

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

CIV-2008-441-145

IN THE MATTER

of an Application for Review under the Judicature
Amendment Act 1972

BETWEEN

**HAWKE'S BAY REGIONAL COUNCIL, CENTRAL
HAWKE'S BAY DISTRICT COUNCIL, HASTINGS
DISTRICT COUNCIL, NAPIER CITY COUNCIL and
WAIROA DISTRICT COUNCIL** all being local
authorities duly constituted under the Local
Government Act 2002

Plaintiffs

AND

THE MINISTER OF HEALTH exercising powers and
responsibilities pursuant to (inter alia) the New
Zealand Public Health and Disability Act 2000

Respondent

SECOND AFFIDAVIT OF KEVIN HENRY ATKINSON

**WILLIS TOOMEY ROBINSON
LAWYERS
NAPIER**

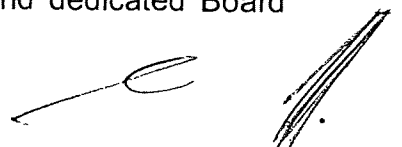
116 Vautier Street, Napier Private Bag 6018, Napier
Telephone (06) 835 3229 Facsimile (06) 835 1430

Solicitor: Matthew Lawson

I, **KEVIN HENRY ATKINSON** of Havelock North, Company Director swear:

1. I am a Fellow of the New Zealand Institute of Management, a Member of the New Zealand Institute of Directors and one of only 124 accredited directors of the New Zealand Institute of Directors. I am a member of the New Zealand Computer Society.
2. I have previously been a director of Xact Systems Ltd, Parkbrook Motors Ltd, Hawke's Bay Sun Ltd, Hawke's Bay Power Ltd, Healthcare Hawke's Bay Ltd and Deputy Chair of the Eastern & Central Community Trust.
3. I am currently the Managing Director of Information Management Services Ltd and a Director on Hatmar Holdings Ltd, Datastore Systems Ltd, the Hawke's Bay Rugby Union Inc., West Quay Holdings Ltd, Unison Networks Ltd, Unison Contracting Ltd, Unison Energy Limited and Penkev Holdings Ltd. I am a trustee of the Hawke's Bay Medical Research Foundation. The total asset value of the organisations of which I am currently a Director exceed \$435million with operating revenues in excess of \$138million.
4. I have held management roles in the Hawke's Bay Farmers Meat Company Ltd from 1972 to 1983 and in Information Management Services Ltd from 1983 to the present.

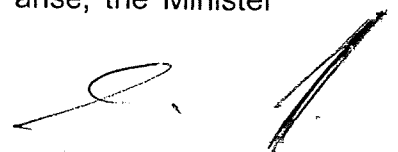
5. I was appointed by the Minister of Health as a Board member on Healthcare Hawke's Bay Limited on the 15th of August 2000. I was appointed by the Minister of Health as Chair of the Hawke's Bay District Health Board on the 10th of December 2000. I held the position of Chairman through until the 27th of February 2008.
6. As I had been an appointed member of the Hawke's Bay District Health Board ("HBDHB") for six consecutive years, I was ineligible for reappointment without the Minister's consent. Rather than seek the Minister's consent, I decided to put my name forward for election to the District Health Board at the triennial election held in October 2007. I believed that I had undertaken the role of Chairman diligently and well but, in putting my name forward for election rather than seeking to be reappointed for a further term of three years by the Minister, I was putting my track record to the community of Hawke's Bay to see if I would be elected democratically.
7. I was the highest polling candidate in the election held in October 2007 and I believe this was an endorsement from the community of Hawke's Bay on my performance as chair of the HBDHB in delivering health services to the community.
8. Throughout my time on the HBDHB I have been privileged to work with a number of very high calibre and dedicated Board



members who have undertaken the often difficult role of serving the community with commitment, dedication and integrity. I also believe that the governance exercised by the HBDHB has been exemplary. As a result, I do not believe that there is any rational or reasonable basis for the Minister's decision to sack the newly elected HBDHB on the 27th of February 2008. I set out my grounds for these beliefs as follows.

BACKGROUND

9. As will be evident from my affidavit, I believe that in order to gain an appreciation of the HBDHB Board's position, and the reasonableness or otherwise of the Minister's decision, a brief description of the background is essential. I set this background out below.
10. In April 2005 it was indicated to the Board that the Minister of Health was considering the appointment of a Mr Peter Hausmann as a member to the HBDHB.
11. I had met Mr Hausmann previously as he was involved as a Director of Healthcare of New Zealand Limited which was a company that had expressed an interest in providing community health services to the Hawke's Bay District Health Board.
12. Notwithstanding the concerns that I expressed about the potential for conflict of interest situations to arise, the Minister



appointed Mr Hausmann with his appointment being effective from the 23rd of June 2005.

13. Given Mr Hausmann's appointment I was aware that there existed a possibility of real or perceived conflicts of interest and I attempted to ensure that these were managed appropriately at a Board and managerial level.
14. Notwithstanding the best attempts to deal with conflicts of interest, concerns were expressed both by other healthcare providers and by members of the Board over alleged conflicts of interest between Mr Hausmann in his role as a HBDHB Board member and his role as a Director and/or Shareholder of various companies.
15. One of the alleged conflicts related to Request for Proposal for Community Health Services. This Request for Proposal was terminated by the Board having taken legal advice on the alleged conflict of interest of Mr Hausmann.
16. In the case of a further contract between a company associated with Mr Hausmann, Wellcare Education Limited, a contract was entered into with the HBDHB in March 2006. The process leading to this contract was subsequently the subject of a review by Audit New Zealand as part of the HBDHB audit. That review is annexed as Exhibit A page 1 to this affidavit and is highly

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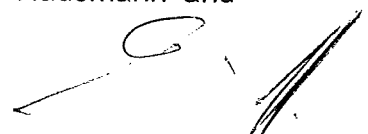
critical of the process adopted by the HBDHB in entering into that contract. The Board was unaware of the contract or that the contract was with a company associated with Mr Hausmann until after the contract was entered into and this is recorded in the Audit New Zealand Report for the year ended 30 June 2007.

17. While I understand it is unnecessary for the purposes of this affidavit to go into detail of the various conflicts of interest, the fact is that there was an issue between the Board and Mr Hausmann over his actions arising from the fact that the balance of the Board considered that Mr Hausmann had acted with a conflict of interest. The situation also led to some tension between the Board and the Chief Executive and a small number of senior managers as to their role, participation or acquiescence in actions that were alleged by the Board to give rise to conflict of interest situations.
18. At all times, the Board was aware of the need to uphold ethical and quality standards expected of a Board such as the HBDHB and was trying to ensure that the Board was acting ethically in ensuring that interests were properly disclosed and conflicts of interest properly dealt with. As a result, while there was some tension on the Board arising out of the allegations against Mr Hausmann and staff involvement in any such processes, the Board continued to carry out its role and continued to be



effective in the provision of quality health and disability services to the people of Hawke's Bay.

19. Following receipt of the Audit New Zealand Report for the year ended 30 June 2007, the Board considered it was necessary to scrutinise further the processes that had led to the Wellcare contract. This was with a view to reviewing procurement practices to ensuring that they were appropriate and robust. As part of this consideration the Board engaged PricewaterhouseCoopers to undertake an email audit of all correspondence between HBDHB staff and Mr Hausmann. This communication audit was requested on the 18th of November 2007 following the receipt of the Audit New Zealand Report.
20. The final result of the email audit was not available until January 2008. That email audit identified that, in relation to the Request for Proposal for Community Health Services, staff, at the request of the Chief Executive, had provided a copy of a draft Request for Proposal document that was yet to be advertised to Mr Hausmann for comment, that Mr Hausmann had amended the Request for Proposal and that Mr Hausmann had effectively been given prior notice of the requirements of the Request for Proposal, before any other party was aware of the requirements.
21. Further, the email audit identified what the Board considered to be inappropriate communications between Mr Hausmann and



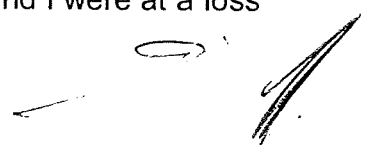
staff members over the negotiation of the Wellcare Education contract.

22. The fact that the email audit had identified these issues led to further tension between the Board and Mr Hausmann and also between the Board and the Chief Executive and some senior managers.
23. I believe that the Board, in furtherance of its objectives of upholding ethical standards expected of a public sector organisation and in furtherance of its obligations as a Crown entity, was required to scrutinise the actions of a Board member and of staff members who had been involved in the alleged conflict of interest situations. That scrutiny was with a view to ensuring appropriate actions were taken so that appropriate processes would be followed in the future.
24. Notwithstanding the fact that there were tensions between the Board and an individual Board member and the Board and some of the managers, including the Chief Executive, I would not describe the situation as dysfunctional. The Board continued to operate as a functional unit and continued to undertake the roles required of it under both the Crown Entities Act 2004 and the New Zealand Public Health and Disabilities Act 2000.



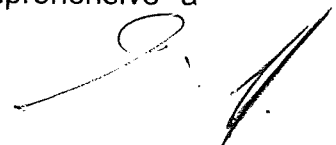
THE MINISTER'S DECISION

25. I was personally very surprised with the Minister's press release of 20 February 2008 (Exhibit B page 40) and his letter to the Board of that same date (Exhibit C page 41). The Minister's letter stated that he had already reached the conclusion that he was seriously dissatisfied with the performance of the Board. We had received no prior indication from the Minister of any dissatisfaction with our performance. I was unaware of anything that warranted the conclusion that he was seriously dissatisfied.
26. As a result, we were never given any opportunity to discuss any issue that the Minister may have had, prior to him reaching the conclusion that he was, as stated in his letter of 20 February 2008, seriously dissatisfied with the performance of the Board.
27. When we received the Minister's letter dated 20 February 2008, we called a Board meeting and I was asked to write to seek clarification from the Minister. I did this by letter dated 21 February 2008. (Exhibit D page 43) In particular, I asked advice of the other reasons (if any) for the serious dissatisfaction with the performance of the Board. I advised that it was difficult to address the allegation of the Minister's lack of confidence in the Board's integrity, the alleged public challenge to the Minister and using the media to advance the personal agenda of the Board members. This is because the Board and I were at a loss

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to understand what the Minister meant by the public challenge to him and what he was referring to in the use of the media to advance personal agenda. We asked for advice as to what reports were being referred to that could be ascribed to the Board or its members.

28. We also asked for clarification of what the Minister meant by his reference to dysfunctional relationships and how this was impacting on the Board's performance of its obligations.
29. By letter dated 22 February 2008 (Exhibit E page 45) the Minister responded however his response failed to shed much light on what was meant by the original letter and purported to justify the earlier comments by matters that had arisen since the Minister's first letter of 20 February 2008. Again, this was difficult to respond to as we were constantly attempting to address a moving target. The Minister gave us six days to respond. Most of the Board members had full time employment and other commitments. We effectively only had two days over the weekend to prepare a response. Being the weekend, it was extremely difficult to collate the necessary information.
30. Notwithstanding the difficulty that we were having in comprehending what the Minister meant in his letters of 20 and 22 February 2008, and the difficulty arising from the short timeframe, the Board attempted to provide as comprehensive a



response as possible (Exhibit F page 47) to what we understood the Minister's issues to be. Notwithstanding that response, the Minister notified the Board that it was dismissed by letter dated 27 February 2008. (Exhibit G page 63) At the same time the Minister made a press release that included the submissions of the board and Mr Hausmann (Exhibit H page 67). I believe that no matter what response we made, the Minister's decision had already been made and that it would not have really mattered what response we made, he was intent on dismissing the Board.

THE BOARD'S PERFORMANCE

31. Pursuant to the New Zealand Public Health and Disability Act 2000 the DHB is required to prepare a District Annual Plan which is required to state the intended outputs of the DHB for that year and the funding proposed for those intended outputs. Further, the District Annual Plan is required to include the expected performance of the DHB's hospital and related services during the year and the amount of any capital investment expected to be required and is required to be agreed by the Minister of Health for each financial year beginning on or after the 1st of July 2001.

32. The District Annual Plan is a strategic document and must be related to the strategic plan which in turn must be reviewed every three years. The Hawke's Bay District Health Board



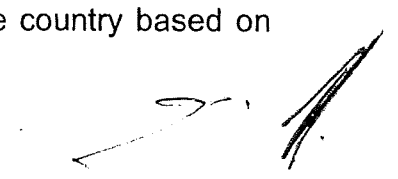
agreed a District Annual Plan for the year commencing 1 July 2007 and this was duly agreed to by the Minister.

33. By letter of 9 July 2007 (Exhibit I page 88) the Minister approved the District Annual Plan for 2007/8 (Exhibit J page 91) noted the successes and initiatives that the Board had achieved and undertaken and the good result given the difficulties faced in the 2006/2007 financial year. I believe that this letter represents a glowing endorsement of the Board's performance.
34. The District Annual Plan for 2007/08 approved by the Minister included a budget that was based on some key assumptions which are stated at paragraph 8.3 of the Plan (page 141 of Exhibit J). If any of these assumptions was at variance with what actually occurred, there were bound to be implications for the budget. In particular, there was an assumption that the Multi Employer Collective Employment Agreements would be settled at a level within the funding provided by the Ministry. This ultimately did not occur and this was the principal reason for the variance in our budget. It had however been identified from the outset and approved by the then Minister, the Honourable Peter Hodgson.
35. Quarterly reports on progress towards achieving the goals in the 2007/08 District Annual Plan and Statement of Intent are



provided to the Board and the Ministry of Health. The report (Exhibit K page 146) for the six months ended December 2007 shows that by half way through the year the HBDHB had achieved 64% of the outcomes required of its Statement of Intent for the entire year, had commenced work on a further 32% of the required outputs and only 4% of work had not yet been started. Importantly, the anticipated end of year result was that 100% of all outcomes would be met.

36. The performance of the HBDHB in terms of delivering on its Statement of Intent and District Annual Plan was well ahead of that anticipated or required by the District Annual Plan.
37. I am also aware of the Ministry of Health Elective Services Caseload Monitoring Report for February 2008 (Exhibit L page 175) which identifies that the HBDHB was one of only 9 DHBs to receive a "green light" for surgical delivery as a result of delivery at 101% of the agreed levels. This performance compared with only 95% achievement of surgical delivery when averaged over all DHBs throughout the country.
38. Another measure of relative performance of HBDHB can be obtained from the Ministry of Health DHB Hospital Benchmark Reports which are prepared quarterly by the Ministry of Health. These benchmarking reports assess the relative performance of the 21 District Health Boards throughout the country based on



15 high level comparative measures of New Zealand hospital performance. In the benchmark report for the quarter January to March 2008, the Hawke's Bay District Health Board was not ranked the worst DHB out of any of the District Health Boards on any of the criteria applied by the Ministry.

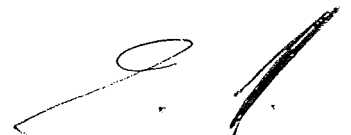
39. Further, if an average ranking is obtained by considering the relative rankings of all of the criteria assessed as part of the benchmarking process, I believe that Hawke's Bay would have ranked around 10 out of the 21 DHBs. This ranking would have been considerably better but for the HBDHB's ranking on workplace injuries or illnesses and hospital associated *s.aureus* infections for which the HBDHB was ranked 20 out of the 21 District Health Boards.
40. The workplace illness figures are high due to the fact that Hawke's Bay District Health Board is one of the few DHBs which allowed unlimited sick leave each year. This was to be addressed in the new employment contracts entered into by the HBDHB.
41. The *s.aureus* infections in the quarter ended March 2008 reflected a spike for those infections in that quarter. For instance, the HBDHB *s.aureus* infections for the previous quarter saw a ranking of 14 out of 21.



42. I believe that analysis of the benchmarking reports over time would have demonstrated that the performance of the HBDHB was relatively consistent and consistently good compared to other District Health Boards.
43. I do not believe that there is any basis on which the Minister could be seriously dissatisfied with the performance of the Board in terms of achieving its Statement of Intent and District Annual Plan requirements, in terms of elective surgery delivery and if a comparison of the HBDHB performance had been made to other DHBs around the country, using the Minister's own benchmarking indices.

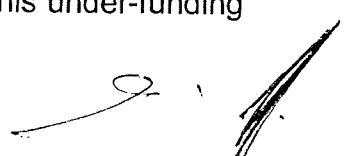
FINANCIAL

44. I believe that it is fair to say that in all aspects of the delivery of health services there is a constant tension between delivering health services and funding those services. The existence of waiting lists and community health problems illustrates that there is always more demand for health services than can be funded. Similarly, a long term perspective needs to be taken, particularly in achieving an appropriate relationship between primary and secondary health services. For example, the benefits of expenditure on a primary health issue such as GP visits or diabetes and obesity education may not be realised for many



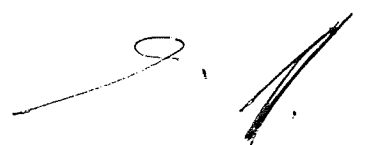
years when the need for secondary intervention for treatment of obesity or diabetes is avoided.

45. In 2003 the Ministry of Health introduced a population based funding formula which allocated health expenditure according to the population and demographics of the District Health Board region. An analysis of the funding properly due under a population based formula with the funding that had been provided to the DHB in previous years, showed that the HBDHB was under-funded by \$18.6million (GST exclusive).
46. This presented a dilemma to the Ministry as in order to properly fund the Hawke's Bay District Health Board in accordance with the population based funding formula, funds would have to be taken from district health boards in the South Island where the population was lower. The Ministry considered that it was not prepared to provide the funding in accordance with the population based funding in full in the first year. Instead, we got \$8.1million of the short-fall in year 2003 and this was slowly increased over the next three years so that we were properly funded in accordance with the population based formula.
47. What this illustrated was that we had for some time been under-funded in terms of the job that we were attempting to do in Hawke's Bay with the population and the particular demographics of Hawke's Bay. The effect of this under-funding



over some years and the gradual phase in of full population based funding which was completed in 2007 cannot be underestimated as it effects the long-term investment in health which pays dividends in the longer term. I believe that it resulted in a level of systemic debt that we were constantly trying to address.

48. With the introduction of the population based funding formula, this under-funding should have been addressed. The population based funding formula is designed to calculate the funding based on population with adjustments for relative demographics of a DHB's population, and also adjustments, known as the rural adjustor, to take into account the distances that are required to be travelled to a secondary hospital from anywhere in the district and also from a secondary hospital such as the Hawke's Bay Hospital to a tertiary hospital such as Wellington or Auckland.
49. The population based funding formula is reviewed every five years and a review was being undertaken in 2007. HBDHB faced an annual short-fall of around \$4 million arising from the difference between what was funded by the population based funding formula via the rural adjustor and the actual costs of transporting patients from throughout the region to Hawke's Bay Memorial Hospital at Hastings and/or from Hawke's Bay to a tertiary hospital.



50. We had attempted to bring the anomalies that we were experiencing with the population based funding formula to the attention of the Minister and had written to the Minister on three occasions by letters dated 23/11/2006 (Exhibit M page 179), 19/9/2007 (Exhibit N page 1810, 4/12/2007(Exhibit O page 184). i never received a meaningful response to those letters.
51. The result was that we were required to fund the short-fall arising from these anomalies and this flowed directly to the bottom-line results in each year.
52. Notwithstanding these difficulties, we have been able to achieve a performance over the four years prior to July 2007 that has seen both surpluses and small deficits. Over that period of four years the results have been within the Ministry of Health Guidelines of plus or minus 1%. I believe that these results have been achieved as a result of good governance.
53. For a number of years we have been in a position of seeking further efficiencies and innovations to address long term sustainability of the DHB and living within its means. There have been a number of reports and papers presented to the Board by management on efficiencies and cost savings that can be introduced. However while management had been able to identify possible cost savings, the lack of realisation of those



cost savings by management was a constant frustration to the Board.

54. The Chief Executive had had these issues raised with him in the course of his performance appraisals. There had been no less than four external consultancies engaged since 2004 to look at efficiencies and cost savings however the management's inability to realise those cost savings had come to the point where the DHB had engaged Michael Quigg, an experienced employment lawyer, to assist the Board with performance issues of the Chief Executive with a view to taking disciplinary action on the basis of non-performance or poor performance.
55. Part of the problem with the Chief Executive is that he is a very likeable person who in turn likes everyone to like him. I believe this made the making of hard decisions involving cost savings and efficiencies very difficult for him. I attempted to assist the Chief Executive in every way that I could and to support him in the implementation of some of these initiatives.
56. In addition, the Board and management were constantly looking at better ways of providing services so that cost savings and efficiencies could be attained without reducing the level of service. An example of this would be the development of the Acute Assessment Unit as part of the Emergency Department. While this involved considerable capital outlay, the benefits in



terms of cost savings and health service delivery will be experienced over many years to come.

57. Another initiative was the examination of how we delivered community health services to the community of Hawke's Bay.
58. As already outlined, the District Annual Plan was one of the strategic documents that detailed how such issues were going to be accommodated in the coming year. The Minister in approving the 2007/08 District Annual Plan took no issue with the assumptions that under-pinned the preparation of that Plan. In particular, the assumptions that the Multi-Employer Collective Agreements ("MECA") for settlement of health sector pay negotiations for nurses and medical staff would be within the future funding track levels. All of the twenty-one DHBs had agreed that District Annual Plans would be prepared on this basis. The obvious result was that if, as eventuated, the MECA settlements were greater than the future funding track levels, there would be an unfavourable variance to what was included in the yearly budgets.
59. Ultimately, the MECA settlements exceeded the future funding track funding made available by the Ministry. The effect on the HBDHB of the shortfall in future funding by the Ministry was between \$4million and \$4.5million for the 2007/08 year. By the 30th of September 2007 the difference between the MECA




settlements and the funding provided by the Ministry was \$1.5million and there were unrealised efficiencies of \$2million. The unrealised efficiencies reflected the fact that efficiencies planned by management had been unable to be achieved within the first three months of the financial year.

60. Our Board resolved to advise the Minister of the financial position but also of the Board's resolve to address the financial challenges facing the HBDHB. In my letter of 4 December 2007 I gave that advice and indicated our keenness to engage with the Minister directly on the financial challenges facing the HBDHB. I did not receive a response to that letter.
61. We received a letter dated 21 December 2007 (Exhibit P page 186) from the Minister setting out his expectations for the 2008/09 year. That letter can only be described as constructive and encouraging. There was certainly nothing that would suggest any dissatisfaction on the part of the Minister or Ministry.
62. I believe the resolve to address financial issues was well placed as the Board had previously addressed such issues in previous years. I believe analysis of the financial statements, Statements of Intent and quarterly performance reports for previous years confirm this.

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63. In furtherance of our commitment to address the sustainability issues of the DHB, the Chief Executive presented a report to the Board meeting on the 13th of February 2008. (Exhibit Q page 189) This report was prepared by the executive management group and recommended a three year sustainability programme to address the HBDHB structural deficit. The minutes of the Board meeting of 13 February 2007 (Exhibit R page 201) record that the Board considered that both a one year and a three year plan were needed and that the management report back to the Audit & Finance Committee and the March Board meeting with a detailed work plan, resources needed and implications for the one year proposal.
64. Given the positive feedback on the 2007/08 District Annual Plan received from the Honourable Peter Hodgson, the encouraging correspondence received from the Minister, the commencement of more hands-on monitoring and input from the Ministry arising from the change in status from standard monitoring to performance watch, and the steps already being taken to address the budget deficit, I do not believe that there was any basis for the Minister to be seriously dissatisfied with the Boards financial performance. We had addressed deficits before and we were preparing to do it again.




THE CHANGE IN MONITORING STATUS

65. I did receive a letter dated 10 December 2007 from the Ministry regarding a proposed change to a monitoring status. (Exhibit S page 207)
66. By letter dated 7 January 2008 (Exhibit T page 209) I responded to the Ministry's previous advice that they were considering a change in the monitoring status of the HBDHB from standard monitoring to performance watch. The two grounds given for considering the status change related to the financial performance which, having undertaken considerable amount of work focussing on the financial performance for the year to date, was still unlikely to achieve a break-even result due to the MECA settlements being greater than the funding provided by the Ministry.
67. The second was the alleged deterioration in the elective contract performance. This aspect had already been addressed as the elective delivery figures for February 2008 demonstrate. In a way, we were quite happy with the change in monitoring status as it enabled greater communication with the Ministry, communication which, as evidenced by the lack of response to my letters of 6 November 2006, 19 September 2007 and 4 December 2007 was not always as it should have been. I



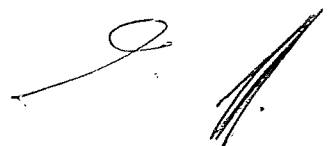
referred to those letters in my letter of 7 January 2008 and requested a response to them.

68. Finally, I reiterated the Board's commitment to working with the Ministry in a constructive manner to resolving the financial sustainability issues of the HBDHB.
69. At this point we had already been working with management to review budgets and address some of the unrealised efficiencies that were being experienced. It should also be noted that while expenditure was ahead of budget, so too were the anticipated outputs required by the District Annual Plan as evidenced by the figures for the six months ended December 2007. At the time of writing my letter of 4 December, we did not have the second quarterly report to which I have already referred. Further, to put the deficit as at the end of October into some sort of perspective, the annual budget for HBDHB was in the order of \$370m or about 1 million dollars per day. Hence, while we were approximately 3-4 days behind budget in terms of expenditure we were also well ahead of budget in terms of achieving the year's outcomes.
70. By letter dated 28 January 2008 (Exhibit U page 212) I finally received a response from the Minister to my letters of 19 September and 4 December 2007. The letter can only be seen as encouraging in our attempt to address the issues and it is



noted that the Minister also saw the change in the monitoring status as of assistance in considering and planning to address the financial situation. The Minister expressed his pleasure at the fact that we had already taken action to manage the impact of the MECA settlements on our operation.

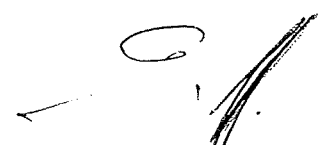
71. On the 12th of February 2008 (Exhibit V page 214) we were formally advised by the Ministry that we had had a monitoring status change from standard monitoring to performance watch. This had already been foreshadowed to us. The Ministry of Health has a three-tiered level of monitoring. As its name suggests, standard monitoring is the standard level, performance watch involves a higher level of monitoring by the Ministry and intensive monitoring, again as its name suggests, involves a far greater monitoring of the performance. The Hawke's Bay District Health Board was standard monitoring and was moved to performance watch on the 12th of February 2008. As detailed in the DHB financial performance for the whole of the country for the period ended 30 November 2007, as at 30 November 2007 there were three DHBs on performance watch, being Auckland, Waitemata and West coast. In addition, there were three DHBs on intensive monitoring, being Capital & Coast DHB, Southland and Whanganui DHB.

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72. The Ministry's letter of 12 February 2008 advised us that the Ministry staff would be in contact with the Chief Executive to organise the first monthly monitoring and intervention framework meeting. The Ministry advised me that they would work closely with us to manage the issues facing the HBDHB and as part of this, the Ministry would prepare a draft monitoring framework to be discussed with the management team during the first meeting. The letter stated that the monitoring framework was intended to support management at the HBDHB in identifying current issues and assist in developing a clinically and financially sustainable health service in the HBDHB area. All of these things were welcomed as, to date, management had had very little success in achieving the financial efficiencies that they believed were possible. The monitoring steps outlined in the Ministry letter of 12 February 2008 were not implemented prior to the Minister's decision of 27 February 2008.

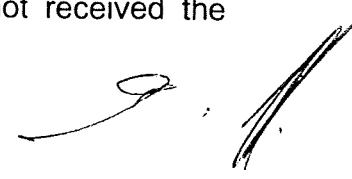
THE BOARD'S INTEGRITY

73. The second reason given for the Minister's serious dissatisfaction was a lack of confidence in the Board's integrity. From the outset I believe that the elected Board members were all people of the highest integrity and standing within the community and this is evidenced by their election and by the



Hawke's Bay communities reaction to the dismissal of the Board by the Minister.

74. The Minister gives as his reason for the lack of confidence in the Board's integrity, the public challenge of him as Minister and the use of the media to advance the personal agenda of Board members. To this date, I am still absolutely at a loss as to what public challenge there has been by the Board to him as Minister or as to the use of the media to advance personal agenda. We sought clarification of this aspect in our letter of 21 February 2008 but the Minister's response of 22 February 2008 did not advance the matter at all.
75. The aversion of the Minister to media comment was unusual given that he made a press release (Exhibit 3 page 40) in relation to his letter of 20 February 2008. While I was being advised that a press release was to be made, I was not aware of its content. I obtained a copy of the press release from the Dominion Post after they had requested comment from me on the Minister's media release.
76. As a result, I, like other Board members, was unaware of the content of the Minister's media release at a time when it had been provided to the media. We were being asked for comment by the Press on something we had not received. Further, at the time I was being asked for comment, I had not received the



Minister's letter of 20 February 2008 so I was unaware of its contents including the request not to speak to the media. Other Board members were similarly uninformed and answered questions asked of them by the media.

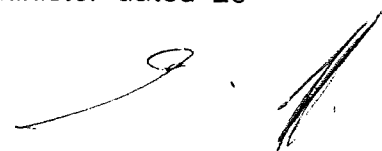
DYSFUNCTIONAL RELATIONSHIPS

77. The first alleged dysfunctional relationship was between the Board and the Minister. I am not sure how the Board could be described as having a dysfunctional relationship with a Minister the Board had never met with and when the Board had only taken office on the 10th of December and had only had one Board meeting in the intervening two month period. Similarly, the Minister had only been in the role of Minister since October 2007. The Board had had very limited communication to or from the Minister and the only meeting that had been scheduled for the Board and the Minister to meet in November 2007 had been cancelled by the Minister. I do not believe that there was any basis on which the relationship could be described as dysfunctional and the correspondence from the Minister would demonstrate this. In addition, I had a series of telephone discussions with the Minister regarding publicity on patient deaths as a result of poor access to cardiac surgery at Capital and Coast District Health Board. All of these discussions were




constructive and were appreciated by the Minister. At no time did he express any dissatisfaction.

78. The second relationship alleged to be dysfunctional by the Minister was the relationship between the management and the Board. It is true that there were tensions arising from the fact that the Chief Executive and other senior managers had been under scrutiny for their actions in relation to the Community Services Request For Proposal and Wellcare contracts. In addition, the performance of the Chief Executive had been the subject of some adverse discussion during the annual performance reviews of the Chief Executive.
79. I believe that the actions taken by the Board were consistent with its obligations as a Board. Further, I do not believe that those tensions were allowed to interfere with the working relationship and that both management and the Board carried on and interacted in a professional manner. This is borne out by the evidence of John Newland, an independent consultant engaged by the Chief Executive who has sworn an affidavit as to his observations of the relationship with management.
80. Finally, it has been suggested that the relationship between the Board and clinicians was dysfunctional. This was not a matter raised by the Minister in his letter of 20 February 2008 and so was not addressed in our response to the Minister dated 26



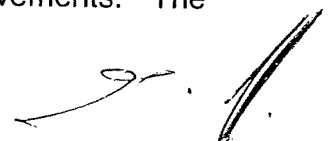
February 2008. Had this issue been raised it would have been easily refuted and I refer to the affidavit of John Rose in this regard. Further, the Minister's letter refers to public statements of dissatisfaction by senior clinicians and his press release attached a transcript of a Radio New Zealand interview with Dr David Grayson. What is not disclosed by the Minister or Mr Grayson's interview is that both Dr Grayson and his wife are members of the management team at HBDHB, with Dr Grayson holding only a part time role as a clinician. In particular, Dr Grayson's wife was one of the Managers whose actions, along with the Chief Executive, were under scrutiny.

81. The HBDHB employs over 120 clinicians. The Board met formally on a quarterly basis with the Clinical Directors of each Department. The relationship between the Board and clinicians is a good one and is borne out of the fact that the Board has always had sound clinical representation on the Board. The Board elected in October 2007 was no exception with Dr David Barry, a medical practitioner of some 34 years experience at the HBDHB being elected to the Board.
82. His experience as a clinician is covered in his own affidavit. In addition, the evidence of John Rose is that the issue of confidence in the Board has never been an issue.



THE AUDIT NEW ZEALAND REPORT

83. The final reason given by the Minister for his alleged serious dissatisfaction were concerns about the Auditor General's Report of 28 January 2008 into the DHB. (Exhibit W page 216)
84. It is now apparent to me that the Minister is referring to the letter from the Office of the Auditor General dated 28 January 2008 providing a summary of the audit for the year ended 30 June 2007. (Exhibit A page 1) It is difficult to see how that audit and therefore the summary of it could be the subject of any serious dissatisfaction given that the audit opinion expressed by the Auditor General for the period was unqualified and identified a limited number of areas that required improvement and identified very few areas in need of improvement in terms of the explanation of the scope and grades appended to the Auditor General's letter. As detailed in my letter to the Minister of 26 February 2008, the matters raised by the Audit New Zealand audit had either been addressed or were in the process of being addressed. This process was being closely monitored by the Board.
85. Further, the Auditor General's letter of 28 January 2008 clearly states that the purpose of commenting on such systems and controls is to highlight areas for improvement identified through the audit and make recommendations for improvements. The



letter states that it is not an assessment of overall management performance or of the entities effectiveness in achieving its financial and service performance objectives. Given the context of that letter and the unqualified audit opinion on the HBDHB's financial statements, I fail to see how that could be the source of any serious dissatisfaction.

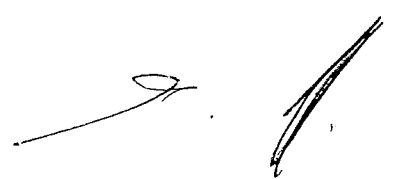
THE HAUSMANN ALLEGATIONS

86. As early as December 2006 Mr Hausmann commenced correspondence to the Minister and the Ministry aimed at either my removal from office and/or the dismissal of the Board. Mr Hausmann had not raised these issues with the Board. Similarly the alleged issues were not conveyed to the Board by the Minister.
87. In these communications Mr Hausmann makes a series of allegations which I believe are untrue and would have been readily dispelled had the issues been raised with me and/or with the Board. I set out these communication in some detail.
88. It is now apparent from documents obtained under the Official Information Act, that since at least December 2006 Mr Hausmann had been communicating with the Minister with a view to ensuring that I was not going to be a ministerial appointee in the future. On 4 December 2006 (Exhibit X page



225) Mr Hausmann e-mailed the Minister purporting to make suggestions as to appropriate Ministerial appointees in the future. The e-mail goes further by suggesting to the Minister that the Minister not announce any change of Ministerial appointments until after nominations have closed for the public elected members so as to avoid the possibility of appointed members (such as myself) standing for election when they were not given a ministerial appointment.

89. If Mr Hausmann had concerns such that these "tactics" were necessary, they were never conveyed to me by the Minister, the Ministry or by Mr Hausmann. This letter was replied to on behalf of the Minister on 13 December 2006. (Exhibit Y page 229) There had never been an issue raised by the Minister or the Ministry concerning my performance as Chair or the performance of any other Ministerial appointments to HBDHB (other than Mr Hausmann). At the Chair's meeting with the Minister in June 2007 the then Minister, the Honourable Peter Hodgson, stated that he was going to make changes to some of the appointments and that he would speak with the Chairs involved "in the next two to three weeks". He did not speak to me and I took this, coupled with the fact that no issue had ever been raised with me concerning my performance, as an endorsement of my performance.

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90. Mr Hausmann wrote to the Ministry on the 6th of December 2007 (Exhibit Z page 230) in response to a letter from the Ministry of 3 December 2007. (Exhibit AA page 233) In that letter Mr Hausmann makes a number of accusations and allegations, all of which are readily refuted but none of which were referred to me or to the Board of the HBDHB.
91. Mr Hausmann's letter of 6 December 2007 complained of a lack of support from the Ministry which he claimed had become acutely apparent to him during the course of the review being undertaken by the Director General of Health.

Paragraph 92 is not to be
searched by order of the
Court dated 19/12/08.

93. At paragraph 8 of the letter Mr Hausmann states:



Throughout the term of my employment I have held many discussions with both Ministers and Dr Bruce Anderson on the acknowledged and documented governance issues at the HBDHB..."

The Ministry and the Minister never raised any of these alleged issues with the Board or with me, despite the fact that the Board had met with both Ministry officials and the previous Minister during that time. I do not know what "acknowledged and documented governance issues" are being referred to. Again, I believe that all of the allegations Mr Hausmann made are readily refuted. We were never given that opportunity.

94. On the 30th of January 2008 (Exhibit BB page 235) Mr Hausmann wrote to the Ministry and after referring to his letter of 6 December 2007, he sought leave of absence from the HBDHB. Again the letter goes on to make further allegations and purports to raise further governance issues which have never been referred to the Board.
95. The next letter from Mr Hausmann to the Ministry is dated the 1st of February 2008 (Exhibit CC page 237) enclosing a letter to the Auditor General alleging a misrepresentation by the Board of the HBDHB in the 2007 Annual Audit Report.




96. The letter attached to Mr Hausmann's letter of 1 February 2008 (Exhibit DD page 238) alleges that the Board misrepresented the truth when it stated to the Auditor General's office that it was unaware that a contract with Wellcare and the HBDHB was proposed until one month until after the contract had been agreed and signed. In support of that allegation he attaches a series of emails between 7 February 2006 and 14 February 2006. He uses these emails as a basis for his allegation that the Audit Department had been misled. Again, this allegation was not referred to us and can be readily refuted as follows.
97. While the Board was aware that the Ministry of Social Development ("MSD") and the Board were looking at joint initiatives and that one of the HBDHB staff, Sue Peacock, had been seconded to jointly work for MSD and the HBDHB, the Board was not aware that a contract was proposed between HBDHB and Wellcare Education Ltd. Diana Kirton's email of 7 February 2006 (Exhibit EE page 241) was the first such indication and she was advised by Chris Clarke that the initiative was being run by MSD and that HBDHB had no role in the selection of the provider of training.
98. Further clarification was sought as to the extent of the HBDHB's involvement by asking whether this was a joint initiative and whether partnership documentation or a memorandum of

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understanding or terms of reference existed. Diana Kirton was specifically asking what were the HBDHB's obligations.

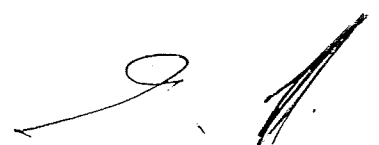
99. The response from Chris Clarke is dated 14 February (Exhibit FF page 242) and advises that there is no formal memorandum of understanding with MSD, only a formal agreement regarding Sue Peacock's employment. Chris Clarke referred to a draft joint contract with MSD regarding the health cadetship initiative and that the contract was being reviewed by MSD and the HBDHB. Chris Clarke referred to the agreement as relational form of contracting. By this I understood that he was referring to the joint relationship between MSD and the HBDHB. This series of emails must be read against the background of the advice given to us by the Chief Executive, namely that the contract was with the MSD, not the DHB and that a competitive tender process had been followed.
100. The Board was genuinely surprised at the April 2006 Board meeting when we were advised that a contract had been signed and that it was a jointly funded initiative between MSD and HBDHB. The concerns of the Board are recorded in the minutes. (Exhibit GG page 245) The reference to a contract between MSD and HBDHB was understood to be in response to Diana Kirton's request for information as to whether there was written partnership documentation, memorandum of



understanding or terms of reference. I certainly did not understand that to involve a contractual relationship between the HBDHB and Wellcare Education Ltd as we had previously been advised that this was not to be the case.

101. As a result, the allegation that was made by Mr Hausmann that we had misled the Auditor General's office, which allegation was also copied to Mr Wilson of the Review Panel, was unfounded. More importantly, we were not given the opportunity to refute the allegation or to give our version of events and our understanding of the correspondence.
102. Mr Hausmann's letter of 30 January 2008 was acknowledged by the Minister's private secretary on the 11th of February 2008 (Exhibit HH page 262) and he was advised that he would receive a personal reply as soon as possible.
103. That reply was in the form of a letter dated 13 February 2008 (Exhibit II page 263) from the Minister to Mr Hausmann. That letter, after referring to Mr Hausmann's letter of 30 January 2008 advised that the Minister had noted his comments. Those comments included the reasons for his requested leave of absence from the Board. The letter went on to state:

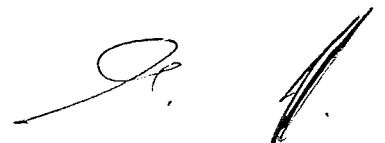
"As you will be aware, events have now overtaken your letter.

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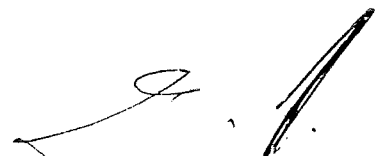
104. I received a copy of the letter from the Minister to Mr Hausmann dated 13 February 2008 on about the 6th of June 2008. When I read it I was sickened. Not only had Mr Hausmann been allowed to make unsubstantiated and untrue allegations against the Board and against me in particular, it appeared that in responding to his request for leave, the Minister had made up his mind that that was not necessary as "events had overtaken" the request. The only possible inference that I can draw from this letter is that on the 13th of February 2007, a week before any issue with the Board was even raised, the Minister had already made his decision to dismiss the Board. I believe this is reinforced by other documents to which I refer under the heading of "Predetermination".
105. The Minister as part of the notification of his decision on 27 February 2008 noted that "another Board member Peter Hausmann" had also provided a submission (Bundle A page 160A) which was critical of the Board's performance.
106. The "submission" by Mr Hausmann contained numerous matters that were factually incorrect and which are set out in paragraph 40(e) of the Statement of Claim. All of those allegations would have easily been refuted had we been given an opportunity to comment on the allegations being made by Mr Hausmann.

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107. It is acknowledged that there were some tensions between the Board and Mr Hausmann and Mr Clarke arising from the questions being asked in relation to the Request for Proposal for Community Services and the Wellcare contract.
108. In addition, issues relating to Mr Clarke's performance as Chief Executive were also under scrutiny in both his performance appraisals and the fact that the Board had engaged Michael Quigg, an employment law specialist, to review the Board's position with regard to Mr Clarke's employment. I believe that scrutinising those issues were part of the Boards function.
109. Allegations that the relationship between the Board and clinicians was dysfunctional are a reoccurring theme throughout Mr Hausmann's submission. This is demonstrably incorrect.
110. Further, while Mr Hausmann has expressed his views, they are not the views shared by the other Board members nor have they ever been raised by Mr Hausmann at the Board meetings that he has attended.
111. Mr Hausmann's inclusion of a letter from Mr Clarke to Peter Chemis of Buddle Findlay, Wellington, can only be described as self-serving. Again, each of these alleged failings of the Board can be readily refuted but we were never given that opportunity.

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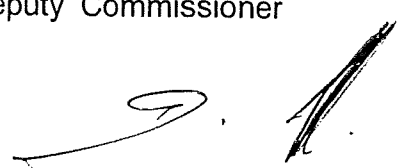
112. For instance, the allegation that clinicians had moved a vote of no confidence in the Board nine months ago is simply not true. The Board enjoyed a good relationship with clinicians and no issues of confidence in the Board had been raised with the Board by clinicians, management or Mr Hausmann.
113. Other allegations range from the readily explained such as the Board's interest in ensuring management was operating effectively to the absurd such as the allegation that I was being investigated by the Commerce Commission. I believe that all of the allegations in Mr Hausmann's submission are readily addressed by reference to the facts but we were never given the opportunity to do so.
114. I believe that ever since the Board, in furtherance of the objectives of a DHB, had taken issue with the alleged conflicts of interest, Mr Hausmann had communicated with the Ministry and the Minister with a view to undermining the Board and my role as Chair in particular. In late 2007 and January 2008 when the actions of Mr Hausmann, the Chief Executive and some senior management came under further scrutiny, those efforts of Mr Hausmann and the Chief Executive were renewed. At all times the Board was attempting to act in accordance with its objectives as a DHB. If, in so acting, that led to tensions with Mr



Hausmann and Mr Clarke, that was understandable but unavoidable.

PREDETERMINATION AND BIAS

115. Mr Hausmann had been communicating with the Minister and/or the Ministry since at least December 2006 making various allegations against me and against the Board. The fact that these allegations were invariably acknowledged by the Minister's office and/or by the Minister personally, the fact that there was no challenge to the allegations being made and the fact that the allegations were never put to the Board or to me to be refuted illustrates a high level of bias.
116. The Board was certainly not afforded the same level of response to communications as it is now evident Mr Hausmann was afforded.
117. Further, references in the correspondence to numerous meetings and discussions illustrate that communications went far beyond the letters that have been released by the Ministry under the Official Information Act.
118. That there was both bias and predetermination is further evidenced by the fact that documents obtained under the Official Information Act show that the appointment of Sir John Anderson as Commissioner and Brian Roche as Deputy Commissioner



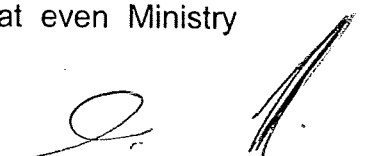
had already been determined by at least the 13th of February 2008. (Exhibit JJ page 264)

119. These documents obtained from the Ministry of Health under the Official Information Act record the proposed appointment of Sir John Anderson as Commissioner and Brian Roche as Deputy Commissioner prior to the Cabinet Policy Committee Meeting on 13 February 2008. The advice further records that the declaration forms for the proposed appointees had already been completed and were attached although these were not released under the Official Information Act. The document goes on to refer to the fact that action on this particular document was required by the 12th of December 2007 which was just two days after the elected Board had been sworn in as members of the HBDHB.
120. I now realise why the Minister had delayed appointing a Chair to the HBDHB and why my continued appointment as Chair of the HBDHB was on a day-to-day interim basis.
121. In an undated memorandum (Exhibit KK page 269) from the Minister to Cabinet titled "Appointment of a Commissioner and Deputy Commissioner to Hawke's Bay District Health Board" the Minister records:

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"This memorandum asks Cabinet to note that I intend to appointments [sic] Sir John Anderson as a Commissioner and Mr Brian Roche as Deputy Commissioner to Hawke's Bay District Health Board."

122. The document is undated but refers to notice of the appointments being published in the Gazette on 13 November 2007 and to the Commissioner's and Deputy Commissioner's appointments being for a proposed term of 13 December 2007 to 5 December 2010.
123. I believe these documents establish that the decision had been made and that the Minister's belated attempt to give the Board an opportunity to respond to the Minister's letter of 20 February 2008 was simply to pay lip service to the need to consult and engage with the Board on these issues. This fact is also borne out by the Minister's letter of 20 February 2008 which stated that he had, prior to any communication or discussion of issues with me or the Board, *"became seriously dissatisfied with the performance of the Board of the Hawke's Bay District Health Board."*
124. Finally, in a letter from the Ministry (Exhibit LL page 273) to the Respondent dated 19 February 2008, the Ministry strongly recommended that the Minister take a different option from the one ultimately taken by him. It appears that even Ministry

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advice in the strongest terms could not change the Minister's mind from the course of action that had been determined some weeks or months earlier.

125. I believe that no matter what explanations or clarification was provided by the Board, the Minister's decision had already been predetermined and in part implemented as evidenced by the fact that the necessary declarations from the proposed appointees had already been obtained. Equally disturbing is a memo, again obtained from the Ministry of Health under the Official Information Act, (Exhibit MM page 279) from Crown Law to the Ministry dated 28 February 2008 one day after the Board's dismissal and Sir John's appointment suggesting that he be asked to "paint a picture of a dysfunctional organisation transformed."

CONCLUSION

126. I believe that the Board members of the HBDHB have undertaken what is at times a difficult role with considerable diligence, integrity and skill. I believe that the attacks on the integrity of the Board are completely unfounded and unwarranted.
127. I believe that the Board had an obligation to ensure that its activities were undertaken in an ethical manner. As a result, I

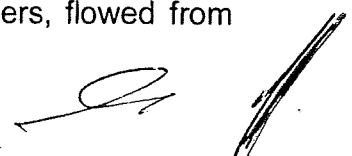
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believe that the actions of the Board in scrutinising issues relating to the Request for Proposal for Community Services and the Wellcare contract were an integral part of the Board's function of ensuring that ethical practices were adopted particularly where conflicts of interest or perceived conflicts of interest might arise.

128. I do not believe that the Board's relationship with the Minister could be described as dysfunctional. We had received glowing reports from the previous Minister of Health. The current Minister of Health had, at the time of the Board's removal, been in office for a very short time. The Board had never met the Minister, had received very little correspondence from the Minister and certainly not received any indication of any issues arising from the Board's performance. Our attempt to obtain clarification as to what the Minister meant by his letter of 20 February 2008 did not clarify the issue at all.

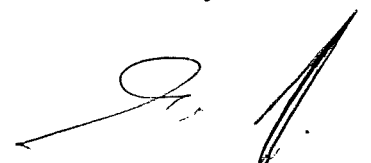
129. I believe that the tensions on the Board flowed solely from the Board's actions in scrutinising the actions of Mr Hausmann and his conflicts of interest in the Request for Proposal and Wellcare contract processes. There were no other tensions within the Board.

130. Similarly, I believe that any tensions between the Board and the Chief Executive and one or two senior managers, flowed from

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the fact that their actions in relation to the Request for Proposal for Community Services and the Wellcare contract were also under scrutiny.

131. Notwithstanding, I do not believe that those tensions resulted in a dysfunctional relationship between management and the Board and that at all times a professional approach was maintained by the Board.
132. The Board enjoyed a good relationship with clinicians and suggestions that there was a lack of confidence by clinicians in the Board are unfounded.
133. The Board has been subjected to a prolonged and covert attack from Mr Hausmann and, more latterly, the Chief Executive. Those allegations were never put to me or to the Board and we have never been given an opportunity to refute or disprove them. All of the allegations are readily disproven.
134. The making of the allegations must be seen in the context in which they were made, namely, by persons whose actions were under scrutiny. I believe that Mr Hausmann's efforts became more urgent in the latter part of 2007 and in January 2008 when it was clear that the extent of the correspondence between the Chief Executive and other senior managers on one hand and Mr Hausmann on the other hand would be revealed by the analysis

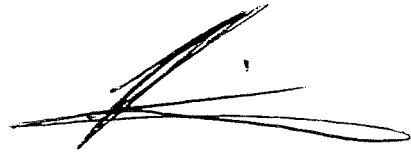
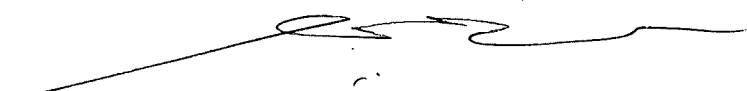
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of the email correspondence that, prior to January 2008 had not been retrievable.

135. The failure to put allegations to the Board and allow the Board to respond to those allegations is in breach of the principles of natural justice. It has also meant that the Minister has been provided with erroneous and therefore irrelevant information and has been deprived of relevant facts.

136. The belated attempt to provide an opportunity to respond to the Minister's apparent concerns was to pay lip service to the need to give the Board an opportunity to be heard. No matter what we said, the decision had been predetermined.

SWORN at *Napier* by)
 KEVIN HENRY ATKINSON)
 this 22nd day of August 2008)
 before me:)

A SOLICITOR OF THE HIGH COURT OF NEW ZEALAND

C. M. Gibson