect of prohibiting employers from offering different terms and conditions to individuals who have chosen not to become a member of a union and who prefer to be employed on an individual employment agreement.

Provision of bargaining information

Under s.32(1)(e), the union and the employer must provide to each other, on request, and in accordance with s.34, information that is reasonably necessary to support or substantiate claims or responses to claims made for the purposes of the bargaining. Section 34 sets out the formal requirements for such a request (including specificity); the process where objection is taken to a request; limits on the uses to which such information is put; and limits on disclosure.

The original Employment Relations Bill had provided that the union and employer must provide to each other "at the commencement of bargaining, during the bargaining as is necessary, and on request, information (including financial information and business planning information) that might reasonably be expected to be relevant to the other party's participation in bargaining". This clause was worded more broadly than the substituted para (e). It might then have been anticipated that guidelines would be established through the proposed codes, governing the release of such information. This, as we have seen, is a leading example of the use of codes in the UK (Gospel and Lockwood, 1999).

As with other "hotspots" under the Employment Relations Bill, however, the considerable political controversy generated during the select committee stage led to significant amendments when the Bill was reported back. The matter was not left to await development of codes. There had been general objections to the obligation to provide commercially sensitive information (particularly in multi-party bargaining); objections to any requirement to supply information at all, unless the initial request related to a response stating that a particular claim was not affordable; and objections to releasing the information to a union, as opposed to an independent third party (Department of Labour, 2000b: 44). As a result, the current provision, as inserted by the majority on the select

committee, provides for disclosure only on request. Further, the disclosure must be reasonably necessary to support or substantiate claims – or responses to claims – made for the purposes of the bargaining.

Sensitive information is then subject to further safeguards in s.34, including the provision of information to an independent reviewer "if the union or the employer providing the information reasonably considers that it should be treated as confidential information" (subs (3)(b)). A person must not act as an independent reviewer "unless appointed by mutual agreement of the union and the employer" (subs (4)). There is no default provision failing such agreement, so that again, ultimately, unreasonable failure to agree would have to be dealt with as a breach of good faith. By the same token, as noted above, the parties are left to decide for themselves on the apportionment of any cost attached to the reviewer's services. Paragraph 2.2 of the *Code* states at sub-paras (o) and (p) that two matters to be considered as ones which may make up an agreed bargaining process are "The provision of information and costs associated with such provision" and "Appointment of, and costs associated with, an independent reviewer should the need arise".

In a series of country-wide seminars following the passing of the ERA, recommendations had been made to employers that the process might be stalled by insisting on a neutral chartered accountant for whom the union would bear the full cost, and that the union be "shown up" by leaving the issue to the institutions (ACT, 2000). This met with the response from one employers' advocate, himself a member of the Interim Good Faith Bargaining Committee, that "[whether] such a dispute would stall a request is questionable . . . the requirement to provide information may persist despite arguments over who pays" (Murray French in Llewellyn, 2000b: 20). The advice given by the ACT party, if followed, would also run into a further difficulty under the *Code*. Under s.34, the request must specify a "reasonable time" within which the information is to be provided (subs (2)(d)). In this context, paragraph 4.4 of the *Code* supplements the obligation by stating that a union and an employer "must provide to each other, on request, *and in a timely manner* information in accordance with ss.32(1)(e) and 34 of the Act" (emphasis added).

Despite (or, in some instances, because of) the amendments made by the select committee, it has been argued, cogently, that:

> [There] is ample scope for development of the issues in future Codes. Alternatively, the bargaining parties themselves could enter "information agreements" aimed at giving effect to the disclosure requirements of the Act in a way that meets their particular circumstances. Some combination of these approaches is probably the best option. A Code of Good Faith providing general guidance, supplemented by information agreements, would help to reduce uncertainty for employers and unions while preserving sufficient flexibility to recognise the variety of workplace environments (Brown, 2001).

Maori protocol and practices

Nothing in s.32 of the ERA refers to Maori protocol. The committee had discussed Maori consultation, with agreement that both workers' and employers' representatives would consult within their own constituencies for Maori perspectives (Interim Committee, 2000c).

Union representatives had pressed for a clause under which the parties should consider appropriate ways in which good faith relations could reflect the Treaty of Waitangi and the parties would be enjoined to give due consideration to proposals of particular importance to Maori. As the chairperson of the Interim Good Faith Committee stated at the time, this was "not about putting the Treaty into the code . . . " but rather about appropriate recognition of protocol (Grills, 2000b). No consensus could be reached, however, on this proposal. Employer representatives opposed the proposal, on the basis that Treaty obligations recognised in s.56 of the State Sector Act 1988 should not be extended to the private sector. Employer representatives proposed instead a clause that required the parties to give due consideration to proposals of particular importance to Maori (*Guide*, 2000).

By this stage, the Minister of Labour and the Minister of Maori Affairs had already released a press statement ruling out a "Treaty clause" in the Employment Relations Bill (Wilson and Horomia, 2000), arguing that the Treaty was an agreement between the Crown and Maori and that the proposed code could deal with Maori tikanga and practices. The political opposition to any insertion of a "Treaty clause" in the code, once the issue came to be aired in this form, was vociferous and – echoing the controversial attacks on the "Closing the Gaps" policy during 2000 - focussed on claims that Maori would thereby receive preferential treatment (Bradford, 2000b; Hargreaves, 2000). In a move reflecting other "hotspot" developments during the progress of the Bill, the Prime Minister then issued a press statement extending to the code the reasoning that had been applied to the Bill (Lane, 2000). Paragraph 1.9 of the *Code* now reads:

> The parties are encouraged to consider, where appropriate, ways in which good faith relations during bargaining can take into account Maori protocols and practices as well as any cultural differences or protocols that might exist in the environment in which the bargaining applies.

In the event, even this permissively-worded clause came to be presented under the banner "Good faith favours Maori" in the business press (Hargreaves, 2000).

Unresolved issues arising from bargaining behaviour

Section 32 is designed to provide minimum requirements for a process under which bargaining will be conducted in an effective and efficient manner. Notably, the requirements are all procedural in nature and the parties are not required, as an aspect of good faith, to agree on any matter for inclusion in a collective agreement or to enter into a collective agreement (s.33).

The emphasis on process is common to other good faith jurisdictions, and particularly those in North America. The generalised good faith duty in those jurisdictions has given rise to elaborating case law that is reflected in New Zealand, to a large extent, in the steps required under subs (1) of s.32. In those jurisdictions, however, issues have arisen that are not expressly covered by the steps in subs (1) but are of central significance to the effective operation of the good faith bargaining process. In particular, overseas systems have had to resolve issues arising from "surface bargaining" (that is, "going through the motions" with

no intention of settling) and bargaining behaviour that seems designed to ensure a breakdown in negotiations. Significantly, these issues were amongst those on which consensus could not be reached in terms of express inclusion in the *Code*. The Interim Good Faith Bargaining Committee noted that it was unable to reach consensus on the following suggested inclusions proposed by union representatives:

> 4.5 The parties should be open in their dealings with one another and clearly disclose proposals during negotiations.
> 4.6 Parties should not table a proposal that is inflammatory with the deliberate intention of provoking a breakdown in negotiations.
> 4.7 Parties must not make 'take it or leave it' demands at the commencement of negotiations.
> 4.8 Parties should not simply 'go through the motions' of bargaining with no real intent to reach agreement on a matter.
> 4.9 Parties should not suddenly table a completely new proposal or revoke an existing offer without a compelling reason (*Guide*, 2000: 7).

Union representatives (whose proposal this was) maintained that these examples, drawn from significant overseas case law, were necessary to guide the parties and were critical to the success of the *Code*. Employers' representatives opposed the inclusion of these matters on the grounds that they introduced a "prescriptive subjective element that, in the end, can only be decided by a third party looking at all the facts surrounding a particular circumstance". Employers' representatives also considered that the *Code* covered bargaining behaviour in an objective manner and that these "subjective elements of intent" were inappropriate in this context, given their view that agreed clauses in the Code required "due consideration, proper explanation, and a working together to identify and resolve issues of disagreement". Listing such examples, which could not be exhaustive, was seen also to be counter-productive (*Guide*, 2000: 7). An underlying theme of the employers' objections, reflecting the analysis of the Department of Labour when it had earlier considered the codification of procedural fairness in personal grievances, was that close definition of procedural steps could lead to a more intensive analysis of the substantive merits of the employer's position. As one commentator put it:

> Employers are understandably concerned to limit good faith to the manner in which the bargaining is conducted and not allow it to stray from process into the content of the actual bargain struck nor even the substance of the bargaining positions adopted by the parties during the course of negotiations (something which presumably they see [the above] union proposals as approaching). What they particularly want to avoid are actionable intentions being ascribed to bargaining positions just because they happen to displease the other side. There is, of course, a fine line between process and the substance of a bargaining position (French, 2000: 17).

The end result is that these issues await clarifying case law (as to which, see *Mazengarb*, 2001: paras [ER32.21] – [ER 32.28]). Christine French, above, expressed puzzlement at the employers' stance of preferring to "leave it to the parties" on the basis that a comprehensive code could have headed off such "unnecessary litigation", noting that "[what] employers . . . should fear . . . is the spectre of endless litigation as unions try to achieve by case law the provisions they could not secure for inclusion in the interim code" (French, 2000: 18).

Remedies

As we have seen, compulsory arbitration is not an option under the ERA. Section 33 states that the duty of good faith does not require a union and employer to agree on any matter for inclusion in a collective agreement or to enter into a collective agreement. A wide range of potential remedies exists, nonetheless, in relation to breach of good faith (*Mazengarb*, 2001: para [ER32.29]; Fulton, 2000). In keeping with the overall emphasis on avoiding litigation, the *Code* states at para 5.1 that:

> Where a party believes there has been a breach of good faith in relation to collective bargaining the party shall, wherever practicable, indicate any concerns about perceived breaches of good faith [at] an early stage to enable the other party to remedy the situation or provide an explanation.

Although this requirement clearly lacks the status of a statutory requirement to give notice before proceedings for breach are commenced, it is suggested that failure to indicate such concerns (where practicable) might be relevant to issues such as remedies and costs in any subsequent proceedings. This is particularly so given the object expressed in section 3(a)(vi) of the ERA of reducing the need for judicial intervention, reflected in overarching requirements under part 10 of the ERA for good faith behaviour to be demonstrated as a precondition for formal adjudication in the Employment Court (*Mazengarb*, 2001: para [Erpt10.1]; Churchman and Roth, 2000: 67-68).

Subsequent developments

Following the work of the interim committee, the members of that committee were formally appointed to the Good Faith Code Committee, to recommend the final Code of Good Faith for Bargaining for Collective Agreement (Wilson, 2000c). In an updating report to the Minister of Labour on 1 November 2000, the chair of the committee noted that:

> Notwithstanding the interim agreement, the parties hold divergent views as to whether and how the code should be further developed. Employer representatives consider that a generic Code of Good Faith relating to collective bargaining should not be prescriptive and neither should it contain subjective elements attempting to discern the intention behind parties' behaviour. The employers' view is that a generic Code should provide the parties to collective bargaining [with] a balance between guidance on the application of the core principles of good faith in relation to collective bargaining and sufficient flexibility to determine the specific details that are relevant to them and the environment in which the bargaining is taking place.
>
> The union representatives have an alternative view, which is that the Code needs to provide guidance about the application of the duty of good faith. The union representatives acknowledge the tension between the need for specificity and the need for general principles to which the parties apply their own practices. In their view the final Code does need to be specific in order to provide the guidance they consider is required by the Employment Relations Act. Practitioners need to be able to easily identify from the code what are good faith bargaining behaviours . . . According to the union representatives the purpose is therefore more than just statement of principle. The code should state principle, illuminated by examples. On the other hand, the employers' representatives consider that

> individual parties should be left to reach their own understanding of how the principles of good faith bargaining are to apply to their own, individual fact situation. Neither position is without its own wisdom.
>
> The fundamental issue at stake is whether the interim code provides sufficient guidance to the parties (Grills, 2000c).

Amongst other methods of consultation on the interim code, the Department of Labour has prepared a survey designed to provide feedback, able to be downloaded from http://www.ers.dol.govt.nz/code.html

Conclusion

The conclusion that could be drawn by those responsible for the passage of the ERA and the development of the *Code* might be that, for some commentators, no satisfactory resolution involving change from the minimalist bargaining regime under the Employment Contracts Act could ever be reached. Opposition politicians who had criticised a perceived lack of consultation on the new law, then turned to dismiss the tripartite discussion on the Code as "leaving the hard questions up to others to answer" (Bradford, 2000c). Those who had initially criticised the allegedly "overly prescriptive" nature of the new legislation later attacked the *Code* as being too generalist in nature (Prebble, 2000b). Meanwhile employers' organisations that had identified particular points of concern within the ERA (such as multi-employer bargaining) and had argued that protracted and costly litigation would result, resolutely opposed attempts to have their concerns systematically dealt with in the *Code* (French, 2000: 20).

For other observers, the overall effect of the *Code* in terms of bargaining behaviour must obviously await assessment at some future date. Indications from the UK are that industrial relations codes of practice have had a significant impact on behaviour ranging from disciplinary procedures (Dickens, 1985: 232) to picketing (*Thomas v NUM (South Wales Area)*, 151) and the provision of bargaining information (Gospel and Lockwood, 1999). This might be thought to be all the more likely in New Zealand, given that the *Code* has been developed by the parties themselves, as opposed to the "third party drafting" approach in the UK.

A relatively common perception, expressed by one employment lawyer during the development of the *Code*, was that the *Code* would "of necessity be so neutral, it will be meaningless and lacking in influence" (Paul Tremewan, quoted in Llewellyn, 2000b). It is true that the need for consensus has obviously resulted in the parties not being able to reach agreement in some areas. Against this, however, it is suggested that some key issues under section 32 may now be approached with far greater confidence under the guidelines produced in the *Code*. These include the scope of arrangements for bargaining, the nature of the obligation to meet, the ambit and implications of the duty to consider and respond to proposals, and the need for timeliness in providing bargaining information.

Finally, in the light of changes made to the bill by the select committee, it is perhaps not surprising that the parties were unable to reach agreement on the vexed issue of direct communication with employees during bargaining. Intense controversy had been generated amongst the business community by opponents of the Employment Relations Bill, leading to a conciliatory response being made by the Government in amendments to "hotspots" in the bill. One such "hotspot" was the communication issue. The substituted clauses relating to direct or indirect bargaining with employees who are represented during the collective bargaining process were subject immediately to differing interpretations, as we have seen. By the time the draft *Code* came to be presented to the Minister, therefore, and regardless of the Government's intentions in relation to the redrafted clauses, it was presumably politically unthinkable that she would exercise her power under section 37 to effectively rewrite the draft *Code* in a way that favoured the interpretation of the union representatives on the committee.

In the same way as with other unresolved questions under section 32, leaving this and other issues for ultimate determination by the courts was clearly a calculated risk. An issue that seems likely to be resolved sooner rather than later in the life of the ERA is whether, for those parties that declined to have issues clarified by the *Code*, taking that risk was worthwhile.

References

ACT (Association of Citizens and Taxpayers New Zealand Political Party) (2000), *The Employment Relations Act*, 2000 (http://www.act.org.nz/action/employment/loopholes.htm)

Anderson, G. (1998), Reforming Procedural Fairness Requirements, *Employment Law Bulletin* 114-116.

Baldwin, R. and Houghton, J. (1986), Circular Arguments: The Status and Legitimacy of Administrative Rules, *Public Law* 239-284.

Bradford, M. (1998), Memorandum to the Chair, Cabinet Economic Committee, *Review of Employment Contracts Act Personal Grievance Provisions: Development of Reform Package*, 17 April 1998, ECO (98) 60.
(2000a), First reading speech, Employment Relations Bill, (2000) 582 NZ Parl Deb, 1171.
(2000b), Trouble with good faith code entirely predictable, press release, NZ National Party, 11 September 2000.
(2000c), Nats outraged at code on good faith, *The Dominion*, 11 September 2000.

Brown, J. (2001), Good Faith Bargaining and the Disclosure of Information under the Employment Relations Act 2000, *Employment Law Bulletin* 2-9.

Burrows, J. F. (1999), *Statute Law in New Zealand*, Butterworths, Wellington, 1999.

Cabinet, (2000a), Employment Relations Bill – Confirmation of Government Reform Package, 10 February 2000, AER (00) M2, 4.
2000b, *Employment Relations Bill*, Confidential Discussion Paper: Cabinet Ad Hoc Committee, 3 February 2000.

Churchman, P. (2000), Communication with Employees, *New Zealand Law Journal* 385-388.

Churchman, P. and Roth, P. (2000), *Employment Relations Act 2000*, New Zealand Law Society Seminar, New Zealand Law Society, Wellington, October 2000.

Consultation (2000), Interim Good Faith Bargaining Committee, Consultation on Draft Code of Good Faith for Bargaining for Collective Agreement, 2000.

Council of Trade Unions (CTU), (1997), *Workplace Relations Bill.* (2000), *Submission to the Employment and Accident Insurance Legislation Select Committee on the Employment Relations Bill.*

Davenport, G. (1999), The Legal Obligation to Bargain in Good Faith in the New Zealand Labour Market: Rhetoric or Reality?, *New Zealand Journal of Industrial Relations* **24(2)**:113-151.
(2000), The Duty to Bargain in Good Faith under the Employment Relations Act 2000, *Employment Law Bulletin* 119-125.

Department of Labour, (2000a), Memorandum Development of a Code of Good Faith – Employment Relations Bill, 28 February 2000.
(2000b), *Employment Relations Bill: Report of the Department of Labour to the Employment and Accident Insurance Legislation Select Committee*, June 2000.
(2000c), Development Process – Code of Good Faith, 3 May 2000.
(2000d), undated paper, Selected provisions of Employment Relations Act in order of reference for Good Faith Code contents.
(2000e), Contracts Expiring between 2 October 2000 and 31 December 2000, note to committee, 14 August 2000.
(2000f), letter, R. A. Stockdill to Walter Grills, 22 September 2000.
(2000g), letter, R. A. Stockdill to Walter Grills, 20 September 2000.

Dickens, L. (with Jones, M., Weekes, B. and Hart, M.) (1985), *Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal*, Basil Blackwell, Oxford, 1985.

Duncan, A. (2000), 'Good faith and little hope' *New Zealand Political Review*, August/September 2000, 12.

Elias, P. (1980), Closing the Closed Shop, *Industrial Law Journal* **9**:201-214.

Feely, M.E. (Acting General Manager, Employment Relations Service) (2001), letter to author, 17 January 2001.

French, C. (2000), Employers and Good Faith, *New Zealand Law Society Employment Law Conference*, Wellington, November 23-24, 2000, 13-21.

Fulton, H. (2000), Remedies for Unfair Bargaining, *New Zealand Law Society Employment Law Conference*, Wellington, November 23-24, 2000, 151-162.

Ganz, G. (1987), *Quasi-legislation: Recent Developments in Secondary Legislation*, Sweet & Maxwell, London, 1987.

Goddard, T. G. (2000), The only constant is change . . . The changed role of the Employment Court under the Employment Relations Act 2000, *Employment Law Bulletin* 115-119.

Gospel, H. and Lockwood, G. (1999), Disclosure of Information for Collective Bargaining: The CAC Approach Revisited, *Industrial Law Journal* **28**: 233-248.

Grills, W. (2000a), *Walter Grills Confident,* press release, Interim Good Faith Codes Committee, 11 September 2000.
(2000b), radio interview, *Kim Hill Nine 'til Noon*, National Radio, 14 September 2000.
(2000c), Update Report on the Good Faith Bargaining Committee to the Hon Margaret Wilson, Minister of Labour, 1 November 2000.

Guide (2000), Interim Good Faith Bargaining Committee, *Guide to Document*, 2000.

Hargreaves, D. (2000), Good faith favours Maori, *The Independent*, 27 September 2000, 3.

Harvey (2000), *Harvey on Industrial Relations and Employment Law*, (Perrins, B., general ed.), Butterworths, London, 2000.

Hide, R. (2000), Employment bill sends government into retreat, *The National Business Review*, 2 June 2000, 18.

Hughes, J. (2000), Hotspots and Damp Squibs, *Employment Law Bulletin* 134-137.

Interim Committee to Develop a Code of Good Faith (Interim Committee).
(2000a), Minutes of first meeting, 2 August 2000.
(2000b), Minutes of second meeting, 14 August 2000.
(2000c), Minutes of third meeting, 24 August 2000.

Lane, P. (2000), No place for Treaty clause in code, says PM, Newsroom story, 12 September 2000.

Lewellyn, I. (2000a), Good faith gets less fuzzy, *The Independent*, 6 September 2000, 8.
(2000b), And now for the fine print . . . lawyers look for ERA loopholes, *The Independent* 13 September 2000, 20.

Lewis, R. (1981), Codes of Practice on Picketing and Closed Shop Agreements and Arrangements, *Modern Law Review***44**: 198-201.

Mazengarb (2001), *Mazengarb's Employment Law*, (6th ed.), Butterworths, Wellington, 2001.

New Zealand Business Roundtable (NZBR) (2000), *Submission on Employment Relations Bill.*

New Zealand Employers' Federation (NZEF) (1996), Fish-hooks in good faith bargaining, *The Employer*, December 1996, 6.
(1997), *The Employer*, February 1997, 1.
(2000a), *Submission to the Employment and Accident Insurance Legislation Select Committee on the Employment Relations Bill*, May 2000, 14.
(2000b), *Good Faith Bargaining Code*, posted on NZEF website (http://www.nzef.org.nz)

Prebble, R. (2000a), Employment Relations Bills (sic) – A threat to the rule of law, press release, ACT New Zealand, 3 August 2000.
(2000b), Good faith Code Just Good Intentions, press release, ACT New Zealand, 25 September 2000.

Robertson, B. (2000), 'How the unions and government will try old-fashioned ways to run your business', *The National Business Review*, August 11 2000, 28.

Stockdill, R. (1997), 'Does experience suggest a problem that requires the introduction of fair bargaining?', memorandum to the Minister of Labour, 11 September 1997.

Symposium (1998), *Symposium on the Industrial Relations Package, Employment Law Bulletin,* September 1998.

Swarbrick, P. (2000), Collective Bargaining, *New Zealand Law Society Employment Law Conference*, Wellington, November 23-24, 2000, 25-35.

Trade Union Federation (TUF) (1998), *The New Employment Law: A Contract or Labour Rights Approach?*
(2000), *Submission to the Employment and Accident Insurance Legislation Select Committee on the Employment Relations Bill.*

Trotter, C. (2000), When lambs lie down with lions, some will be eaten, *The Independent*, 29 March 2000, 19.

Upton, S. (2000), 'Confidence sags as government seeks to legislate for good faith', The *National Business Review*, 2 June 2000, 21.

Wilson, M. (2000a), 'Minister of Labour addresses nation's employers', *The Employer*, June 2000, 6.
(2000b), Letter to Walter Grills, 5 July 2000.
(2000c), Letters to chair and members of committee, dated 27 October 2000.

Wilson, M. and Horomia, P. (2000), The Employment Relations Bill and the Treaty, NZ Government, press release, 1 August 2000.

Cases

Airways Corporation of NZ Ltd v NZ Air Line Pilots Assn IUW [1996] 1 ERNZ 126 (CA)

Health and Safety Inspector v W Crighton & Son Ltd [2000] ELB 152 (DC)

NZ Fire Service Commission v Ivamy [1996] 1 ERNZ 85 (CA)

NZ Medical Laboratory Workers Union Inc v Capital Coast Health Ltd [1994] 2 ERNZ 93 (CA)

R v CD [1976] 1 NZLR 436.

Tucker Wool Processors Ltd v Harrison [1999] 1 ERNZ 894 (CA)

Thomas v NUM (South Wales Area) [1985] IRLR 136.

Tyler v Attorney-General [2000] 1 NZLR 211.