IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2007-485-1814

UNDER	the Judicature Amendment Act 1972, Part 7 of the High Court Rules and the Declaratory Judgments Act 1908
IN THE MATTER OF	an application for review and declarations
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

Hearing: 19, 20, 21, 22 November 2007

Counsel: FMR Cooke QC & L Theron for Applicants
M Scholtens QC & H P Kynaston for Respondents

Judgment: 7 December 2007

RESERVED JUDGMENT OF McGECHAN J

In accordance with r 540(4) I direct the Registrar to endorse this judgment with the delivery time of 3.30 pm on 7 December 2007

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I. Introduction

[1] This is an application for judicial review. The Applicants are industry associations comprising a large number of so-called "Age-Related Residential Care Service Providers". These are private organisations and companies. I will term them "Providers". The Respondents are District Health Boards throughout New Zealand, established under the New Zealand Public Health and Disability Act 2000 ("the Act"). I will term them the "DHBs". Each DHB has a contract with various Providers, termed an "Age-Related Residential Care Services Agreement". I will term these the "Agreements". DHBs have an umbrella organisation which I will term "DHBNZ".

[2] The Agreements, largely uniform nationwide, contain a specific annual review clause A21. In early 2007 the (then) Minister of Health ("the Minister") informed DHBs extra funds would be available to boost wages for the Providers' lower paid workers ("LPW"). The Minister also took a position in relation to encouragement of collective agreements for LPW. As an aspect of the annual review for the forthcoming year commencing 1 July 2007, the DHBs sought and obtained inclusion of two new Agreement clauses, A4 (wage increase for LPW) and A5 (collective agreements for LPW).

[3] This proceeding seeks a declaration that clauses A4 and A5 are invalid, and orders such be set aside. Payments in fact have been made by DHBs to Providers since 1 July 2007 under interim arrangements. It is said that payments have been made to LPW accordingly. Providers' obligations in relation to A4 and A5 are not being enforced in the interim. The DHBs counterclaim for orders resolving the resulting financial position past and present.

[4] The proceeding raises some significant issues as to the extent to which a Minister legitimately can seek to influence DHBs; whether in the circumstances the DHBs have acted for the purposes of their empowering legislation; and as to the propriety of process followed. At a level which is more mundane, but important to

the LPW involved, it has implications for their remuneration and livelihood. Much in the end turns on the facts and inevitably this will be a long judgment.

[5] I was not given an agreed statement of issues. There is a sea of affidavit evidence and documentation of various sorts, some rather peripheral. In those circumstances I set out the pleadings.

II. Providers' Pleadings

Pleading: The service Agreements

[6] The Providers furnish age-related residential care services under Agreements with DHBs made pursuant to s 25 of the Act. Clause A21 of the Agreements provides:

> A21.1 Each year there will be a single national review of all agreements between DHBs and providers for the provision of Age Related Residential Care Services. The review will be carried out on behalf of all DHBs by us, or by one or more DHBs that may include us.
>
> A21.2 Review Process
>
> a. The review will be carried out in a manner which enables meaningful participation by you and provider representative groups.
>
> b. You and provider representative groups will be notified in writing of the timeframe and process for the review and the issues that will be addressed in the review.
>
> c. We will ensure that you and provider representative groups have the opportunity to comment on issues raised by us and also to raise any other matters that affect providers on a national basis relating to the provision of Age Related Residential Care Services during the course of the review, including, for example, the price we pay for the services. However, the review will not address any matter that has been addressed as a potential Variation Event under clause A23 in the same financial year as the review.
>
> d. You may appoint another Person or a provider representative group, to provide comments and otherwise participate in the review on your behalf.

A21.3 We will consider in good faith all comments received from you and provider representative groups, and prepare a report summarising those comments and our views on the issues.

A21.4 Any variation to this Agreement made as a result of a review under this clause A21 must be in writing and signed by both of us.

Pleading: The 2007 Review

[7] Around December 2006, the then Minister commenced discussions with the DHBs and the New Zealand Council of Trade Unions ("the CTU") relating to employment of certain health sector workers. As a consequence:

> … the Minister advised the DHBs of an initiative involving health workers in the aged residential care sector. Under the initiative the Minister required the DHBs to ensure that there would be a permanent increase in wages for low paid workers in residential and home support, and to ensure that providers would have in place access to collective agreements for such employees.

The DHBs, prior to 1 March 2007, decided to implement the Ministerial initiative by imposing new terms in the Agreements.

[8] By letter dated 1 March 2007, DHBs, by the DHBNZ, commenced the A21 2007 Review. The letter identified process, issues, and a timetable involving completion by 15 April 2007 for implementation. It contained a statement:

> **3. Impact of policy changes** – 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.

That statement was a DHBNZ representation that it had advised Providers of all relevant policy issues known to DHBs and DHBNZ.

[9] The clause A21 process ensued, with provision of issues by DHBNZ and with claims by Providers. A meeting was scheduled for 20 March 2007. In advance of that meeting, in its Schedule of Review Issues DHBNZ stated:

> **4. Impact of policy changes**
>
> 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.

By making that statement, DHBNZ represented the DHBs and DHBNZ were unaware of any other policy changes that would "effect" *(sic)* the A21 Review.

[10] The Applicants in this way took all steps needed to ensure the A21 Review would be completed within the timetable. The DHBs failed to do so.

Pleading: Disclosure and implementation of the Ministerial Initiative

[11] On 1 May 2007, the Minister issued a press release announcing an increase in funds for the health sector. The Minister 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.

[12] On 23 May 2007, Providers' representatives met DHBNZ "to be advised of the outcome of the 2007 Review as summarised in a document provided by DHBNZ at the meeting". DHBNZ "advised, for the first time, of the decision to include clauses to give effect to the Ministerial Initiative". The relevant document included statements:

> **Low Paid Workers Initiative**
>
> In line with Government expectations funding specific to low paid workers has been included in the price for services this year.
>
> There is an obligation on providers that the funding included specific to this initiative flows through in total to an increase in the hourly rate for low paid workers.
>
> Providers are obligated to pass through an increase in the hourly rate of at least $1.30 per hour.
>
> Sufficient funding has been included in the price to meet this obligation.
>
> Intent is to increase the general rates of pay for low paid workers from this point forward.

> Any new workers are not intended to be employed at lower rates than the new rates that apply following the increase.
>
> …
>
> **Collective Agreements**
>
> All parties have an expressed interest in the health and wellbeing of their communities. To this end the sustainability and stability of the aged care sector through good staff retention policies creates certainty for all including the clients we provide services for.
>
> Government is of the view that a much more sustainable sector is to be found by provider and collectivised workforces negotiating the development of this sector.
>
> Providers have obligations currently under the Employment Relations Act. Obligations in the ARRC Variation will reflect existing obligations under the ERA.
>
> The main purpose is to encourage dialogue/engagement on collectives when requested to do so by either unions or groups of worker.
>
> Obligations on providers expected to be relatively passive.

The next day DHBNZ provided draft amendments.

[13] There was a telephone conference on 30 May 2007, followed by a letter from the Applicants dated 14 June 2007 rejecting the initiatives for reasons given.

[14] On 22 June 2007, DHBNZ by letter "formally confirmed the outcomes of the review", being the position "with minor amendments" set out on 23 May 2007. The DHBs proposed to incorporate two clauses as key aspects of a variation of Agreements:

> **Wage Increases**
>
> The first relates to funding that is specific to improving wage rates and conditions for employees in the categories listed under clause A4.2. There is a requirement for providers to increase the hourly rates of pay for these employees by at least $1.00 per hour or such higher amount as is necessary to ensure that the minimum hourly rate of pay for the Relevant Employee is no less than $12.55 per hour with effect from 1 July 2007. This obligation responds positively to concerns expressed by the sector about the need to improve rates of pay for low paid workers to achieve a higher level of stability in the workforce and is consistent with the Government's expectations referred to above. The intention is to increase the general rates of pay for all employees in the categories as set out in the variation from this point forward and any new workers are not intended to be employed at a

lower rate than that which applies once the new rates are implemented. There is sufficient funding included in the new TLA prices for providers to meet these obligations which should be seen as minimums to be achieved and improved upon wherever possible recognising the importance of improving sector stability and ongoing sustainability.

Collective Agreements

The second relates to the development of a sustainable future for the sector, best achieved through provider and collectivised workforces negotiating the development of this sector going forward. Providers are encouraged to use all reasonable endeavours to conclude collective agreements covering each category of Relevant Employee in respect of whom collective bargaining is initiated.

[15] On 25 June 2007, the DHBs "promulgated" a variation to take effect from 1 July 2007:

A5 Wage Increases

A5.1 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 A5.2 ("Relevant Employees") by at least $1 or such higher amount as is necessary to ensure that the minimum hourly rate of pay that you provide to the Relevant Employees is at least $12.55, with effect from the date of commencement of this Variation.

A5.2 The pay increase specified in clause A5.1 applies to your employees, whether their employment commences before or after the date of this Variation, in the following categories:

a. Care Assistants
b. Cleaners
c. Laundry Workers
d. Kitchen Assistants

A5.3 By 1 October 2007, you will provide us with a written report (in the form required by us) confirming that you have complied with the condition specified in clause A5.1.

A5.4 You will, upon request, provide us, or our authorized agent, with sufficient evidence to demonstrate to our reasonable satisfaction that you have complied with the condition specified in clause A5.1.

A5.5 If you breach clause A5.1 we may withhold an amount equal to the amount by which you have breached or are breaching your obligation under clause A5.1 from the next payment or payments due, at our discretion, until you have remedied the breach.

A5.6 We will give 20 Working Days notice of our intention to withhold payments under clause A5.5, during which notice period you may remedy your non-compliance.

A5.7 The amount or amounts withheld by us in accordance with clause A5.5 will be repaid to you provided we are satisfied that you have remedied the breach.

A6 Collective Agreements

A6.1 It is a condition of this Variation that you will use all reasonable endeavours to conclude one or more collective agreements covering each category of Relevant Employee in respect of whom collective bargaining is initiated, and in assessing whether you have exercised all reasonable endeavours, we will, without limitation, have regard to whether you have offered as a minimum to enter into a collective agreement which reflects the terms and conditions of employment of Relevant Employees under existing employment agreements.

A6.2 Without limiting this obligation, you will:

a. Participate positively in any bargaining initiated under section 42 of the Employment Relations Act 2000 ("ERA") in good faith; and

b. Work positively towards settlement of collective agreements for each category of Relevant Employee.

A6.3 Within one month after 31 December 2007 and 29 February 2008, you will provide written reports to us (in the form required by us) in relation to each category of Relevant Employee. These reports will either:

a. Confirm that a collective agreement is in place; or

b. Advise the steps taken by you, and the progress made, towards putting a collective agreement in place.

A6.4 In the second report, if a collective agreement is not in place for one or more categories of Relevant Employee, you will also specify the reasons why, in your view, a collective agreement is not in place, and the grounds on which that view is based.

A6.5 To avoid doubt, this clause A6 does not limit the ERA in any way, and does not create any right which is in any way enforceable by an employee, union, or other third party.

Other clauses required Providers to sign and return the variations by 20 July 2007 to obtain retrospective payment between 1 and 20 July 2007 and the forecast increase.

[16] Out of an average 7% increase in funding to be provided by DHBs, an average 4.6% component reflected costs incurred by Providers under other terms in the Agreement, leaving only the remainder, averaging 2.4%, attributable to clauses A4 and A5.

[17] Notwithstanding the increase attributable to clauses A4 and A5 was only 2.4%, DHBs advised the entire increased funding for 1 July 2007 would be withheld, with no variations at all, unless Providers signed and returned Agreements by 20 July 2007. Further, unless that happened, payment would not be backdated to 1 July 2007.

[18] Providers signed and returned documents subject to a challenge by this proceeding. Funding followed under interim arrangements. Providers have passed on all funds attributable to clauses A4 and A5.

Pleading: Varied circumstances of Providers

[19] Applicants allege A4 and A5 were "imposed" by DHBs notwithstanding that meant DHBs were "seeking to regulate the management of the business affairs of the Providers". Indeed, it is alleged A4 and A5 are directed to the private management of the Providers' business, and not to provision of services to DHBs.

[20] Applicants allege A4 and A5 were so "imposed" notwithstanding and "without addressing" different circumstances and employment relationships for each Provider.

[21] Different circumstances and employment relationships are then particularised at length. These include extant obligations to employees under the Employment Relations Act 2000 and Minimum Wage Act 1983; varying employee rights to bargain individually or collectively under the Employment Relations Act 2000; regional variations in pay rates; existence and timing of pay adjustments; different staff ratios and variations in seniority; and operating margins and business viability.

[22] Given that variation in circumstances, the amount of the increase attributable to clause A4 "is insufficient in the case of most of the Providers" to give effect to the required increases under clause A4.

Pleading: Required consistency with District Planning

[23] Applicants say the services covered by the Agreements, and funding for those services, form part of outputs (and funding of outputs) "required to be addressed in the District Annual Plans" (DAPs) to be established for each DHB under s 39 of the Act. The implementation of the Ministerial Initiative "by the imposition of clauses A4 and A5" and "the decision to spend the funding increase in that way" does not accord with those DAPs in that:

> 35.1 the services provided by the Providers are not addressed in the district annual plans; and/or
>
> 35.2 clauses A5 and A6 involve a change to the policies, outputs and funding of outputs to the extent that the district annual plans address the services.

There was no consultation on the changes and their effect on plans set out in the DAPs under s 40 or otherwise.

Pleading: Grounds for review

[24] Applicants then allege as grounds for review:

> 38. In proceeding in the manner identified above, the respondents have acted unlawfully, irrationally and with procedural impropriety in that:
>
> 38.1 the DHBs have responded to the Ministerial Initiative as if it were a direction from the Minister that they are required to follow notwithstanding:
>
> (a) the Ministerial Initiative was not a directive under any of the powers of the Minister under the Act or the Crown Entities Act 2004; and
>
> (b) the Ministerial Initiative is beyond the powers of the Minister to give such directives;
>
> 38.2 in responding to the Ministerial Initiative by requiring clauses A4 and A5 to be imposed in the agreements, the DHBs have utilised the powers established and derived from s25 of the Act for the purpose of:
>
> (a) imposing a national employment relations initiative of Central Government; and

(b) regulating the private employment relationships that each of the Providers have with their workers;

which are not proper purposes for which such powers can be exercised;

38.3 by seeking to so change the terms and conditions of employment of the Provider's employees, the respondents have sought to exercise their powers as if those employment relationships were controlled by a single collective employment agreement, under the respondents' control, which is inconsistent with the relationships and obligations the Providers have with and to their employees under the Employment Relations Act 2000, and thereby involves the exercise of the power under s25 and the Agreements for an improper purpose;

38.4 in responding to the Ministerial Initiative by imposing clauses A4 and A5 in the Agreements, and attributing the national funding increase to the cost of clause A4, each of the DHBs have failed to consider and address the health service needs of the respective resident populations in accordance with their district strategic plans and district annual plans as they are required to do under the Act;

38.5 by so acting, the respondents have acted with procedural impropriety in that:

(a) the respondents failed to raise their intended action during the A21 review in accordance with the procedure advised by the respondents, and misrepresented the position by providing the advice described in paragraphs 12 and 15 above;

(b) clauses A4 and A5 were then imposed by the DHBs, and were not been *(sic)* agreed to by the Providers, and such terms cannot be so imposed under clause A21 or s25 of the Act;

(c) the threat not to implement the other terms and conditions agreed between the parties under the annual review process conducted under clause A21, and to withhold the entire annual increase in funding unless the providers signed and returned the agreements, and to not backdate the increase to 1 July if not signed by 20 July was procedurally improper, and in breach of the obligation of good faith required to be followed by the DHBs;

(d) the Ministerial Initiative, and clauses A4 and A5, involve significant changes to the provision and funding of services to be provided in each of the geographical areas established for each DHB which have not been addressed in accordance with the procedure set out in s40 of the Act (including

through consultations with each of the DHBs resident population), or alternatively are not consistent with the plans relevant to the services provided by the Providers, or which are not properly addressed at all in the district annual plans; and

(e) the DHBs have not met the Providers' legitimate expectations of consultation in good faith or negotiation as established by clause A21 of the Agreements and s25 of the Act.

38.6 By so acting, the respondents have failed to take into account relevant considerations, and have acted irrationally in that:

(a) the respondents have failed to take into account the variations in the circumstances applicable to each Provider, including employment relationships that each of the Providers have with their specific employees;

(b) the amount of the funding increase does not correspond to the required wage increases, and the issue has not been appropriately addressed by the respondents in the process; and

(c) each of the DHBs have failed to address the particular health funding needs and priorities within their territorial area in the context of the health funding increase.

Pleading: Ancillary matters: Relief

[25] It is pleaded and admitted that the "DHBs' decisions to act upon the Ministerial Initiative and include clauses A4 and A5 were the (purported) exercise of a statutory power. (Whether that is a matter which can be resolved on pleadings is questionable, but immaterial: the assertion is correct.)

[26] An alternative claim under the Declaratory Judgments Act 1908 for a declaration that clauses A4 and A5 "were not, and are not, agreed by the Providers" is not pursued. It is dismissed.

[27] Relief as formulated in the Prayer altered in course of DHBs' submissions after a question raised from the Bench as to the propriety of setting aside clauses in Agreements between DHBs and Providers when the individual Providers were not

formally parties. Counsel for Applicants submitted that a representation order under r 78 was not necessary; but applied for such an order should the Court conclude otherwise. In conjunction, counsel for Applicants reformulated the Prayer for relief as one for orders:

> 1. Declaring that the respondents acted unlawfully in deciding to include clauses A4 and A5 in the variation to the age related residential care service agreements with providers; and
>
> 2. Setting aside clauses A4 and A5 in the age related residential care service agreements with each of the providers represented by the applicants (to be included in a schedule to any sealed order).

The schedule referred to was identified. Counsel for Respondents, in light of a view that it was a decision by both parties to put clauses A4 and A5 in the variation agreements, submitted that number 1 should read:

> 1. Declaring that the respondents acted unlawfully in deciding to include clauses A4 and A5 in the variation offered to the providers of age related residential care services.

I treat this as an application to amend the statement of claim, opposed to that extent.

[28] I make orders under r 78 appointing Applicants to represent Providers named in the annexure at pages 0001 to 0011 (inclusive) to the affidavit of Martin John Taylor sworn 23 October 2007 other than Providers named in bold and italics, and granting leave to amend the amended statement of claim dated 5 0ctober 2007 in terms of (1) and (2) as reformulated by counsel for Applicants.

III. DHBs' Pleadings

[29] The DHBs admit in a general way the chronology of events; but with denials and/or different interpretations of certain key points.

[30] As to the Agreements, there is no admission of discussions between the Minister and the CTU. The DHBs deny the Minister "required" them to ensure wage increases and collective agreements; and deny the DHBs decided to "implement" the Ministerial Initiative by new terms in the Agreements. DHBs admit the two

statements relating to advice being sought from the Ministry as to new policy matters; but deny such were representations that the DHBs were not aware of any such policy matters. DHBs allege that the letter of 1 March 2007 did not limit Review issues, or commit DHBs and Providers "irrevocably to the timeframe or process specified in that letter". Further, DHBs deny Providers adhered, and the DHBs did not adhere, to the timeframes required for the 15 April 2007 completion.

[31] As to disclosure and implementation, DHBs deny the 23 May 2007 meeting, at which the Ministerial Initiative proposals were disclosed, was to advise the outcome of the Review. DHBs allege the "review at that time was ongoing", and these matters were raised to enable Providers to comment, both then and subsequently, as part of the Review process. DHBs admit their letter of 22 June 2007 advised Providers "of the outcome of the review"; but deny changes made were only "minor". They were "substantial".

[32] DHBs dispute Applicants' attribution of only 2.4%, on average, of the 7% increase to clause A4. DHBs allege a further "future funding track" ("FFT") component of 2.1% is to be added; and the total (4.5%) provided sufficient funding.

[33] DHBs deny Providers signed Agreements subject to challenging clauses A4 and A5: DHBs allege Providers signed under protest.

[34] DHBs deny, on a "no knowledge" basis, that all funding attributable to A4 and A5 has been passed on by Providers. As to the varied circumstances of Providers, and asserted required consistency with district planning, DHBs enter blanket denials; and assert consideration of all relevant matters as to circumstances and employment contracts, and deny the initiatives (clauses A4 and A5) were required to be "expressly and particularly mandated" by the DAPs so as to require prior change.

[35] As to grounds of review, the DHBs admit in terms of statement of claim paragraph 38.1(a) that the Ministerial Initiative was not a directive under statutory powers of the Minister; and admit within paragraph 38.1(e) that the Providers "had legitimate expectations" that the DHBs would consult and negotiate the variation in

accordance with obligations under the Agreements and s 25. The DHBs assert those expectations and obligations were met. More generally, the DHBs allege:

> The respondents say further in relation to paragraphs 38.2 and 38.3 that they considered that clauses A4 and A5, if accepted by aged residential care providers, were reasonably likely to contribute to the achievement of a more sustainable and stable workforce and thereby the respondents' objectives under section 22(1) of the Act.

IV. Facts: A History

Approach

[36] For purposes of analysis, it is useful to break the course of events into two sequences:

a) From 1 November 2006 to 23 May 2007 (inception to the meeting that day); and

b) 24 May 2007 onward.

Over the first period, it assists understanding to keep in mind that two processes were running down parallel paths:

a) The contract A21 Review (with an associated A23 complication); and

b) The development of the LPW and collective agreement proposals crystallising into clauses A4 and A5.

The two did not advance at the same speed.

1 December 2006 – 23 May 2007: Inception to revelation

[37] The 2007/2008 A21 Review was not a novelty. There had been at least three comparable reviews before. Except for the 2006/2007 Review, none had been

completed on time; and that latter was completed on time only because some significant issues had been extracted and carried forward as A23 variations. There appears to have been a tradition of some give and take on timetables; but timing was known to be important. Failure to complete processes by 1 July involved administratively difficult backdating. Previous Reviews had been carried forward by Project Teams on both sides. The DHB structure was complex, with the DHB Project Team supported by DHBNZ and reporting through various avenues onward to individual DHBs. Responses from individual DHBs were necessary at some important points. The Providers' Project Team structure appears to have been simpler, but also required reference back to numerous individual Providers at various stages. It was known that unless differences could be settled in principle by mid to late April, finalisation by 1 July 2007 would prove difficult.

[38] The Providers did not have power under clause A21 to initiate Reviews. The power rested with the DHBs. The Providers were anxious to make progress, and also to resolve the A23 matters still held over from the previous Review. Providers requested action by letters, culminating in a letter of 1 November 2006.

[39] Whether by consequence or coincidence, on 5 December 2006 two things happened. One was the genesis of the 2007/2008 A21 Review. Mr Shapleski (DHB Project Team consultant and operative) prepared a draft scheme for the Review for submission to the SIG (one of the DHB Reports). It envisaged conclusion by 1 July 2008. The other was a meeting called by the Minister involving DHB and Ministerial officials. The Minister had been concerned for some time at conditions in the aged residential care ("ARC") workforce, and had obtained a Ministry report as far back as August that year. No doubt the Unions were similarly concerned. The Minister conveyed to DHBs that he considered there should be more focus on that workforce area, and that he would like to see his office and the CTU kept informed. This led to a further meeting on 20 December 2006, to which I will come.

[40] Meantime, Mr Shapleski's draft scheme for the Review was approved by the SIG on 14 December 2006, and the DHBs met with the Minister the next day. The Minister broadly supported the approach the DHBs intended to take.

[41] On 20 December 2006, the DHB Project Team updated DHB General Managers on A21 Review action to that point. To all appearances, very little occurred over the summer holiday period. That is not uncommon in Wellington bureaucracies. There may have been some modelling and other preparatory work.

[42] As noted, 20 December 2006 also saw progress on what was to become the LPW initiative. A meeting, held at the CTU offices, attended by DHB, Ministry and CTU representatives, considered the Minister's and doubtless CTU's wishes as to the ARC sector workforce. It was decided, after general discussion, to convene a "workshop" to be held 16 February 2007. In due course, invitations went out over the names of both the CTU and DHBNZ. Attendance was invited from a wide range of interests. There was some debate whether to include representation from Providers. In the end, three persons connected with Providers were invited, strictly to give a "perspective" as contrasted with an advocacy position. The purpose, so the invitation said, was to discuss how to achieve improvements in the ARC and disability support sectors, including pay and working conditions for LPW. Differently put, it was to "understand perspectives, and to develop an agreed plan of action which will achieve improvements short, medium and longer term". The stated anticipation was that "a plan to be developed following the meeting will inform the Government in considering these sectors". Extensive background papers were circulated before the meeting. A Ministry paper noted, amongst various possibilities, an increase in funding of DHBs, with "flow through" arrangements via Providers to LPW wages. A CTU sheet headed "Quality Funding Agreement" referred expressly to an "agreed pass through" to wages, and to collective bargaining and agreements as "quality criteria". The Ministry and Unions clearly had these matters in mind for discussion.

[43] As at mid to late January 2007, some modelling work was being done for DHBs by Mr Shapleski, and another consultant with a view to the pending Review. Upon request from DHB representatives involved with the forthcoming workshop, the two consultants diverted temporarily to modelling assistance for the workshop on anticipated increases in minimum wage levels. There is no other evidence of cross-pollination between the two processes at that stage.

[44] Clearly by late January 2007, the annual Review was still inchoate. It was not until this point, when staff were back from leave, that General Managers of DHBs were asked to appoint remaining members of the DHB Project Team (Mr Shapleski and a Ms Cliffe were ongoing). The appointees required were not confirmed until as late as 22 February 2007.

[45] Meantime, matters advanced on the workshop front. Despite later mantra as to Budget secrecy, by 15 February 2007, the eve of the workshop, two leading DHB Chairmen had been told by the Minister (or perhaps his office) that $37.5 million had been allocated to LPW matters. The Chairmen, naturally, told the lead CEO member of the DHB Project Team, Mr Foulkes. That figure would not have been regarded as set in stone, but would have appeared to be a calculated rather than a mere rounded figure, and as something which could be worked on meantime.

[46] The workshop took place as planned. The meeting was informal, with no minutes taken. There is not a reliable account of everything which occurred. It is difficult to assess how actively the DHB representatives were engaged. However, from notes taken and later presentations by Mr Foulkes, it appears the workshop considered a two-stage approach. Stage 1 was an increase for the lowest paid, with 30 April 2007 the target date for identification of amounts and pass through mechanisms, and 30 July 2007 the target for implementation. Stage 2 involved a number of "long term strategies and ongoing implementation" from 31 July 2007. Focus areas for the workshop included "use and role of collective bargaining". To similar effect, for what it may be worth, a much later 12 June 2007 letter from the Minister to DHBs states:

> There was agreement between participants that work should be progressed in two phases … the first phase would focus on ensuring flow through of additional Government funding to workers wages with the second phase being primarily related to other issues in workforce development.

The Minister did not attend, but the outcome no doubt was reported to him.

[47] On or by 22 February 2007, the Minister had publicly "flagged" extra funding for the ARC sector. The actual text is not in evidence. A Radio New Zealand news item noted that the last Budget had committed an extra $126 million

over four years; and that the Minister said: "A similar amount may be available again this year". (That obviously equated to $31.5 million for 2007/2008.) This stimulated a leading member of the DHB Project Team, Mr Climo, to inform other team members he had been told "last week" of a pledge of additional funding, but that it was a Budget secret. He advised Ms Cliffe, leading the Project Team, that the figure was $37 million from 1 July 2007. This information was not to be distributed (beyond Mr Shapleski) "but obviously you can acknowledge that there is extra money". The "technicalities" of flow through of the funds "needed to be worked through".

[48] Also on 22 February 2007, the remaining appointments to the DHB Project Team were at last confirmed. Ms Cliffe, as anticipated, told the lead A21 Review operative, Mr Shapleski, that $37 million was likely to be available from 1 July 2007. The first formal step in the Review was for DHBs to state the timetable and the DHB list of issues. Obviously, the team had been working in the background meantime, but the proposed issues needed clearance by DHBs first. With the timetable proposing completion by 15 April 2007, the team's aim was to keep the list to a minimum. By 1 March 2007 eight issues were confirmed. The LPW initiative, and the collective agreements matter, were not amongst them.

[49] Drawing these strands together, as at 1 March 2007 there was a Ministerial Initiative, strongly supported by the CTU, to procure an increase in wages for LPW in the ARC sector; and there was $37 million to support that. The figure technically was secret, but would not have been difficult to approximate from the Minister's own press release. There was also a Ministerial and CTU intention to advance collective agreements in the workforce, but that was projected for after 30 July 2007. The DHBs were prepared, at least in principle, to progress the LPW wages side. The methodology by which that would be achieved was far from settled. There were pointers towards a contractual pass through mechanism, but that was not inevitable. Alternatives, such as a Crown Funding Agreement (CFA) approach, were open. Work on the pass through mechanisms, particularly modelling and consideration of repercussions, was at an early stage. There were other (non-LPW) issues which needed review, and a tight timetable tending to constrain multiplication. It is understandable that DHBs, rightly or wrongly, would not be inclined at that point to

bring in the complication of the still inchoate LPW "initiative". Providers would have been aware the Minister was proposing funding to assist LPW wage rates, and a possibility this would somehow be done through DHBs as from 1 July 2007, but there is no evidence of any wider degree of knowledge. Wellington can be a leaky sieve, but it is not suggested, and nor can I infer, that Providers had inside knowledge.

[50] Against this background, on 1 March 2007 the DHBs wrote the following letter over the signature of Ms Cliffe as "Lead General Manager, A21 General Review Project". It stated:

> Dear Provider
>
> **General Review of Aged Residential Care Agreements for 2007/08**
>
> District Health Boards are about to commence the annual General Review of aged residential care agreements for 2007/08 as required under the terms of their agreement(s) with you. As in the past, the review will be carried out as a single national review on behalf of all DHBs.
>
> **Issues for Review**
>
> Under the terms of the review, DHBs will consider the following issues:
>
> 1. Price – This will be included in the review and determined as part of a national process inclusive of all DHBs.
>
> 2. Impact of new legislation – Advice will be sought from the Ministry of Health on any new legislation that may impact on aged care and that needs to be included in a contract variation for 2007/08.
>
> 3. Impact of policy changes – 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.
>
> 4. Licences to occupy – DHBs have committed to reviewing the contract as part of the 2007/08 review particularly in respect to any anomalies that may exist which disadvantage couples with an LTO where one is required to enter subsidised long term care.
>
> 5. HCPNZ Admission Agreement – DHBs will check for consistency with the ARRC agreement.
>
> 6. Transfer of contracted beds following closure, buyout or transfer of ownership of a facility – DHBs need to review current processes and alignment with the terms of the agreement.

7. Assignment of contracts – DHBs will review processes looking for consistent management across all agencies involved including issues of supply.

8. Agreement needs to remain consistent with HealthPAC's process and system requirements. DHBs will look at both for consistency and identify any changes required.

9. Two-yearly reviews – The parties will look at the benefits and explore price options for non-review years.

Issues for further work outside of the Review

You will be aware that several issues were deferred by agreement during the last review due to time constraints. These included:

- Incorporation of the Aged Residential Hospital Specialised Services, Respite Care, Day Care and Carer Relief Agreements into the Age Related Residential Care Agreement by way of Schedules to the ARRC Agreement.

- The issue of non-subsidised high cost medications and associated clauses.

- The issue of changes to transport and accommodation policy.

- Rural service provision.

A firm commitment from DHBs to appropriately resource work to review the above issues is being sought so that progress on these issues can be made this year.

Provider Issues

It is hoped that issues of interest to providers have been captured in either of the above. If however there are additional issues that you consider should be included in the review this year and you believe they can be given due consideration within the timeframe available you are asked to table any such issues without delay.

Timeframe

Engagement with providers on all issues will be completed by 15 April to ensure any variation to your agreement(s) can be implemented and changes to Maximum Contributions notified by Government by 1 July 2007. This is in the interest of all parties as it will avoid the need for back dated payment arrangements. Should you wish to comment on the issues above or have an exceptional issue to raise please contact the Lead General Manager, A21 Aged Care Review in writing at the address below.

We look forward to your input and another successful review for 2007/08.

It is admitted on the pleadings this constituted the commencement of the A21 2007 Review.

[51] Given the stated background, paragraph 3 was unfortunate. The DHBs well knew that the Minister was pushing, and prepared to fund, an LPW initiative; that the DHBs were not resisting that initiative; and there was at least a definite possibility it would involve pass through amendments to the current Agreements to meet a 30 July 2007 deadline. The clear implication, however, of paragraph 3 was that there were no Ministerial policy matters outside the listed issues known to the DHBs. That was wrong.

[52] I do not accept this was a standard clause put in each year. The evidence conflicts as between Ms Cliffe and Mr Taylor. I prefer the latter's evidence, which is more detailed and supported by 2006 and 2007 documentation. Nor do I accept the LPW initiative was not a "policy" within the sense of clause 3. It was something the Minister wanted and was openly promoting; and is a rose by any other name. There may have been a degree of rationalisation on the DHBs side, and in the absence of cross-examination I am loathe to find there was a calculated intention to mislead. It is likely the LPW initiative was omitted as it was regarded as still insufficiently formulated, and to do so would be inconvenient, particularly within a crowded timeframe. It could, however, have been flagged as a pending matter still being worked on inside or outside the Review. Without that, paragraph 3 was misleading.

[53] Over the next six weeks to 15 April 2007, matters proceeded down their two separate paths. The A21 Review pursued its timetabled course. Work on the LPW initiative progressed, but lagged well behind.

[54] On the A21 Review side, the Providers' issues ("claims") were filed in timely fashion on 12 March 2007. A meeting was scheduled for DHBs' and Providers' teams to discuss issues on 20 March 2007. The day before, 19 March 2007, the DHBs prepared and distributed to Providers a schedule of issues for discussion. There were not many. The accompanying DHB note stated: "… issues are not numerous as we remain committed to a pragmatic list in light of tight timeframes and associated issues also being dealt with". They did not include the LPW initiative, or any reference to collective agreements. There were also separate A23 issues still extant.

[55] The schedule included the following prominent passage:

> **4. Impact of policy changes**
>
> 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.

[56] Between the 1 March letter initiating the Review and this 19 March 2007 schedule, some advances had been made by DHBs on the LPW initiative. On 5 March Mr Foulkes had briefed DHB Chairs on the 15 February workshop and its outcomes. The Chairs were comfortable with developments, as the CEOs had been on 26 February. As at 8 March 2007, communications between Mr Foulkes and Mr Climo show the DHBs were developing a response to the LPW pay "jolt" for 1 July 2007. Modelling assistance was needed. There was at least one associated telephone conference as to who, how much, and the modelling to be carried out. On 13 March 2007 there were internal discussions, and discussions with the Ministry on flow through implications.

[57] Clearly, as at 19 and 20 March 2007, the DHBs were not a great deal further advanced on the methodology of the LPW initiative, and were little, if any, better equipped to discuss it with Providers. My previous observations as to paragraph 3 in the 1 March 2007 letter apply. Paragraph 4 was misleading again. Indeed, given its more explicit terms, it was perhaps even more so.

[58] On 20 March 2007, DHB and Provider teams met in accordance with Review process to discuss the schedule of issues, so far as it went. Mr Taylor for the Providers and Mr Foulkes, Ms Cliffe and Mr Shapleski for DHBs were included in the teams. The issues had been confined in view of timeframes. Mr Taylor was aware, in a general way, that an LPW initiative existed and was being discussed outside Provider circles. However, it does not seem to have been raised in a direct way. The DHBs' stance was that they could not discuss ARC funding increases, as the budget was still unknown. That was at best half true. Mr Taylor asked Mr Shapleski, with specific reference to paragraph 4, "if he knew of any policy or legislative changes that would require the contract to be altered". Mr Shapleski

replied he was not aware of anything. He did, however, undertake to keep Providers posted. I do not accept the question properly could have been deflected by semantics concerning the word "policy". The Minister's concerns and aims were clear, and were known to DHBs. That answer was wrong, and was misleading in itself.

[59] In the outcome, Providers came away with the impression the rumoured LPW wage increase would not affect the A21 2007 Review. They would have been wondering how it would be done. Certainly, there was a degree of residual suspicion. As Mr Taylor wrote in a report soon afterwards:

> … 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.

[60] Between the conclusion of the 20 March 2007 meeting and the 15 April 2007 Review completion target date, there was continued modelling and development work on the LPW by DHB consultants, and there were a number of contacts between DHBs and the Minister. There was also a significantly increasing degree of contact from the CTU, which was interested not only in the LPW wages side, but in the promotion of collective agreements.

[61] It is not necessary to detail every step in that process. On 22 March 2007, only two days after the 20 March meeting, Mr Shapleski prepared a funding options paper based on $37 million and including the LPW initiative. Telephone conferencing followed. Modelling on a pass through basis continued, assuming six classes of workers and a $1 per hour increase (neither would remain constant). Between 28 and 30 March 2007, DHB papers were drafted. The 30 March paper envisaged the flow through mechanism. It led on to a 2 April 2007 DHBNZ paper, prepared both for submission to "the DHB collective" and for a 4 April 2007 meeting with the Minister. The paper focussed on the ARC contract, assumed six classes of worker and $1 per hour, or alternatively four classes of worker. It assumed a pass through mechanism, noted CTU engagement on principles, and included a draft (rather simplistic) pass through clause. It noted, however, the possibility of a Ministry prescriptive policy statement achieved through a CFA directive. It included a timetable, given "Minster's agreement to approach",

concluding Provider engagement on 15 April with implementation from 1 July 2007. There was no reference to collective agreements. The meeting between the DHB team and Minister which followed brought out Ministerial agreement with the general direction, but preference for an increase to $1.25 if possible; and an expectation of robust monitoring of flow through. It also emerged a CFA variation was not a practicable option within the timeframe. Mr Foulkes briefed DHB Chairs next day. The CTU had written to the Minister on 27 March 2007, applying pressure to promote the stage 2 matter of collective agreements. On 6 April 2007, Mr Foulkes wrote to the CTU updating matters. Stage 2 was put as taking a "back seat". It remained so, from the DHBs' perspective, in a paper dated 10 April 2007, which went out on 12 April 2007 to DHB CEOs on the current state of the LPW initiative. The paper reduced the LPW initiative to four categories of workers. It assumed "at least" $1 per hour. The date for conclusion of Provider engagement on the A21 Review was pushed out to 20 April 2007. It said the package "has been tested in a preliminary way" with the Minister. Otherwise, it largely reproduced the 2 April 2007 paper. Responses were requested from DHB CEOs over the next fortnight after regional DHB meetings. There was no evident sense of urgency.

[62] The 15 April 2007 (and even 20 April) timetable date for conclusion of the A21 Review came and went. Providers had confirmed their position. DHBs had not, and plainly would not before 24 April 2007.

[63] Was this simply a cavalier attitude? There are sharp and untested differences between deponents as to whether Review timetables were merely aspirational, with deviations tolerated, or were set in stone. To some extent, the differences may reflect failures to distinguish between new developments on standing issues and completely new issues. I accept, particularly given the firm terms in which DHBs laid down a timetable and issues in the 1 March 2007 letter, that it was not envisaged an important new issue within the Review would be raised beyond that timetable. For the 2007/2008 review at least, it was clear as at 1 March 2007 that adherence was expected. I do not believe delays past 15 April 2007 occurred because DHBs believed the timetable was unimportant. They occurred because DHBs could not comply.

[64] At this relatively late moment, the CTU moved. It renewed pressure on the Minister in relation to stage 2 collective agreements. On 27 March 2007, the CTU had written to the Minister. On 11 April 2007, Ministry staff informed Mr Foulkes that the CTU felt "out of the loop" and were meeting the Minister. Mr Foulkes contacted Ms Brown of the CTU on 17 April as a "catch-up", precise content unknown. Then on 24 April 2007, the Minister delivered a surprise. He wished to accelerate the presently stage 2 matter of collective agreements, acknowledging in doing so that it was a Government decision, and not one of the DHBs. I accept Mr Foulkes' note as the best record of the conversation. It reads:

> 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, ie not supportive in short term, and significant further discussion would be needed with CTU in longer term, (stage two, which would likely require bi-and tripartite consideration).
>
> 2. The Govt is nevertheless supportive of CTU view although does not believe it will deliver in the short term, and has desire for a combined approach ie. DHB proposed use of contractual means for pass through, but with providers 'asked' (?) to develop collective agreements for workers and for them to be in place within a timeframe eg end of 2007.
>
> 3. The Minister acknowledged the perception of an interventionist approach, however felt it would be beneficial in the longer term in contributing to the continuity of care in the sector (improved retention etc).
>
> 4. He was clear it was a Government decision not DHBs, and would be prepared to put in writing to us, and front any response from the sector.
>
> I noted and respected the position, discussed some risks, and indicated that DHBs would consider the implications, and that Dennis or Pat as Chairs would likely wish to discuss. He indicated that he had a scheduled call with Dennis this evening at which it could be discussed.
>
> Some initial thoughts we will need to consider:
>
> The scope of coverage by any clause.
> The degree of encouragement v requirement of providers to have a collective agreement.
> Implications for funder/provider relations.

Implications for precedents.
Likely resistance from providers and potential to delay the whole pass through.

The Minister will be attending part of national CEOs meet on Monday/ Tuesday at which he expects to be able to explain the Govt position further.

In the meantime DHBs analysis and preparation for the pass through will continue, and I am seeking further details from CTU on draft/proposed agreements they have been working on from their perspective. A copy of letter sent to Minister is attached FYI. It was expected from other feedback that this would be picked up in stage 2 as outlined above however this now becomes more relevant.

[65] The Minister followed with a letter to the CTU dated 27 April 2007, seemingly intended as a reply to the letter from the CTU dated 27 March. It reads:

Thanks for your letter of 27 March regarding the low pay and work project. Thank you also for the CTU's ongoing involvement in these matters.

My understanding is that the CTU and DHBs are reaching a view that the seven broad principles/work areas should be progressed in two phases: a short-term and longer term response plan. I am comfortable with that.

Your letter also proposes that DHBs require providers to contractually put in place collective agreements that workers may (or may not) choose to sign. You explained the merits of such a move. I considered this suggestion, discussed it with colleagues, and think it is a good one.

However it cannot happen immediately and most of the new funding will flow from 1 July. Accordingly I have reiterated to DHBs that they should develop a pass through mechanism, for implementation from 1 July but should also require providers to put in place collective agreements by, say, the end of the calendar year. They will be discussing these issues next week.

I think it is clear that progress on the seven broad principles/work areas, which of course many providers area already actively engaged upon, can be enhanced in a collective environment. Certainly I am motivated to have a workforce that is better paid and better trained because the standard and continuity of care of older New Zealanders will be enhanced. The future of this sector does not rest on paying the minimum wage and suffering high turnover, as the quality and safety project graphically showed.

Similarly, while providers will no doubt welcome the substantial extra funding in this year's budget, they may be less enamoured with the various conditions that I have been putting on them over recent years. A much more sustainable future is to be found by providers and their collectivised workforces negotiating the development of this sector with progressively fewer preconditions from me, though clearly DHB involvement will be ongoing.

A copy was forwarded to Mr Foulkes, but that may have been a day or so later. On 27 April 2007, Mr Foulkes asked the CTU for any draft clauses they may have and suggested a meeting early the following week.

[66] The DHB Project Team had been working on a further paper to go to DHBs, and had a "work in progress" version by 30 April 2007. It did not take the new collective agreements developments into account.

[67] Providers had been entitled to expect, and no doubt did expect, DHBNZ action by 15 April 2007. When nothing occurred, the natural reaction would be to enquire. On 18 April 2007, Mr Foulkes spoke to Ms Cliffe. Ms Cliffe was not authorised to formally disclose the LPW initiative until approved by the DHBs, but spoke informally. Her record, two days later, is:

> … spoke at length to Martin on Weds – he is fine about delay. Also and very generically talked about our parallel low paid workers process. I think he is just keen to see the colour of our money.

Ms Cliffe says this was one of a number of such instances over an unspecified period. No details are given. I accept her recollection. It explains an otherwise curious apparent lack of interest on the part of Providers as to what was going on.

[68] On 1 May 2007, the Minister (who would be overseas on Budget day) issued a press release. Amidst other material, it disclosed provision of $150 million over four years for the ARC sector and stated:

> "The Government recognises the need to raise the level of pay for workers who provide valuable support to our senior citizens and we know that low pay and high staff turnover are a major workforce issue in aged care," Pete Hodgson says.
>
> "Accordingly 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."

Apart from this oblique mention, there was no specific reference to pass through and collective agreement obligations proposed. The Providers – or at least HCPNZ – issued an immediate press release welcoming the extra money, and stating funding increases would be passed through to workers. Mr Foulkes, who had no details of

mechanisms under consideration, considered the method would be by a percentage increase, as he considered usual. That would not pose a problem. Evidently Providers were somewhat puzzled at the reference to collective agreements. On 2 May 2007, Mr Foulkes asked Ms Cliffe what the Minister meant. She refused to comment.

[69] DHBs were, indeed, somewhat caught short by the Minister's 1 May press release. They were not in a position to engage Providers on the detailed proposal for the 2007/2008 Review as it was still being finalised and internal approval from DHBs had not even been sought, let alone obtained. They noted from the HCPNZ press release that Providers did not seem opposed to a pass on as part of the contract negotiations which had started in March, and the absence of suggestion it was too late to do so. There were exchanges between 8 and 11 May 2007 between DHBs and the CTU as to the wording of clause A5 relating to collective agreement obligations. There was even record of a consultation with the Minister's "political adviser", who had suggestions as to a form which "would meet the Minister's expectations". On 10 May a summary of feedback, and a request for endorsement by 18 May 2007, was sent out to DHBs. The DHB Project Team had its worries. By 11 May Mr Foulkes was recording there was resistance from some Providers as to the approach now proposed, and risk of delay to the whole contract variation, including pass through to wages. Ms Cliffe appears to have been in informal contact with the Providers and was receiving a similar message. An internal note from Ms Cliffe dated 10 May 2007 reads:

> 1. ARC pass through clause of $1.30. Whilst I have not discussed quantum with providers they are aware that we will be presenting a clause of this kind and are likely to accept it (as long as funding is available etc etc).
>
> 2. Collective clauses – they had heard about the possibility of this and had raised large concerns with me earlier. Bottom line they will resist this at all costs. To the point where a possible scenario will be to accept FFT and whatever is offered for A23 and tell us to stuff the rest – so back on Ministers plate within minutes. They have grave concerns about a service agreement being used to "do the unions business for them" or to enact govt labour polices *(sic)*. They are very worried about the potential for their wage cost escalation if this is enacted – which of course would mean another large A23 claim for us. Usual threats of legal action of course should this be enforced.

…

4. Collective – although not as strongly anti as the ARC providers they will still resist this. There is a belief that DHBs have meddled enough in private businesses and this is the final straw. However, there are already quite a few collectives in place and they work and they keep the providers honest. Anecdotally I hear that the unions have been remarkably unsuccessful in their attempts to unionise this workforce as the workers themselves have resisted.

Obviously without presenting this and letting individual providers consider the implications the above is only opinion. However, I would like to be very clear who is accountable for the outcomes of this process as these clauses are likely to be the sticking point in concluding the rest of the package. Have we received the Minister's letter of expectation yet? Whilst I know we agreed that it would be non prescriptive, I believe these clauses put the DHBs in a difficult, risky and invidious position as the contractual partners. I fully support the "package" that we have been working on but this changes the thrust of activity completely.

[70] On 15 May 2007, the DHB Project Team sent all DHBs the A4 and A5 variations as then drafted, seeking approval by 18 May 2007 prior to meetings with Providers. The proposed increase was $1.30 per hour. The collective agreement clause required employers to use "best endeavours" to conclude collective agreements, in the assessment of which DHBs would have regard to whether (as a minimum) the Provider had offered to enter into a collective agreement reflecting existing employment contracts. It was recognised this involved "very tight timeframes", but it was said these were necessary "to meet the Minister's expectations" and the DHB commitment to 1 July 2007. A considerable internal debate followed within DHBs. An important example was the Auckland DHB, at that point rejecting the proposed clauses as *ultra vires*.

[71] On 22 May 2007, the day before the scheduled 23 May meeting with Providers, Mr Foulkes updated the Minister's office on the "pass through". The level was to be $1.30 per hour for four categories. The intent as to collective agreements was summarised. It was said the DHBs were meeting Providers the next day to address review issues "in general terms". DHBs added "it is hoped to conclude the substantive discussion shortly afterwards". One wonders.

[72] It appears DHBNZ obtained legal advice on 22 May 2007 as to legal justification for one or both of the clauses. The content of the advice is not in

evidence, but may be inferred from the terms of requests to DHBs for written statements on 24 May, dealt with below.

[73] On 23 May 2007, the separate streams of A21 Review, much delayed, and the A4/A5 initiative at last officially converged. The meeting dealt with A23 matters (also requiring funding) in the morning and A21 matters in the afternoon. While not all DHB responses were to hand, the DHB Project Team took the risk; which perhaps is a measure of the sense of urgency which by now existed. The DHB team delivered a PowerPoint presentation. It included reference to the proposed A4 and A5 matters, plus disclosure of funding and price increases. The slide as to the LPW initiative stated:

> **Low Paid Workers Initiative**
>
> - In line with Government expectations funding specific to low paid workers has been included in the price for services this year
> - There is an obligation on providers that the funding included specific to this initiative flows through in total to an increase in the hourly rate for low paid workers
> - Providers are obligated to pass through an increase in the hourly rate of at least $1.30 per hour
> - Sufficient funding has been included in the price to meet this obligation
> - Intent is to increase the general rates of pay for low paid workers from this point forward
> - Any new workers are not intended to be employed at lower rates than the new rates that apply following the increase

The slide relating to collective agreements said:

> **Collective Agreements**
>
> - All parties have an expressed interest in the health and well-being of their communities. To this end the sustainability and stability of the aged care sector through good staff retention policies creates certainty for all including the clients we provide services for.
> - Government is of the view that a much more sustainable sector is to be found by provider and collectivised workforces negotiating the development of this sector.
> - Providers have obligations currently under the Employment Relations Act

- Obligations in the ARRC Variation will reflect existing obligations under the ERA

- The main purpose is to encourage dialogue/engagement on collectives when requested to do so by either unions or groups of workers

- Obligations on providers expected to be relatively passive

Reporting

- Government and DHBs are interested in progress on collective agreements and a reporting requirement will be included

- Providers will be asked to provide reports one month after both 31 December 2007 and 29 February 2008

DHBs were said to be committed to a 1 July 2007 implementation.

[74] Accounts of the meeting vary to some degree. DHB representatives present state that the Provider representatives did not seem surprised, but immediately responded to substance. A DHB record, made later on 4 June, states:

> Providers made it clear at the end of the meeting that the $1.30 obligation would not be viable, required more flexibility, and would be a "show-stopper" if included in the Variation in its current form.

As to response to the collateral agreements clause, the same source records:

> **10. Collective Agreements**
>
> The Team outlined the rationale for the inclusion of this clause in the Variation confirming that all parties have an expressed interest in the health and well-being of their communities and to this end the sustainability and stability of the aged care sector through good staff retention policies creates certainty for all including clients. The main purpose is to encourage dialogue and engagement on collectives when providers are requested to do so by either unions or groups of workers.
>
> Providers were reminded of the obligations they currently have under the Employment Relations Act (ERA) and that the obligations under the ARRC Variation reflect those existing obligations.
>
> The discussion was somewhat divisive across the representatives with some taking a reasonably pragmatic and accepting approach whilst others were adamant that whilst accepting their ERA obligations the Variation appeared to expand on those obligations and this would be resisted. In particular they did not like the requirement to report to DHBs on progress seeing this as an imposition being made by DHBs in employment matters that they see are outside of the scope of DHB interest under the NZPHD Act.

[75] I accept that Provider representatives knew in advance of the LPW wages initiative in general terms. The Minister had trumpeted funding, and Ms Cliffe had disclosed the prospect of a contractual pass through on an informal basis. There was much less prior knowledge of collective agreement intentions, although from the Minister's press release something – of some sort – was in the wind. Providers did not, however, know detail. As tends to happen in business circles, the first attention was directed towards grasping and criticising the figures presented and their implications. The rest, beyond concerned generalities, could and did wait. I accept Providers were surprised to varying degrees, and were concerned. This was an important matter, with barely five weeks left for assessment and decision, with potential to delay other matters which Providers very much wanted. The DHBs were saying backdating was not an option. The meeting terminated with Provider requests for hard copy of the slides presented, and the draft A4 and A5 clauses.

[76] To generalise, following the 23 May 2007 meeting the DHB Project Team reported back to DHBs; liaised further with Providers on problems Providers' modelling disclosed; came to accept that the $1.30 per hour figure would reduce; received a flat rejection by Providers of both flow through and collective agreements clauses; settled clauses A4 and A5 in final form; so advised Providers; and saw to the sending out of variation agreements for signature on a "take it or leave it" basis. Within this process the Minister maintained a degree of pressure on DHBs.

[77] Some particular events within that general process need closer description.

[78] As at the date of the 23 May 2007 meeting, the DHB Project Team did not have all DHBs' responses to the issues involved. It is not clear whether all such responses were in by 24 May 2007; but whatever the position, Messrs Foulkes and Climo wrote urgently to all DHBs that day. The object was to summarise the DHB responses actually received, raise a legal matter regarding the proposed clause A5, and report (very briefly) on the 23 May meeting. The communication also forwarded the latest "Final Draft" of the ARC contract variation. The DHBs were still looking to a 1 July 2007 implementation. The communication (by email) reads in relevant parts:

Thank you for your responses to our recent requests for DHBs to endorse the price increases for ARC & HBSS services and the distribution of the funding to the specified services, as well as endorsement of the proposed contract variations. Within our collective decision making rules, we can advise you that:

1. The HBSS and ARC Draft Variations received the most response.

    - This feedback has been taken into account and there have been some amendments made to the Variations to meet the concerns expressed. In particular, the collective agreements clause has been amended to make it more broadly consistent with existing employer obligations under the Employment Relations Act. There is no penalty clause attached, although reporting obligations remain. The pass through clauses for wage increases remain the same.

    - All material issues raised through feedback around these variations have been addressed. Please therefore Note the revised final draft versions which will be used in discussions with providers.

2. DHBs have previously expressed support for the Low Paid Workers initiative through their Chairs and CEOs and contribution to the process to date. However it would be helpful if you could please ensure that you reply to this email to confirm this support and belief, that:

    - The overall health of older people low paid workers initiative, including the approach taken 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 services 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.

We refer you to the legal advice from Buddle Findlay dated 22 May 2007 (attached) which has been obtained on behalf of all DHBs, with particular reference to points 7-15 regarding this confirmation.

…

7. DHBs can anticipate a further letter of expectations from the Minister, and associated Crown Funding Agreement variation relating to the Health Of Older People Low Pay initiative in the near future.

…

Thank you for the input to date from you and your staff, and thank you in advance for the effort that will be required to ensure we meet the Minister's

> expectations and our commitment to target a 1 July commencement date for the variations.

[79] The legal advice dated 22 May 2007 referred to is not in evidence. Its substance can be inferred without difficulty from the terms of the confirmation in writing sought from DHBs. The DHBs obviously had sought advice as to powers to include and act as proposed in clauses A4 and A5, and had received the obvious advice in consequence.

[80] The responses by DHBs are not produced in evidence in themselves. An application by counsel for DHBs to admit a further affidavit by someone exhibiting various papers, probably some or all such responses, was made during hearing in the course of submissions for the DHBs. It was opposed. It was declined on grounds of unacceptable lateness. By that point, counsel for the Applicants had nailed his colours to the mast on a basis such evidence was absent.

[81] There is documentary evidence that 21 out of 22 DHB responses had been received both by 28 May and by 2 June 2007. There is no identification of the standout. Mr Foulkes deposes that "by early June" each DHB had responded. There is no reference to a non-responder. Mr Foulkes then deposes – admissibly or not – that DHBs so responded "confirming their agreement with the initiative in the form presented to Providers on 23 May". Mr Foulkes goes on to note:

> 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.

Mr Foulkes stated, as above, that DHBs made their decision "taking into account clearly expressed Ministerial expectations. The Minister conveyed his expectations to all DHBs in a letter of 12 June [2007]". This is somewhat confusing. Responses received by 2 June 2007 clearly could not have been influenced by a Ministerial letter of 12 June, although that could be true for later conduct.

[82] Counsel for applicants objected to the evidence from Mr Foulkes "as to what was in the mind of the DHBs", citing *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 on attempts by other deponents to state the reasons for Ministerial decisions. Counsel for the DHBs submitted authority based on Ministerial decisions was distinguishable. I accept counsel for Applicants' objection, so far as it goes. Accordingly, I accept the evidence of what was placed before the DHBs, and as to usual practice surrounding decisions of this character, and of the fact of the actual decisions which were made. I rule inadmissible the evidence directed to the DHBs' reasons for decisions made. I doubt whether my decision would have differed here if copies of the DHB responses had been allowed into evidence. Acute hearsay questions, both of admissibility and reliability, would have arisen. What was needed was a series of affidavits from those in the Chair of the DHB Boards which made the decisions, stating the reason(s) they were made; or from the delegate of the DHB if the decision was delegated. The course which was proper for Ministers, as producing the best evidence, and as recognised in the *NZFIA* (supra) line of authority, was proper for the DHBs here. I will come separately to the related question of adverse inferences.

23 May 2007 – July 2007: Revelation to signatures

[83] The overall position of DHBs following immediately after the 23 May 2007 meeting can be gauged from two DHBNZ reports dated 28 May 2007 and 4 June 2007. Their distribution is somewhat uncertain. It may be the 28 May paper was not circulated until 4 June; and the 4 June paper was not circulated until 6 June 2007. They reflect doubts which Providers had expressed, which were not yet resolved. They also reflect a background fact that less than a month remained before money, obtained by the Minister, was due to be used for the purposes he proposed.

[84] The DHBNZ report of 28 May 2007 restated in its introduction the health-purpose related matters contained in the communication of 24 May, and confirmed 20 out of 21 DHBs had "confirmed their continued support along these lines". The report under a sub-heading "Key Messages" then went on to state:

> **What is the Low-Paid Workers Initiative?**
> DHB chairs and CEOs have committed to work with Unions, at the request of the Minister of Health, to stabilize workers in the Health of Older People sector [Phase 1 to which these variations relate] and then to focus on Workforce Development and Quality [Phase 2, to be scoped by end June 2007].
>
> Recruitment and retention of care assistants, cleaners, laundry workers and kitchen assistants has been challenging for the sector over recent years. Additional funding has been included in the price to allow providers to increase the hourly rates of pay for these workers to support workforce stability and sector sustainability in this strategic area. The intent is to increase the general rates of pay for low paid workers from this point forward, and to seek to move them ahead of minimum wage rates. Any new workers are not intended to be employed at lower rates than the new rates that apply following the increase.
>
> …
>
> **Why are DHBs involving themselves in employment matters that are the domain of providers and their employees?**
> The *best endeavours* obligation around collective agreements supports the Low Paid Workers Initiative and overall objectives for this group of workers as set out in the Introduction to this paper. The obligations in the ARRC Variation reflect the existing obligations providers have under the Employment Relations Act (ERA). DHBs are encouraging dialogue/engagement on collectives when providers are requested to do so by either unions or groups of workers. The obligations reflect those that providers already have.

> **So why include the obligation in the ARRC if they already exist under the ERA?**
> DHBs have a strong interest in the development of a stable and sustainable workforce in ARRC. It is in the interest of all parties to achieve this. The sector has been signalling for some time that recruitment and retention of staff is a real issue that they are faced with. The sector is encouraged to engage in collective agreements as a part of the overall objective, which includes the increase in rates of pay for low paid workers. To see what progress is made a feedback obligation is also included.
>
> **Are the obligations ongoing?**
> The obligations related to the wage increase and collective agreements are time-limited and thus are not seen as long-term obligations. Thus they are included in Part A of the Variation. Part B of the Variation covers changes to the ARRC that are seen as permanent or long-term.

[85] The succeeding 4 June 2007 report is to be read in the context of some intervening discussion and modelling between Providers and DHBs, particularly as to the flow through position. Providers were complaining that a requirement to pass through a fixed dollar amount was too inflexible, and that the $1.30 figure could not be funded given so-called "backfill" associated with time factors for such matters as sick leave and the like. DHB modelling had moved by 31 May 2007 to a suggested lower figure of $1.15. It is to be remembered the Minister had wanted as much as possible.

[86] The 4 June 2007 report contains a more detailed account of the 23 May 2007 meeting. On the wages flow through matter it stated the current position as:

> Further work is being carried out on the DHB analysis but it is likely that the strict requirement for a $1.30 per hour increase for the four employee categories will be altered.
>
> The providers appeared to be supportive of the pass-through obligation other than the amount of $1.30 and also requested more flexibility to enable them to address anomalies in wage structures at provider level where they existed. Such flexibility is also being considered as part of the review of this matter. In some respects 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.

On the collective agreements it stated the current position as:

> Providers acknowledged their obligations under the ERA and might accept a collective Agreement clause that did nothing more than support those obligations. There is a view among the representatives that the clause expands on their ERA obligations (the reporting requirement is an example) and further legal advice is being taken by providers. The outcome of this

> remains unclear and will probably remain that way until such time as the Variation is formally presented.

The report accepted that the timeframe of 1 July no longer was achievable. It suggested a "pay-in-draft" at the new rates from 1 July, with variations to be signed and returned by an undecided date, reverting to old rates effective 1 August if necessary.

[87] As noted, there was a degree of ongoing discussion, including disclosure of models and outcomes. Providers, naturally, were anxious to report back to some 700 plus organisations which they represented. The Providers were not assisted in doing so by tardiness on the part of DHBs in supplying the DHBs' model to the Providers. Despite requests, it was not supplied until 14 June 2007. The result of the delay was unfortunate. I accept that, in consequence, the Providers' consultants could do little more than respond to that model itself, and to any obvious errors it displayed. There was not time to liaise with Provider organisations for feedback.

[88] By 11 June 2007, Mr Taylor of the Providers was informally indicating to Ms Cliffe for the DHBs that the Providers may go as far as a $12.55 minimum wage, and that collective agreements were "universally rejected". Obviously, DHBs would need to consider whether to give way, or to make a stand.

[89] At this somewhat fraught point, the Minister chose to write a letter, dated 12 June 2007, to all Chairmen of all DHBs by first names. The Unions had been hovering. There is no direct evidence the letter resulted from Union disquiet. The DHBs had been pressing for a so-called "letter of recommendation" for some time, obviously designed to allow DHBs to sheet home responsibility at least for the collective agreement clause to the Minister. It had been slow to come. The letter of 12 June may have responded to that. Whatever the reason for its timing, the letter stated (relevant parts):

> **BUDGET 2007 HEALTH OF OLDER PEOPLE FUNDING**
>
> This letter outlines my expectations associated with the new funding for aged residential care and home-based support services announced in the 2007 Budget.

In December 2006, I met with district health boards (DHBs) and the New Zealand Council of Trade Unions (CTU) to encourage a joint work programme to address the high turnover and low wages of the aged and disability support workforce. At the meeting on 16 February 2007, there was agreement between participants that work should be progressed in two phases.

It was agreed by participants that the first phase would focus on ensuring flow through of additional Government funding to workers wages with the second phase being primarily related to other issues in workforce development.

On 1 May 2007, I announced that the Government has committed $405.2 million for older people services over the next four years. This letter relates to the $150 million for the aged residential care sector, $81.2 million for home-based support services for older people, and the relevant proportion of the $128 million future of DHB's funding track and demographic funding that can be attributed to these services.

The priority for this year is to introduce the health of older people low paid disability workforce initiative that will see improved wage rates in the residential care and home support sectors. The overall initiative is intended to support workforce stability and sustainability in this strategic area. The expectations outlined below will contribute to enhancing the quality and continuity of care for health and disability services consumers in the residential care and home based support sectors. As you are aware this is consistent with DHBs overall objectives.

To achieve this, it is my expectation that for the additional funding, DHBs will

- Primarily ensure a permanent increase in wages for low paid workers in residential and home support
- Introduce a flow through to workers that is transparent with effective reporting mechanisms
- Ensure providers have in place access to collective agreements for their employees
- Implement the initiative as soon as possible
- Adopt a consistent approach as far as possible nationally.

I have discussed these requirements with Tony Foulkes, lead CEO for the initiative and Craig Climo lead CEO for the Aged Residential Care contract. I have been pleased with the work DHB officials have undertaken to support this policy and am pleased with the targeted 1 July 2007 effective date for provider contracts. I expect to be kept informed about the progress and significant decisions that are being made in respect of implementing this initiative.

This funding is intended to not only provide immediate wage increases but also to encourage all aged residential care and HBSS providers to put in place collective agreements that will provide an ongoing voice for workers in the sector. I expect collective agreements to be progressed as part of the 2007/08 contract changes for the sector. I recognise, however, that effective implementation will take some time as it requires provider/employee representative negotiations rather than DHB led negotiations and consider it

> is reasonable to give till 31 December 2007 for this condition to be met. As I have previously advised you, I have written to the CTU outlining this expectation.

The language had moved from "recommendation" to "expectation". Perhaps reflecting DHBs' current uncertainty as to the precise figures which would be passed through, there was no express reference to the Minister's previous insistence upon $1 per hour minimum. The "expectation" as to collective agreements was very clear. I have no doubt this letter, whether so intended or not, would have stiffened the resolve of DHBs to proceed onward in its terms.

[90] That resolve was soon to become important. On 14 June 2007, Providers wrote roundly rejecting both the LPW wages pass through, and the collective agreement. There were two documents of that date. The first headed "Provider representative response to DHBNZ's presentation on the ARRC A21 review", stated it was a response to the DHBNZ position as presented at the 23 May 2007 meeting. It noted, perhaps opaquely, that at time of writing "no formal position has been presented by DHBNZ". It also noted the response was given on a "no *(sic)* prejudice" basis, in light of what was said to be the good faith issues raised by DHBNZ introducing the passing on and collective bargaining clauses outside the timeframe they set for the consideration of clauses and issues under the A21 Review. (That timeframe was identified by reference to the 1 March and 19 March 2007 documents.) As to proposed wage pass through in clause A4 (then at $1.30), it was "rejected" as to method, amount, and proposed verification. As to the proposed collective agreements clause A5, it was rejected. Reasons were given. It seems not to have been intended to terminate discussions nevertheless. Providers were prepared to pass on all funding as a percentage increase (around 7%), with voluntary disclosure and a DHB funded audit simply confirming compliance or otherwise. The second document was a letter, again "non-prejudice *(sic)*", from Mr Taylor to Ms Cliffe and Mr Shapleski. After discussing legalities of the collective agreement clause, and whether it introduced obligations exceeding those under the ERA, the letter suggested A5 be re-worded as follows:

> A5.1 It is a condition of the Variation that in the event bargaining is initiated for a collective agreement covering any category of Relevant Employee you will:

a. Participate in that bargaining in good faith

b. Conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to.

[91] Interestingly, on that same day, representatives of Providers and DHBs still were in discussions as to modelling matters. However, the reality is that apart from a downward shift eventually to $1 per hour and an outward shift in the date for signature and return of variation agreements, the die was cast.

[92] DHBNZ prepared an update dated 21 June 2007 for lead Chairs and the Minister. A copy was sent to the Minister's office that same day "for use in briefing the Minister". (An internal email within DHBNZ of 22 June says it was sent to the Minister "at his request".) It commenced by stating that "during April-May 2007" DHBs "finalised the details" of the "approach" to vary the agreement. That "approach" was said to "flow from the package presented to the Minister in early April". To "implement the approach" DHBs had made specified "decisions". These involved:

4) *Contract Variation Clauses*
The contract variation clauses have taken into account the views of DHBs, providers and the CTU. As expected, most discussion has centred on the specified flow-through to workers' wages, and requirement for providers to support collective employment agreements.

a) *Flow through clause*
The intent of the flow through clauses for both ARRC and HBSS contracts is to ensure that funding flows through to workers' wage rates, and that the flow-through can be substantiated.

For ARRC, the clause expects the funding to achieve a minimum $1 per hour wage increase, with all workers being paid more than $12.55 per hour [i.e. at least $1.30 above the current minimum wage].

Not all providers agree this is achievable, but the DHB modelling (based on recent industry information) supports it. The DHB modelling is necessarily based on averages, and there will be workers paid higher and lower than the average. However, taking the average approach the modelling shows that a minimum $1 increase to wages will take care workers (the largest group of specified ARRC workers) on average to $12.94 per hour, at least an 8.4% average increase. Workers in the other specified categories

> are paid close to the current minimum wage ($11.25) and a minimum $1.30 increase per hour will given them at least an 11.5% increase to $12.55 per hour.
>
> The contract variation provision enables DHBs to receive reports from providers regarding the flow-through, and to audit providers after going through the reporting processes if that DHB is still not satisfied that the minimum rates have been achieved at a provider level and to clawback funding if necessary.
>
> …
>
> b) *Collective Agreements clause*
> 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.
>
> The clause now specifies:
>
> *[sets out final clause pleaded as para A6 in para [15] above]*
>
> It is expected that, with DHB encouragement through the contract variation requirement, that providers will at least offer to establish a collective agreement which reflects the terms and conditions of the staff covered at that time. In practice it is recognised that achieving the Ministers objectives in the timeframe indicated will largely depend upon the capacity and work of the CTU as they engage in discussions with providers.

As to implementation date, the paper observes:

> ARRC and HBSS Providers have provided feedback on the Variations for their respective service areas in the last 2-3 weeks. Union representatives have had input over a longer period. The concerns have primarily centred on the Flow-through and Collective Agreements clauses. Amendments have been made to both as a result of the feedback. These amendments do not reduce DHB commitment to meeting the Minister's objectives for the new funding.

It accepted there "have been risks" a 1 July date may not be achieved. It projected that variations would be sent to Providers on 3 July, for return signed by 20 July, with backdating withheld for Providers who do not return signed agreements by 27 July 2007. The DHBs concluded with a forecast:

> Clearly providers need to accept the Variations. DHBs have been requested to backpay for July services at the new rates as long as contracts are signed

> by 27th July 2007. The indications are that HBSS providers will; the signals from the ARRC sector are more equivocal but DHBs are optimistic they will accept the Variation given the significant funding available.

A copy of the "update", with texts of the variations, was sent to all DHBs on 22 June 2007.

[93] There is no evidence as to response by the Minister, if any. It is likely he would have wished to know the exact amount being passed through to LPW when finalised, and would be wanting that done quickly.

[94] On Friday 22 June 2007, the DHBs, through Ms Cliffe, stated the DHBs' apparently final position. The letter stated (relevant parts):

> We write to confirm that DHBs have completed the general review of both the Age Related Residential Care and Aged Residential Hospital Services Agreements for 2007/08 and have presented the outcomes of the review at the meeting with provider representatives held in Christchurch on 23 May 2007. A copy of the slides presented at the meeting has been forwarded to you separately. The Variation that reflects the outcomes of the review will now be completed and presented to ARC providers for signing and return to their local DHB. We would ask that they complete this part of the process by 20 July 2007 to ensure new prices take effect from 1 July 2007. A copy of the final form of both the ARRC and ARHSS Variations are attached.
>
> ***Variation on DHBNZ Website***
> To allow more time for providers to review the Variation an interim copy will be available from June 22nd and can be accessed from DHBNZ's website at: www.dhbnz.org.nz
>
> Providers are encouraged to access a copy for review whilst the formal process of loading new prices into the contracts that will go out takes place. It is anticipated that formal documents will be sent to providers on or about the 3rd July allowing until 20th July for the signing and return of the documents to their DHBs for completion.
>
> …
>
> **Part A**
> There are three key points to note in Part A of the Variation:
>
> ***Wage Increases***
> The first relates to funding that is specific to improving wage rates and conditions for employees in the categories listed under clause A4.2. There is a requirement for providers to increase the hourly rates of pay for these employees by at least $1.00 per hour or such higher amount as is necessary to ensure that the minimum hourly rate of pay for the Relevant Employee is no less than $12.55 per hour with effect from 1 July 2007. This obligation responds positively to concerns expressed by the sector about the need to

> improve rates of pay for low paid workers to achieve a higher level of stability in the workforce and is consistent with the Government's expectations referred to above. The intention is to increase the general rates of pay for all employees in the categories as set out in the Variation from this point forward and any new workers are not intended to be employed at a lower rate than that which applies once the new rates are implemented. There is sufficient funding included in the new TLA prices for providers to meet these obligations which should be seen as minimums to be achieved and improved upon wherever possible recognising the importance of improving sector stability and ongoing sustainability.
>
> ***Collective Agreements***
> The second relates to the development of a sustainable future for the sector, best achieved through provider and collectivised workforces negotiating the development of this sector going forward. Providers are encouraged to use all reasonable endeavours to conclude collective agreements covering each category of Relevant Employee in respect of whom collective bargaining is initiated.
>
> ***Signing of the Variation***
> The third is the need to complete the signing and return of the Variation to give effect to a 1 July implementation of the new funding through the increased prices. Providers will need to have completed this process and have documents back with their DHBs prior to 20th July for new prices to take effect from 1 July. It is anticipated that new prices will take effect from the payment period following 31 July with a backdated payment for the month of July completed by 31 August. For documents received after the 20th July new prices will take effect from the 1st day of the month following the month the documents are received by the DHB. There will be no backdating for Variations that fall into this category.

Interestingly, a covering personal note from Ms Cliffe to Mr Taylor said she would be "in touch Monday when you have had a chance to review". What she had in mind is not known. Nor is whether anything occurred.

[95] On 6 July 2007, HCPNZ wrote, for itself, to the DHB Project Team alleging on asserted legal advice that clauses A4 and A5 were unlawful for reasons stated, which largely match the basis of this later proceeding (the letter is misdated 6 June). The provisions were to be withdrawn by 13 July 2007, or HCPNZ–represented Providers would "accept the Variation under protest" and issue judicial review proceedings to invalidate those provisions. A letter from DHBNZ was dismissive. Effectively it said Providers were free to issue, if they wished, but the signed agreement should be sent to enable funds to flow. An arrangement was reached under which an interim order would not be necessary, as a waiver of A4 and A5 obligations would be put in place pending determination.

[96] This correspondence has legal hoof-prints all over it. It does not assist in factual determinations. Nor does a DHB press release of about this time.

V. Illegality and Improper Purpose

Utilising s 25 powers for improper purposes: Grounds 38.2 and 38.3

[97] I take grounds 38.2 and 38.3 ahead of 38.1, as that was the order preferred in Applicants' submissions. Counsel for Applicants started with emphasis on the statutory scheme. The submissions point to the separate roles and powers of the Minister and DHBs under the Act; both in the context of the wider Crown Entities Act 2004 and Employment Relations Act 2000. The Minister's powers (Part 2) relate to national strategies, funding agreements, and committees. DHBs, which are separate partly elected territorial bodies, have health-related objectives and functions under ss 22 and 23. Those are to be pursued in line with stated national district strategies and plans. The DHBs have specific power, if permitted by the Annual Plans, to enter into s 25 service Agreements under which other persons provide services on terms and conditions as agreed. The Minister's powers to go beyond policy (as above) and to intervene are limited to circumscribed directions under s 32 and requirements under s 33, along with restrictions to direct specific outcomes imposed by the Crown Entities Act. At heart, the legislation intends devolution of power to DHBs. Industrial matters are to be controlled under the generally applicable ERA.

[98] Counsel for Applicants then identifies the (standard) service Agreements entered into by DHBs with Providers, and particularly clauses A21 and A23 as the means by which DHBs regulate and control ARC services. It is the powers under those clauses which are the subject of challenge.

[99] Although the exercise of statutory powers is admitted, counsel for Applicants specifically invoked *Webster v Auckland Harbour Board* [1983] NZLR 646, 650, and latterly *Diagnostic Medlab Ltd v Auckland District Health Board* HC AK CIV-2006-404-4724 20 March 2007 Asher J, reported in part in [2007] 2 NZLR 832, 836,

[9]-[11], as to controls over entry into and exercise of powers under contracts entered into by statutory bodies.

[100] Applicants, as the broad basis of challenge, contend that clauses A4 and A5 requirements abuse the powers of DHBs under the Act, and are inconsistent with the regime prescribed by the Act as to the role of the Minister and the basis on which DHBs may contract to secure provision of health services.

[101] This broad basis then refines into two lines of attack, albeit interrelated, (1) "improper purpose" and (2) Ministerial interference.

[102] As to improper purpose, counsel started from the undeniable generality that "a power granted for one purpose must be used for that purpose and not for some unauthorised or collateral purpose" (*Laws of NZ; Administrative Law;* [27]). The first step, it follows, is to interpret the statutory provision granting power so as to determine the proper scope of that power. That interpretation should take account of the context of the Act as a whole. Sometimes, it was said, matters are more straightforward: if the particular power, as a matter of interpretation, is not intended to be used for that purpose in any circumstances, the decision makers' motives do not need to be addressed. Counsel, along with invocation of *Padfield*, cited two cases as illustrative of the relevant improper purpose ground: *Lower Hutt City Council v Attorney General ex rel Moulder* [1977] 1 NZLR 184 (statutory powers did not extend to the purpose) and particularly *Poananga v State Services Commission* [1985] 2 NZLR 385 (other statutory powers did so extend and should have been used). It was submitted it did not matter that what the decision maker sought to achieve was laudable, or might be seen to promote the overall objectives of the legislation: what matters is whether the particular power existed for achievement of the particular purpose: *Laws of NZ op cit* [29]; *Poananga* (supra) 396; 398.

[103] Counsel submitted the issue of improper purpose "does not require a detailed assessment of the motivations of the DHBs" because – *irrespective of motivation* – the clauses could not legitimately be imposed under s 25. That section does not exist for the purpose of imposition of a national employment relations initiative on wages and collective agreements. It exists to enable DHBs to buy in health services they

are unable to provide themselves. Discretionary provisions within the Agreements, such as A21 Reviews, do not enable exercise beyond the underlying s 25 purposes.

[104] The point was supported in submission by the wider legislative context of the ERA. That imposes a detailed regime, including good faith obligations under s 33 and public health sector obligations under schedule 1B clause 6. An attempt to repeat those obligations through the Act is to use the powers under the Act for unintended purposes. The same applies to A4, attempting to prescribe a minimum wage, a matter regulated by other legislation.

[105] Counsel resisted arguments that A4 and A5 are indeed within the overall objectives of DHBs set down in s 22, and therefore are not improper, on two bases, (1) (essentially factual) that minimum wages and unionisation do not achieve s 22 objectives, (2) achievement of s 22 objectives must be through the prescribed mechanisms, not as if open-ended powers existed, a restriction emphasised by s 22(2). The allegation of improper purpose is not answered, it was said, by an assertion of general consistency with objectives: it is necessary to consider the particular powers involved (*Poananga* (supra)).

[106] Counsel for Respondents' submissions raised the question of intensity of judicial review within *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385, 391 (PC), but rested largely on contention clauses A4 and A5 can be brought within s 22(1) objectives and wider statutory context. The *Lower Hutt City Council* and *Poananga* cases were said to be distinguishable. Those matters apart, counsel accepted there was "no difference on basic law".

Utilising s 25 powers for improper purpose: Grounds 38.2 and 38.3: Decision

[107] I deal first with the ground alleging utilisation for improper purpose as advanced in paragraphs 38.2 and 38.3. I defer to the next section the related ground asserting action as if directed by the Minister under paragraph 38.1, which raises some acute factual issues.

[108] Despite the careful analysis by counsel for Applicants, I am not persuaded clauses A4 (wages) and A5 (collective agreements) must be regarded as falling outside the objectives, functions, and – with that – s 25 service contract powers of DHBs.

[109] Section 22(1) states that DHBs have objectives which include:

> (a) To improve, promote, and protect the health of people and communities.
>
> …
>
> (c) To promote effective care or support for those in need of personal health services or disability support services.

[110] On that basis, it would be within statutory objectives to promote the health of people within ARC facilities, or ARC patients with need of personal health services, as it would all others.

[111] Section 23(1)(a) enacts that for the purpose of pursuing its objectives, DHBs have functions which include:

> (a) To ensure the provision of services for its resident population and for other people as specified in its Crown Funding Agreement.

[112] On that basis, it is within its functions to ensure the provision of ARC services for those requiring ARC services in its resident population.

[113] In light of those clearly permissive objects and functions, we come to service agreement powers in s 25. Section 25 provides:

> (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.

The term "services" derives from a complex series of definitions, including "health services", "disability support services", "personal health services", "public health services", and "public health". Its meaning can be captured sufficiently for present purposes as "health purposes". DHBs are empowered – if permitted by Annual Plans, and in accordance with Annual Plans – to contract out the provision of such health services.

[114] Under s 25(2)(a) the DHBs may negotiate and enter into service agreements – that is, for health services – "containing any terms and conditions that may be agreed". Beyond the control by Annual Plan, there is no expressly stated restriction on that power.

[115] It is at this point the administrative law requirement for exercise of powers within statutory purposes comes into play. DHBs do not have freedom to agree on (or more realistically, impose) all obligations, of any type, no matter what their content. It is not as though they are natural persons, contracting without a statutory basis. Conditions of contract must be of a character which at least are capable of promoting health purposes. They must not be of a character which the statute intends be achieved in another way. A condition requiring Providers to employ only staff who had red hair would not be. A condition requiring Providers to employ only staff who do not have communicable diseases would be. The one could do nothing for health. The other could promote health by reducing risk of infection amongst the community.

[116] It follows that DHBs were acting within statutory purposes, and within s 25, if the A4 and A5 conditions were at least capable of promoting health purposes, and were not directed at matters which the Act intended be achieved in another way. If so, they were within statutory purposes and within contractual powers. If not, they were not.

[117] I consider both A4 and A5 were *capable* of promoting health purposes. Better pay, and better industrial power through a collective agreements, *could* – I do not say *would* – lead to a more satisfied and stable workforce, with a flow-on effect of enhanced care for ARC residents. Better the experienced and motivated carer than the inexperienced and resentful so far as ARC health is concerned. It is possible to say that better wages and – though more debatably – better union organisation within Provider workforces – would promote better care of the aged.

[118] It is not simply a matter of whether it is within statutory purposes to require that a Provider pay better wages and promote collective agreements in Provider workforces. If one stops there – as the argument for counsel for Applicants chooses to stop – such conditions are plainly outside powers. DHBs do not exist for the purpose of enhancing wages and industrial conditions generally. It is, rather, a matter of whether it is within statutory powers to require Providers to pay better wages and to promote collateral agreements *when such are capable of improving health outcomes for ARC residents*. In that fuller context, the answer is different.

[119] I do not accept clauses A4 and A5 fell outside DHBs' statutory purposes (and s 25) because these wage and collective agreement matters could (and some would say should) have been brought about within the industrial mechanisms of the ERA. DHBs cannot, of course, act in or require contravention of the ERA any more than anyone else can. However, as long as DHBs' stipulations do not involve actual breaches of the ERA, and are at least capable of promoting health purposes, I do not see the DHBs as required to stand back simply because the matter, at least in legal theory, could be resolved under the ERA independently, or within private employment relationships. If there is a workforce matter which is inimical to health, and the ERA mechanisms are not functioning and not likely to function, I do not see the DHBs as acting outside statutory purposes if they step in to require outcomes or procedures which would be lawful under the ERA and which are capable of enhancing health. The same applies to private employment relationships.

[120] It follows that in so far as the Applicants' case (grounds 38.2 and 38.3) rests on submissions that clauses A4 and A5 are outside statutory purposes, without need

to examine DHBs' motivations, it cannot succeed. It is necessary to move to ground 38.1.

Acting as if directed by the Minister: Ground 38.1

[121] This is a related but different aspect. It raises directly the question of actual DHB motivation. Were clauses A4 and A5 included for health purposes, or were they included because that is what the Minister wanted?

[122] Applicants' submissions began with identification of the separate statutory roles of DHBs and Minister. The Act devolves power: it is the DHBs which have responsibility for meeting health needs of constituents, including through entry into service agreements. "The Minister is given no role in relation to those agreements". The Act and Crown Entities Act cross-reference to define responsibilities and matters in which it is proper for a Minister to be involved. Section 33 of the Act (requiring provision of services) could not apply, but is significant in how it requires the Minister to keep out of matters of detail, including price. Section 32 of the Act (Ministerial directions), which under subs (1) must be read with s 113(1)(b) Crown Entities Act, could not apply, for the same reason.

[123] Applicants submit it is therefore beyond the Minister's powers "to give a direction which requires a private body, who *(sic)* contracts with a DHB, to undertake a particular act, or secure a particular result, in relation to particular employees the private body employs".

[124] That, Applicants submit, is precisely what the Minister is seeking to do, not by direct utilisation of (insufficient) statutory powers, but "by advising the DHBs what he wants them to do". The limitation of the legislative regime "cannot be side-stepped and avoided" in that way. It was a "de facto" instruction of the same character as that "akin" to a direction and treated as such in *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1, 75, per Finn J. The Minister has done indirectly what he cannot do directly. The language of "expectation" means in context "that the DHBs should give effect to the Minister's desires", and was "akin to an instruction".

[125] Applicants submit that on the facts, and despite doubts on the part of some, the DHBs required inclusion of clauses A4 and A5 to give effect to the Minister's desires. It was not done as a matter of independent decision.

[126] Submissions for DHBs raised, first, the question of intensity of review within *Mercury Energy* principles (supra), citing also *Bayline Group Limited v Secretary of Education* [2007] NZAR 747; *Southern Communities v Health Care Otago* HC DUN CP30/96 19 December 1996 Eichelbaum CJ; *Diagnostic Medlab* (supra); and *Vector Limited v Transpower New Zealand Limited* HC AK CL1/98 17 August 2000 Williams J. The present case was put as one where arguments were as to matters of detail, without adverse effects, and in contracts to which Providers had agreed, albeit under protest. Such, it was submitted, were not susceptible to judicial review. Counsel for DHBs cited *Attorney-General v Ireland* [2002] 2 NZLR 220 [42] as authority that an additional purpose was lawful and it did not invalidate a decision so long as the added purpose did not thwart or frustrate the policy of the Act in question.

[127] Counsel then made four core submissions:

i) Disagreeing that there is no power for the Minister to direct or require DHBs to reach those outcomes;

ii) Disagreeing that the Minister's "expectations" were in the nature of directions (or improper);

iii) That DHBs considered the Minister's "expectations" were a proper expression of Government policy to which they responded properly;

iv) That in any event DHBs did not treat the Minister's expectations "as directions" and such have no bearing on the case.

A brief summary of supporting detail for core submissions is necessary.

[128] As to the first, the Minister is able, legitimately, to influence decisions DHBs take in relation to s 25 Agreements through determining the New Zealand Health and Disability strategies (s 8); approving District Strategic and Annual Plans; influencing Statements of Intent; and through Crown Funding Agreements. Further, there is no prohibition in the Act on the Minister expressing "views, opinions, preferences or expectations". As to the term "expectations", s 170(2) of the Crown Entities Act states that the purpose of a Crown Funding Agreement is to assist the Minister and (for example, DHBs) to deal with their respective "expectations". The intention that a CFA "assist" in this way recognises that a CFA will not be the only way expectations may be "clarified, aligned and managed". It can be done – as here – by expectations being expressed, then taken into account by DHBs in making their own decisions. This, it was said, is common practice. Sections 33 and 32 powers were not exercised. However, they do not support a dividing line. Both were potentially applicable. Section 33(1)(a) allows requirements that DHBs "arrange" the provision of health services. Limitations as to directions apply only between named persons and in relation to prices paid by DHBs and Providers. Section 32 is not excluded, seemingly for the reason that s 33 is more appropriate (a submission which I still struggle to grasp).

[129] As to the second, third and fourth core submissions, on the weight of the evidence "DHBs themselves decided whether and how the Minister's expectations should be effected". The *Hughes* case is distinguishable. In *Hughes* the Board members did not treat the Minister's communication as a direction, so the Court disregarded it. The same should apply.

[130] Respondents' counsel's submission concluded:

> 139. The evidence clearly demonstrates that DHB's considered whether they could and should implement the low paid workers' initiative themselves, and by what means. It was the DHB's who decided to address the low paid workers' initiative by way of the A21 review process. They gave it substance in the form of draft clauses, debated those, and then watered them down following that internal debate and feedback from Providers.
>
> 140. There can be no doubt that the DHB's wished to give effect to the Minister's expectations. They are Crown agents and were being offered a substantial amount of public money for a specific purpose. While that may be so, they were the ones who devised clauses A4

> and A5, and separately turned their minds to the questions whether those clauses should be introduced. The process was a lengthy and iterative one; it was no rubber stamp.

Acting as if directed by the Minister: Ground 38.1: Decision

[131] Essentially this ground turns on a question of fact: did the DHBs include clauses A4 and A5 due to something akin to a direction from the Minister, to be treated as such; or did the DHBs decide to do so aware of the Minister's wishes but acting independently? The burden of proof is on the DHBs.

[132] There are no affidavits from Chairpersons or other actual decision makers of individual DHBs stating the reason (or reasons) their particular DHBs required inclusion of clauses A4 and A5. Indeed, as the case has turned out, there are not even formal minutes of the decision making DHBs as to reasons. It will be necessary to consider the question of adverse inferences under *NZFIA* doctrine in due course. First, I prefer to examine the evidence which the Court does have, such as it is, and consider the inferences which it may permit.

[133] It must be kept in mind that Applicants' pleaded case is directed at Ministerial interference. It does not directly allege CTU interference. If the Minister pressed for something because the CTU was pressing him, that is within pleading. If the CTU pressed DHBs directly, that is outside pleading.

[134] The development of the DHB attitude – whatever it was – was a progressive matter. Strictly speaking, it was the DHBs' state of mind at time of signature by DHBs which counts, but that can only be measured by seeing how the matter grew.

[135] There is no doubt that so far as DHBs were concerned the genesis of the matter lay with the Minister. It was the Minister who in December 2006 made it plain to DHB representatives he wanted action in relation to workforce conditions. It was in response to the Minister's urgings that DHBs met the CTU in late 2006, and became committed to the 16 February 2007 workshop. It was at that workshop that the DHBs, through Ministry and CTU papers, first learned of wage increase and pass through proposals for the forthcoming financial year, and of collective bargaining

proposals for the longer term. Crucially, it was from the Minister (or Ministry) that DHB Chairs came to hear (15 February 2007) that there would probably be a $37.5 million sum to back this up. That was vital Ministerial oil. It was corroborated by a Ministerial press release reported on the radio shortly afterwards. A wage increase for LPW, totally funded by the Minister's new money, would not have been objected to by DHBs in principle at this early stage, although they would have wanted to see the details of how it would be put through. I am satisfied that is where matters stood as at commencement on 1 March 2007 of the A21 Review. The outcome of briefing of DHB CEOs and Chairs around that time is consistent.

[136] The DHB Project Team knew as at commencement of review on 1 March 2007 that there was a Ministerial initiative to increase LPW wages, with backing of a confidential $37.5 million, and that there was a possibility it would be handled by pass through obligations, but the concept was considered too inchoate and inconvenient to include in the A21 Review started that day. The wages idea was a Ministerial initiative, and DHBs were comfortable with it, but clearly did not feel Ministerial pressure at a level such that the initiative must somehow go into the review unformed. With equal clarity, DHBs did not feel it was an idea of their own, by adoption, which was ready to do so. Indeed, and unwisely, the existence of the initiative was concealed to avoid complications and delay. The A21 timetable down to the meeting of 20 March 2007 proceeded without further Ministerial demands or DHB initiatives for A4 or A5. The matter remained an idea under examination.

[137] That hiatus really continued until DHBs, after technical discussions including Ministry officials in mid March, formulated their first tentative assessment. That began with Mr Shapleski's funding options paper, but did not really refine until the 2 April 2007 paper for the DHB collective and the Minister. As at that point, the DHBs had worked up a flow through proposal, recognising that an increase at $1 per hour could be passed through the A21 contract Review, and an implementation timetable. It was DHB work, but very clearly subject to discussion with and clearance by the Minister at a meeting on 4 April 2007. The proposals were sent to the Minister in advance for "discussion" seeking his early comment. The paper noted the Minister "expects" to address LPW wage rates by increases of at least $1 per hour, and that DHBs can achieve this "expectation" and simultaneously resolve

the A21 and A23 Reviews. The proposed timetable recognises "Minister agreement to approach" as to come on 4 April 2007. A good deal of work had gone into this paper. So far as LPW wages were concerned, DHBs clearly were supportive but only to the extent the Minister agreed with their proposed approach. The question of collective agreements was not yet on the horizon.

[138] The Minister's approach at the 4 April meeting with DHBs was consistent with that viewpoint. The Minister evidently made plain what he would like to see, but not in mandatory terms. He "indicated" DHBs should "consider" increasing the $1 per hour to "(say) $1.25" but only "if possible". He expected firm mechanisms for monitoring flow through: "won't prescribe" but suggested clauses in contracts. There is another somewhat enigmatic clue to DHBs' attitude at this time: it emerged at the meeting a CFA covering the necessary funding to DHBs would not be ready in time, but there would be a May (no doubt post-Budget) letter of comfort. The DHB negotiator recorded DHBs needed to see a draft "to ensure that the Minister's non-prescription is being adhered to".

[139] It is also clear that DHBs as a body did not regard themselves as committed yet to the LPW wages initiative so discussed with the Minister. A reporting memorandum the next day (5 April) to CEOs, referring to the LPW initiative and the ARC "package", said that a "proposed package" had been "developed" and "was tested yesterday with the Minister of Health so as to seek any early comment". It continued "it was made clear in this meeting that the DHB collective discussion was yet to occur on the substance of the package, and the Minister was fully supportive of that". After advising the paper would be available for CEOs on 10 April for "discussion and comment" at regional meetings, the paper commented "we are hopeful that DHB support will be advised". This is all far from the language of representatives who feel directed by the Minister, or which attempts to direct DHBs.

[140] The DHB team paper of 10 April, perhaps not released until 12 April 2007, is consistent. It refers to "work progressing" on the LPW initiative; with a "proposed package" having been "tested in a preliminary way with the Minister" prior to "DHB collective decisions" on substance. The paper then set out that "package in detail". In doing so it stated "DHBs are leading" the activity concerned. CTU views were

said to have influenced the paper, but commercial directions had not "formally" been discussed with CTU or Providers yet as "DHB and ministerial engagement are more critical at this point". There are then a number of references to Ministerial "expectations". Funding is said to be expended in manner which meets the Minister's "expectations". CEOs are recommended to "agree that the proposed approach meets the Minister's expectations". After noting that the Minister "expects" increases of at least $1 per hour, the paper states that "DHBs can achieve this expectation". The paper notes two other relevant matters. The first, that the Ministry had indicated it "will look at" a prescriptive policy statement directing flow through a CFA, which would not require agreement with Providers. Second, there are references to endorsing DHB commitment to "stage 2". Stage 2, at that point, amongst a miscellany of matters, included collective agreements. There is no explicit reference to collective agreements, and they were not immediately in prospect. Clearly, all is up for discussion at a DHB level. It is known what the Minister wants, and there is the prospect it could be engineered by the Minister through a CFA variation without either demanding or requiring DHB action, but the decision clearly is regarded as still resting with DHBs, and an open one.

[141] Down to this point, I am not prepared to find that DHBs were acting on something akin to a direction by the Minister and to be treated as such. The original idea had been the Minister's, but the DHBs had taken it on board and were developing it within their own processes. The Project Team, at least, was in favour. They hoped it would be agreed to by DHBs. The DHBs were working in close liaison with the Minister, and endeavouring to accommodate his views, but that is to be expected. It had been his idea, and he was supplying the money. They were not, however, behaving as if dictated to.

[142] Then, on 24 April 2007, when the package including the LPW wages matter was still under consideration within DHB circles, the Minister accelerated the collective agreements matter.

[143] Clearly, this occurred as a result of CTU pressure. There is some indication that views within Cabinet that day also played a role. However, to all appearances it was a matter which the Minister himself endorsed, and emphatically. As the

Minister said in his subsequent (27 April 2007) letter to the CTU, he considered the idea that DHBs require Providers to contractually put in place collective agreements was "a good one", but it could not happen immediately. "Accordingly", the Minister said in that letter, "I have reiterated to DHBs that they should develop a pass through mechanism, … but should also require Providers to put in place collective agreements by, say, the end of the calendar year". (The "reiteration" so far as collective agreements is concerned is somewhat misleading. It was the first iteration.)

[144] The Minister telephoned Mr Foulkes, a lead CEO on the DHB Project Team, late on 24 April 2007. I regard it as a key conversation. It was fully noted by Mr Foulkes, and there is no contradictory affidavit from the Minister. I accept Mr Foulkes' note. The Minister recognised that DHBs were not supportive of use of collective agreements as a pass through mechanism in the short term, and that DHBs felt further discussion was needed in the longer term. However, the Minister said, Government was supportive of the CTU view (although not believing it would deliver in the short term). Government, he said, "has a desire" for a combined approach, that is, contractual pass through, but with Providers "asked (?)" to develop collective agreements to be in place by, for example, the end of 2007. The Minister acknowledged there would be a "perception" of an interventionist approach. Then, tellingly, the Minister stated "he was clear it was a government decision not DHBs and would be prepared to put that in writing to us and front any response from the sector". The tenor of this conversation comes through clearly. The Minister knew this acceleration of collective agreements into the current A21 Review would not be welcomed by DHBs. He informed Mr Foulkes it was a "government decision": not a "suggestion", or "recommendation", but a "decision". As if to emphasise, he stated a willingness to put that in writing, and to deal with complaints from the "sector". In best political traditions, the writing proved slow to come and was not quite in those terms when it arrived. I do not, however, doubt what was said at the time.

[145] The initial DHB response was guarded. Mr Foulkes concluded his conversation with the Minister on a basis which "noted and respected the position" (that is, neither agreeing nor disagreeing), mentioned some risks, and indicated that

DHBs would consider the implications. The matter was to be discussed further by the Minister with lead DHB Chairs at a national CEOs' meeting in a week's time. As Mr Foulkes noted, there were matters which DHBs needed to consider; including likely resistance from Providers and potential to delay the "whole pass through". DHBs, it is to be remembered, were already substantially past the 15 April 2007 date by which the A21 Review was scheduled to be completed. This collective agreements matter could cause severe timetable difficulties.

[146] Meantime, initial feedback had been received from DHBs to the LPW wages initiative as outlined in the 12 April paper, which effectively did not mention collective agreements. By 27 April, three regional meetings and 21 out of 22 DHBs had responded. There were questions and queries on matters of detail, but all were "generally supportive" of the "proposed approach". Leaving out collective agreements, the DHBs were exactly that: supportive. This is not the language or tone of obedience to something akin to a direction, and treated as such.

[147] Obviously, DHBs needed to sort through the implications of the Minister's "government decision" that DHBs "should" require Providers to promote collective agreements. The DHB team sought draft clauses from the CTU. That is not surprising. Obviously the CTU was influencing the Minister, and it would be wise to square off the CTU requirements. There was discussion at a national CEOs' meeting, and a further meeting with the Minister occurred on 1 May prior to his press release of that date. It was decided that work would continue on finishing the relevant clauses, with continuing liaison with the Ministry and the Minister's office "over communication of Government's decision on the use of collective bargaining to DHBs". Clearly, the DHB team wanted overt recognition this was a Government requirement, for which Government should be blamed, not a Project Team idea. Beyond that, the attitude at the time was defensive. When Mr Taylor sought enlightenment from Ms Cliffe as to what the Minister meant by his reference to "collectivised workforces" in the 1 May Ministerial press release, she refused to comment.

[148] There was some early resistance from individual DHBs. An Auckland DHB message of 4 May 2007 presciently notes "the ARC willingness to introduce

collectivism will be minimal", and it noted other tactical and public relations problems.

[149] The DHB Project Team obviously needed to settle precise clauses for consideration by individual DHBs. As well as interchanges with the CTU over early May, and obtaining legal assistance, the team was in touch with the Minister's office. The official concerned opined that a suggested draft seemed about right in terms of CTU correspondence, but wanted the team to contact the Minister's "political adviser". That person (identified as one Jim Turner) was reported on 11 May as believing "best endeavours plus penalties [as we have it in clauses] would meet Minister's expectations". However, there were limits to the extent to which drafts could be finalised without reference to DHBs. The Project Team saw a need, by that point, to "test the current clause with DHBs before going further with CTU" (or, given the linkage, probably the Minister).

[150] I am satisfied that at this point, 10 May 2007, at least the DHB Project Team regarded the new collective agreement aspect as a Government, not DHB, initiative, which was likely to prove a sticking point, and wanted to sheet home responsibility and blame to the Minister if necessary. This is very clear from Ms Cliffe's note of 10 May 2007. With reference to the "collective clause", she wanted it to be "very clear who was accountable for the outcomes of this process as these clauses are likely to be the sticking point in concluding the rest of the package".

[151] Against this background there are two papers to be read together:

i) The DHB update, dated 8 May, sent 10 May 2007; and

ii) A Project Team message to all DHBs dated 15 May 2007.

[152] The 8 May paper reported on feedback from regional CEO meetings and all DHBs as "generally supportive" and as giving "a high degree of confidence in the acceptability of the package to DHBs". (It is to be remembered the feedback on the 12 April paper, to which this refers, was only on the topic of LPW wages. It did not include any imminent collective agreements proposal.) There are two very brief

references to the collective agreement matter. The first said that "there are political expectations regarding flow through clauses … similarly the contract variation needs to contain expectations on Providers to enter into collective employment agreements". The collective agreement aspect was put as a "political expectation". Second, under a reference to Provider resistance to contractual commitments to "wage rates or any other form of flow through" it was said that "the Minister has made it clear that he requires DHBs to ensure contractual commitment". The word used is "requires". This appears to have been regarded as extending to collective agreements also: it was said "a number of the larger Providers … already have collective agreements … and we have seen sector acceptance of such clauses in some districts". Endorsement of funding distribution and price increases was sought by 18 May.

[153] The Tuesday 15 May paper enclosed draft clauses, including A4 and A5, and requested response "with your endorsement of the variations and any comments" by end of Friday 18 May. Clauses A4 and A5 were said to have been drafted "to meet the clearly stated expectations of the Minister and Government". The paper stated "we are cognisant of the range of DHB and provider views about the collective agreement clauses in particular. The clauses have been drafted on a pragmatic realistic basis. However, we value your feedback and encourage that to be given." Tight timeframes, it was said, "were necessary" in order to meet the Minister's expectations (and DHB commitment to implement by 1 July 2007).

[154] I am satisfied that down to 15 May 2007, and this first distribution of draft clauses, the DHB Project Team regarded the collective agreements clause as a Ministerial requirement, not as an initiative which the DHBs adopted willingly as their own, and regarded it as a matter for which the Minister held and was to take responsibility. It had a worrying potential, to them, to disrupt and delay the A21 Review negotiation, including the LPW wages pass through.

[155] Evidently, some DHBs did respond as requested by Friday 18 May 2007. Auckland DHB responded on 17 May with both barrels. It required Ministerial directions under s 32 on both the A4 and A5 clauses, which it viewed as *ultra vires*. Wairarapa was "comfortable" and "happy" except for clause A5. It required to see

legal advice. Dates are not entirely clear, but it appears Northland, Wanganui, and South Canterbury had reservations, at the very least, as to A5. There may have been others. It appears not all responses were in even as late as 23 May 2007, despite the request for response by 18 May.

[156] On 22 May 2007, the DHB team obtained legal advice as to DHB powers. That opinion is not in evidence. No doubt it responded to DHB concerns being expressed.

[157] Early on 24 May 2007 – the day after the 23 May A21 Review meeting with Providers at which the LPW wages and collective agreements clauses had been disclosed to Providers, and to a mixed reception – the DHB Project Team sent DHBs the legal opinion concerned, and so-called finalised clauses. It referred to DHBs' "previously expressed support for Low Paid Workers initiative". The support, to that point, had been or largely been for the wages pass through initiative, not the collective agreements matter. DHBs were then asked to reply "to confirm this support and belief" in precise terms obviously designed to match objectives and functions provisions of the Act. The wording referred to "the Low Paid Workers initiative, including the approach taken in this first stage". The "first stage" originally had not included collective agreements. Since the Minister's move on 24 April, it did. That possible source of confusion was not further clarified. It is not known whether the accompanying legal opinion would have done so. Response was requested by the end of Friday 25 May. By Monday 28 May 2007, 20 out of 21 DHBs were said to have confirmed "continued support along these lines".

[158] Interestingly, immediately after the legal advice dated 22 May 2007 was received, references in DHB documentation to Ministerial expectations or the like rather reduce. Instead, the tendency becomes toward mantra that collective agreements promote good staff retention policies which in turn improve health.

[159] I have considerable doubts whether DHB viewpoints that collective agreements were matters driven by the Minister, not the responsibility of DHBs, somehow magically altered over the period of a few days. I think it much more likely that DHB personnel learned of judicial review dangers involved in any

apparent blind obedience to the Minister, and ceased talking so loudly in those terms. I rather doubt whether they ceased thinking in those terms. Clearly enough, however, by the fact of response by 28 May 2007 DHBs accepted, for whatever reason, the inclusion of collective agreements clause A5 in the A21 Review. With that decision made, it is not surprising that the formula of a sustainable workforce, which could be aligned with statutory objectives, became more fashionable. If it was going to be done, then it should be justified to any extent possible.

[160] Ironically, perhaps, at this very point the Minister wrote his somewhat delayed 12 June 2007 letter of expectation. The letter stated it was the Minister's "expectation" that, for the additional funding, DHBs would ensure a permanent increase in LPW wages, introduce a flow through, and "ensure Providers had in place access to collective agreements for their employees". The Minister expressed pleasure with the work of DHB officials undertaken "to support this policy". He expected "to be kept informed". He then added that funding was intended "to encourage" Providers to put in place collective agreements; that "I expect collective agreements to be progressed" as part of contract changes; and referred to extended time "for this condition to be met". The Minister stated he had written to the CTU outlining this "expectation". While the Minister did not repeat his 24 May telephone reference to "government decision", the language firmed from "recommendation" to "expectation".

[161] The 21 June 2007 DHB internal update, immediately copied to the Minister's office, appears to me to have been written with a Ministerial audience in mind as much as DHB Chairpersons. It notes the approach flows from the package presented to the Minister in early April. As to the contract variation clauses, it said these have taken into account views of DHBs, Providers, and the CTU. It does not refer expressly to the Minister. However, in relation to the collective agreements clause, after noting Provider resistance, it says the clause has been modified to take feedback into account "without losing the government's intent". As to timing of collective agreements, it recognised "that achieving the Minister's objectives in the timeframe indicated" will depend upon the CTU. At this important final stage the DHB Project Team are back to identifying clause A5 as a matter of Government intention and Ministerial objectives.

[162] The revised variation agreement containing clauses A4 and A5 was notified to Providers on 22 June 2007, with copies available on the internet from that date. While formal documents were not issued until 3 July, the die was cast from 22 June. At this final point, DHBs did not have much to say as to Ministerial involvement. First, it was said that additional funding "reflects Government's continued efforts to raise pay levels in the sector", recognising pay and staff turnover were an issue, and a more "sustainable future" was to be found in Providers and "collectivised workforces" negotiating. Second, under a heading concerning wage increases, which were put as a matter which "responds positively" to concerns as to the need to improve wages "to advance a higher level of stability in the workforce", it is said such "is consistent with the Government's expectations referred to above". Under a heading "Collective Agreements", the document repeats phrases as to sustainability being best achieved through collectives' workforce negotiation, without any further reference to Government at all.

[163] Individual DHBs subsequently sent out the variation agreements to their Providers against the background of that letter dated 22 June. There is no evidence that any individual DHB qualified or dissented from the content of that letter. There is room for inference of implicit adoption by DHBs of its content, including references, such as they are, to Government.

[164] There are further matters of direct evidence as to DHB motivations which require consideration. I accept Applicants' submission that Mr Foulkes' evidence directly as to motivations or intentions of individual DHBs when agreeing to clauses A4 and A5 is inadmissible. Affidavits were needed from those making the actual decisions in each DHB. I have considered whether an exception might be available in the case of the Taranaki DHB, of which Mr Foulkes was CEO. Arguably, his generalised remarks as to the reasons for DHB decisions might proceed from a basis of personal knowledge in the case of his own DHB. However, in the absence of direct evidence that he was personally involved in the Taranaki DHB decision, I am not prepared to do so. For similar but stronger reasons, I am not prepared to make an exception in the case of the Waikato DHB. There is material in the form of a memorandum to a Waikato DHB committee dated 22 August 2007 relating to reasons, but the author is identified only as "General Manager, Planning and

Funding". I am unable to infer that an official at that level was one of the decision makers.

[165] There are also some other factors which must be noted.

[166] Applicants' submissions invoke approaches recognised in *NZFIA* (supra); citing in particular Cooke P 544, to which I add Richardson J 561 and McMullin J 568. I note also the recent decision in *Accident Compensation Corporation v Ambros* [2007] NZCA 304 [59] with its recent invocation of Lord Mansfield's hallowed precept as to cases where facts lie particularly within the knowledge of the defendant. Where a Minister or official or official body (such as a DHB) which is the actual decision maker does not make an affidavit stating the grounds upon which a decision is made, the Court is left looking at such evidence as it does in fact have. In that situation, the Court can be justified in drawing inferences which are adverse to the decision maker which had means of knowledge, and could have given evidence, but did not do so. That does not shift the onus or alter the standard of proof.

[167] Further, at risk of emphasising the obvious, it is not necessary for a DHB to have conceived the idea itself. Progress in health does not depend upon the degree of imagination present in DHBs. It is entirely in order for a DHB to receive a suggestion – even a very strong suggestion – from an outside source; consider the suggestion; and, if it seems a good one and within powers, to act on it.

[168] Further, and again at risk of stating the obvious, Ministers of the Crown have freedom of speech. They may speak as they wish to anyone, including DHBs. That freedom of speech, however, does not empower Ministers to give directions which they do not have statutory power to give, or to excuse others acting upon such unauthorised directions.

[169] Further, it is important to look at realities when something is said, and not mere form. There is a spectrum or continuum of communications from persons in authority which can range from "suggestion" or "wish" at the lowest to "direction" and even "command" at the highest. Categorisation, ranging roughly from "do it if

you like" to "do it" is not necessarily determined by the label which the speaker chooses. It is a matter of substance and reality, in all the circumstances, not form of words. Intended, or even likely, effect is to be gauged in the particular circumstances surrounding the utterance. Particular care is needed when gauging the potency of so-called "suggestions" or "recommendations" given by persons in authority to others who have reason to wish to retain goodwill. Even if couched in terms which are seemingly only a request, words can have and be known to have the effect of commands, as Henry II found out to his cost some years ago.

[170] Further, and at risk of a further truism, statements by a decision maker as to reasons are not decisive as to actual reasons. They are, of course, entitled to respect. They can be a starting point. However, it is the realities of the actual decision making, determined also against background facts and reasonable inferences, which in the end are determinative, whatever words the decision maker may have chosen to deploy.

[171] In this case, there were two clauses on which DHBs were required to decide. As will appear, they are best examined separately, albeit each in the context of the other.

[172] Clause A4 (wage increase) was an idea which originated with the Minister, not the DHBs. However, I am satisfied on the evidence that DHBs adopted the idea in principle, as a good one, and one which they should support, from an early stage. It is not hard to see why. It would not cost the DHBs anything. The Minister was to see to the funds required. It is entirely credible the DHBs would see a pay increase for low paid ARC workers as likely to improve sustainability and staff retention in that sector, with a real prospect of health benefit outcomes. DHBs would have appreciated soon enough that there would be administrative details which could be troublesome and which would need to be sorted out, and that Providers could raise difficulties on matters of detail, but those would not have been seen as serious impediments. I am satisfied that DHBs took up and put through the wages initiative as, in effect, a joint enterprise with the Minister, and – crucially – without considering they were under some form of direction requiring them to do so. The language of "recommendation" is not to be taken more strongly. There may well

have been different degrees of enthusiasm amongst the 22 DHBs. It would be surprising if all 22 were thinking in exactly similar terms. That is not important in itself. I am satisfied that by the time the decision was made in June 2007, there was an awareness that action being taken was in line with that which the Government and Minister wanted – and possibly some satisfaction in that with an eye to future relationships – but the DHBs acted without feeling under direction. While there is room for adverse inferences from the failure of DHBs to give evidence as to reasons, the positive inferences so far as the wages initiative is concerned heavily outweigh any such adverse inferences.

[173] The A5 (collective agreements) clause is much more problematic. In its inception, it was the idea of the Minister (and more remotely, the CTU). The Minister originally was prepared to have it as a matter deferred to stage 2, beyond the horizon of the 2007/2008 ARC Review. While mentioned in passing in DHB papers in the early stage, it was not in any sense prominent at the time the DHBs considered and decided to go ahead in principle on the LPW wages initiative. It was, if noticed at all, something for the future. The DHBs, with a crowded A21 Review agenda, had enough on their plate at that time. When the Minister suddenly telephoned on 24 April 2007 to say (in the terms recorded) that he wanted collective agreements accelerated into the current A21 Review process, that message would have been at best unwelcome. There was a measure of appreciation of that likelihood in the Minister's words. It was "a government decision, not DHBs".

[174] I am satisfied that concern would not just have been a matter of timing and inconvenience. Increasing wages of low paid workers, at least when one does not have to fund it, would be accepted by most as a good thing almost immediately. Imposing obligations to work towards collective agreements favoured by the Trade Union movement is a rather different animal. There is no substantial evidence before me whether or not collective agreements would in fact advance the lot of low paid workers. There are obvious assumptions, or perhaps articles of faith, held by the Minister and the CTU to that effect. There is some evidence to the contrary in an affidavit for the applicants. I regard it as a matter of controversy and opinion. What matters more in this case are the available inferences, if any, as to the probable beliefs on the point on the part of the DHB decision makers. Apart perhaps from

some on the extreme left and right, it is unlikely there would have been any unanimity amongst members of individual DHB Boards, or amongst Boards, on such a question; and with that, on whether such would procure favourable health outcomes. I am quite unable to draw the same inference of probable adoption, and carriage forward in joint enterprise with the Minister, as was readily available in relation to LPW wages initiative.

[175] That inability to infer adoption is strengthened by some other evidential pointers. First, and obviously, the matter was put by the Minister to a lead CEO negotiator as a "government decision". That is not the language of request or recommendation. Despite more guarded language at a later point, it is likely that message endured. The DHBs well knew that this stipulation would cause trouble in completing already delayed negotiations with Providers. When the clause was made known amongst DHBs, there was a considerable internal debate. The final report to DHBs notifying the clause term spoke of "Government's intent". The whole question of clause A5 was faced by DHBs under conditions of urgency to meet funding availability from 1 July, and in a situation where clause A5 was bundled in with other outcomes which DHBs did consider desirable.

[176] On the other hand, as noted in considering other grounds of review advanced, it is not impossible to view the promotion of collective agreements in Provider workforces as within the ambit of health purposes. It is not impossible that one or more DHBs could have reached that view, independently of Ministerial communications. It is not to be forgotten that in the end DHBs did sign up to clause A5 against a background of legal advice that such was within powers if pursued for health purposes.

[177] This is a situation where adverse inferences due to absence of affidavits by actual decision makers are available. There are distinct pointers to a situation in which DHBs, on this A5 collective agreements matter, considered themselves under something akin to a direction from the Minister with which they must comply. It is different from the wages matter, where the inference is one of likely adoption. On the collective agreements matter, much more controversial, there is no room for such a countervailing inference. I consider that the evidence and inferences open point to

the DHBs acting under something akin to a direction from the Minister, unanswered by direct evidence from the DHB decision makers themselves. Put bluntly, this was never the DHBs' idea; they acted on it not because they wished to but because the Minister was insistent; it was part of a package deal; and the package was urgent.

[178] I find ground 38.1 is not established as to clause A4 (LPW wages initiative), but is established as to clause A5 (collective agreements).

Failure to address health service needs in accordance with District Strategic and Annual Plans: Ground 38.4

[179] This ground rather blossomed in course of argument. I deliberately start with the ground as it is pleaded. The core allegations pleaded are that:

a) In imposing clauses A4 and A5 DHBs were required by the Act to consider and address health service needs of their populations in accordance with District Strategic and Annual Plans;

b) The DHBs failed to do so.

[180] Applicants' submissions ranged widely. DHBs' *powers* to enter service agreements were not "open ended": under s 25 DHBs can do so only if permitted by, and in accordance with, their Annual Plans. The new clauses, it was said, seek to introduce policies and changes which are "not consistent with" Annual Plans. The submission then advances as the reasons the new clauses are "not consistent":

> 86.1 the Annual Plans for the DHBs fail to address the service agreements with the providers;
>
> 86.2 to the extent that they obliquely refer to the service agreements, the Ministerial initiative and the new clauses are not consistent with such references;
>
> 86.3 the Annual Plans fail to specify the "outputs" and cost of such outputs which are secured by such service agreements as required by the Act; and
>
> 86.4 the Plans make no reference to policies or strategies sought to be achieved through the service agreements in a manner that is consistent with the Ministerial initiative, and to the extent that they

> do make references to policies the references are not consistent with the initiative.

There is no conceptual problem with 86.2 or the second sentence of 86.4 (although they are not made out on the facts). There may be some conceptual difficulties with the remainder. The submission appears to be that where there is silence on the one hand (plans), and statement on the other (clauses), there must be inconsistency. That is not necessarily so. It can be said with at least equal logical force that a statement cannot be inconsistent with a silence. Fortunately, I do not think it is necessary to become enmeshed in such semantics or metaphysics. I interpret the pleading as intending assertion that Annual Plans did not confer necessary powers to include *clauses A4 and A5* in the s 25 Agreements.

[181] Applicants' submissions then reviewed ss 38, 39 (read with s 136(1) Crown Entities Act definition of "outputs") and s 30. The submission then states:

> 92. The effect of these provisions is reasonably apparent. Each DHB consults with its residential population to establish its overall strategies. Those are set out in a Strategic Plan which is agreed with the Minister. Each year the DHB must have an Annual Plan – and in that plan it must identify various "outputs" that it is to achieve during the year, what the costs of those outputs is going to be, and how the obtaining of those outputs relates to its overall strategies. If it is changing its strategies, or there is a significant change in the outputs to be achieved, the funding of those outputs, or its policies, it must consult with its resident population before doing so. The service agreements entered by a DHB must then be consistent with the Annual Plans.
>
> 93. In terms of the requirements of the PHD Act relevant to the DHB's service agreements with the provides, as a matter of interpretation each of the Annual Plans:
>
> 93.1 should provide that the DHBs can enter the services agreements with providers to obtain the aged residential care services provided under the agreements;
>
> 93.2 should identify the services in terms of the "outputs" the DHB intends to achieve – which in this case would presumably be reflected by the number of contracted beds within the rest home, hospital and dementia unit care categories;
>
> 93.3 identify what the anticipated cost of obtaining these "outputs" through the service agreements is (i.e., the cost per bed); and

> 93.4 identify how the services obtained under the service agreements achieve the strategies that DHB has decided upon after consultation with its resident population.

Applicants then submit, as "the essential point", that Annual Plans for each of the DHBs "do none of these things".

[182] That omission is said to have two important ramifications:

i) DHBs have failed to comply "with legislative requirements associated with service agreements", the Annual Plans purporting instead to give DHBs a "blank cheque" as to service agreements and terms of service agreements, with "the control mechanism identified by s 25 … ignored".

ii) There are no references in Annual Plans to strategies or policies relating to concerns about staff turnover: certainly nothing allowing greater remuneration or relating to collective agreements.

[183] Applicants' submissions deal with contentions that it has not been past practice for District Annual Plans to express outputs at other than a high level of aggregation, or to specify contracts or terms of contracts for implementation. That amounts to ignoring the Act, not complying with it. Complaints that to bring service contracts within Annual Plans would mean changes to contracts would require changes to Annual Plans are dismissed as approaching the matter the wrong way round: plans come before contracts.

[184] Respondents' submissions resisted contention that District Annual Plans were the only control mechanism for DHB decisions on s 25 Agreements. There are controls under District Strategic Plans, the Statement of Intent, Crown funding Agreements and statutory provisions such as s 27(1). There is no "blank cheque". It was not necessary, it was said, to give a detailed description of the ARC service agreements in District Annual Plans. "Outputs" are to be interpreted in a broader manner. "The statutory scheme does not require specification of services or outputs at the level of detail submitted by applicants." A high level of aggregation is

permitted. There would be significant practical implications if initiatives such as the present gave rise to a need for s 40 consultation.

Failure to address health service needs in accordance with District Strategic and Annual Plans: Ground 38.4: Decision

[185] I am not persuaded the legislative scheme required the DHBs' District Annual Plans to prescribe the level of detail for which Applicants contend.

[186] District Annual Plans should be set in context and hierarchy. At the top are the New Zealand Health Strategy and New Zealand Disability Strategy, determined by the Minister under s 8. Beneath that are the District Strategic Plans, determined by relevant DHBs under s 38. The District Strategic Plans must reflect the overall direction of, and not be inconsistent with, the New Zealand Health and Disability Strategies. They require the Minister's consent. Beneath both are DHBs' District Annual Plans under s 39. District Annual Plans, except to the extent to which the information is included in the DHB's Statement of Intent for the year, must include "the intended outputs of the DHB for that year, and how they relate to the DHB's District Strategic Plan" and the "funding proposed for those intended outputs". I have no doubt from the way in which the Act and the Crown Entities Act are intended to work together that "output" is to be read in line with the definition in s 136 of the latter: "goods or services that are supplied by a Crown Entity" (excluding internal consumption). The District Annual Plan must also include the expected performance of DHBs' services (and the amount of capital investment required). The District Annual Plan must be signed by the Minister. DHBs must also complete a Statement of Intent within ss 137 – 149 Crown Entities Act. This is designed to set medium term intentions (three years ongoing). The content of the statement is prescribed by s 141. At its lowest, under s 141(e), it requires information as to how the entity proposes "to perform its functions and conduct its operations". Ministers have some involvement, including a power to require amendments. DHBs may enter into Crown Funding Agreements under s 10 of the Act. Crown Funding Agreements may contain any terms and conditions which may be agreed. Such CFAs are "output agreements" for the purposes of Part 4 of the Crown Entities Act, with s 170(2) – (5) applicable. Their purpose under s 170(2) is

to cover matters relating to funding and production of outputs, including standards, terms and conditions under which Crown entities will deliver and be paid for outputs. They are signed by or on behalf of the Minister. A copy of the Statement of Intent and Crown Funding Agreement must be "attached" to each Annual Plan. The troika must not be inconsistent with the District Strategic Plan: s 39(8).

[187] This hierarchy and scheme obviously grows somewhat in detail as it descends. First, there is a national strategy; then a more locally focused district strategy; then the Annual Plan read along with the Statement of Intent and the CFA. I am satisfied that even at this lowest level of Annual Plan, the emphasis is intended to be on general thinking rather than particular detail. Strategies have been set out. The Annual Plan comes in to implement those strategies. It is a plan, not a manual. Obviously, a district strategy could be to maintain or improve availability of aged residential care. It may be that the Annual Plan to implement that strategy could properly lay down how that is to be done: in house, through service contracts with Providers, or however. It would allocate the necessary portion of funding. That much would make sense in a document of this nature; but I do not see the legislative scheme as designed to descend in its Annual Plan or associated documents to the level of detail represented by wage rates and Union membership of Provider workforces. Should it cover lunch hours? Overtime? Travelling allowances? Holidays? There are industrial procedures for determining such minutiae. It is not likely a document at the level of an Annual Plan was intended to cover such matters.

[188] There is some supportive force in the argument that the inclusion of such low level detail in Annual Plans would lead to administrative difficulties in the event of a need for changes mid term, or even at the end of term. There are s 40 consultation requirements, which could take some time. However, arguments based on inconvenience are seldom conclusive. I place more weight on the evident overall legislative intention, which is consistent.

[189] For clarity, this conclusion is reached in relation to Annual Plans, as distinct from Statements of Intent and CFAs. Those documents are to be "attached" to the Annual Plans, but are separate instruments in their own right and I do not treat them for present purposes as part of the Annual Plan itself. Even in those cases, however,

details at the low level presently at issue would at most be optional rather than obligatory.

[190] It follows that I do not accept the essential thesis in Applicants' pleading that DHBs failed to consider and address health service needs in accordance with their District Strategic Plans and District Annual Plans as required under the Act. Matters at this level were not required to be dealt with in such plans, and clauses A4 and A5 were not inconsistent or beyond powers.

[191] There is, however, a final matter; indeed, something of a warning. Section 25 empowers a DHB to enter into service agreements "if permitted to do so by its Annual Plan and in accordance with that plan". It rather appears that DHB Annual Plans do not contain an express empowering provision under s 25. That is unwise. The provision says "if permitted to do so"; not "unless prohibited from doing so". It is possible that a challenge based on the power of DHBs to enter into service agreements at all might succeed. It would have shortened the judgment. The case has not been argued that way, no doubt for obvious pragmatic reasons. It is a matter which might be thought to warrant attention.

[192] Ground 38.4 does not succeed.

Procedural impropriety: Ground 38.5

[193] Applicants invoke requirements of procedural fairness put as arising by implication from the Act "and also" from the terms of the Agreements, particularly clauses A21 and A23. The submission also cites the observations of Asher J in *Diagnostic Medlab* (supra) in relation to s 25 contracting. The requirements "to follow rules of fair play" are supported by the terms of the Agreements themselves, particularly A21. DHBs were required, it is said, to consult Providers, or persons affected in accordance with *Wellington International Airport* (supra) doctrine. DHBs, it was submitted, did not meet those standards. Applicants particularly complained at:

i) The omission of the Ministerial Initiative from the procedures and timeframes laid down at commencement, then introduction at the "very end".

ii) The non-inclusion of the Initiative in the Review issues despite discussion at the time with Government and CTU and detailed work underway, including consideration of implementation through variation of agreements.

iii) Misrepresentations of lack of awareness of additional policy matters.

iv) Delays in providing the DHBs' model and in advising the financial position, in June 2007, leaving no time for Providers' representatives to have meaningful discussions with Providers, curtailing input.

v) DHBs' "take it or leave it" insistence that no part of the increase in funding would be made available unless Providers agreed to clauses A4 and A5, although the latter comprised only a 2.4% component of the 7% increase.

vi) The amount of money provided by DHBs is insufficient (I defer consideration of this last to the next section, and indeed it is difficult to view it as a procedural matter).

Applicants reviewed supporting evidence at length.

[194] DHBs submitted that the content of procedural fairness obligations is as stated in the Agreement clause A21. Responding to Applicants' submissions *in limine*, it was urged:

i) The change in timetable was not improper, with neither party feeling constrained. There were significant other issues still to be addressed. The raising of other issues beyond timetable had

happened in the past. There was no Provider objection to the implications of the 1 May Minister's press release. "Timeframes and definition of issues were seen as more aspirational than conditional."

ii) There was nothing inappropriate in discussions with Government and CTU before discussions with Providers. The issue is whether (later) engagement with Providers was sufficient.

iii) There were no misrepresentations, because there was no decision to include the variation in the A21 Review until late May (although it was the DHBs' preference) and Providers were not misled, given Ministerial press releases and informal discussions.

iv) Delay in provision of the model did not inhibit Providers' own modelling, or ability to consult Providers about effects of the clauses. It was submitted there were significant interchanges before 22 June 2007. The DHBs' submission highlighted activities and approaches post-25 May 2007, contending that while "the period of engagement was concentrated" the "quality … was such that the Providers were able to participate meaningfully in the process, as required by clause 21".

Again, submissions reviewed the evidence in detail.

Procedural impropriety: Ground 38.5: Decision

[195] I am relieved from examining the evidence in detail by findings made in the course of the factual history set out in IV above. Any assessment of procedural impropriety must examine the entire course of events. It is the whole which counts, allowing for some internal balancing factors. The Court in the end must stand back and view the overall realities.

[196] The minimum procedural propriety and fairness requirements are those stated and implicit in the Agreement clause A21 itself. It required that the Review be carried out "in a manner which enables meaningful participation" by Providers. Providers would be notified of "timeframe", "process", and "issues that will be addressed". Providers were to have "opportunity to comment" on those issues; and "to raise any other matters" (on a national basis). DHBs were obliged to "consider in good faith all comments" made by Providers, and to prepare a report of those comments and DHB views. It is implicit in that required step that the report would be released to Providers. It would not be much use if kept secret. I regard it as likewise implicit that there would then be room for further negotiation. Such is needed for "meaningful participation", and was likely to be necessary in real terms, given that process required, at end, signature by both sides. There is no dispute, on the pleadings, that Providers "had legitimate expectations that the [DHBs] would consult on and negotiate the Variation in accordance with [at least] their obligations under the agreement".

[197] There may also have been a superadded or concurrent obligation of procedural fairness, at more than a minimal or cursory standard, imposed on the DHBs in line with *Diagnostic Medlab* (supra).

[198] In my view, on the question of procedural propriety or fairness, the history of the matter largely speaks for itself.

[199] DHBs laid down a timetable and programme on 1 March 2007. They said nothing at that stage of the nascent LPW wages initiative. More seriously, the 1 March letter was misleading on the point. Providers complied with the timetable by 12 March. DHBs responded with the required summary on 19 March and meeting on 20 March 2007. DHBs still said nothing as to the LPW wages initiative. It is true that it was still, in the DHB Project Team's mind, not sufficiently developed; but I am also satisfied it was withheld for convenience and timing reasons. It would have been possible to disclose it in a general way as a forthcoming possibility. More seriously, another misleading statement was made. DHBs then simply ignored their own timetable for completion as previously notified. They proceeded with development of the LPW wages initiative in accordance with their own internal

processes and resources. It does not suffice to say the timetable was merely "aspirational". The terms of the 1 March letter make it quite clear that was not the case. Observance was necessary if the 1 July target was to be met. I agree, however, that subject to questions of delay there was nothing intrinsically wrong in DHBs conducting discussions with the Minister and CTU. Then, on 24 April 2007, DHB problems and delays were exacerbated by the Minister accelerating and effectively demanding inclusion of a collective agreements clause. In the end, that is probably what wrecked the ship. The DHBs, with reluctance, obliged; and eventually, on 23 May 2007, disclosed the position of the Review and also clauses A4 and A5. To state the obvious, the 15 April timetable was long past, and clauses A4 and A5 had not been included within process issues for discussion. Providers had some prior inkling of A4, to which they did not object in principle, but had thought it would be in a manageable percentage increase form. Providers had no advance warning of the collective agreements requirement. Providers were left scrambling, with new and controversial issues raised and limited time allowed. Providers did their best, although they were handicapped by three weeks delay on the part of DHBs in supplying a copy of the DHB model. Providers did manage to argue for a significant "backfill" reduction of flow through on wages, $1.30 to $1, and some reduction of obligation to promote collective agreements. They were, however, handicapped in consultation with members and in a considered response. Their position was made more difficult by DHBs putting forward, on 22 June 2007, the final form of variation including clauses A4 and A5 on a bundled basis, and as a "take it or leave it" package, with a directive that failure to return signed agreements by (ultimately) 27 July 2007 would mean loss of backdated payments. The insistence on a 1 July 2007 start was for administrative reasons. It would have been inconvenient, but that start could have been delayed.

[200] Put shortly, DHBs were caught out by delays of their own making and by Ministerial intervention; responded by ignoring their own previous timetable; tabled clauses A4 and A5 late and with insufficient time left for Providers to respond in full fashion; then said "take it or leave it" on pain of serious financial consequences so as to fit with a self-imposed deadline. DHBs created a timing problem by their own delays, and then sought to transfer that problem on to the Providers.

[201] This was in breach of Providers' rights to meaningful participation, and their legitimate expectations of adherence to process, at the very least. I do not find, in absence of cross-examination, that what occurred was the result of bad faith, but it was procedurally unfair, both in terms of contractual obligations (which suffice) and in terms of *Diagnostic Medlab* doctrine.

[202] Ground 38.5 is made out.

Irrationality: Inadequacy of funding: Ground 38.6

[203] The pleading alleges both failure to take relevant considerations into account, and irrational action. In presentation, the emphasis was on the latter.

[204] The ground is advanced on three particulars:

a) DHB failure to take into account variations in circumstances applicable to each Provider (including employment relationships each Provider has with its specific employees).

b) The amount of the funding increase does not correspond to the required wage increases.

c) DHBs have failed to address the particular health funding needs and priorities within their territorial area.

These must be the focus of present attention.

[205] Applicants' submissions start with two collateral complaints.

[206] First, DHBs required Providers to access part of FFT (effectively allowances for future inflation) towards meeting costs of the A4 wages increase. FFT funding, it is said, is to meet general inflationary costs; and required draw-down to cover part of this specific increase will be at the expense of other wage increases.

[207] Second, Providers (a) had been giving normal wage increases (including increases during the period the Ministerial Initiative was being kept secret) and now need to give an additional $1 per hour, (b) the increases interfere with margins in relation to other workers (for example, for seniority), and those margins must be restored. Funding does not extend to that.

[208] Applicants' submissions then put "perhaps the most important point". The DHB model "is only a model". It "will not be accurate for all Providers". It is based on survey results, averages, and assumptions. Amongst such assumptions are staffing ratios, occupancy rates, and ratios of low paid workers to other workers. There will be Providers who depart from those assumptions and averages; and for those Providers funding will be insufficient. The DHBs, it is said, knew this; but required "the clauses" nevertheless, seeming to treat adversely affected Providers as collateral damage, with little idea of the nature and scope of those effects.

[209] All these problems are said to derive from the fact that "what the Minister required" was a particular dollar per hour/particular employee result, made more problematic by funding on a per bed/per day basis. If more money had been made available to be spent on wages, with a requirement the percentage increase be passed through, there would have been no need for a model.

[210] The two different payment bases also are said to lead to regional differences. There is a different base funding level in each region, due to higher capital costs in urban areas. An increase in funding on a percentage basis (here 7%) results in urban Providers (for example, Auckland) receiving more than rural (for example, Wairarapa), with resulting differences in ability to pay.

[211] DHBs, unable to rationally model a dollar per hour/worker increase from a per bed/per day rate with a percentage increase, have made this irrationality the Providers' problem.

[212] Applicants also put these factors as breaches of good faith requirements in A21 procedure.

[213] Respondents' submissions invoke the *Wellington City Council v Woolworths New Zealand Limited (No. 2)* [1996] 2 NZLR 537 and *Diagnostic Medlab* (supra) [311] approaches to irrationality in this context, arguing against application of a "hard look" standard. Whether DHBs should have relied on the model they did use, applied an average, and taken into account FFT "are questions of judgment and opinion and are not fact". The Court should resist examining the merits "of the particular aspects of the DHBs' [modelling] decisions". (The word "modelling" is an oral exegesis.)

[214] The use of a model, it is said, was not irrational. It was necessary. The model was "based on" a PWC model which Providers had used themselves. The key differences were:

a) Different average wage figures;

b) Modelling on average TLA price instead of lowest TLA price; and

c) Taking into account part of the FFT element.

[215] The submission proceeds to arguments in justification for each. In course of doing so there is acceptance that "circumstances differ among Providers, and that their individual configurations may depart to a greater or lesser extent from the circumstances in the model. As a result, some Providers may have to use other elements of the price increase to fund the pass through obligation." DHBs deny the outcome arises because the increase is in dollar per hour terms, and not in percentage terms: in the latter case, it is said, varying staff configurations amongst Providers would mean different funding needs. It was rational to use an approach which would give a standard benefit to all workers, rather than more to some Providers' workers than others. The FFT approach followed, it was said, from Providers' past approach of passing on FFT to low paid workers voluntarily.

Irrationality: Inadequacy of funding: Ground 38.6: Decision

[216] A Court must constantly be on its guard not to overstep the mark on the irrationality ground for review. The question always is whether the decision is "irrational" – one such that no reasonable body of persons *could* have arrived at the decision – not whether the Court thinks the decision is wrong, or not the best decision which could have been made. I accept the present case is not in the so-called "hard look" category. Irrationality of the present type is not an easy matter to establish.

[217] Providers argue that the problem, at base, stems from the use of a dollar per hour per worker approach, as opposed to a percentage increase. That is contested; but assuming it is so, the problem for Providers' onward argument is that the dollar per hour per worker approach was required by the Minister who controlled the funds. We are not blessed with an explanation from the Minister as to why this approach was required. However, it was, and the DHBs were required to move on from there. If they wanted the $37.5 million funding, that was the approach which must be used. It is not a case of the Providers choosing a system calculated to lead to irrational outcomes. It was a system imposed upon them, and one which they must deal with as best they could.

[218] Given that starting point, the use of a model not only was rational, but almost inevitable. The question reduces, accordingly, to one whether the particular model itself was rational, and whether it produced an irrational outcome.

[219] There are some debatable assumptions in the model, canvassed in submissions. I am particularly unimpressed with the use of FFT. However, "debatable" does not mean "irrational". Indeed, it may well signal the opposite. It is not for the Court, on an irrationality submission, to weigh competing arguments of that character.

[220] Outcomes, through application of the model, were bound to be at least rough and ready. Clearly, there would be and are some inconsistencies amongst Providers. It seems clear that some Providers, almost through random circumstances, will be

under-funded in the sense that they will need to resort to other funding. However, given that DHBs were required to produce a dollar per hour per worker result, and that modelling could only proceed upon assumptions and averages, I am unable to find that outcome, to the degree proved, "irrational" within the legal test. Whether DHBs would have been able to do better if there had been adequate time, more disclosure, and proper provider feedback, is an open and different question.

[221] Ground 38.6 does not succeed.

VI. Relief: Counterclaim

[222] Applicant DHBs seek orders (as amended):

1. Declaring that the respondents acted unlawfully in deciding to include clauses A4 and A5 in the variation to the age related residential care service agreements with providers; and

2. Setting aside clauses A4 and A5 in the age related residential care service agreements with each of the providers represented by the applicants (to be included in a schedule to any sealed order).

[223] The DHBs counterclaim that increased funding was provided to meet clauses A4 and A5; and if A4 and A5 are set aside, then that funding should be set aside also. DHBs claim, in such circumstances, "a declaration or order that the price payable to providers under the agreements be reduced by such amount or amounts as the Court thinks just". In course of submissions, this was explained as also seeking a retrospective account. Providers resist the counterclaim on various grounds, including unavoidable alteration of position, and need to address implications on a case by case basis involving respective Providers. The counterclaim, provisional in character, went virtually unmentioned in argument, except by DHBs as an aspect of overall concerns regarding relief.

[224] Providers cite well recognised authority that refusal of relief must be exceptional.

[225] DHBs submit that the Court should limit remedies granted to declarations, and decline to set aside clauses A4 and A5. Alternatively, if the Court is minded to set aside A4 and A5, no orders should be made in the interim (except status quo and timetabling) to allow parties to negotiate and/or prepare further submissions. The submission is that leave should be reserved to bring the matter back before the Court with a realistic timeframe. It is said that such an interval would also give DHBs and relevant authorities time to consider what lawful steps can be taken "to remedy the position". Counsel cites, particularly, *Ankers v Attorney-General* [1995] 2 NZLR 595 and its sequential judgment. Various detailed grounds are advanced supporting this course. Providers respond by stating willingness to negotiate on outcome, but submit there is no reason "why invalid clauses should be left standing as part of this process". It is said it would be "undesirable for their status to be left in doubt".

[226] Obviously, there could be practical difficulties if the clauses are set aside. The Providers say DHBs should not be excused by pointing to problems they have created themselves. The submission adds "clearly the practical consequences of setting aside clauses A4 and A5 and in particular in terms of funding will need to be discussed between the DHBs and providers – the entire package will need to be renegotiated, probably as part of the next annual review which is due to commence shortly".

[227] I am satisfied the declarations sought by the Applicants should be made. Quite simply, there is no sufficiently strong discretionary reason not to do so.

[228] I am satisfied, however, that the application for orders setting aside clauses A4 and A5 should stand adjourned for a reasonable time. I am not at all satisfied I understand the full potential repercussions which may follow setting aside. There is a public interest, going beyond commercial interests of the parties, in the continued proper operation of ARC facilities. While not satisfactory long term, the present ad hoc arrangement appears to be functioning. Some delay will allow time for informed analysis and discussion between parties. In a complicated situation, but one in which

parties must soon be in discussions for the 2008/2009 A21 Review in any event, it is in the public interest to encourage that approach. Leave must be reserved, of course, to come back to the Court on reasonable notice for determination, if required.

[229] I do not see a need for interim or other orders at this juncture, but likewise, leave should be reserved to apply on reasonable notice.

[230] I do not see the counterclaim as requiring disposition unless and until the relevant clauses have been set aside. For clarity, it stands adjourned undetermined.

VII. Orders

(1) There will be a declaration that the Respondents acted unlawfully in deciding to include clauses A4 and A5 in the variation to the Age-Related Residential Care Service Agreements with Providers.

(2) The application for orders setting aside clauses A4 and A5 stands adjourned sine die with leave reserved to apply on not less than 10 days' notice for further determination.

(4) Respondents' counterclaim stands adjourned sine die undetermined, to be brought on upon not less than 10 days' notice.

(5) Leave is reserved to the parties to apply for interim relief, timetable orders, or directions.

(6) Cost are reserved.

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R A McGechan J

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