

**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

THIRD AFFIDAVIT OF KEVIN HENRY ATKINSON

**WILLIS TOOMEY ROBINSON
LAWYERS
NAPIER**

116 Vautier Street, Napier Private Bag 6018, Napier
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Solicitor: Matthew Lawson

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

1. I have read the affidavits filed by the Respondent in these proceedings. This affidavit is in reply to the matters raised by the Respondent and in other supporting affidavits.
2. In this affidavit I will address the issues raised under a series of headings starting first with the affidavit of David Richard Cunliffe.

BACKGROUND

3. At paragraph 16 the Respondent refers to being advised of a range of serious and worsening problems at the Hawke's Bay District Health Board. Annexed hereto and marked "**A**" is a briefing paper dated 2 November 2007. The stated purpose of this report is to provide the new Minister with an introductory overview of the health and disability support sector and the key issues that may arise in the portfolio in the near term.
4. The briefing paper includes an attachment headed "DHB Issues". That paper outlines issues at Capital & Coast District Health Board, Southland District Health Board, West Coast District Health Board and the Whanganui District Health Board. The Hawke's Bay District Health Board is not even mentioned in the briefing paper. This of course is consistent with the fact that no issue had ever been raised with the Hawke's Bay District Health Board.

DELAY IN THE REVIEW PROCESS

5. The Respondent refers to the delay in the completion of the review into conflicts of interest at the Hawke's Bay District Health Board. The Respondent refers to the progress on the report being held up by what had become an intensely disputed

legal process and that he had been advised of a number of lawyers being involved for the Board, management and individual Board members and the review panel.¹ None of that delay was caused by the Board other than Mr Hausmann.

6. The review panel had prepared two draft reports and provided them to the Board via its solicitors for comment. Again, there was the requirement to only view the drafts at the offices of Sainsbury Logan & Williams and we were not allowed to copy them. In the case of the second draft, this was provided chapter by chapter and, as will be discussed later in this affidavit, the Board was given a matter of days to provide comment on the draft.
7. At the outset it was agreed by all the parties and the panel that in order to manage the flow of information, all contact on the draft reports was to be conducted via the Board's solicitors, Sainsbury Logan & Williams. It was therefore inevitable that there would be a solicitor involved for the Board.

Paragraph 8 is not to be searched without leave of the Court.

9. The Board comments on the first draft were prepared and provided to the panel within seven days.
10. It is acknowledged by the Respondent that much of the delay arose from legal representations made on behalf of Mr Hausmann with respect to the first draft.² In fact, I am aware that representations were made on behalf of Mr Hausmann for

¹ Paragraph 22 of the Respondent's affidavit
² See paragraph 23 of the Affidavit of David Richard Cunliffe

over three months. Mr Hausmann was the only Board member privy to those representations. The delay in the completion of the review was also a source of frustration to the Board.

The last two sentences of paragraph 10 are not to be searched with leave of the Court.

11. We were unaware of the basis on which the two drafts were so different and we were given only a matter of days to provide comments on the second draft.
12. There were so many errors in the second draft that more time was required and hence an extension was sought. This was not forthcoming and so the Board, in the interests of ensuring that the panel had the correct information, sought and was granted an interim injunction so that further time could be available to correct some of the many inaccuracies in the second draft.
13. An example of the misinformation that was given to the Review panel is the document comprising the "comments" made by more than 20 past and present staff. This is the document referred to as "document C" and was provided to the Minister by Mr Hausmann as part of his submission on 26 February 2008. This document contains a number of inaccuracies as referred to in my second affidavit at paragraph 112 et seq. The Review Panel recognised the difficulty the Board had in addressing what were anonymous and unsubstantiated accusations and agreed that it was a matter of natural justice.
14. We perhaps should have been concerned at the number of people nominated to speak to the panel and the fact that senior

managers with whom the Board actually dealt were not proposed to be interviewed. As will be discussed later in this affidavit, the fact that over 20 people were interviewed should also have been of concern as the Board only really had contact with five senior managers.

15. The delay in the review panel process was never raised as an issue by the Respondent either prior to the Minister's letter of 20 February 2008 nor in the letter of 20 February 2008. Had it been raised we could have been very specific as to the delays, the reasons for the delays and the fact that the Board was not responsible for those delays.
16. It is clear from the Respondent's affidavit that he regarded the actions of the Board in seeking the injunction as completely unacceptable but he never raised that with the Board. Further, I do not believe that it is an "unacceptable course of action"³ where a Board seeks to obtain a reasonable time period for making representations to a Ministry review panel.
17. At all times the Board was acting on advice from its lawyers Sainsbury Logan & Williams and Mary Scholtens QC. The problem that the Board was faced with was that Mr Hausmann had been given three months to comment on the first draft and his representations had obviously resulted in a substantial change in the review panel's findings.
18. We were not aware of any further information having been provided and were not given an opportunity to comment on any further information. What is clear is that there were a number of alleged facts and allegations that had been included in the second draft which were simply not true or which had been

³ Para 24 of the Affidavit of D R Cunliffe

misrepresented or misinterpreted. We were not given the opportunity to correct those untruths and misconceptions.

19. It is for these reasons that Mary Scholtens QC was instructed to seek an interim injunction and this was readily obtained..
20. While the Minister says now that the Board's behaviour was "completely unacceptable", the Board's actions were never questioned by the Respondent. If they had been, then we could quite easily have given the reasons why we were concerned about the second draft as these reasons were easily expressed.
21. Finally, the seeking of an injunction could not have played any part in the Minister's serious dissatisfaction as expressed in his letter of 20 February 2008 as, at that time, no application for an injunction had been made and it was not raised with the Board by the Respondent at any time subsequent to his letter of 20 February 2008.

RELATIONSHIP WITH MANAGEMENT

22. In paragraph 25 of the Respondent's affidavit, he states that:

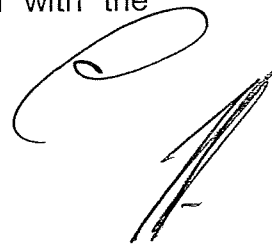
"By the middle of February, it became apparent that the Board's relationship with management had broken down completely and my confidence in the Board had been badly shaken."

23. In my second affidavit I referred to the fact that no issue had been raised by the Respondent or by the Ministry with the Board prior to the Minister's letter of 20 February 2008. In that letter, the Minister stated as a basis for having already become seriously dissatisfied with the performance of the Board, that there existed a dysfunctional relationship between the Board and management. In our letter of 21 February 2008, we asked

for the Minister to identify precisely what was meant by the use of the word "dysfunctional" in his letter of 20 February 2008. The Minister's response did not provide any example or any clarification as to what was meant. It now appears from the Respondent's affidavit that the Respondent relies on three matters as the basis for his view that the relationship with management had broken down completely.

24. The first is the letter from Dr Dinesh Arya⁴. That letter was copied by Dr Arya to me and when I received it I called him to discuss it. He assured me that in urging a decision to be made on the chairmanship of the DHB, he was not seeking to have me displaced as chairman or any other member of the Board displaced. More importantly, this letter was not referred to the Board by the Respondent. If it had been then that clarification could have been provided as part of our response to the Minister's letter on the 20th of February.
25. The second matter on which the Minister appeared to form this view that the relationship had completely broken down were the views expressed by Dr Grayson. These views were not conveyed to the Board for comment despite the fact that the Respondent had telephoned Dr Grayson and obtained his views prior to writing his letter of 20 February 2008. Dr Grayson had never raised an issue with the Board as to the Board's performance and governance at any time.
26. The Respondent's letter of 20 February 2008 purported to raise the relationship between the Board and management as an issue, but despite requesting clarification of what was meant by his letter, the Minister failed to provide the Board with the

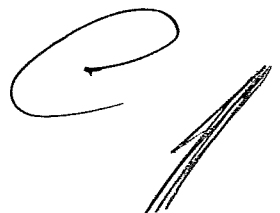
⁴ Exhibit DC14 to the Affidavit of D R Cunliffe

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matters that had been alleged by Dr Grayson or to disclose that any allegation had even been made by Dr Grayson.

27. The third matter relied on by the Minister are the views of Dr Tustin. Dr Tustin had never raised an issue with the Board. Those views were not conveyed to the Board for comment or rebuttal. The views expressed by Dr Tustin could have been readily dispelled had we been given the opportunity and I refer to the affidavit of Dr Rose, the Chair of the Senior Medical Staff of the Hawke's Bay District Health Board, that not only had there been no vote of no confidence by clinicians (as we have subsequently found to have been alleged), there has never been any issue brought to his attention which questions the confidence of the clinicians in the Board⁵. It had never been an issue.
28. Further, the Board had a good representation of people with clinical experience such as Dr David Davidson, Dr David Barry and Dr David Marshall. All of these people had first hand knowledge of the Board activities both from the perspective of a Board member and from the perspective of clinicians at the Hawke's Bay District Health Board.
29. Had Dr Tustin's or Dr Grayson's views been referred to us, then I believe they could have been readily refuted.
30. The Minister also deposes to the fact that he spoke with Dr Grayson and with Dr Tustin about their views. The Minister never met with or spoke with the Board. I am not aware of the Minister ever seeking the views of anyone who might express a contrary opinion to those of Dr Grayson or Dr Tustin.

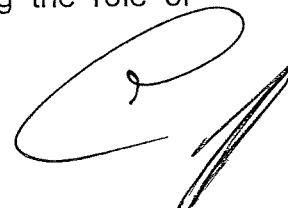
⁵ See Para 5 - affidavit of J Rose



31. It is apparent from the Respondent's affidavit that he took exception to the fact that I advised the Minister of the very close friendship between Chris Clarke as Chief Executive of the HBDHB and Anthony Hill as the Deputy Director General of Health. These comments were not raised with me, no issue was taken at the time and they were not part of the matters which the Minister sought that we address in his letter of 20 February 2008.
32. As a Board, we were very conscious of the need to manage any potential issue that may arise out of the friendship between Chris Clarke and Mr Hill from the Ministry of Health.
33. We also believed that on occasions, this friendship was used to advance or to bolster Mr Clarke's point of view. This was borne out by the discoveries made in the forensic e-mail audit. For instance, on one occasion the Board resolved not to set up a new Primary Health Organisation against the recommendation of the Chief Executive. The reasons for that are irrelevant for current purposes however the email audit identified that shortly after the meeting, Chris Clarke and Sue Peacock were instrumental in drafting a letter (Exhibit "B") with the intention that this would subsequently come to us as a letter from the Ministry of Health.
34. While it was not a matter raised by the Minister and therefore not addressed by the Board, I believe that the Board had good reason to counsel caution in respect of Mr Hill's and Mr Clarke's friendship. The Minister assured me he was aware of that friendship and that steps had been taken to address that issue. At no time did he take issue with me raising that point.

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35. Notwithstanding the Ministers contention that Mr Hill had disclosed the connection and "...had no involvement in relation to matters connected with the various Hawke's Bay reviews", discovered documents and other documents released under the Official Information Act show that Mr Hill played an integral role from the outset of the Review of conflicts of Interest and a role in the crucial period after the Ministers letter of 20 February 2008. Examples of this are Exhibits "C" and "D".
36. Paragraphs 41 to 44 recounts a telephone conversation that I had with the Minister on the 13th of November 2007. The Minister's file note records that I was annoyed that I had been informed of what the Minister had called about by one of the Dominion Post reporters requesting comment from me on the issue prior to being contacted by the Minister. This would become a reoccurring theme whereby press releases would be made of communications from the Minister before we actually received the communications. As noted in the Minister's file note however, I expressed my appreciation for the call.
37. At paragraph 42 he says that I insinuated that if I was not reappointed as Chair then I would make available information on preventable deaths of cardio-thoracic patients on waiting lists at Capital Coast DHB. If the Minister got the impression that I was inferring that I would make information public if I was not made the Chair then such an inference is very unfortunate as I am well aware of my responsibilities as a Director and Board member. Further, it implies that I was hell bent on being the Chair of the District Health Board when frankly, other than as a matter of public service, I could find many better things to do than spend between 30 and 40 hours per week undertaking the role of Chairman.

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38. As noted in my address to the Board on 4 December 2007 (Exhibit E), I was committed to securing for the Hawke's Bay people the health services which are expected and needed, irrespective of whether I was Chairman or an ordinary Board member. Further, I had advised the Minister by way of a telephone message to him that if the issue was me being the Chairman then I would happily stand aside from such as position. I never received a reply to this telephone message but it is recorded in documents released by the Ministry under the Official Information Act (Exhibit "D").
39. The Minister has somehow linked his perception of an insatiable desire to be Chair to my advice to him of the fact that a cardiologist was contemplating going public about the preventable deaths being experienced on waiting lists at Capital Coast Health. I was simply advising the Minister of the fact that the cardiologist could potentially go public in furtherance of the "no surprises" policy that Ministers like to have from Chairmen. I note that a report has recently been released by the Director General of Health on this issue and confirms or validates the Hawke's Bay Cardiologists concerns.
40. The Minister's misapprehension is characterised in paragraph 43 of his affidavit where he refers to the unmistakable overtones in my comments and that I was likely to make public information that would embarrass the Government. He goes on to say that this significantly affected his confidence in me because I was prepared to put my own interests as Chair ahead of the wider interests of the Board and the people of Hawke's Bay. Nothing could be further from the truth. Importantly, these issues that had apparently been extremely concerning to the Minister were

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never raised with me at the time or in the letter of 20 February 2008.

41. That there was really no issue at that point is borne out by the Minister's second file note of the telephone conversation we had on the 21st of November 2007 where I advised the Minister that we had received a draft Audit New Zealand Report for the year ended June 2007 and I advised that I was having a meeting with Colleen Pilgrim from the Office of the Auditor General later that morning.
42. I did note that there may be employment issues arising from the report and this reflected an earlier telephone conversation I had had with Colleen Pilgrim from the Office of the Auditor General who also had serious concerns about the actions of Chris Clarke and had discussed with me that she accepted that there could well be implications for his future employment.
43. Importantly, the discussion as evidenced by the Minister's file note of 21 November 2007 is not indicative of a dysfunctional relationship between me and the Minister.
44. Finally, the Minister states that I was challenging him as Minister and the Government. I have never challenged the Minister or the Government. Further, the Minister does not refer to the telephone discussion I had with him where I advised him that two opposition members of Parliament were likely to raise the issue of the use of the sale proceeds from Napier Hospital. This is hardly the action of someone challenging the Minister or pursuing some form of political agenda.

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THE FINANCIAL PLAN

45. At paragraph 28 of his affidavit the Respondent states that his principal concern was to ensure that those DHBs running deficits had a plan in place that would bring them back into balance within a reasonable time. Over a substantial period, the Hawke's Bay District Health Board had operated well with both small deficits and surpluses in previous years. From time to time, any organisation is faced with financial challenges and discrepancies from budgeted figures. The Hawke's Bay District Health Board as a Board had previously managed such situations extremely well. This is borne out by both our financial results and the Ministries own objective reports of performance over recent years.
46. In this instance, the need to achieve efficiencies and cost savings had been identified for some time and formed an integral part of the HBDHB District Annual Plan. The potential deficit situation had been identified and the Board had been working with management on a plan towards financial sustainability in the medium to long term. The strategy had been an agenda item since September 2007 when the deficit was first identified and management had been working on the planned strategy to address that situation.
47. The Board was mindful that there was a new Board elected in October 2007 and that the strategy would need the buy-in of the new 2008 Board. The fact that management presented the strategy to the new Board's first board meeting on 13 February 2008 for consideration, appears to have been ignored by the Respondent.

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48. As with all previous financial situations of the DHB, the matter was being addressed. Adding to the delay in finalising the financial strategy was the fact that we had not received responses from the Minister to our letters of 19 September 2007⁶ and 4 December 2007⁷. The report prepared by the executive management group and considered at our meeting of 13 February 2008 is referred to in paragraph 63 of my second affidavit and is exhibited as exhibit Q to that affidavit.
49. Finally, the Minister dismissed the fact that the Hawke's Bay District Health Board received positive feed back from the then Minister, the Honourable Peter Hodgson, in his letter of 9 July 2007. That acknowledgement of a good performance by the then Minister was dismissed by the Respondent⁸ on the basis that this letter "was simply a standard letter thanking Board's for their input ...". The Minister's letter of 9 July 2007 was the letter by which the Hawke's Bay District Health Board District Annual Plan was agreed to by the Minister. It is a requirement of the New Zealand Public Health and Disability Act 2000 that the annual plan must be agreed by the Minister and I am aware that some DHBs did not have their annual plan so approved by the Minister. To dismiss such a fundamental letter as a "standard letter" does not do justice to the importance of that statutory requirement.

FINANCIAL PERFORMANCE

50. In the Minister's letter of 20 February 2008 the first reason for him allegedly being seriously dissatisfied with the performance of the Board was the rapidly deteriorating financial performance. Firstly, it is not accepted that just because actual results are at

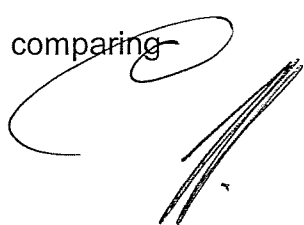
⁶ Exhibit N to my second affidavit at Page 181
⁷ Exhibit O to my second affidavit at Page 184
⁸ See paragraph 134 of the Respondent's affidavit



variance with what was budgeted, there is a *“rapidly deteriorating financial performance”*. This is particularly so where the variances have occurred as a result of matters identified in the District Annual Plan as being beyond the control of the DHB and which would affect the ultimate result. In other words, we identified a series of assumptions and risks to the achievements of the key accountability documents namely the District Annual Plan and Statement of Intent. The fact that some of those risks eventuated has given rise to a variance in the financial result.

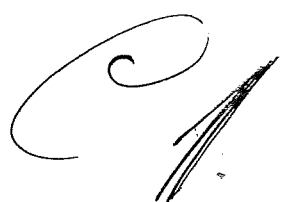
51. The Minister has apparently relied upon the advice of his economic adviser Andrew Johnson and that advice is provided as Exhibits DC2 and DC30 to the Respondent's Affidavit.
52. The analysis undertaken by Andrew Johnson purports to compare the Hawke's Bay District Health Board performance with other district health boards based on the results for the six months ended 31 December 2007. Quite properly Mr Johnson completes his two page analysis by saying *“There may be explanations from HBDHB that would alter the above analysis”*. This document was never referred to us for comment and had it been, then I believe the concerns expressed would have been dispelled. For instance, Mr Johnson's analysis proceeds on the basis that the effects of the Multi Employer Collective Agreements (“MECA”) would only be reflected in the forecast deficit for the year not the actual position after six months. It is now apparent that many of the district health boards throughout the country were not accruing the effects of the MECA settlements in their month to month accounts, meaning that there would be a significant disparity for the full year figures as compared to the month to month figures.



53. The reality was that in an attempt to ensure that the monthly forecasting figures were an accurate reflection of the financial position of the DHB, HBDHB was accruing the impact of all the MECA settlements with nurses, senior and junior doctors, not just the nurses settlement as envisaged by Mr Johnson. This should have been clear from my letter of 4 December 2007 but if it was not, then that clarification would have been readily available.
54. The result is that if you are comparing our financial results which include an accrual for the expected MECA settlements with a DHB's results which do not include such accruals, then you are effectively comparing apples and bananas.
55. That a comparison such as that undertaken by Mr Johnston is dangerous is readily illustrated. Attached to this affidavit and marked "E" are the 21 DHB results on a monthly basis for the period ended 31 July 2007 to 30 June 2008. This information has been obtained from the Ministry of Health website.
56. Comparison of the year to date figures for Canterbury, show that the deficit goes from \$7,260,000.00 in May to \$15,475,000.00 for the year ended June.
57. Capital & Coast goes from a deficit of \$32,645,000.00 to a deficit of \$40,358,000.00. Hutt Valley, a DHB of very similar size to the Hawke's Bay District Health Board, goes from a deficit of \$3,330,000.00 to a deficit of \$9,420,000.00.
58. By way of comparison, Hawke's Bay District Health Board went from a deficit of \$6.443m in May 2008 to \$6.743m in July 2008. This highlights the effects of the accruals being included on a monthly basis. It also highlights the dangers of comparing accounts prepared on a different basis.
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59. Importantly for current purposes, the report on which the Minister relies is dated 1 February 2008. That document could have been referred to the Board and the misconceptions upon which the analysis is based dispelled. It wasn't. The analysis by Mr Johnson in the document DC2 certainly anticipated that there may have been explanations that would alter the analysis that he had done, but we were never asked for explanations.
60. In addition to the accruing of the MECA settlements, the HBDHB was also including the cost of elective treatments that were being undertaken but not accruing the additional revenue that would flow from those elective treatments. As referred to in the affidavit of David William Ritchie⁹, additional funding for elective surgery in the sum of \$2.465million was available from the Ministry. David Ritchie refers to the fact that it was a "use it or lose it" source of funding that could not be carried over. It was also a requirement that if you commenced the utilisation of the additional funding, then the DHB was required to have completed the years planned work within the required period. This meant that there were costs incurred right from the beginning of undertaking the elective surgery but the funding was not provided until both the base electives contract for the year and the additional work was completed.
61. As a result, we prepared our financial statements on the basis that the costs had been incurred but the revenue was not able to be recognised as it had not yet been received. If other DHBs treated these matters differently, this would further skew any comparison between the relative performance of two different DHBs with different accounting practices.

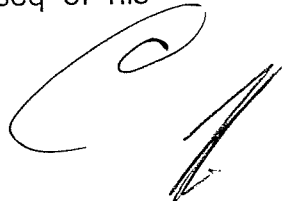
⁹ At paragraph 10 of that affidavit



62. In saying this, I am not suggesting that other DHBs were attempting to mislead or prepare their accounts in a manner that was unacceptable. I simply highlight the danger of a comparison between accounts prepared on different bases. This was implicitly recognised by Mr Johnson's caveat that there could well be explanations that would alter the analysis.
63. The Hawke's Bay District Health Board again took a conservative approach to an adjustment arising out of the revaluation of fixed assets. Our accounts were prepared on the basis that this would not be refunded by the Ministry, however, I understand that other district health boards prepared their monthly accounts on the basis that such adjustments would be refunded. Ultimately, the Ministry did refund the \$1.5million adjustment. Had we had that certainty, then the end of year projected deficit would have been less than the \$7.7million projected by us in December 2007.
64. Finally, the Ministry of Health prepares and undertakes quarterly benchmarking of DHBs. While this does not necessarily allow perfect comparisons, there is some effort to remove discrepancies in how matters are treated. Neither Mr Johnson nor the Minister even refer to those benchmark reports.

CRITICISM/PUBLIC CHALLENGE

65. In the Minister's letter of 20 February 2008, one of the reasons given for the Minister already being seriously dissatisfied with the performance of the Board was a lack of confidence in the Board's integrity by publicly challenging him as Minister and by using the media to advance the personal agenda of Board members. This is repeated in paragraph 48 et seq of his affidavit.




66. The Board was at a loss to understand what public challenge and what media statements were being referred to and so in our letter of 21 February 2008 we sought clarification of those asking for the Minister to identify precisely what public challenge was being referred to and what use of the media was being referred to and what personal agenda was being referred to. Again, the Minister's response did not provide any clarification or further examples.
67. In his affidavit at paragraph 49 the Respondent gives four examples where the Board was allegedly seeking to point the finger at the Ministry and the Government or to discredit the Ministry or the Government. I do not believe that any of the examples given by the Respondent contain any public challenge or criticism of the Government or the Minister. I do not believe that any of the newspaper reports contained any challenge or criticism of the Minister or the Government policy. They do express concern in the delay in the release of the Ministry of Health Review into the conflict of interest issue. Again, the delay in that review was not as the result of Board's actions nor was it as a result of anything the Minister did. The concerns I was expressing were precisely the same as those being expressed by others including the Minister.
68. The Respondent's Exhibit DC7 is a report in the Dominion Post of 6 December 2007 which reports on my final address to the Health Board prior to the new Board being sworn in (Exhibit "F"). In that address I reported on the fact that I had been asked to stay as Chairman on a day-to-day basis. I advised the Board that I did not know why this was the case and stated that I have had no adverse comment from either the former Health

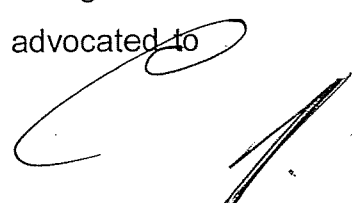


Ministers or Minister Cunliffe regarding my personal performance. These are statements of fact.

69. I, like the Minister, expressed my concern at the long and unnecessarily convoluted process of the review and I believed that that review was diverting the whole organisation's attention. Again, I was not attempting to criticise or challenge the Minister or the Ministry. I was simply repeating the frustrations in the drawn-out process which, from his own affidavit, were frustrations shared by the Minister.
70. The Minister believes that the Board was using the media to advance its own purposes. He also refers to public relations and media relations consultancies being engaged by the DHB. This is not true. The HBDHB Board did not engage media relations or public relations consultants. I had engaged a consultant to assist in my election campaign. That was my personal choice and expense and their role was completed prior to the October 2007 elections
71. It is also implicit that the Minister believed that press releases were being made by the Hawke's Bay District Health Board with various comments. Again, this is not the case.
72. Of the examples in paragraph 49 of the Minister's affidavit, none of these originated from the Board. Specifically, the first example in paragraph 49.1 is the Dominion Post reporter's report from the Hawke's Bay District Health Board meeting of 5 December 2007. Board meetings are required to be open and public and the press often attended. At that meeting I addressed the Board. Nowhere in my report do I make the comment ascribed to me by that article or as referred to in paragraph 49.1 of the Minister's affidavit. What I actually said

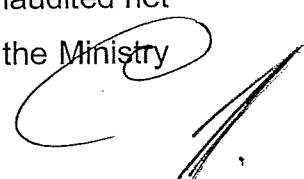


was that I found the situation untenable and unhelpful because Board members have had to endure a long and unnecessarily convoluted process with the Ministry of Health review which had diverted their attention away from the real purpose – the governance of health matters in Hawke's Bay.

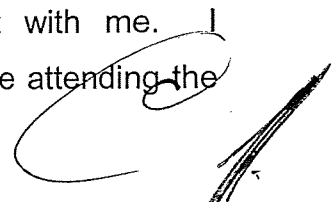
73. At no time did I say that the health of the people of Hawke's Bay would be jeopardised by the enquiry. It is also notable that in my report to the Board I stated *"Regardless of whether I continue on the Board as Chairman or as an ordinary member, I would remain committed to endeavouring to secure for Hawke's Bay the health services which are expected and needed."*
74. The second example at paragraph 49.2 was an editorial written by the editor of Hawke's Bay Today. Unfortunately this editorial took the headline from the previous Dominion Post report to refer to the health of the people of Hawke's Bay being jeopardised. The editorial was not as a result of a press release.
75. The third example at paragraph 49.3 is an article that I wrote for the Hawke's Bay Today (Exhibit "G"). This follows an interview that I had with the Review Panel in which the Review Panel expressed the opinion that the Board was in the main there to approve the recommendations made by management. I expressed to the Panel that this was not my view of proper governance of an organisation and that where appropriate, the recommendations and reports of management should be tested and, if necessary, the robustness challenged by the Board asking questions. I have many years experience as a Director involved in the governance of a number of significant organisations. I have never taken the approach advocated to
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me by the Review Panel and I have never been on a board of directors where such an approach was countenanced.

76. Other Board members also have considerable experience in governance of a number of organisations. At no time did any other Board member see their role as "rubber stamping" management recommendations.
77. I believe that the views that I expressed in this article are not a challenge to the Minister but expressed my personal views of what are accepted principles of governance. I have been asked by the New Zealand Institute of Directors if my paper can be used and disseminated to members as an example of good governance practice.
78. Further, in that article I expressly state that I see one of the roles of a district health board as looking after the Government's interests. I am not sure how that can be construed as a challenge to the Minister or his Government.
79. The final example in paragraph 49.4 of the affidavit of the Respondent is a report from the Dominion Post on the 13th of February 2008. This is the article that mis-quoted me and that fact was clearly stated in our response to the Minister of the 26th of February 2008. When this article was printed I sought that it be corrected by the Dominion Post. That correction never occurred.
80. I am well aware of my obligations as Director and of my fiduciary obligations to the HBDHB. I would not put forward a plan simply to get Ministerial sign-off. Further, the fact that the quote refers to the Minister refusing to accept anything less than a break-even budget is demonstrably incorrect as from the unaudited net results for the year ended 2007/2008 obtained from the Ministry



of Health website (Exhibit "G") it is clear that 13 of the 21 District Health Boards had planned for a deficit. In other words, a break-even budget was not the be-all and end-all.

81. Finally, at paragraph 50 the Minister refers to *"frequent and pointed use of the media to criticise the Ministry and by implication the Government as not being an appropriate way for a Crown entity to conduct itself"*. The reality is that the District Health Board was not conducting itself by way of media releases. Instead it was attempting to engage directly with the Ministry of Health and the Minister. We had written to the Minister but received no replies. We had sought to meet with the Minister but those arrangements had been cancelled by the Minister. At no time did the Hawke's Bay District Health Board issue media releases and none of the examples referred to by the Minister emanated from the Hawke's Bay District Health Board.
82. In that same paragraph the Minister refers to a "no surprises policy". The Board attempted to ensure that there were no surprises for the Minister and my attempt at warning him of the cardiologists concerns and the matters to be raised by opposition MPs is an example of this.
83. At paragraph 51 the Respondent refers to a meeting that I had with Craig Foss and Chris Tremain who are both National MPs for Tukatuki and Napier respectively. I met with those MPs on the 7th of February 2008. It is incorrect that I had not allowed the Chief Executive to attend the meeting. I was contacted by Kathy Shanaghan who is employed by the District Health Board as the chief executives personal assistant. She advised that the two members of parliament wished to meet with me. I presumed that the Chief Executive would also be attending the
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meeting but was advised that the members had met with the Chief Executive the previous week and that they only wanted a brief meeting with me.

84. That meeting took place on the 7th of February 2008. It is not correct that the day after the meeting, opposition spokespeople raised my comments in the House by way of oral questions. The House did not reconvene until the 13th of February 2008. In the interim I had contacted the Minister and advised him of the meeting with Craig Foss and Chris Tremain and that they were asking questions of whether the funds from the sale of the Napier Hospital could be used to off-set losses at the Hawke's Bay District Health Board. I informed the Minister of this so that it would not come as a surprise to him if that issue was raised. The Minister thanked me for the call.
85. It appears that the Minister now subscribes to the view that the Board and I were attempting to take a political stance, to embarrass the current Government and to somehow facilitate the National Party. Nothing could be further from the truth. At all times we were focussed on providing the best health outcomes for the people of Hawke's Bay and were not influenced by party political agendas. We attempted to keep the Minister informed on all issues including issues such as the deficit,¹⁰ the fact that the cardiologists from the DHB were going to "go public" regarding what they believed were preventable deaths of cardiac patients in the Wellington cardiology unit, and my meeting with opposition MPs. Again, I briefed the Minister on this so as to ensure there were "no surprises" for him.

¹⁰ For example our letter of 4 December 2007

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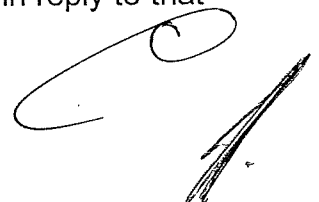
86. It is notable that the Minister has relied on a limited basis for his decision and has not sought, as alleged by him on other occasions to justify his decision on the basis that the Board was:

".... a nasty little nest of self-perpetuating, provincial elites who have been propping each other up, and, either through ignorance or malpractice, slipping each other cosy contracts without proper governance protections and doing it time and time again. They do not like it; the elites of the Bay do not like having the same standards applied to them as to anyone else or to any other Crown entity anywhere in New Zealand. But should these standards not be applied to the Bay – is this is what the Board is saying? Is Hawke's Bay special?"

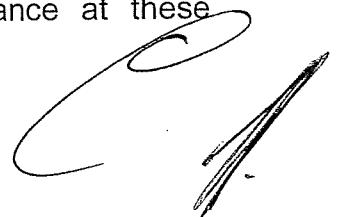
87. I have been privileged to work with members of the Board who, almost without exception are of the highest integrity and who have worked very hard to benefit the people of Hawke's Bay. Other than the problems experienced with Mr Hausmann, at no time was there a situation where contracts have been awarded to Board members. At no time was there a contract negotiated by me for laboratory services, at no time was I investigated by the Commerce Commission, at no time was a contract entered into by the District Health Board cancelled by the Commerce Commission. These are all completely untrue allegations which appear to have influenced the Minister but are not now relied upon in his affidavit.

THE AFFIDAVIT OF C E CLARKE

88. I have read the affidavit of Christopher Edward Clarke dated 3 September 2008. I make the following comments in reply to that affidavit.

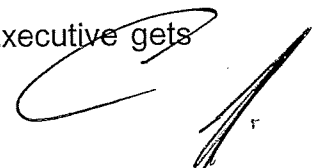


89. At paragraph 7 Mr Clarke refers to the Board's style as trying to involve itself closely in the day-to-day matters, to engage directly with staff and to retain a healthy constructive tension between Board and management. I do not believe that the Board was involved closely in any day-to-day matters or that it engaged directly with staff. The contact between the Board and staff was limited to the five senior managers who reported to the Board meetings. That was the Chief Executive, the Chief Operating Officer, the Chief Financial Officer, the General Manager Planning Funding & Performance and the Director of Maori Health. Outside of those five senior managers, attendance by other staff at the meetings of the Board and committees were infrequent and really only arose if there was a particular issue on which they were presenting. By way of example, I do not recall Dr Grayson ever attending a full Board meeting and the number of occasions in the last two years that he may have presented on an agenda item would be limited to two or three short presentations. Perusal of the minutes confirms this. (Exhibit "H")
90. Similarly, I do not recall Penny Andrews ever attending a Board meeting and again the minutes confirm this. Further, while she deposes to the fact that she has held her position since December 2003, she does not disclose that her position was part time until late November or December 2007. Since her appointment to the staff on a full time basis she attended three Audit and Finance committee meetings.
91. Any other involvement the Board had with management was by way of attendance at the management committee meetings for the Elective Services Committee, the Facilities Committee and the Facilities Masterplan Committee. Attendance at these

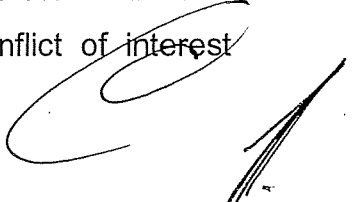
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meetings was always as a result of express invitation by the Chief Executive.

92. I believe that there is nothing in any of the minutes for the Board and Committees that show any dysfunction. The only possible exception to that statement is the attempt by the Chief Executive and Penny Andrews to re-write the Audit & Finance minutes of 19 December 2007. By this time I believe the Chief Executive was attempting to create a conflict. It is notable that these minutes were taken and drafted by members of staff. At no time did either David Ritchie or I attempt to rewrite the minutes. Although I did provide comments on the draft minutes as circulated by staff. This was standard practice so that a good draft of the minutes could be presented to the next meeting.
93. Chris Clarke also attempts to paint the picture of a Board that was interfering and refers to a by-product of the Board's approach being that management would produce vast quantities of Board and advisory committee papers. I find this incredible as the Board were constantly seeking more concise and effective reporting than that which was being provided by management and this is referred to in the minutes and in the affidavit of John Newland. We were constantly trying to get management to be more focused and succinct in its reporting. This is acknowledged in a paper prepared by the Chief Executive to the Senior Leadership team dated 17 August 2007 (Exhibit "I").
94. At paragraph 12 and again at paragraph 27 Chris Clarke refers to his rating plunging from 100% to 9% between January 2007 and November 2007 on the matter alternatively referred to by him as "Board relations" and "maintaining a trusting relationship with the Board". I am not sure where the Chief Executive gets

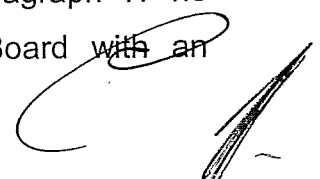


these figures from. It is the case that his performance was reviewed regularly and that one of the questions is: "Has the CEO established a trusting relationship with the Board?". Annexed hereto and marked "J" and "K" are the two relevant performance reports. In relation to question 4 which is the question relating to the trusting relationship with the Board for the year ended 2005/2006 reported in December 2006 five of the eleven Board members considered that improvement was necessary while six believed that his performance on this indicator was unsatisfactory.

95. For the year ended 2006/2007 reported in November 2007, a very similar rating was achieved whereby one Board member believed the Chief Executive's performance on this issue was satisfactory with the remaining 10 Board members being evenly split between improvement being necessary and the Chief Executive's performance being unsatisfactory. As a result, it is not correct to say that he went from a rating of 100% to 9% between January 2007 and November 2007. There had been long standing performance issues with the Chief Executive particularly with regard to the level of trust that the Board could place in him. The Board had met with Michael Quigg, a lawyer specialising in employment matters on 15 August 2007 and 24 January 2008 seeking advice on how we could address the performance issues being experienced with the Chief Executive.
96. At paragraphs 13 and 14 of his affidavit, Mr Clarke refers to the catalyst for the collapse of the relationship being the Ministry of Health's independent enquiry. He also refers to the Board's reaction to the establishment of the review being extraordinary. I am not sure what he means by this as it was the Board that was actually calling for the review of the conflict of interest
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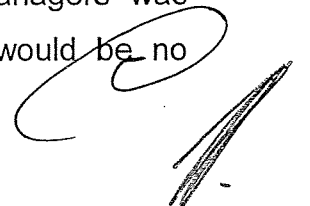
issues by the Auditor General which had been considered in a preliminary way by the Audit Office audit for the year ended 2007. We were quite happy for the review to be undertaken by the Director-General of Health. The important thing was to ensure that it was a robust process and enquiry.

97. In paragraph 14 Mr Clarke refers to my meeting with him and Penny Andrews in his office and discussing the organisation's response to the review enquiry. He states that I indicated that it was important that the information that the Panel received be managed and co-ordinated through a single channel, namely the Board's solicitors Sainsbury Logan & Williams. This is not correct. At the outset the Review Panel wished to ensure that the receipt of information by it was managed in an orderly way. It was agreed between the Review Panel, Sainsbury Logan & Williams on behalf of the Board and Russell McVeigh on behalf of Mr Hausmann that all communications would be channelled through those law firms. This included a process whereby the drafts of the Review Panel and other communications from the Review Panel could be considered on a confidential basis. We were required to sign confidentiality agreements in furtherance of this process.
98. It was not stipulated by me or directed by me that staff speaking to the Review team would have to go through the respective law firms. The Review Panel had direct contact with various staff members and the suggestion that I would or could require that be conducted through Sainsbury Logan & Williams on behalf of the Board is ludicrous.
99. From this point there were two issues which seriously influenced the Board's confidence in Chris Clarke. In paragraph 17 he refers to the Review Panel presenting the Board with an



anonymous summary of comments made to it by the various people the panel had interviewed. This was not the case. The Review Panel met with the Board in Napier in late October 2007. They did not present the Board with the document referred to in paragraph 17 of Mr Clarke's affidavit. Instead, they advised the Board that they had interviewed more than 20 staff members and that some of them had said that they felt bruised, battered and bullied by the Board.

100. It is fair to say that the Board were shocked by these comments as we did not believe that this was the case. We were also surprised that there were twenty staff members supposedly making such comments as the Board only had any real contact with the five senior managers.
101. It was at this point that the Panel agreed to provide us with the document referred to in paragraph 17 of Mr Clarke's affidavit when that document was subsequently provided it was clear that there were significant errors and inaccuracies in it. We were never given the opportunity to correct those inaccuracies.
102. In paragraph 18 Mr Clarke claims that the Board's response was to seek to arrange a series of meetings with senior management. This again is incorrect. What we asked for was a meeting with the Chief Financial Officer, the Chief Operating Officer, the Chief Executive Officer and the General Manager, Planning Funding & Performance. This is recorded in my file note of the conversation I had with the Chief Executive on 2 November 2007. (Exhibit "L")
103. Mr Clarke was quite happy to arrange this meeting but subsequently advised that one of the senior managers was unable to attend. He later advised that there would be no



meeting as Penny Andrews had approached Michael Wigley, one of the panel reviewers as to whether or not a meeting should be held. It is at this point that there is a significant divergence between what Mr Clarke portrayed to the Board and the truth.

104. It was conveyed to the Board by Mr Clarke that Penny Andrews had contacted Michael Wigley who had advised them that a meeting should not take place.
105. I did express my concern that it was inappropriate to phone Michael Wigley without first speaking to Sainsbury Logan & Williams and Chris Clarke stated that he was unsure whether or not Penny had spoken to Sainsbury Logan & William.
106. Chris Clarke advised me that Michael Wigley had advised that it would be unwise for a meeting between members of the Board and senior management to proceed as this could compromise the review process. The Chief Executive said that Michael Wigley advised that the meeting could proceed after the panel had submitted its final report to the Ministry. I suggested that Chris phone Sainsbury Logan & Williams and advise them of what had occurred. This is all recorded in my file note.
107. I subsequently contacted Sainsbury Logan & Williams and Stuart Webster advised that he had been contacted by Chris who had conveyed the same message to him.
108. I must admit that I was surprised that we were being counselled against discussing an allegation that senior management felt battered bruised and bullied. If that was the situation then I believed it was something that the Board should address as soon as possible.

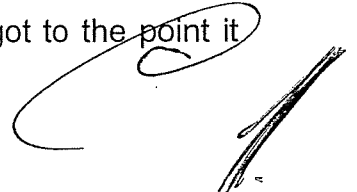
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109. At a subsequent meeting on the 9th of November 2007 between the Board and the Review Panel, I raised this issue with Michael Wigley and said that I did not agree with the advice that he had provided as the Board needed to be able to talk to its senior managers if they believed there were serious issues such as being bruised, battered and bullied by the Board. Present at that meeting was the entire Board, the entire Review Panel and the Board's solicitor, Stuart Webster from Sainsbury Logan & Williams.
110. Michael Wigley advised that he did not give such advice and that on the contrary, he had advised it was not appropriate for him to get involved in this and that it was a matter for the Board to consider what was appropriate in the circumstances. This was in direct contradiction of what Chris Clarke had informed us.
111. At the meeting held with the Review Panel it was decided that Penny Andrews should be called to the meeting. When she arrived, Stuart Webster and Penny Andrews went outside to discuss what had been said. When they returned the meeting was advised that it was as Michael Wigley had said, namely that he had not given the advice that there should be no meeting and that it was a matter for the Board to decide what was appropriate.
112. I was concerned with the fact that contact was being made with the Review Panel on such issues as it was in breach of the agreement that had been reached between the Review Panel and all the lawyers involved as to how communications were to be managed. That is not the same thing as saying that staff were not able to talk to the Review Panel in the interviews arranged by the Review Panel. The Board and I were more

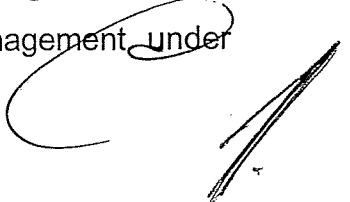
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concerned about the fact that the Chief Executive had been less than truthful about the advice Michael Wigley had given.

113. It is disingenuous to suggest that it was this event that led to the Board instructing Michael Quigg and that we were pursuing disciplinary action. Mr Quigg had been engaged well before this event to advise the Board on how to progress matters when the Chief Executive was scoring around 9% on the "board Trust" criterion of his performance appraisal.
114. At paragraph 28 Mr Clarke refers to the Chair/CEO relationship ceasing to function from this time. I would agree that there was a further serious dent in the trust required in the relationship however I do not believe that the relationship ceased to function. I also note that the Chief Executive did not believe this also as he wrote to the Board by letter dated 13 November 2007 acknowledging the issues regarding governance and management expectations and behaviour and expressing a commitment to working with the Board to address those issues in a candid constructive and timely way. He suggested that a facilitator such as Graeme Nahkies be sought to help clarify and address these issues in a pro-active manner. A copy of this letter is annexed as Exhibit "M".
115. I agreed with this and I contacted Graeme Nahkies to see if he would be available. He was but it was considered that in order for him to be most effective, his input should await the finalisation of the Review Panel report. This matter was left on that basis.
116. While Mr Clarke considers that the relationship had ceased to function as a result of the review being undertaken, I believe that the real reason why the relationship had got to the point it

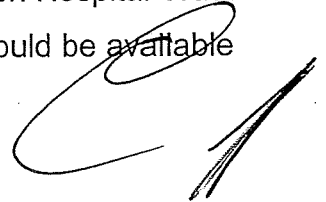
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did was the forensic email audit revealing the extent of Chris Clarke and other management involvement in the issue surrounding the Community Service & Wellcare contracts. The emails provided by that audit clearly show that Chris Clarke had (inter alia) been a party to the provision of confidential Request for Proposal documents to Mr Hausmann for comment and amendment prior to the Request for Proposal being notified to any other potential bidder. The email audit is referred to in my second affidavit at paragraphs 19 to 22.

117. As a result, I believe it is the fact that the email audit provided such clear evidence of inappropriate behaviour by the Chief Executive and some other management staff that Mr Clarke turned on the Board and did everything in his power to ensure that the Board would be dismissed. I believe that this is the catalyst and motivation for the issues raised by both Mr Clarke and Penny Andrews in relation to the minutes of the Audit & Finance Committee and the issue relating to the awarding of contracts to Royston Hospital.
118. With regard to the awarding of contracts to Royston Hospital, as detailed in the affidavit of David Richie, the directive given to management was to attempt to negotiate a contract on national pricing terms so that a start could be made on utilising additional funding prior to the Christmas/January period. There was certainly nothing improper in that approach but both Penny Andrews and Chris Clarke attempted to make it appear this way. In that regard, it is notable that management had itself negotiated a similar sized contract with Royston Hospital in December 2007 for the performance of 40 hip operations. This contract was not tendered but negotiated by management based on commercial rates and was done by management under
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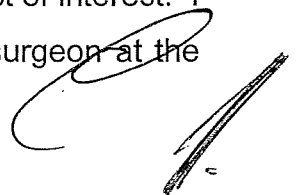
delegated authority without any reference to the Board. This is entirely appropriate and is precisely the same process authorised by the Board in its meeting of 19 December 2007.

119. A further example of the mischief and misinformation on which Ms Andrews and Mr Clarke were operating is evidenced where at paragraph 19 of her affidavit Penny Andrews expresses the view *"that a contract for \$600,000.00 for additional elective surgery was effectively awarded to Royston Hospital because Mr Atkinson stated at the committee meeting that he had spoken to Jacqui Gray of the Royston Trust and that she had informed him that the difference in price between the inter-district flow and Royston Hospital's price could be absorbed by the Trust and therefore Royston could perform the additional elective surgery at a price that could be agreed by the District Health Board."* I believe this statement illustrates the misunderstanding of the respective rolls of the parties and what actually occurred.
120. Royston Hospital is owned and operated by Wakefield Health Ltd having purchased the hospital from the Royston Hospital Trust Board in late 2005/early 2006. The Royston Hospital Trust Board still own shares in Wakefield Hospital and it is from this source that funds for charitable purposes are available.
121. The Royston Hospital Trust Board is a Charitable Trust formed under the Charitable Trust Act 1957. I am aware that one of its charitable purposes was to assist in the provision of elective funding for use in the Royston Hospital.
122. I contacted Jacqui Gray who is a senior legal practitioner in Hawke's Bay and former president of the Hawke's Bay District Law Society. She is also the chair of the Royston Hospital Trust Board. I wanted to ascertain whether funding could be available



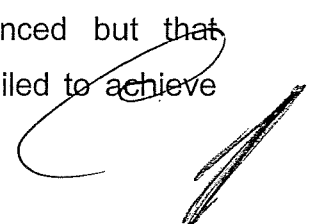
to supplement the funding provided by the Government. We were advised by management that the cost of having the surgery conducted in a private hospital would far exceed the funding available and I thought that a charitable trust such as the Royston Hospital Trust Board may be able to subsidise the difference between the national pricing schedule for operations and what might be expected by a commercial operation such as Wakefield Health Limited. Jacqui Gray advised me that they had funds available and that she would look at whether the trust could help.

123. At no time did I negotiate a contract with the Royston Hospital Trust Board and to do so would have been pointless as the hospital is actually owned and operated by Wakefield Health Ltd. To state that a contract was effectively awarded as a result of my attempt to obtain additional funding from a legitimate charitable trust source not only impugns my integrity and reputation but also that of a highly regarded legal practitioner and a charitable trust which, like the Hawke's Bay District Health Board, is only attempting to secure the best health outcomes for the people of Hawke's Bay.
124. Jacqui Gray is the Chair of the Royston Hospital Trust Board and obviously cannot commit to funding without her board approval and without actually knowing what amount was to be funded. That of course would not be known until the negotiations between the HBDHB staff and Wakefield Health Ltd had been substantially concluded. I am unaware of whether funding was ultimately required from the Charitable Trust or if it was, how much.
125. Finally, Ms Andrews considered that I had a conflict of interest. I declared from the outset that my brother was a surgeon at the

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hospital. My brother is an orthopaedic surgeon and as the elective surgery which was being discussed did not involve any orthopaedic surgery, I did not believe that any conflict would arise even if that relationship were to give rise to a conflict.


126. The resolution from the meeting was for management to negotiate with Royston Hospital for additional elective surgery of up to \$600,000.00. If that negotiation was unsuccessful then that sum would form part of a public tender to be initiated for the balance of available funding. At all times the resolution was to allow management to negotiate a contract. It was not the Board negotiating a contract.
127. Further, the minutes record that both Diana Kirton and I abstained from supporting the resolution to avoid the perception of a conflict of interest. The minutes also record that Peter Dunkerley abstained from voting. Peter Dunkerley is a shareholder in Wakefield Health Limited.
128. From the outset, the potential or perceived conflicts of interest were at the forefront of our mind and that is why David Marshall and Helen Walker were co-opted onto the Audit & Finance Committee.
129. I believe that the actions of the Board members present were entirely proper and in accordance with best management of conflicts of interest.
130. The only reason the funding for additional elective surgery was referred to the Board was that, in attempting to utilise the additional funding, the Board was required to take the risk which management was not prepared to take namely, that the additional elective surgery would be commenced but that funding would not be available if the HBDHB failed to achieve

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the base contract required by the District Annual Plan. That was a risk the Board was prepared to take in the interests of providing as much health care to the people of Hawke's Bay as possible. At the time the Board was dismissed we were one of the few DHBs that was ahead of its target for elective surgery.

131. I note that the Hawke's Bay District Health Board subsequently achieved its year end targets and the additional surgery with much praise from the Minister. This could not have occurred without the initiative being taken by the Board.
132. This reinforces that at all times the Board was acting in the best interests of the people of Hawke's Bay.

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

Christopher W Morgan
 Solicitor
 Napier

A SOLICITOR OF THE HIGH COURT OF NEW ZEALAND