

**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, Tairāwhiti, 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

**SECOND AFFIDAVIT OF MARTIN JOHN TAYLOR
IN SUPPORT OF APPLICATION FOR JUDICIAL REVIEW**

19 OCTOBER 2007

Next Event Date: 19 November 2007 at 10.00 am

Before: Justice Miller

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AFFIDAVIT OF MARTIN JOHN TAYLOR IN SUPPORT OF APPLICATION FOR JUDICIAL REVIEW

1. I, **Martin John Taylor** of Wellington, Chief Executive Officer, swear:

Introduction

2. I am the Chief Executive of Healthcare Providers New Zealand Incorporated ("**HCPNZ**"). HCPNZ is a duly incorporated society, having among its objects the representation of its members and its members' interests. HCPNZ has in excess of 524 age related residential care service providers as members, providing approximately 27,229 age related residential care beds at its facilities throughout New Zealand. HCPNZ's members constitute over 70% of the age related residential care service providers ("**Providers**") in New Zealand and provide over 80% of New Zealand's age related residential care beds.
3. Annexed marked "**A**" is a paginated bundle of true copies of relevant documents, to which I refer to in this affidavit by their page number.

Industry Composition

4. The Aged Care sector is made up of about 758 facilities, who provide 33,828 beds, with an averaged size facility being 53 beds. Most facilities range between 32 and 62 beds, with the smallest facility having 7 beds and the largest 332 beds.
5. 72% of the sector is in private ownership, with the remainder being operated by religious and welfare organisations or community trusts such as Christian Healthcare Trust, Presbyterian Support Central, and Kimihia Home and Hospital. Large groups such as Ryman, Guardian, Qualcare, Eldercare, Metlife and Radius make up about 25% of the sector by bed. The largest grouping in the sector in terms of ownership and size are stand alone owner operated facilities or privately owned small groups of facilities.

Representation of Providers

6. The issue that is the subject of these proceedings has been discussed at length by HCPNZ members and at Board level. A decision has been made by the HCPNZ Board, supported by HCPNZ members, that HCPNZ, as an applicant on behalf of its members, seek a judicial review of the 2007 annual review process undertaken by, or on behalf of, the District Health Boards ("**DHBs**").

7. In preparation for this application for judicial review I asked our members to confirm whether or not each member authorised HCPNZ to make this application. I have attached to this affidavit a list of all HCPNZ's members [**annexure p 1**]. The names of the members that have requested not to be represented by HCPNZ are italicised and in bold.
8. HCPNZ, together with the New Zealand Council of Christian Social Services and the Association of Residential Care Homes Incorporated (**'ARCH'**), both entities representing Provider interests, have formed the Provider Representation Group ("**PRG**"). PRG represents the interests of their constituents' age related residential care service providers at a national level, in particular over dealings with the DHBs. I co-ordinate the operations of PRG.
9. The DHBs were, until relatively recently, exclusively represented by District Health Boards New Zealand Inc ("**DHBNZ**"), an incorporated body providing a national service for DHBs. However, I understand that neither Auckland DHB nor Canterbury DHB remain standing members of DHBNZ, although both remain involved in meetings with DHBNZ and have continued to allow DHBNZ to represent some of their interests under the New Zealand Health and Disability Act 2000 ("**the Act**").
10. Each year PRG and DHBNZ engage in an annual review of provider service agreements. The Provider funding year commences 1 July. HCPNZ members rely on this funding to a substantial degree, with most of their patients qualifying for subsidised care.

Age related residential care service devolved to DHBs

11. DHBs were established under the Act, which also set the framework for streaming Crown funding through DHBs who could then purchase health and disability services from Providers. Section 25 of that Act provides for service agreements between DHBs and Providers in the following terms:

Service agreements

(1) In this Act, **service agreement** means an agreement under which 1 or more DHBs agree to provide money to a person in return for the person providing services or arranging for the provision of services.

(2) A DHB may, if permitted to do so by its annual plan and in accordance with that plan,—

(a) negotiate and enter into service agreements containing any terms and conditions that may be agreed; and

(b) negotiate and enter into agreements to amend service agreements.

(3) A DHB that has entered into a service agreement must monitor the performance under that agreement of the other parties to that agreement.

12. On 1 October 2003, disability support services funding for older people devolved from the Ministry of Health to DHBs. Prior to this the Ministry of Health contracted directly with Providers. The Minute of Cabinet's decision dated 17 February 2003 ("**Minute**") [p 12], provided for that devolution. The Minute records that Cabinet:

...agreed that a national approach by district health boards to aged residential care contract negotiations and price consistencies would be required and should be able to be effected through the Crown Funding Agreement/Operational Policy Framework.

13. The Crown Funding Agreement between DHBs and the Minister established (among other things) [p 16]:

- *a national process for the management of age related residential care service agreements;*
- *that DHBs have regionally agreed that a national framework for age related residential care service agreements is required to meet the requirements of the Minute;*
- *that DHBs have agreed to commit to processes to meet this requirement, including for the annual review of the contract.*

14. Therefore, instead of each of the 21 DHBs negotiating individual s25 service agreements with individual Providers, a national framework for service agreements meant each DHB and the relevant Providers effectively negotiated a national document.

15. DHB funding for age related residential care service is expressed as a per day price under the s25 service agreements. Those prices are effectively a subsidy of each resident's total cost of care but it is important to note that they are not applied uniformly across the country in recognition of the different capital costs in different regions. The amount a subsidised aged care resident is entitled to will depend on the Territorial Local Authority ("**TLA**") they wish to live in. There are 72 different TLAs and each TLA area has four different rates reflecting the different subsidised services i.e. rest home, hospital, dementia and psycho-geriatric. For example, the weekly rate for a subsidised rest home patient in Auckland is \$773.08 but in Westland it is \$703.43.

Age related residential care services provided under standard form Agreement

16. Since the 1 October 2003 devolution of Crown funding, HCPNZ members have contracted with DHBs through s25 service agreements by way of the national agreement mechanism I refer to above.
17. Age related residential care services are therefore provided to each of the DHBs by HCPNZ members in accordance with largely identically worded standard form Age Related Residential Care Services Agreements ("**Agreement**") [p 18] in relation to each age related residential care facility located within each DHB's geographic catchment area.
18. I say "largely identically worded" because obviously the services, facilities, parties, and dates of the Agreement differ. At a general level, Providers may provide DHBs with one or more of resthome, dementia, hospital, and psycho-geriatric age related residential care. As explained above, there is also a regional differentiation in price.

Clause A21 reviews

19. Clause A21 of the current Agreement includes a provision for "a[n annual] single national review of all agreements between DHBs and Providers for the provision of Age Related Residential Care Services", and has done so for several years. By this means, the Agreement may be varied to incorporate relevant national changes – for example, to services, or the price to be paid for them. Clause A21 includes a process by which the DHBs will initiate the review and stipulate its timeframe, process and issues.

Clause A23 reviews

20. Throughout the A21 review documents references are made to the A23 claims. The Agreement's clause A23 claims process is intended to address variation events that have a material impact on the provision of aged residential care services that are beyond the control of both parties. This process is intended to be entirely distinct from the A21 review process, although this year it was conducted on the same day as the A21 review process.

Previous reviews

21. Each year since 2003 the Providers have met with the DHBs through their representative, DHBNZ, to negotiate the s25 service agreements pursuant to clause A21.
22. DHBNZ have an A21 negotiating team comprising of Sam Cliffe, Jon Shapleski and other DHB representatives who change from time to time. This DHBNZ representatives have not changed over the last three A21 reviews. PRG have

been assured by DHBNZ on a number of occasions that both Jon and Sam have the mandate from all 21 DHB CEOs to engage in, and conclude (with confirmation from each DHB board) the A21 process.

23. In previous reviews funding increases have never been conditional on the Providers amending employment conditions for its employees. In fact no clause, until the 2007 review, had ever interfered with the contractual relationship between the Provider and its employees.
24. Prior to the commencement of the substantive review we were notified of the DHBs' issues or claims and the Providers would notify their claims as well. Once the claims were notified they would be summarised and circulated to the representatives. These claims form the basis of the review. Although the issues or claims might evolve during the negotiation period, we never experienced a situation where the DHBs raised new issues or claims after the negotiation period or after the deadline for raising issues had passed. In one previous A21 review the DHBs did introduce some additional clauses late, but in that instance there was no DHBNZ imposed deadline for submitting issues.
25. One of the major expectations of Providers is that the DHBs will pass on to Providers the Future Funding Track ("FFT") funding increase they receive from the government¹. This expectation has largely been accepted by DHBs with FFT or inflationary adjustments being made to the bed day fees since the 2003/2004 financial year.
26. In the three years that I have led the A21 reviews on behalf of PRG, no DHB representative has ever raised with me or the PRG group any concern about providers not passing on funding by way of wage increases to Provider employees.
27. In fact, operators in the aged residential care sector have an established pattern of passing on funding through wage increases. An HCPNZ 2006 survey² recorded an average 4.7% increase in caregiver wages from between December 2005 and December 2006. Over the same period the survey found kitchen hands wages increased 5.9%, cleaning staff by 5.4%, and laundry staff by 3.8%. Over this period funding to the sector had increased by about 4.5% (made up of a 3% increase for rest homes and a 6% increase for geriatric hospitals in July 2006).

¹ DHBs population based funding model includes a 'Future Funding Track (FFT)' loading each year to deal with cost increases from wages and the CPI.

² HCPNZ 2006 survey covered 379 facilities, which is 49% of all aged residential care homes, and 61% of all beds in the sector.- pages 63-68

28. Based on the available survey data, and based on my discussions with hundreds of operators, I can confirm wages have increased each time the bed day rate has increased. In contrast, neither the DHBs nor the Union have produced any data, or research, to support the assertion that operators' do not pass on funding increases in wage increases voluntarily.
29. In fact a DHBNZ briefing to DHBs dated 28 March 2007 (page 5) confirms that DHBs knew that past funding increases have been passed on in wages, as it states, "Further, actual data recently collected for modelling of A23 claims would suggest that the sector is passing on the majority of annual price increases to wages" **[p 81]**.
30. It needs to be remembered, however, that this is a very difficult industry, and operators need to be free to manage their businesses in the most effective and efficient way. They are private operators who have committed capital to provide services through contracts. Many operators have gone out of business because of the increasingly tight margins, and each have obligations to their shareholders, trustees or equivalent owners. The increase in wages is partly a reflection of operators making the decisions that are best for their operations.
31. Following the 2005/06 A21 review I wrote to the Minister of Health, Hon. Pete Hodgson, about some concerns I had with DHBNZ's approach to the review, and in particular, the delays that were occurring during the reviews **[p 92]**. In his response to my letter the Minister of Health wrote:

I would like to clarify my role for you. The Government requires district health boards to take a national approach to the Aged Related Residential Care contract and to consult with the Minister of Health before any pricing change occurs. This consultation is a matter for the Minister and boards only. To avoid any misunderstanding, I want to make very clear that the Minister of Health does not become involved in contract negotiations.

2007 review

32. At this year's review PRG confirmed that the negotiating group had the mandate to negotiate on behalf of all 21 DHBs. This confirmation was sought and received at meetings in March and May 2007.
33. The 2007 review was important for PRG members in a price context because there was an urgent need to negotiate increases in price reflecting significant recent events that had placed inflationary pressures on PRG members over and above the usual goods and services inflationary pressures (I understand the Consumer Price Index increase for 2006/07 was approximately 3%). Among these extraordinary pressures were the increased entitlements under the

Holidays Act 2003 (chief among those are the extra week's annual holiday and time and a half for working a public holiday), the wage flow-on from the Nurses' Multi-Employer Collective Agreement, the Future Funding Track (the expected inflation pressure on costs) and the need for extra funding to cover special cost claims for patients with complex needs. Providers relied on PRG to negotiate the best outcome for them that could reasonably be reached in the circumstances so that their revenue stream could match their increased business expenses.

34. When the PRG sent its statement of claims for the A21 review on 12 March 2007 to DHBs, we asked them to work with us on (a) updating the pricing structure for the aged residential care sector, (b) establishing some research into the acuity levels of current residents, and (c) updating the fee for dementia care **[p 95]**.
35. The 2006 A21 review, which commenced on 10 February 2006, left insufficient time for some significant issues to be resolved in advance of the commencement of the new funding year. As a result, it was agreed that working groups would be established to progress those issues before commencement of the next review. PRG wrote to DHBNZ on 18 July 2006 **[p 104]** to pursue the setting up of those working groups, and again on 18 September 2006 **[p 105]** to offer draft terms of reference for the working groups' formation. We did not receive a response from DHBNZ to these communications.
36. When still nothing had happened by 1 November 2006, PRG wrote again to DHBNZ **[p 107]** to ask that it initiate the 2007 review promptly so as to make a start on the outstanding issues on behalf of PRG and in order to conclude the next A21 review in a timely manner. I highlighted the difficulty that back payment issues would cause for both parties if the review was not completed within the deadline.
37. DHBNZ did not respond until 1 March 2007 **[p 108]** when it advised Providers of the commencement of the 2007 review and stipulated its timeframe, process, and issues. In brief, DHBNZ proposed a series of issues for determination by 15 April 2007 which would be incorporated in a subsequent variation to the Agreement ("**Variation**"), to take effect on 1 July 2007. Included in the issues was an item "*Impact of policy changes*", in relation to which DHBNZ noted:

Advice will also be sought from the Ministry of Health on any policy issues that will impact on the ARC A21 Review, particularly those that will add additional costs or require amendments to the current agreements.

The "Low Paid Workers" initiative

38. To summarise, PRG attempted to initiate negotiations and communications with DHBNZ on the A21 review on 1 November 2006 and a number of times thereafter. DHBNZ did not respond to PRG's attempts until 1 March 2007, almost four months later. During this time PRG was not aware of any action or consultation involving the Minister, the Ministry, or anyone else, relating to the Aged Residential Care sector. I was not informed of any initiatives that would affect HCPNZ's members and I was certainly never told of a 'Low Paid Workers' initiative.
39. When PRG did finally receive DHBNZ's letter initiating the review on 1 March 2007, there was nothing in the letter to indicate there were any major changes afoot. It is now clear, however, that by 1 March 2007 there had already been significant development on a Low Paid Workers initiative (the "**LPW initiative**") that would later manifest itself as clauses A4 and A5 of the Variation:
- 39.1. The genesis of the LPW initiative appears to have been a meeting on 20 December between DHBs, the Ministry of Health, the Hon Pete Hodgson's office and the Council of Trade Unions (the '**CTU**'). Notes from the meeting show that it was being held at the Minister's direction and the aim was to achieve change in the Aged Residential Care sector [**p 111**]. It was noted that provider representatives needed to be part of the discussion, but despite this no provider representative were ever included in the development of the initiative.
- 39.2. The next meeting on this issue between representatives from the same organisations occurred on 16 February 2007 (the '**February meeting**') [**p 114**]. Prior to the February meeting a 61 page briefing report was prepared. This included a report from the Ministry Of Health to the Minister dated 2 August 2006 advising on how to pass support services funding through to workers in the residential care sector [**p 116**]. One of the options discussed in the report was the use of flow through clauses in service agreements (page 27). The briefing report also identified issues with the Minister of Health adopting an interventionist approach to wage control in employment relationships (page 32).
- 39.3. Emails from the CTU (Eileen Brown) to Tony Foulkes (dated 24 January) identified a need to have Provider representation at the February meeting [**p 133**]. However, they did not identify either the head of ARCH or me as appropriate representatives of the

sector. Instead they selected three providers from the aged care sector, including one aged residential care provider, Dwayne Crombie the new CEO of Guardian HealthCare. Previously, Dwayne Crombie was employed as a DHB CEO. Some time after the meeting Dwayne telephoned me to tell me of his attendance at the meeting, although he did not provide any detail of the meeting. He told me that he did not attend the meeting in any representative capacity for the aged care sector, or on behalf of other providers, and not even on Guardian's behalf. He said he was there in a private capacity. Handwritten notes from the meeting confirm he attended to provide "perspectives not representation"[p 136].

39.4. Interestingly, this limited Provider representation was later referred to in a letter from the Minister to DHBs, in which he outlined his expectations [p 146]. In this letter, dated 12 June 2007, the Minister stated that "employer participants at the February meeting agreed to the 'Phase 1' flow through mechanism and the putting in place of collectives". This appears to wrongly imply that Providers had agreed to the initiatives when at that stage only one aged residential care Provider was even aware of the initiative. Furthermore, when the letter was sent, PRG, the legitimately mandated employer representatives, had made it clear to DHBs and the government that they did not approve of either the pass through mechanisms or the collective agreement clauses.

The First A21 review meeting – 20 March 2007

40. The first A21 review meeting between DHBNZ and PRG was held on 20 March 2007. In advance of the 20 March 2007 meeting, by email of 12 March 2007 [p 95] HCPNZ made claims on behalf of its members. By email of 19 March 2007 [p 148] DHBNZ collated the DHBs' issues into a single list for discussion the following day. In terms of "Impact of policy changes", DHBNZ repeated that:

Advice is being sought on any new policy or changes to policy that may impact on aged care that may need to be included in a contract variation.

DHBs are not aware of any policy changes that may need to be considered at this time however are awaiting confirmation from the Ministry.

41. Given what had already transpired in relation to the LPW initiative outlined above, I now regard these statements as misleading. At the 20 March meeting DHBNZ did not disclose any information regarding the LPW initiative. In addition, DHBNZ also stated at the 20 March meeting that they were unable to

discuss funding increases because the budget for aged residential care was still unknown. This is clearly untrue. Handwritten notes from a dinner on 15 February at the Duxton Hotel record the exact amount being allocated to aged residential care, \$37.5 million, and noted what level of increase this would mean to the base line funding, namely 6.43% **[p 149]**. This information was also sent by Craig Climo in an email to Tony Foulkes, Sam Cliffe and Janice Donaldson on 22 February 2007 (i.e. one month before the first A21 meeting on 20 March) **[p 151]**. The email also confirmed that the funding needed to pass through to low paid workers. Obviously then, the DHBs already had significant information on the likely funding and review outcomes by 20 March 2007.

42. At the 20 March meeting I asked Jon Shapleski, in reference to DHBNZ's discussion document "Impact of policy changes" section **[p 108]**, if he knew of any policy or legislative changes that would require the contract to be altered. He replied he was not aware of anything. This is contradicted by Craig Climo's email of 22 February, which directs Sam Cliffe to share information on the LPW initiative with Jon **[p 151]**.
43. In my notes from the 20 March meeting under point 4. "Impact of policy changes advice", I wrote, "Again no more information was forthcoming, although we have to keep an eye on this area. We will alter the contract for legislation, as there is no alternative, but changing it for policy is another matter. DHBNZ need to remember it's an evergreen contract and changes in the contract for policy must be negotiated" **[p 157]**.
44. The 20 March meeting closed with a commitment by Jon Shapleski to provide any information DHBNZ had regarding any policy or legislative changes, or clause changes to the Agreement to the PRG. Despite this commitment Jon did not send me any information. On 13 April and 30 April I requested information from Jon **[p 163 and p 165]**. In my 30 April letter to Jon and Sam I specifically stated:

"Once we see your legal advice and the clause changes you propose, we will have to seek our own legal advice. We do not want a repeat of the previous year when a change was insisted on by DHBNZ, based on a particular reading of a legislation change that was not in fact necessary. This year if we have any disagreement, then we will need to negotiate an agreed outcome".
45. I now believe that the reason they did not provide us with any information is because the parties chose to keep it confidential until the variations had been drafted, which did not occur until 24 May 2007 **[p 167-173]**.

Post-20 March Meeting Developments

46. Although DHBNZ refused to disclose what changes they had planned for the Agreement, or even the fact that there were any at the 20 March meeting, it is clear from various email communications that other meetings were continuing between the CTU and DHBs about the LPW initiative **[p 174]**.
47. On 28 March DHBNZ prepared a briefing for the DHBs entitled, "DHB Funding of Aged Residential Care and Home Based Support Services in 2007/8" **[p 81]**. This document states that, "The government has tasked the DHB sector as both funder and provider of services to show leadership and work with the CTU and relevant Ministries on appropriate strategies for improving the rates of pay in the Aged care...sectors". It then goes on to say that, "service contracts are seen as one of the key mechanism to achieve change". Sam, Jon and Tony Foulkes all received this document on 29 March, but still did not disclose to PRG that significant policy changes were planned for the 2007 A21 review.
48. On 30 March DHBNZ published another briefing paper for the DHBs regarding funding of Aged Residential Care and Home Based Support Services **[p 177]**. This paper confirms that the LPW initiative was a Ministerial initiative, stating that "the Minister has indicated that he wants to see low paid workers salaries increased by at least \$1 per hour generally". The briefing also stated that the Ministry of Health indicate a Crown Funding agreement is needed to achieve the policy intentions of the LPW initiative.
49. By 2 April 2007 draft LPW clauses were in circulation among the DHBNZ and the DHBs. The draft clause, which was set out in a DHBNZ briefing paper entitled, "Low Paid Workers Initiative: ARC and HBSS Contracts the Key Mechanism For Realising Phase One Objectives" **[p 184]** and is set out below, closely resembles the final A4 and A5 Variation clauses:

It is a condition of this Variation that you will increase the hourly rate of pay that you provide to the categories of employees specified in clause [xx] by \$1 per hour, with effect from the date of this Variation.

The pay increase specified in clause [xx] applies to employees, whether their employment commences before or after the date of this Variation in the following categories:

Aged Residential Care
Care Assistants; Cleaners; Laundry Workers; Kitchen Assistants; Cooks;
Gardeners [if agreed]

50. On 4 April 2007 Sam Cliffe attended a meeting with the Minister regarding the LPW initiative. In an email reporting back on her meeting **[p 196]** she noted

that the Minister wanted to increase the proposed passing on amount from \$1 to \$1.25. Meanwhile, PRG were still under the impression that there were no policy or legislative changes to be considered in the A21 review and that the claims settled on April 15 were the only claims to be negotiated.

51. An email from Tony Foulkes, Taranaki DHB, to Craig Climo (Waikato DHB) Nigel Murray (Southland DHB) Denis Cairns (Southland DHB) and Pat Sneeded (Counties Manukau DHB) dated 24 April also indicates the level of both the Minister's and the CTU's involvement in the LPW initiative and consequently the A21 review [p 198]. In this email Tony comments:

"This afternoon I received a call directly from the Minister to advise me of some conversations he had recently had with CTU and also with cabinet today. In short, 1. The DHB view on the use of collective agreements as a potential pass through mechanism is understood, i.e., not supportive in the short term 4. He was clear it was a government decision not DHBs, and would be prepared to put in writing to us..."

52. By 29 April 2007 the DHBs were being consulted over draft clauses (email Janice Donaldson to Tony Foulkes) [p 200]. There was, however, still no consultation about the plans or the clauses with PRG.

53. Despite the absence of consultation with Providers, a number of the DHBs and the DHBNZ had identified difficulties with both the process and the intent of the LPW initiative. DHB feedback on the initiative was recorded in a DHBNZ briefing dated 30 April, entitled, "Low Paid Worker Initiative: ARC and HBSS Contracts" [p 205]. It identified as a potential problem "Provider resistance to committing contractually to specified wage rates or any other form of flow through for workers (and DHBs should avoid being prescriptive about providers' business)".

54. Other feedback from various DHBs shows that they had identified problems with both the intent of the initiative and the mechanism by which it was to be achieved:

- Northland DHB considered that the Collectivism clauses were ultra vires the DHBs powers and that the approach breached the good faith provisions in A21 [p 209].
- Counties Manukau DHB noted that there was no evidence to suggest that all Providers would be able to cover the wage increase from the funding provided given likely variations in ratios of affected workers [p 209].

- Whanganui DHB considered the collective bargaining clause to be inappropriate and beyond the usual requirements to be a “good employer” [p 209].
- Wairarapa DHB had similar concerns. Wairarapa questioned the DHBNZ on the necessity for the collectivisation clause, commenting that it seems a ‘most inappropriate requirement’ to require providers to have a specific contractual arrangement with their employees beyond the usual requirements to be a good employer and that it is ‘a new and major shift in strategic health policy’ [p 211].
- Auckland DHB appear to have been particularly concerned about all aspects of the initiative, including the legal implications of the clauses and the method by which the initiative was being achieved, even rejecting the clauses initially [p 214]. Peter Lowry at the ADHB went as far as calling the process ‘an accident waiting to happen’ [p 217].
- Waikato DHB also indicated their opposition to the mechanism in particular in a report to their Community and Public Health Advisory Committee [p 221].

55. There are also numerous indications in correspondence that the DHBNZ negotiators were not in favour of the initiatives [p 228]. For example, in an email from Sam Cliffe to Janice Donaldson, Tony Foulkes, Jon Shapleski and Craig Climo she expresses the view that “these clauses put the DHBs in a difficult, risky and invidious position as the contractual partners” [p 230].

56. Regardless of the DHBs views on both the initiative and the mechanism, it is clear that they had little choice but to implement the strategy. In a letter from the Minister to Ross Wilson of the CTU on 27 April [p 232], the Minister thanks the CTU for their on going involvement in the LPW initiative, and says, “I have reiterated to DHBs that they should develop a pass through mechanism, for implementation from 1 July”. Email communications between the Auckland DHB and DHBNZ also emphasise that it was not a DHB driven process. For example, in an email from Sam Cliffe to Peter Lowry (ADHB) Sam comments in response to a question from Peter regarding the source of the draft clauses that ‘these clauses have been directed and drafted outside of either the A21 or the A23 process’ [p 234].

57. On 1 May 2007, the Minister of Health issued a press release [p 236] relating to increased funds available for, among other things, age related residential care, in which he stated:

... I expect district health boards to satisfy themselves that a sufficient proportion of the funding increase is reflected in improved wage rates. However a much more sustainable future is to be found by providers and collectivised workforces negotiating the development of this sector.

58. This press release is the first indication that we had that there may be budget funding increases relating to our sector. By 8 May DHBNZ were informing DHBs about the increase they would receive in the budget and the Ministerial expectations attached to that funding. They were told that "There are political expectations regarding flow through clauses for both service areas similarly the contract variation needs to contain expectations on providers to enter into collective agreements" [p 237]. These decisions had been made without any consultation with Providers, despite DHBs and Providers having been formally engaged in the A21 review for over two months.

59. This absence of consultation is in contrast to the high level of consultation DHBs were engaged in with Unions, as email correspondence between Ross Wilson and Tony Foulkes on May 14 illustrates [p 241]. In this email Ross points out to Tony that the Minister had told them that DHBs are required to make providers put in place collective agreements. The email follows up on another CTU email to Tony on 10 May where a draft A5 clause is included for DHB consideration [p 242].

60. Following the Minister's budget press release I contacted Sam Cliffe and discussed in very general terms with her the possibility of Providers agreeing to a policy whereby "if we get a 5% increase, we will pass on a 5% wage increase". I thought most Providers would agree to this and it is not controversial as this is what happens in most years with funding increases. Sam did not at any stage indicate that a policy had already been agreed for passing on the funding with the unions and the Minister, or that there would be collective bargaining conditions attached to the funding. When I asked Sam what the Minister may have meant around his collectivised workforce comment, Sam refused to comment.

The Second A21 review meeting – 23 May 2007

61. On 23 May 2007 we had a second A21 review meeting with the DHBNZ negotiators. At this meeting DHBNZ informally presented the results of the review to PRG [p 244]. It was at this meeting that we were told for the first

time of the LPW initiative and presented with the new Variation clauses relating to the wages pass on and collective agreements.

62. DHBNZ said at the meeting that increased funding was intended to allow for the LPW initiative. The proposal was to include increased funding of around 7%. Of the 7% increase in funding, 4.7% reflected costs already incurred and the remainder (2.3% average) reflected the LPW initiative.
63. It was made clear to us that there was little room for negotiation on these clauses and that it was a Ministerial initiative rather than a DHB decision. This was subsequently confirmed by a letter from Tony Foulkes to Harvey Steffen in the Minister's office dated 22 May 2007 **[p 249]**.

Subsequent Amendment of the Variation

64. On 24 May 2007 DHBNZ followed up its informal presentation to PRG with draft amendments to the Agreements outlined at the 23 May 2007 meeting **[p 252]**. This was the first time the categories of so-called low paid workers had been formally notified. By letters of 14 June 2007, PRG responded to the DHBNZ presentation **[p 254]** and wrote separately to DHBNZ on the collective agreement initiative **[p 270]**. By letters of 22 June 2007, DHBNZ advised that the 2007 review had been completed, and that an amended variation ("**Variation**") would soon be sent out to Providers for signing **[p 277]**. The DHBs also responded to PRG's 14 June 2007 letters **[p 281]**. The generic form of the Variation was sent to the PRG on 25 June 2007 **[p 283]**. As a result of the PRG's opposition to both the wages pass on and collective agreements clauses DHBNZ made two amendments:

- A reduction of the minimum dollar pass through amount from \$1.30 to \$1.00; and
- A change from the requirement to use best endeavours to conclude collective agreements to a requirement to use reasonable endeavours.

65. DHBNZ commented in their briefing to the DHBs on the Agreement negotiations, in relation to the second amendment, that "as expected, ARRC and HBSS providers have been resistant to committing contractually to any requirement beyond their obligations under the Employment Relations Act. The clause has been modified to take into account the feedback, without losing the government's intent" **[p 303]**.

66. The lack of consultation and the difficulties arising from the absence of consultation with Providers was acknowledged by DHBNZ in its 4 June briefing

to DHBs where it commented that “it may well have been beneficial to extend the earlier tri-partite discussions to include some provider representatives at some point for their view on realistic scenarios” [p 309]. This view was prompted by the realisation that a \$1.30 pass through amount was not viable. Because of the lack of consultation, DHBNZ did not appreciate the flaws in their modelling until after the 23 May meeting.

67. Following these minor amendments the DHBs required the Providers to accept the generic Variation as provided to them on 25 June by 20 July 2007 if they wished to have the increased funding backdated to 1 July 2007. By letter of 6 July 2007 (misdated 6 June 2007) [p 315] PRG asked that clauses A5 and A6 in the Summary of the Variation (“**Clauses A4 and A5**”) be withdrawn from the Variation, but advised that if they were not, the Agreements would only be signed under protest, in anticipation of this judicial review proceeding. DHBNZ responded by letter of 13 July 2007 [p 317]. PRG also wrote to DHBNZ on 19 July 2007 on the practicalities of judicial review proceedings [p 319] to which DHBNZ responded on 1 August 2007 [p 320].

68. On 17 August 2007 we then commenced these proceedings and sought interim relief preventing the clauses from being enforced until this application had been determined. The DHBs gave an undertaking that the clauses would not be enforced and that the full amount of the funding would be provided. The first payment was paid to Providers on 24 August 2007. Providers undertook to pass on the LPW component of the funding in wage increases. This has occurred.

69. While the A21 Review negotiations were still in progress the Minister sent a letter of expectations to DHBs, setting out his expectations, including his expectation that he be “kept informed about the progress and significant decisions that are being made in respect of implementing this initiative” and his expectation that collective agreements be progressed as part of the 2007/08 contract changes for the sector. He also informed the DHBs that he had written to the CTU outlining his expectations [p 322].

Providers concerns

70. In previous negotiations between PRG and the DHBs there has never been a variation of this kind. For instance, there has never previously been a mandatory link imposed between funding increases and Providers' terms of employment; that has always been the sole domain of Providers and the employees (or their unions).

71. Our response of 14 June 2007 to the DHBs' draft amendments sets out the reasons why the Variation was flawed and had not been thought through [p

324]. Significantly, the imposition of a dollar amount meant the tagged percentage increase fell well short of the funding required to fund the DHB desired wage increase to low paid workers. In other words, the DHBs were asking Providers to pass on something they were not prepared to fund. The problem is that although the DHBs offered a component of increased funding to reflect a pass-on to low paid workers, it was expressed in percentage terms (2.12%-2.45% depending on the type of subsidised patient) but the required effect was in dollar wage rate terms (an increase of at least \$1.00 per hour per employee). This was like comparing apples with oranges.

72. Some of these issues are addressed in the affidavit of Mr Andrew Johnston of BDO Spicers who has illustrated the position by analysing the position of three providers. I arranged for those three providers to make the necessary information available to him on a confidential basis. They are three providers who are active members of HCPNZ and who had their financial reports in sufficiently good order for it to be able to be made available at short notice to BDO Spicers. Their circumstances are illustrative of the issue that affects operators more generally.
73. The situation is exacerbated because the Variation applies irrespective of the individual circumstances of the Provider. It takes no account of the business or health care profile of the Provider, staff ratios, nor the region in which it operates. It applies even if pay had recently been increased. It failed to foresee and account for the flow-on effects such as pay parity, staff relativity (both as between the low paid worker categories and staff outside those categories), and non-subsidised wage inflation (for instance the increased payroll costs for a Provider caring for non-subsidised patients).
74. I, and PRG, do not believe the DHB's properly considered the flow-on effects of the Variation. These are particularly significant for the aged care industry. If the relevant employee hourly rates are increased by at least \$1.00 per hour (or more in some cases) the wage demand for all other classes of employees is directly affected. This is because wage relativity is an essential driver underlying the dynamics of labour market costs in our industry. If there is an insufficient wage differential between classes of employees doing different jobs and with different levels of responsibility the disaffected staff will leave the industry seeking greater wage differentials elsewhere.
75. The DHBs seem to have assumed that each and every employee in the relevant employee categories are low paid or, as between categories of relevant employees, are paid on a similar basis. For instance, we are aware that some carers earn an hourly rate of \$19.45, which is, relatively speaking, a

high rate. So too, carers are rewarded on educational achievement but this is generally not the case for, say, laundry workers.

76. It is clear that the DHBs had recognised these difficulties but had chosen to ignore them for 'simplicity and cost reasons' [p 331].

77. I would also like to clarify that PRG members are willing, and have agreed, to pass on all of the tagged funding increase to low paid workers. In the 14 June 2007 letter I advised DHBNZ that PRG members agreed to pass on the whole of the low paid workers percentage component of the increased funding, which would result in around a 7% wage increase for the four categories of employees [p 324].

Impact of the Variation

Collective Agreements

78. The suggested justification for the collective agreement clauses is to improve the sustainability of the aged residential care workforce. Currently, the number of collectives and the number of staff they cover is low throughout the industry. The majority of the sector, owner operators (about 50%), have few if any collectives. The large operators (25% of the sector), and religious and welfare facilities (25% of the sector) have collectives in place. However, for those facilities with collectives not all staff are covered by them as union membership is low.

79. The argument that more collectivisation means a more sustainable workforce is not supported by any research. The information we do have indicates there is no correlation between collective agreements and better recruitment and retention rates. HCPNZ research has shown a decrease in turnover rates in the past two years, without any noticeable increase in the number of collectives or unionisation.

80. HCPNZ undertake a yearly survey of the sector each December. The 2006 survey showed (at page 58) that in December 2005, turnover was 33%, and in December 2006 this had dropped to 26% [p 333]. The most collectivised health workforces are found in DHBs. The most recent study of DHB workforces by Auckland University in June 2007 found, "nearly 40% of staff nurses leave their jobs each year" [p 334]. Therefore DHBs, with collectivised workforces, have a turnover rate of 40% whilst aged residential care, with few collectives, has a turnover rate of 26%. As such the assertion that more collectives means greater workforce stability cannot be sustained.

Wages Pass Through

81. Because documentation surrounding past A21 reviews and even this review (until May 23), never raised any issue about passing on funding into caregiver wages, many operators gave wage increases before this date to employees on individual employment agreements. For these employers the LPW Initiative created a situation where they had passed on money in anticipation of an increase. But the eventual increases did not cover the cost of the pass on.
82. If DHBs in December of 2006 had been open about with the sector, then this would not have happened. Even through the details of the LPW initiative were not finalised until early 2007, the intent was clear, and this intent clearly indicated the use of a rigid pass through mechanism. As such, operators could have made more informed choices with wage increases in the period January 2007 – June 2007.
83. I sought responses from HCPNZ members about the Variation and received an unprecedented (but unsurprising) reaction. A selection of those responses (including some who have corresponded with their local DHB) is attached [**p 335**]. The responses are confidential to these proceedings. Members confirmed that the funding increase tagged for Clause A4 was insufficient to cover the true cost of passing on the dollar amounts, with one provider saying an increase of only 37c per hour was covered by the percentage increase.
84. Effects of the DHBs enforcing Clause A4 will likely include Providers being compelled to:
- 84.1.decrease staffing numbers;
 - 84.2.decrease the number of patient care hours;
 - 84.3.roster off youth workers or those with disabilities;
 - 84.4.refuse patients requiring more intensive care.
85. I also think that some businesses may have to defer pay increases to other staff (with possible resignations) or even cease operations because the deficit in some cases will be too burdensome.
86. These changes have the potential to permanently alter the way Providers operate to their and their patients' detriment. For instance, reducing staff ratios is not in the interests of patients, nor management, nor staff. Lower staff ratios mean (in general) higher risks of accidents because staff are asked to do more; lower care hours mean patient care maybe compromised. The

high quality of care currently being delivered throughout New Zealand will not be supported by the proposed changes.

DHBs reaction to Judicial Review

87. After I had notified the DHBs of HCPNZ's intention to make this application for review, Tony Foulkes, as spokesperson for DHBs on the Aged Care Contract, prepared a press release in response [p 364]. The press release only refers to concerns raised regarding clause A4 and claims that HCPNZ are relying on 'legal semantics' because the DHBs have provided the funds to meet the clause A4 conditions. Tony also encourages the Providers to sign the agreements, commenting that "these providers can sign the agreement, get the additional funding, and can continue to seek a judicial review. If the review is granted and finds in their favour, then DHBs may have to remove the clauses – simple as that."

88. Based on advice I obtained I understood that it was not as simple as that. I understand that many of the effects from clause A4 are irreversible and for this reason I advised my members to sign under protest pending the outcome of this challenge and agree to pass on the wage increase covered by the funding.

Sworn at Wellington)
On 23 October 2007)
Before me:) _____
Martin John Taylor

A Solicitor of the High Court of New Zealand