



## COVERSHEET

<b>Minister</b>	Hon Iain Lees-Galloway	<b>Portfolio</b>	Workplace Relations and Safety
<b>Title of Cabinet paper</b>	Amending the Code of Good Faith in Collective Bargaining	<b>Date of release</b>	17 May 2019

### List of documents to be proactively released

<b>Date</b>	<b>Title</b>	<b>Author</b>
10 April 2019	Cabinet paper: Amending the Code of Good Faith in Collective Bargaining	Office of Hon Iain Lees-Galloway
	Cabinet paper attachment: Proposed Code of Good Faith in Collective Bargaining	Committee for the Code of Good Faith in Collective Bargaining
	Cabinet Economic Development Committee: Minute of Decision (DEV-19-MIN-0085)	Cabinet Office

**Information redacted**

**NO**

In Confidence

Office of the Minister for Workplace Relations and Safety  
Chair, Cabinet Economic Development Committee

## **AMENDING THE CODE OF GOOD FAITH IN COLLECTIVE BARGAINING**

### **Proposal**

1. This paper expresses my intention to approve a revised Code of Good Faith in Collective Bargaining (“the code”).

### **Background**

2. The code gives guidance to employers and unions on their duty to act in good faith when bargaining for a collective agreement. The Employment Relations Authority and Employment Court may have regard to any approved code in determining whether or not bargaining parties have dealt with each other in good faith.
3. The Employment Relations Act 2000 (“the Act”) allows the Minister for Workplace Relations and Safety to approve a code recommended by a committee.
4. I established the Committee for the Code of Good Faith in Collective Bargaining in February 2019 (APH-19-MIN-0004 and CAB-19-MIN-0030 refer). The committee was asked to consider:
  - 4.1. changes to the code necessary to remedy any inconsistency between it and the Act as a result of the passage of the Employment Relations Amendment Act 2018 (“the Amendment Act”),
  - 4.2. explaining the operation of the duty of good faith and its application to multi-employer collective agreement (MECA) bargaining.
5. The Act requires the committee to have equal representation of unions and employer organisations. The committee therefore comprised two representatives from BusinessNZ and two from the New Zealand Council of Trade Unions. It was chaired by a fifth member from the Ministry of Business, Innovation and Employment (MBIE). MBIE also provided secretariat services to the committee.

### **Comment**

*Task 1: the committee was asked to remedy inconsistencies*

6. The committee has reported back to me with proposed amendments to the code. These address its first task of remedying inconsistencies between the code and the Act. A small number of paragraphs in the code require amending to reflect changes made through the Amendment Act:
  - 6.1. The Amendment Act requires parties to conclude a collective agreement. Guidance relating to this has been reintroduced to the revised code.
  - 6.2. The Amendment Act now requires parties to continue to bargain on other matters even when they are deadlocked on an issue. The revised code

therefore contains strengthened language in this paragraph, to make it clear that parties must continue to bargain on other matters.

7. To support these changes, and to ensure the code provides practical guidance to bargaining parties, the revised code also contains some ancillary changes. It:
  - 7.1. specifically mentions that the duty of good faith applies to relationships between employers in MECA bargaining,
  - 7.2. lists all the matters that must be included in a collective agreement (and that will therefore be discussed in bargaining), and
  - 7.3. says that not genuinely negotiating for rates of wages or salary payable to employees to be covered by a collective agreement is undermining behaviour, which is likely to be a breach of good faith.
8. I agree with all of the committee's proposed changes to remedy the inconsistencies discussed above.

*Task 2: the committee was asked to provide examples of reasonable grounds to oppose concluding a MECA*

9. The committee was unable to reach agreement in relation to its second task. This task was set by Cabinet last year (DEV-18-MIN-0253 and CAB-18-MIN-0541 refer). It involves providing examples of reasonable grounds to oppose concluding a MECA.
10. This task relates to a new provision of the Act, which says opposition to concluding a MECA, if based on reasonable grounds, is a genuine reason not to conclude a MECA.
11. Social partners on the committee considered that it is for the courts to decide what reasonable grounds to oppose concluding a MECA are. There is also a risk of any examples in the code being inconsistent with future judicial interpretation of the Act, because the code is not binding on the courts. Including examples in the code could also close off readers' minds to other potentially valid reasons to oppose concluding a MECA.
12. Given social partners' unanimity on this point, I agree with their recommendation not to include examples of reasonable grounds to oppose concluding a MECA in the code.

*I have considered the committee's recommendations and accept them*

13. I agree with the committee's recommendations as a whole, and intend to approve the revised code as proposed by the committee (see attached).

### **Timing**

14. The revised code will come into effect on 6 May 2019, which is the same day that changes to the Act relating to the duty of good faith come into force.

### **Consultation**

15. MBIE officials consulted the Ministries of Education and Health, the Department of Prime Minister and Cabinet, the State Services Commission, and the Treasury on this paper, and their comments were taken into account.

### **Financial implications**

16. There are no financial implications associated with amending the code.

### **Legislative implications**

17. Legislation is not required to amend the code.

### **Impact analysis**

18. As the code is not a legislative instrument, regulatory impact analysis requirements do not apply.

### **Human rights**

19. There are no human rights implications associated with amending the code.

### **Gender implications**

20. There are no gender implications associated with amending the code.

### **Disability perspective**

21. There are no disability implications associated with amending the code.

### **Publicity**

22. The revised code will be notified in the *Gazette* and published on the MBIE website. I also intend to issue a press release when the revised code (and remaining changes made through the Amendment Act) comes into effect.

### **Proactive release**

23. I intend to proactively release this paper in whole.

### **Recommendations**

The Minister for Workplace Relations and Safety recommends that the Committee:

1. **Note** my intention to approve a revised Code of Good Faith in Collective Bargaining
2. **Note** the revised code will be effective from 6 May 2019, which is when remaining provisions of the Employment Relations Amendment Act 2018 come into force.

Authorised for lodgement

Hon Iain Lees-Galloway  
Minister for Workplace Relations and Safety

# CODE OF GOOD FAITH IN COLLECTIVE BARGAINING

## Introductory note

I have approved the attached Code of Good Faith in Collective Bargaining under section 35 (1) of the Employment Relations Act 2000 (the Act). The changes from the previous Code were recommended to me by the Committee on the Code of Good Faith in Collective Bargaining to reflect practices, developments and experiences in applying the duty of good faith under the Act and taking into account ~~both~~ the Employment Relations Amendment Act 2018 ~~and the Employment Relations Amendment Act 2010~~. The new Code comes into force on ~~6 March 2015~~ May 2019.

Accordingly as of that same day I have revoked, under section 38 of the Act, the existing Code of Good Faith in Collective Bargaining, approved by the then Minister of ~~Labour Workplace Relations and Safety~~, Hon ~~Paul Swain~~ Michael Woodhouse, on ~~9 August 2005~~ March 2015.

In accordance with section 39 of the Act, the Employment Relations Authority or Employment Court may have regard to an approved Code in determining whether or not a union and an employer have dealt with each other in good faith in bargaining for a collective agreement. This means that if the parties can show that they have followed the Code, the Authority or Court may consider this to be compliance with the good faith provisions of the Act.

The Code will also help parties to identify all the things they should be considering when trying to bargain in good faith.

Hon ~~Michael Woodhouse~~ Iain Lees-Galloway  
Minister for Workplace Relations and Safety  
~~6 March 2015~~ [Date TBC]

## Section 1: Introduction

- 1.1 The purpose of this generic code is to give guidance to employers and unions (the parties) on their duty to act in good faith when bargaining for a collective agreement or variation to a collective agreement under the Employment Relations Act 2000 (the Act).
- 1.2 This code is not a substitute for the Act. However, the Employment Relations Authority (the Authority) or the Employment Court (the Court) may have regard to it in determining whether or not the parties have dealt with each other in good faith in bargaining for a collective agreement.
- 1.3 Good faith under the Act requires the parties to an employment relationship defined in section 4(2) of the Act, to be active and constructive in establishing and maintaining a productive employment relationship. This applies to the relationships between parties in multi-party collective bargaining, which includes employers in multi-employer collective agreement bargaining. This includes a requirement that the parties must be ~~are~~ responsive and communicative and ~~do~~ must not do anything

likely to mislead or deceive each other. Therefore, when bargaining for a collective agreement the parties need to consider whether their actions will establish and maintain the type of relationship required.

- 1.4 The parties should also develop good faith practices that are consistent with the legal requirements of the Act. Employers and unions who act in good faith are more likely to have productive employment relationships.
- 1.5 Bargaining for a collective agreement (including a multi-party agreement) means all the interactions between the parties that relate to the bargaining. This includes negotiations and communications or correspondence (between or on behalf of the parties before, during, or after negotiations) that relate to the bargaining. Bargaining also includes interactions about a bargaining process agreement.
- 1.6 Disputes can arise over the interpretation of the words used in a collective agreement, therefore care should be taken to ensure that the wording clearly reflects the agreement reached.
- 1.7 There are certain matters in ~~legislation section 54(3) of the Act~~ which must be included in collective agreements:
  - a coverage clause, and
  - the rates of wages or salary payable to employees bound by the collective agreement, and
  - a plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the 90-day period in section 114 of the Act within which a personal grievance must be raised, and
  - a clause saying how the collective agreement can be varied, and
  - the date or event on which the collective agreement expires.

~~-including, for example, a coverage clause and provision for the expiry of the agreement.~~
- 1.8 The good faith matters set out in this code are not exhaustive.

## **Section 2: Agreeing a Bargaining Process**

- 2.1 In order to promote orderly collective bargaining the parties must use their best endeavours to enter into an arrangement, preferably in writing, as soon as possible after the initiation of bargaining, that sets out a process for conducting the bargaining in an effective and an efficient manner. Even if the parties cannot agree on an arrangement they must continue to bargain in good faith, and should endeavour to ensure that such bargaining is effective and efficient.
- 2.2 The parties should consider the following matters which may, where relevant and practicable, in whole or in part, make up any such arrangement:

- advice as to who will be the representative(s) or advocate(s) for the parties in the bargaining process
- advice as to whom the representative(s) or advocate(s) represent
- the size, composition and representative nature of the negotiating teams and how any changes will be dealt with
- advice as to the identity of the individuals who comprise the negotiating teams
- the presence, or otherwise, of observers
- identification of who has authority to enter into an agreement, any limits on their authority, and signing off procedures
- the proposed frequency of meetings
- the proposed venue for meetings and who will be liable for any costs incurred
- the proposed timeframe for the bargaining process
- the manner in which proposals will be made and responded to
- the manner in which any areas of agreement are to be recorded
- when the parties consider that negotiation on any matter has been completed, and how that will be recorded
- communication to interested parties during bargaining
- the provision of information and costs associated with such provision
- the appointment of, and costs associated with, an independent reviewer should the need arise
- any process to apply if there is disagreement or areas of disagreement
- the appointment of a mediator should the need arise
- 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
- where appropriate, ways in which good faith relations during bargaining can take into account tikanga Māori (Māori customary values and practices), and/or any cultural differences or protocols that might exist in the environment in which the bargaining occurs.

2.3 The parties will adhere to any agreed process for the conduct of the bargaining.

### **Section 3: Bargaining**

3.1 The duty of good faith applies to all collective bargaining, including multi-party collective bargaining. The requirement in section 54 of the Act to include rates of

wages or salary payable to employees in every collective agreement means the duty of good faith applies to all interactions between parties in collective bargaining about the rates of wages or salary payable to employees.

3.2 The duty of good faith requires parties bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason not to, based on reasonable grounds. The duty of good faith under the Act does not require a union and an employer bargaining for a collective agreement—

~~to enter into a collective agreement, or~~

~~to agree on any matter for inclusion in a collective agreement.~~

3.32 Genuine reason does not include:

- opposition or objection in principle to:
  - bargaining for, or being a party to, a collective agreement, or
  - including rates of wages or salary in a collective agreement (that is, according to sections 32(1)(ca), 33(1) and 54 of the Act, parties cannot conclude a collective agreement without including rates of wages or salary in that agreement), or
- disagreement about including in a collective agreement a bargaining fee clause under Part 6B of the Act. That is, if parties cannot agree on the inclusion of a bargaining fee clause and there are no genuine reasons based on reasonable grounds not to conclude a collective agreement, parties should conclude the agreement without a bargaining fee clause.

~~However, an employer does not comply with the duty of good faith if—~~

~~the employer refuses to enter into a collective agreement, and~~

~~the employer does so because the employer is opposed, or objects in principle, to bargaining for or being a party to a collective agreement.~~

3.34 In relation to multi-employer collective agreements, a genuine reason includes opposition to concluding one, if that opposition is based on reasonable grounds.

3.5 The parties should, therefore, at all stages in the bargaining, act in a way that will assist in concluding a collective agreement.

3.64 As soon as possible, but not later than 10 days, after the initiation of bargaining the employer must draw to the attention of all employees under the proposed coverage clause (whether members of the union or not) that collective bargaining has been initiated. This is extended to 15 days if 2 or more employers are identified as intended parties to the bargaining.

3.75 At the beginning of bargaining, a union must notify the other parties of its procedure for ratification.



- 3.86 The employer must not advise, or do anything with the intention of inducing, an employee:
- not to be involved in bargaining for a collective agreement, or
  - not to be covered by a collective agreement.
- 3.97 An employer is not prevented from communicating with the employer's employees during collective bargaining (including, without limitation, the employer's proposals for the collective agreement) as long as the communication is consistent with the general duty of good faith and the duty of good faith in collective bargaining.
- 3.108 The parties must recognise the role and authority of any person chosen by each to be its representative or advocate.
- 3.119 The parties 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 parties agree otherwise.
- 3.129 The parties must not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining. Undermining behaviour is likely to be a breach of good faith. Such behaviour includes:
- going through the motions of bargaining without genuinely negotiating or intending to settle the collective agreement
  - not genuinely negotiating for rates of wages or salary payable to employees to be included in the collective agreement
  - unduly hurrying the bargaining process to prevent proper consideration
  - tabling extreme proposals with the intention to break down negotiations
  - presenting initial claims on a "take it or leave it" basis, or
  - tabling completely new proposals or revoking existing offers without compelling reasons.
- 3.134 The parties must meet each other, from time to time, for the purposes of bargaining. The frequency of meetings should be reasonable and consistent with any agreed bargaining arrangements and the duty of good faith.
- 3.142 The meetings will provide an opportunity for the parties to explain, discuss and consider proposals relating to the bargaining. Where proposals are opposed, each party should provide explanations which support their view.
- 3.153 A union and employer must provide to each other, on request, and in a timely manner, information in accordance with sections 32(1)(e) and 34 of the Act that is reasonably necessary to support or substantiate claims or responses to claims made for the purposes of bargaining.
- 3.164 The parties must consider and respond to proposals made by each other.

- 3.1~~75~~ Even though the parties have come to a standstill or reached a deadlock about a matter, they ~~should~~must continue to meet, consider and respond to each other's proposals on other matters.
- 3.1~~86~~ 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.
- 3.1~~97~~ However, the parties are not required to continue to meet each other about proposals that have been considered and responded to.
- 3.~~2048~~ The parties should attempt to settle 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.
- 3.~~2149~~ Negotiated terms and conditions, which are passed on (to an individual employment agreement or another collective agreement):
- during bargaining with the intention or effect of undermining the bargaining, or
  - after the bargaining has concluded with the intention and effect of undermining the collective agreement will constitute a breach of good faith.
- 3.2~~29~~ Relevant to the duty of good faith is whether or not an employer considering passing on the terms and conditions negotiated in a collective agreement or reached in bargaining has consulted with the union concerned before passing on the term or condition to an individual or another union. The parties should attempt to reach agreement on any pass on arrangement an employer is considering. If a pass on occurs with the agreement of the union concerned, it is not a breach of good faith.

#### **Section 4: Mediation**

- 4.1 Where the parties are experiencing difficulties in concluding a collective agreement they may agree to seek the assistance of a mediator. This could be a mediator provided by the Ministry of Business, Innovation and Employment's mediation services. Parties should note that for strikes and lockouts in essential industries there are specific requirements in relation to the use of mediation services.

#### **Section 5: Facilitation**

- 5.1 Where there are serious difficulties in concluding a collective agreement, a party may apply to the Authority for facilitation to assist in resolving those difficulties. The Authority will then decide whether the application for facilitation satisfies one or more of the grounds set out in the Act.

#### **Section 6: Breach of Good Faith**

- 6.1 Where a party believes there has been a breach of good faith in relation to collective bargaining the party shall, wherever practicable, indicate any concerns about

perceived breaches of good faith at an early stage to enable the other party to remedy the situation or provide an explanation.

- 6.2 Parties are able, in certain circumstances, to seek a penalty for a breach of good faith.
- 6.3 The parties are also able to apply to the Authority to fix the provisions of the collective agreement to which the bargaining relates. An application may be made whether or not any penalty has been imposed for a breach of good faith. The Authority will then decide whether the application to fix the provisions satisfies the grounds set out in the Act.

PROACTIVELY RELEASED