

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

CIV-2007-485-1814

Under the Judicature Amendment Act 1972

In the matter of An application for review

Between **HEALTHCARE PROVIDERS NEW ZEALAND
INCORPORATED and NEW ZEALAND ASSOCIATION OF
RESIDENTIAL CARE HOMES INCORPORATED**

Applicants

And **NORTHLAND, WAITEMATA, AUCKLAND, COUNTIES
MANUKAU, WAIKATO, LAKES, BAY OF PLENTY,
TAIRAWHITI, TARANAKI, HAWKE'S BAY, WANGANUI,
MIDCENTRAL, HUTT VALLEY, CAPITAL & COAST,
WAIRARAPA, NELSON MARLBOROUGH, WEST COAST,
CANTERBURY, SOUTH CANTERBURY, OTAGO, AND
SOUTHLAND DISTRICT HEALTH BOARDS**

Respondents

AFFIDAVIT OF ANTHONY PAUL FOULKES

the *6th* day of November 2007

BUDDLE FINDLAY
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I, **ANTHONY PAUL FOULKES** of New Plymouth, Chief Executive, swear:

Introduction

1. I am the Chief Executive of Taranaki District Health Board (**Taranaki DHB**), and was one of two 'lead CEOs' involved on behalf of the 21 District Health Boards (**DHBs**) in the negotiation this year of the Variation which is the subject of these proceedings. I was lead CEO with responsibility for the low paid workers initiative, and the process and reasoning behind the inclusion of clauses A4 and A5 of the Variation.
2. I took up the position of Chief Executive of Taranaki DHB in December 2004. Prior to that, I have held various senior health management roles in the National Health Service in the United Kingdom and from 1996 in various Crown Health Enterprises and DHBs in New Zealand.
3. I have a BA Honours in Social Policy and Administration, an MSc in Information Systems Management, and graduated from the United Kingdom National Health Service General Management training scheme.
4. Annexed marked "A" is a paginated bundle of true copies of relevant documents, which are referred to in this affidavit by their page numbers. I have also referred to documents attached to Martin Taylor's second affidavit, which I refer to as (**Taylor, page x**).

District Annual Plans and the age related residential care agreement

5. Before describing the low paid workers initiative, I wish to refer first to the District Annual Plan (**DAP**) of DHBs. I understand the applicants allege that the decision to spend the funding increase in the way set out in the Variation "does not accord with" the various DAPs, in that the services provided by the providers are not addressed in those plans, and/or clauses A4 and A5 involve a change to the policies, outputs and funding of outputs to the extent that the DAPs address the services (refer to paragraph 35 of the amended statement of claim).
6. DAPs are one of the high-level accountability documents which apply to DHBs under the New Zealand Public Health and Disability Act (**NZPHD**). Other relevant accountability documents are provided for by the Crown Entities Act 2004.

7. As Chief Executive of Taranaki DHB, I am one of the signatories, along with the Chair of the DHB, to our DAP. I am therefore very familiar with DAPs, which are developed by all DHBs in accordance with Ministry guidelines. Whilst exact style and presentation will vary between DHBs, the general content, approach and level of detail would be similar.
8. I now describe the Taranaki DHB DAP for the 2006/07 financial year, by way of example, to illustrate the general form and content of all DAPs.
9. I refer to the 2006/07 DAP because that is the DAP that was in force when the low paid workers initiative, and the other initiatives in the 2007 A21 review process were underway. Those initiatives were to apply to the Age Related Residential Care Agreements (**ARRC Agreements**) for the 2007/08 financial year. If the initiatives were to require changes to a DAP, such changes would be made to the 2006/07 DAP for inclusion in the 2007/08 DAP.
10. A copy of the Taranaki DHB 2006/07 DAP is annexed at **pages 1 to 174**. The DAP focuses on the activities planned for the 2006/07 financial year. It sets out the direction the Taranaki DHB will take on planning and funding for health and disability services for the year. It prioritises areas of focus and sets out objectives and activities.
11. The DAP describes the Board's key roles as follows:
 - (a) assessing needs and planning health and disability services;
 - (b) funding organisations and individuals to provide specific health and disability services; and
 - (c) providing specific health and disability services to the community.
12. The DAP identifies the various areas of focus, covering both groups within the community and specific health conditions. Age related residential care is primarily a service for older members of the community. In relation to older people, the DAP specifies various objectives, including healthier living in their own homes, their ability to participate in family life, fewer hospitalisations, and the provision of appropriate services. Specific activities include a review of assessment treatment and rehabilitation services and the needs assessment and service coordination services, and

identification of training opportunities to facilitate a restorative focus for home support, leading to fewer older persons entering rest homes.

13. The DAP contains the financial statements for the DHB, comments on the financial trends and sets out strategies to remove or reduce funding gaps and risks.
14. The DAP specifies total expenditure by the DHB on non-hospital providers at \$111 million. This amount is paid to 222 providers who have in total 297 contracts with Taranaki DHB. The contracts cover a wide range of services including residential care, home help, primary care, pharmaceuticals, dental services, mental health services and so on. Taranaki DHB is a medium sized DHB by reference to population served. Larger and smaller DHBs will have bigger and smaller numbers of contracts respectively. Sam Cliffe notes in paragraph 37 of her affidavit that the four Northern DHBs have approximately 2850 contracts between them.
15. Much of the funding under these contracts is "fee for service", that is the cost to the DHB varies according to the use of the services and cannot be capped in the contract. In relation to age related residential care, this reflects that a DHB has liability under the Social Security Act to fund residential care for the persons specified in that Act.
16. The DAP contains a lot of information about strategies, targets, objectives and priority activities. However, in terms of section 39(2)(b) of the NZPHD, the DAP expresses the intended outputs, and funding for those outputs, at a very high level of aggregation. To the extent that activities that are specified may require a contract in order to be implemented, the DAP does not specify the form of implementation, and certainly does not predict any terms and conditions of such contracts.
17. The DAP does not quantify outputs or funding for outputs in specific areas such as primary health, mental health, or age residential care services. Nor does it discuss any proposed terms and conditions for contracts for such outputs.
18. The status of the ARRC agreement or the 2007 A21 review was not referred to as a policy, output or funding for an output in the DAP.

19. I do not consider that the 2007 A21 review process and subsequent Variation, even including the low paid workers initiative, amounted to a change, still less a significant change, to any policy, output or funding for an output contained in the DAP. Similarly, I do not consider that ARRC variations in previous years amounted to matters one would anticipate to see signalled in the relevant DAPs.
20. Where significant changes to a DAP are proposed, section 40 of the NZPHD requires the DHB to publicly consult before including the change in the DAP. Only then would the change be acted upon by the DHBs. Examples of significant service changes that have been regarded as requiring public consultation are the proposed closure of a rural hospital or other withdrawal of services available to a community or population. Changes of this significance occur occasionally, but not each year. When I became CEO of Taranaki DHB for example, one such consultation process was concluding regarding the provision of maternity services.
21. I am not aware of any previous suggestion by any party, including the Minister, the Ministry, other DHBs or any provider, that any proposed ARRC variation, including the 2007/08 variation which incorporated the low paid workers initiative, must be publicly consulted on and then be included in the DAP of each DHB before the A21 review can commence.
22. The applicants have expressed concerns about the time taken to initiate and carry out A21 reviews (**Taylor, paragraph 31**) and have criticised the timing of commencement of the 2007 review (**Taylor, paragraph 36**). However, the providers did not suggest at any time during the 2007 A21 review process that consideration of the low paid workers initiative must be deferred while DHBs publicly consulted on the initiative in accordance with section 40. To do so would of course have compounded the delays they were criticising.

Background to low paid workers initiative

23. There have, for some time, been concerns amongst the DHBs, and throughout the health sector generally, about the retention, conditions and development of the health sector work force. The issues faced by the sector vary across the country, and across the various disciplines and work forces, but broadly comprise issues such as high turnover of staff, the value that is placed on staff by their employers, and issues concerning the quality,

experience and training of staff, all of which have an impact on delivery of health care. These issues are particularly prevalent in a few areas, one of the most serious being in the aged care sector, particularly amongst workers who fulfil the care and support functions. The demand for these workers has grown as the aged care sector continues to grow, but in general terms the value placed on these workers is low, when measured by low pay and other conditions and limited opportunities for training, development and career advancement.

24. This concern is not unique to the DHBs. It is a concern that is recognised by the Ministry of Health (**Ministry**), providers in the aged care sector, and other stakeholders such as the Department of Labour and the New Zealand Council of Trade Unions (**CTU**).
25. By way of example, HealthCare Providers New Zealand (**HCPNZ**) issued a media release on 2 January 2007 (**page 175**); stating "a crisis is looming in the aged care sector because of chronic shortages of staff and underfunding". Workers such as care assistants, cleaners, laundry workers or kitchen assistants are able to obtain jobs in, say, retail or hospitality that provide better conditions and opportunities, and that do not have many of the difficult or less pleasant aspects of the job in aged care.
26. The DHBs have, since October 2005, had a formal "Future Workforce" strategy in place, the purpose of which is to provide direction and commitment to the development of the workforce in the health sector. As part of this strategy, there are six separate strategy groups charged with responsibility for certain areas of the health sector workforce, one being the strategy group for the "Care and Support Workforce" (until recently this was referred to as the "Non-regulated Workforce"). In essence, this group oversees the Future Workforce Strategy for all health sector workers not regulated by the Health Practitioners Competence and Assurance Act 2003.
27. The six strategy groups are made up predominantly of representatives from the various DHBs, and are chaired by a lead CEO. They in turn report to an umbrella Future Workforce Strategy group, which is made up of representatives from the DHBs, Ministry and others from the health workforce funding and education sectors.

28. In December 2006, the then lead CEO of the Non-regulated Workforce Strategy group stood down, and I assumed that role. Shortly after that, I also agreed to take over from one of the CEO representatives on the umbrella group.
29. The CEO who I was to replace on this group was Margot Mains, CEO of Capital and Coast DHB, and to assist the transition, there was a period of a few months where we both were involved in the group.
30. The first meeting I attended of this umbrella group was on 5 December 2006. The meeting was also attended by the Minister of Health, the Honourable Pete Hodgson. A number of health workforce matters were discussed at the meeting. Among these, the Minister advised that he wished to encourage a greater focus from DHBs on the non-regulated workforce, particularly in the aged care sector. The Minister considered that the DHBs, together with input from the Ministry, the CTU and providers, had a role to play in addressing the workforce issues and thereby developing a more sustainable sector. He encouraged us to involve the Ministry and the CTU more in the development of the workforce strategy for the sector.
31. Following this meeting, Lesley Harwood from the Minister's Office initiated a meeting on 20 December 2006 between representatives of the DHBs, CTU, Ministry and Department of Labour to plan the process for developing a plan to achieve change in the aged care sector (refer to the meeting information in **Taylor, page 111**).
32. The 20 December meeting was facilitated by Margot Mains, and a copy of her whiteboard notes taken during that meeting is attached in **Taylor, page 113**.
33. At that meeting, we identified key issues in the aged care sector as those present saw them, and discussed how we should progress our thinking. We decided to set up a workshop for 16 February, and discussed who should be involved in that. The DHBs and other representatives felt it was important that a provider perspective be present. I use the term "perspective" deliberately, as the purpose of the workshop was to develop the funders' thinking in the first instance, with the benefit of a provider perspective, before we formally engaged with providers or provider representatives such as HCPNZ.

34. In the lead up to the 16 February workshop, a small group set the agenda and invitation list, facilitated the meeting arrangements generally, and collated and circulated a bundle of pre-existing documents by way of background reading. This is the 61 page briefing report referred to in **Taylor, paragraph 39.2**, and which is annexed (in a 54 page version) to this affidavit at **page 176 to 229**.
35. This small group included myself, Elizabeth Knopf from the Ministry, two Department of Labour representatives, staff of District Health Boards New Zealand Limited (**DHBNZ**) and Eileen Brown from the CTU.
36. The night prior to the workshop (15 February 2007), the DHB attendees met informally over dinner. I made a rough note of some of our discussions, which is attached to Martin Taylor's affidavit (**Taylor, pages 149 to 150**). The note refers to aged care and has the number "37.5" next to it. This came out of a discussion that two of the DHB Chairs who attended, Pat Snedden and Dennis Cairns, had had with the Minister's office, in which it was indicated that \$37.5m may be made available to the aged care sector by way of extra funding in the next Government budget. This was expressed as a very preliminary indication to assist DHBs in their thinking and, even putting to one side budget secrecy, was to be kept strictly confidential until formal Government funding decisions were made and disclosure authorised.
37. The individuals who attended the 16 February meeting bringing a provider perspective were Peter Hausmann of Health Care New Zealand (also a Board member of the Hawke's Bay DHB); Dwayne Crombie, the Chief Executive of the Guardian Healthcare Trust; and Ross Madden, a last minute alternate for Ralph Jones, the Chief Executive of IHC. It was the CTU who proposed that these individuals be invited, and this proposal was accepted. Consideration was given to inviting Martin Taylor. However, as he is CEO of HCPNZ, that would likely have amounted to formal representation of providers. As I have said above, we were looking at this time to develop our own thinking and were not ready to formally engage with providers. We therefore sought a reality check from a provider perspective, rather than advocacy or representation. It was appreciated that providers would have much to say about the initiative if and when it crystallised into a coherent proposal, but that was for some future time.

38. The workshop was relatively informal and was attended by most of the invitees referred to in the invitation annexed at **Taylor, page 114**. The other attendees came from the Minister's office, the office of Ruth Dyson, Minister of Labour, various DHBs, Accident Compensation Commission, Department of Labour, the CTU and other government departments.
39. The workshop was not about funding; it focussed on sector sustainability and workforce issues more broadly with the aim of establishing an action plan outlining short-term, medium-term and long-term mechanisms to achieve improvements in the workforce generally.
40. There were no formal minutes taken of the workshop. The record was literally the printout from the whiteboard. I took my own personal notes at the workshop, primarily as the facilitator, so that I was able to reflect back the discussion. These are attached at **Taylor, page 136**. I did not circulate or share my notes.
41. After the workshop I prepared a presentation which set out the issues discussed at the workshop, the environment in which DHBs could address the issues, the DHBs' purposes and principles of engagement, and the desired two-stage approach arrived at by workshop participants.
42. On 26-27 February and 5 March I delivered the presentation to the DHB CEOs' Forum and the DHB Chairs' Forum respectively. A copy of my presentation to DHB Chairs is attached at **page 230**. It records the DHBs' purpose of achieving improvements in the sector, DHBs' commitment to quality services, and the need for collaboration and a long term approach. It was particularly noted that "Some short term action may be required, however, the kind of strategies for a longer term sustainable position are likely to require constructive relationship over 3-10 years". It was always clear that the substantive initiative would require engagement with many parties including providers. This has indeed progressed with constructive discussions with provider representatives continuing outside the A21 review process.
43. In terms of the two stage approach, Stage 1 covered an increase in wages for the lowest paid, (subject to additional funding being available through the government's next budget), with the objective being to identify agreed amounts, target groups and proposed pass through mechanisms by 30 April, with implementation from July 2007.

44. Stage 2 would include consideration of seven focus areas or themes:
- passing on a percentage of increases to wages;
 - training, development, standards setting;
 - skills recognition and staircasing pay;
 - sustainable and safe industry;
 - transparent contracting process;
 - recognition of funders' context and constraints;
 - use and role of collective bargaining.
45. The CEOs and Chairs confirmed the direction we were taking to develop and progress both stage 1 and 2.
46. I do not know the extent to which providers were made aware of the outcomes of the 16 February workshop. Reporting back was left to individuals' discretion; the workshop was not considered to be a secret, but nor was it something that was openly advertised. Martin Taylor states (**Taylor, paragraph 39.3**) that Dwayne Crombie telephoned to tell him that he attended the workshop, but according to Mr Taylor, Mr Crombie gave no other detail.
47. I should emphasise at this point that the concerns about the sustainability of the low paid workforce did not arise from any view of DHBs that providers did not apply a proportion of previous price increases to wages.
48. I am not aware of DHBs making an assertion that providers do not "pass on funding increases and wage increases voluntarily," contrary to the claims by Mr Taylor (**Taylor, paragraph 28**). I confirm that DHBs have not produced any data or research to support such an assertion. To do so would be contradictory to the DHBs' position. Mr Taylor is correct to acknowledge (**Taylor, paragraph 29**) that DHBs knew that part of past funding increases were applied to wages. As Mr Shapleski states in his affidavit, (**Shapleski, paragraphs 36-51**) DHBs' modelling included assumptions about wage pass through practices by providers.
49. Accordingly, the low paid workers initiative was not premised on the view that providers did not apply previous funding increases to wage increases.

While previous wage increases by providers are of course welcome, the funding increases were not specifically targeted by DHBs for that purpose. The low paid workers initiative represented a new focus by the Minister and DHBs to increase funding with the express purpose that it be passed on in wage increases targeted at the lowest paid.

50. I should also note that, while providers may have an expectation that DHBs will automatically pass on FFT funding increases (**Taylor, paragraph 25**), this expectation is not accepted by DHBs. DHBs form their own views, based on their strategic and annual plan considerations, as to what level of increase, if any, to pass on to contracted providers.

Implementation of Stage One

51. Following endorsement by Chairs and CEOs given at the meetings referred to in paragraph 42 above, the DHBs team continued to work on the implementation of Stage One. We were aware of the amount of new funding the Government was considering allocating for this purpose (approximately \$37.5 million) although I was also aware this was not at all certain. My notes of the February 16 workshop (**Taylor, page 140**) record a comment by Pat Sneddon (Chair of Counties Manukau DHB and one of the lead Chairs for the low paid workers initiative) that he was not confident about the amount. We began to consider how that possible new funding could be used. This included by how much and through what mechanisms wages could be increased. However, at this stage (March) Stage One did not include a proposal to include a collective bargaining clause.
52. The work necessary to develop options for implementing the wage pass through was carried out under my guidance by DHBNZ, in its role as facilitator of national DHB programmes and initiatives.
53. Various meetings and discussions were held involving at various times Craig Climo, lead CEO for the A21 Review, Janice Donaldson and other DHBNZ personnel, Sam Cliffe and Jon Shapleski from the A21 Project Group, Ministry officials, and other DHB representatives.
54. We also had some modelling done to forecast the benefits that might be passed down to workers in the sector, depending on the amount of money that was made available. We used an analyst from Canterbury DHB, Paul Bridgford. We also began considering the possibility of using the A21

review process to pass on any extra funding that was made available. This was a sensible option because the funding would be paid to the providers, and variations to the ARRC Agreement which arise from the A21 Review process is the accepted method of implementing price increases.

55. This work was the basis for the DHBNZ draft discussion paper of 28 March (**Taylor, page 81**). The paper was not distributed to DHBs, but formed the basis of the 2 April paper referred to in paragraph 63 below.
56. The 28 March discussion paper analysed the low paid workers initiative in the context of various other issues DHBs were considering in relation to age residential care.
57. The other issues included the A21 review price increase and the A23 variation event issues, that is the increases to the minimum wage, increases and annual leave entitlements under the Holidays Act, the impact of the DHB multi employer collective agreement covering nurses in the sector (**NZNO MECA**), and other specific cost pressures.
58. The paper also considered the low paid workers initiative in relation to home based support services (**HBSS**), which DHBs fund via separate contracts with the relevant providers. Provisions similar to clauses A4 and A5 were entered into them. Those providers are not party to these proceedings.
59. The paper developed proposals for how the total funding for aged residential care (FFT and the proposed additional \$37.5 million) could address all these issues, as well as the low paid workers initiative.
60. The possibility that a pass through obligation of a specific wage increase would be included in the ARRC Agreement was noted.
61. The paper also referred to the possibility that the Ministry could make a direction under the Crown Funding Agreement (**CFA**) to require pass through of a specific amount. If so, DHBs would be able to vary the ARRC Agreements using the unilateral amendment power under clause A23.9b, rather than by a variation requiring the agreement of each provider.
62. I briefed the lead DHB Chairs (Dennis Cairns and Pat Sneddon) on the approach taken in the paper, on 29 March, and again on 5 April following the discussion with the Minister.

63. On 2 April, DHBNZ prepared a further briefing paper (**Taylor, page 184**) in preparation for a meeting with the Minister of Health on 4 April to be attended by me, Craig Climo (lead CEO for the A21 process), Sam Cliffe and Julian Inch (CEO of DHBNZ). That paper outlined the package proposal to address the various issues described above. It included a proposal to require a \$1 per hour wage increase for low paid workers and contained a draft clause for inclusion in the variation to give effect to the proposal.
64. Sam Cliffe prepared a summary note from the meeting (**Taylor, page 196**). In brief, the Minister agreed with the direction proposed. I advised the Minister that collective DHB discussion and decision-making had yet to occur and therefore the direction would be subject to the outcome of these discussions. He supported that approach.
65. Following the meeting with the Minister, on 12 April Craig Climo and I sent a paper on the low paid workers initiative to all DHB CEOs which described the package proposal (**page 243**).
66. The purpose of the paper was to enable CEOs to discuss the proposal at their regional meetings and provide feedback.
67. On 10 May a further paper (dated 8 May) (**page 258**) was sent to all DHBs seeking their endorsement of the price increases for the ARRC Agreement. The paper included a summary of feedback from CEOs including feedback given at their 30 April/1 May meeting.
68. On 15 May a further paper was sent to all DHBs enclosing draft variations to the ARRC Agreement (**page 265**). The draft variation including an obligation to pass through \$1.30 to the relevant workers, and an obligation in relation to collective agreements.
69. The DHBs' initial proposal discussed with the Minister on 4 April was an increase of \$1.00 per hour. The Minister indicated that he would like to see as large an increase as possible, while leaving it to DHBs to determine the amount, based on their analytical work. As a result, further analytical work was carried out. This is summarised in Jon Shapleski's affidavit. The conclusion was that there was sufficient funding in the amount proposed to enable a \$1.30 increase (later revised as a result of provider feedback to a minimum \$1 increase and minimum wage of \$12.55).

Collective agreement

70. Before describing the response of DHBs to these May papers, I now summarise the process by which the collective agreement clause was included in the draft variation.
71. As noted above, the outcome of the 16 February workshop was that the CTU proposal relating to collective agreements would be considered in Phase Two of the low paid workers initiative.
72. On 24 April I received a call from the Minister in relation to the collective agreement proposal. My email advising colleagues of that conversation is at **Taylor, page 198**. It records the Minister's advice in relation to his and his Cabinet colleagues' views on collective agreements. My email raised various issues DHBs would need to consider to respond to the Minister's expectations. I also received a copy of the Minister's 27 April letter to Ross Wilson, president of the CTU (**Taylor, page 232**).
73. I then arranged for draft clauses addressing the collective agreement proposal to be prepared. As indicated in the 2 May letter from the Minister's Office, I consulted the CTU on possible clauses (**page 284**).
74. The overall intention underlying the clauses we developed was not to extend the obligations of providers under the Employment Relations Act (ERA) or to expect them to take a proactive role to initiate collective bargaining. Instead the expectation was that, if bargaining was initiated, then the provider would respond positively and at least offer to establish an agreement which reflected the terms and conditions of staff at the time.

Decision making by DHBs

75. The 10 and 15 May papers to DHBs requested responses and endorsement by 18 May. Then followed vigorous debate among DHBs about many aspects of the initiative. The comments at **Taylor, page 54** are a sample of some of the comments made by DHBs. However, there was no objection to, and indeed there was full support for, the objective of improving the sustainability of the low paid workforce.
76. Following this feedback, I reviewed the proposals further, obtained further legal advice and agreed to amend the proposed collective agreement clause so that it was more consistent broadly with the ERA. Although we

had not yet obtained formal DHB signoff on the draft clauses, on the basis of discussions to date with DHBs, I was able to authorise the Project Team to present them at the 23 May meeting with providers (described in Mr Shapleski's affidavit at **paragraphs 92 to 109**). The purpose was to commence formal engagement with providers at this meeting, which had been scheduled to discuss the A21 review (and the A23 process). Our objective was to implement the A21 and low paid worker initiatives in time for the new prices to take effect on 1 July. It was important to enable discussion with providers as soon as possible. Accordingly, I continued with the process of seeking DHB approval of the initiative at the same time as engagement with providers commenced.

77. It is incorrect for Mr Taylor to state (**Taylor, paragraph 63**) that there was little room for negotiation or that this was not a matter for DHB decision. As I explain below, the decision was made by DHBs. My letter to Harvey Steffens (**Taylor, page 249**) simply advised the Minister's office of the preparation that had been done and the approach being taken to discussions with providers.

78. The day after the 23 May meeting, Craig Climo and I sent a further email to all CEOs (**page 287**). The email responded to the concerns raised by DHBs and asked them to formally confirm their support for the proposal. In particular I asked DHBs to confirm their support for the low paid workers initiative and belief that:

- "the overall health of older people low paid workers initiative, including the approach taking in this first stage is intended to support workforce stability and sustainability in this strategic area;
- it is intended that this will or is reasonably likely to contribute to enhancing the standard and continuity of care for health and disability consumers in the residential care and home based support sectors;
- this objective is consistent with the objectives of DHBs set out in the NZPHD Act."

79. By early June each DHB had separately responded, confirming their agreement with the initiative in the form presented to providers on 23 May. This accords with usual practice in A21 reviews, where formal decisions on proposed variations are made by DHBs.

80. The fact that there was debate and discussion among DHBs demonstrates the serious consideration given by DHBs to the issues. They did not take their decisions lightly.
81. In this case, DHBs made the decision taking into account clearly expressed Ministerial expectations. The Minister conveyed his expectations to all DHBs in a letter of 12 June (Taylor, page 322). However, DHBs were advised to, and did, make their own decisions, based on advice received from me and the Project Team, legal advice and their own assessment of the importance of the objective to improve sustainability of the sector and the likely contribution the low paid workers initiative would make towards achieving this objective.
82. I have no doubt that had DHBs received advice and decided that the variation was not feasible for operational or legal reasons, they would have advised the Minister accordingly. However, that was not the case, and DHBs wished to take a positive step towards their objective by ensuring the funding reached its intended destination, that is thousands of low paid workers, as soon as possible, that is from 1 July.
83. While DHBs initially wished to defer the consideration of the collective agreement until Phase Two, taking into account communications from the Minister, they considered it would be likely to make a small but positive contribution to the sustainability of the workforce in terms of improved terms and conditions.
84. More generally, it is common practice for the Minister to set out expectations for DHBs, and for DHBs then to make decisions in pursuance of their statutory objectives, in light of those expectations. The low paid workers initiative is far from unusual in this regard.
85. For example, in the Executive Summary of the Taranaki DHB DAP for 2006/07 (page 8), we state that the key influences on our planning are:
- accountability obligations under the NZPHD and the Crown Entities Act;
 - strategies issued by the Minister under the NZPHD;
 - Taranaki DHB's 10 year district strategic plan;
 - Ministerial expectations and emerging issues.

86. The DHB included specific activities in the DAP in response to Ministerial expectations (see list at pages 133 to 134).
87. If the Minister had wished to impose his views on DHBs, there are a number of ways the Minister can do so, depending on the nature of the issues. This could be, for example, via a direction under the NZPHD or the Crown Entities Acts, by Ministerial involvement in the Statement of Intent under section 145 of the Crown Entities Act, by requirement in the CFA or, with the support of the Executive Council, by regulation.

Consultation with providers

88. I am aware that providers are critical of the timing of their formal involvement in the initiative. There are various reasons why this did not occur earlier. Jon Shapleski's affidavit provides a sense of the work involved in getting to this point, which was very significant. It was necessary to clarify the available funding and work out what was affordable, develop options for implementing the initiative, prepare a recommended wage increase obligation and mechanism, and obtain DHB approval to present the proposals. The DHB team was not mandated to formally engage with providers until DHBs reached this point. In fact, for the reasons referred to in paragraph 76 above, I took the decision to present the proposal to providers on 23 May prior to seeking formal DHB approval.
89. We were also unable to inform providers about budget decisions in advance of the Minister's 1 May media release which announced funding increases for the next four years (**Taylor, page 236**). However, we were not in a position to engage providers on the detailed proposal for the 2007/08 financial year, as it was still being finalised and approval from DHBs had not yet been sought.
90. Nevertheless, providers welcomed the Ministerial press release, with HCPNZ issuing a media release of the same day (**page 306**).
91. The release noted:

"It is too early to say what percentage increase this will mean for the 758 facilities that provide aged care to over 40,000 elderly each year, as the actual price increases are a matter for negotiation for between providers and DHBs", said Mr Taylor."

"This is welcome news for our annual contract negotiations which started in March ..."

"The Minister also signaled that he wants DHBs to ensure that the funding will be passed on to low paid workers in the sector."

"We can confirm the sector will continue its good record of passing on funding increases to workers."

92. The DHBs were pleased to see that HCPNZ welcomed the prospect of including the funding increase and the focus on passing on the increase in the annual contract "negotiations" which started in March (obviously referring to the A21 process).
93. HCPNZ did not suggest that the increases deriving from the extra funding should not be included in the process, for example, because it was too late to do so, or because the proposal had not been announced earlier.
94. Overall, the release demonstrated HCPNZ's support for the Minister's and DHBs' objective of supporting sustainability in the sector and ensuring wage increases for the lowest paid.
95. Mr Shapleski in his affidavit describes the consultation with providers from the 23 May meeting. I was briefed on the providers' responses. I approved the 4 June DHBNZ paper (**Taylor, page 309**) which was sent to all DHBs advising on progress and providers' responses.
96. I was briefed on and involved in the process of developing responses to providers' concerns. These responses were summarised in an update sent to the Minister on 21 June and to lead Chairs on 22 June (**page 314**). The specific changes to clause A4 and A5 are summarised in Mr Shapleski's affidavit (**Shapleski, paragraph 149**).
97. I accepted and am confident that there is sufficient funding to enable the revised wage pass through to be made, accepting that some providers whose structure differs markedly from the model may need to draw on other components of the price increase. This would be consistent with the good record providers have emphasised of applying part of previous non-specified funding increases to wages.

98. I am aware that providers obtained legal advice suggesting that clause A5 (the 23 May version) differed significantly from the ERA (Taylor, page 271). However, while providers did express, in principle, opposition to the inclusion of a collective agreement clause in the variation, the fact is they advised that they would accept such a clause if it reflected the requirements of the ERA (Taylor, page 276).
99. I was satisfied that the revised clause A5 met the providers' reasonable concerns.
100. Following further informal feedback from lead Chairs and from the Minister, I approved the final form of low paid workers initiative as set out in Sam Cliffe's 22 June letter to the providers (Taylor, page 277) and the distribution by DHBNZ of the final revised Variations to DHBs on 22 June (page 314). I was able to do so on the basis that the final form of the variation was within the parameters of the DHB approval in late May/early June, and subject to endorsement from lead Chairs, which was given.
101. Following communication of the DHBs' decision on the final form of the variation, I, along with other members in the Project Team, continued to receive feedback from providers concerning the variation. I understood that providers objected particularly to clause A5.
102. On receipt of the providers letter of 6 July (Taylor, page 315) DHBs took legal advice and consulted with colleagues. Following receipt of that advice and further discussion, I replied on 13 July declining to withdraw clauses from the variation (Taylor, page 317).

SWORN at New Plymouth)
 this 5th day of November 2007)
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 ANTHONY PAUL FOULKES

Before me:



 A Solicitor of the High Court of New Zealand

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2007-485-1814

Under the Judicature Amendment Act 1972

In the matter of An application for review

Between **HEALTHCARE PROVIDERS NEW ZEALAND
INCORPORATED and NEW ZEALAND ASSOCIATION OF
RESIDENTIAL CARE HOMES INCORPORATED**

 Applicants

And **NORTHLAND, WAITEMATA, AUCKLAND, COUNTIES
MANUKAU, WAIKATO, LAKES, BAY OF PLENTY,
TAIRAWHITI, TARANAKI, HAWKE'S BAY, WANGANUI,
MIDCENTRAL, HUTT VALLEY, CAPITAL & COAST,
WAIRARAPA, NELSON MARLBOROUGH, WEST COAST,
CANTERBURY, SOUTH CANTERBURY, OTAGO, AND
SOUTHLAND DISTRICT HEALTH BOARDS**

 Respondents

**LIST OF DOCUMENTS ATTACHED TO THE AFFIDAVIT OF ANTHONY PAUL
FOULKES**

"A"

This is the annexure marked "A" referred to in the within
Affidavit of **ANTHONY PAUL FOULKES** and sworn at New
Plymouth this ^{5th} day of November 2007 before me:

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A Solicitor of the High Court of New Zealand

ETHELRED CHEY

Lawyer
New Plymouth



BUDDLEFINDLAY
Barristers and Solicitors
Wellington

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| 100 | DHBNZ Email to DHBs with revised resolutions | 22 June 2007 | 314-352 |