
**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**

APPLICANTS

AND

**MINISTER OF HEALTH
RESPONDENT**

AFFIDAVIT OF DAVID RICHARD CUNLIFFE

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I, David Richard Cunliffe, Minister of Health, of Auckland, swear:

1. I am the Minister of Health. I am also the Minister for Communications and Information Technology and am the Member of Parliament for New Lynn. Before I entered politics I had commercial experience as a management consultant and project leader for the Boston Consulting Group, a leading international management consulting firm. Prior to this I obtained a Masters in Public Administration from Harvard University's John F. Kennedy School of Government and Harvard Business School. I was a Fulbright Scholar and Kennedy Memorial Fellow. Prior to that I was a New Zealand diplomat employed at the Ministry of Foreign Affairs and Trade with experience in various political, economic and trade areas with postings at Canberra and Washington DC. I have governance experience as trustee of the Asia NZ Foundation, and as a trustee and member of the board of management of New Zealand Business and Parliament Trust and as patron of various local charitable sporting and cultural organisations.
2. I have held Ministerial office for five years across seven Ministerial and Associate Ministerial portfolios, including a period as Associate Minister of Finance and State-Owned Enterprises, where I gained significant experience in governance and board administration, including overseeing Ownership Reviews of a number of Crown Entities and State-Owned Enterprises.
3. The purpose of this affidavit is to respond to the applicant's allegations concerning my decision of 27 February 2008 to dismiss the board of the Hawke's Bay District Health Board ("the Board") and replace it with a commissioner.
4. This affidavit will address the following matters:
 - 4.1 The legislative and policy context;
 - 4.2 The issues of concern I had about Hawke's Bay DHB;
 - 4.3 My decision-making process, including my letters of 20 and 22 February 2008, consideration of the Board members' submissions, and my decision on 27 February 2008;

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4.4 My response to specific allegations made by the applicants.

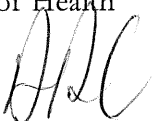
Legislative and Policy context

5. While it is important that I place my decision to dismiss the Board within the wider context of the New Zealand Health Strategy, launched in December 2000, and the broader accountability mechanisms in the New Zealand Public Health and Disability Act 2000 ("PHD Act"), it is also important to note that my decision to dismiss the Board turned on a unique set of factors that had arisen in Hawke's Bay. In summary, I chose to dismiss the Board because the relationship between the Board and management at the DHB had broken down, because I had lost confidence in the Board's collective judgment, and because I concluded that it was beyond the capability of the Board to resolve these issues. I also considered that, in light of the dysfunctional relationships that had developed at the top of the organisation, it was beyond the ability of the Board to address the serious financial position it found itself in.
6. District Health Boards ("DHBs") are part of a system charged with fulfilling a vital government function - the provision of health and disability services to the public of New Zealand. In so doing, they are accountable for delivering on health outcomes and the efficient management of millions of dollars of public money. Lives are ultimately at stake. The crisis that arose at the Hawke's Bay DHB was the result of a breakdown in governance in a crucial part of the health system in the Hawkes Bay. In any environment a breakdown of this kind would have required the intervention of those charged with responsibility for the effective functioning of the system as a whole.
7. The PHD Act provides the legislative basis for implementing the New Zealand Health Strategy. The enactment of the PHD Act was central to the development and delivery of that strategy, although other legislation, primarily the Crown Entities Act 2004, is also relevant in terms of providing the legislative framework of accountability for the relevant public sector organisations and agencies.
8. The PHD Act establishes 21 DHBs and gives them a central role in the delivery of a high quality health care. The Government expects that DHBs will



act in a coordinated fashion to deliver on health outcomes, and this is a very important component of the system that has been in place since 2000.

9. The PHD Act partially devolves the provision of health services from the Crown to DHBs, but the Crown, through the Ministry of Health and the Minister, retains explicit powers to ensure accountability, and to maintain direction and control.
10. The PHD Act and the Ministry accountability framework that supports it, known as a Monitoring and Intervention Framework ("MIF"), comprise a multi layered oversight, accountability and governance regime. For example, the Act provides that each Board must submit a District Strategic Plan ("DSP") and a District Annual Plan ("DAP") that must be approved by the Minister. The performance of Boards is monitored closely by the Ministry, which in turn reports to the Minister, with more intensive monitoring available if that is considered necessary.
11. Other aspects of the Crown's oversight of the performance of DHBs include:
 - 11.1 Boards and health providers are expected to deliver outcomes that conform with the New Zealand Health Strategy and New Zealand Disability Strategy, which are determined by the Ministers of Health and Disability Services respectively (s 8).
 - 11.2 The Minister determines the strategy by which national standards and quality assurance programmes in the health sector are determined, and how compliance with those standards will be measured (s 9).
 - 11.3 DHB performance is benchmarked and publicised, and funding agreements between the Minister and DHBs, and service level agreements between DHBs and providers, are used to set quality standards and delivery expectations (s 10).
12. Sections 30 and 31 of the Act provide that the Minister has a range of mechanisms available to intervene in the event that he or she becomes concerned about the performance of a Board of a DHB.
13. The PHD Act provides a graduated a set of accountability mechanisms for the Crown, directed by me as Minister. These range from the Ministry of Health



monitoring a DHB, and/or the appointment of one or more a Crown Monitors to the DHB, and ultimately to the removal of the Board or a member of the Board.

14. In considering if I should have resort to any of these mechanisms, it is my responsibility to determine the nature and degree of the problem, and which of the tools will resolve it most appropriately. It is not simply a matter of escalating a problem up a graded scale from least intervention to most. It is very much a matter of judgement as to which of the available mechanisms is most likely to be effective, in the context of the particular facts and circumstances that arise.

Background

15. I became the Minister of Health on 5 November 2007. I received a series of briefings (both written and oral) on all major issues in the health portfolio around that time.
16. I was advised, on appointment, that there were a range of serious and worsening problems at the Hawke's Bay DHB. Two issues that officials regarded as of particular concern were the Board's financial performance and issues regarding the governance of the organisation. I was advised that the latter topic was already under investigation by an independent panel, convened by the Director-General of Health, that was examining allegations surrounding the way certain alleged conflicts of interest had been handled within the organisation.
17. One of my first tasks as Minister was to make ministerial appointments to DHBs and to appoint the Chairs of the DHBs following the triennial elections that had recently been held. Minister Hodgson, the previous Minister of Health, had done most of this work on this, and a draft paper to Cabinet on the appointments was partially completed.
18. From the time of my appointment, I received regular briefings from the Ministry as to the appointment of permanent Board members to the Hawke's Bay DHB. I had discussions with the Director-General and other senior officials regarding the situation in Hawke's Bay. In light of the independent Review Panel that (I was told) was shortly to report, I decided to delay

appointing the Board Chair of the Hawkes Bay DHB, and to defer any ministerial appointments, until after the release of the Review Panel's report. I was open to the possibility of reappointing Mr Atkinson as Chair, but decided that it would be unwise to make the appointment at that time, as the report was only a short time away, and would provide me with independent advice as to how well the Board had been functioning under his leadership. At that stage I had been advised that the Panel was likely to report before Christmas.

19. I note that, at an early stage Mr Anthony Hill, Deputy Director-General for Sector Accountability and Funding at the Ministry of Health, advised me that he was a personal friend of the Chief Executive of the Hawkes Bay DHB and would not be involved in advising me on matters that involved the Chief Executive.

The delay in releasing the Review Panel's report

20. From 11 December 2007 to 23 January 2008 I took formal leave from Parliament as I had surgery on one knee and had broken my other foot. To make matters more complicated, my wife was recovering from major surgery, and during part of this time I was the principal care-giver for our young family.
21. While I was initially advised that the Review Panel's report was due no later than Christmas, this had changed by early December. Prior to my going on leave, the Director-General advised me that the report was now likely to be delivered around the third week of January. I was disappointed by this news – I had completed most of the other appointments arising from the DHB elections, and I was not comfortable about leaving the Hawke's Bay situation unresolved over Christmas. I knew that the local community was keen to achieve certainty around the leadership of its DHB. Nonetheless, I appreciated that the Review Panel's report was likely to be a very valuable resource, so I continued to wait.
22. In briefing me, the Director-General did not say anything about the substance of the pending report. It did concern me, however, to hear that progress on the report was being held up by what had become an intensely disputed legal process. I was advised that a number of lawyers were involved for the Board, management, individual Board members and the Review Panel.

23. In the second week of January 2008, the Director-General told me that he had been advised that he would now not get the report before the end of January. I understand that much of the delay arose from legal representations made on behalf of a Board member, Mr Peter Hausmann, with respect to the Panel's first draft. I was frustrated by this delay especially when, a short time later, I was told that the report was unlikely to be released until late February. As I discuss in more detail below, I was subject to ever-increasing pressure from the Hawke's Bay community to resolve the uncertainty surrounding the status of the Board, and my concerns about the dysfunctional state of the Board had become acute in the first half of February. When I decided to wait for the Review Panel's report, I had never expected that I would have to wait so long.
24. In the end, I decided that I could no longer afford to wait until the Panel reported. My concerns in this regard were heightened when I received the surprising news that the Board itself had resolved to apply for interim orders to prevent the release of the report in February. I regarded this as a completely unacceptable course of action for a DHB when faced with an independent report that had already been delayed for several months. In fairness, however, I had come to the view that some action on my part would be necessary by the time I learned that the Board was seeking to delay the report still further.
25. As I discuss more fully below, 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. Local pressure for urgent action had become intense, and the Board's financial position had deteriorated to a state that I regarded as unacceptable in the absence of a credible recovery plan.
26. It is also important that I record that, though the Director-General kept me updated regarding the likely reporting date for the Panel, I was never made privy to any of the Panel's findings until the final report was released. I never saw any of the Panel's draft findings, nor was I informed of their contents. I did not have any communication, either direct or indirect, with any member of the Panel. The Director-General was at pains to ensure that I was kept at a distance from the Panel's work until its final report was released. I understood the wisdom of this course – the Director-General and I were both determined

to maintain the integrity of the independent panel's processes, and as part of this it was very important that there should be no question of political interference prior to the release of the Report.

Financial performance


27. A significant complication surrounding the governance issues that existed in Hawke's Bay was the substantial deficit the Board was running, which was both worsening rapidly and projected to continue to worsen. Deficits are not very unusual in the health sector – a number of Boards run deficits from time to time. The Ministry and the Minister will generally tolerate deficits provided they are not excessive, are not unduly at variance with forecasts, and the Board has a clear plan to bring the budget back into balance.
28. I was briefed on the financial positions of all DHBs when I took over as Minister. While I was unhappy about the financial position of a number of Boards, my principal concern was to ensure that those Boards running deficits had plans in place that would bring them back into balance in a reasonable time.
29. On 4 December 2007, Mr Atkinson wrote to me regarding the Board's financial position. A copy of that letter is annexed and marked "DC1". The Board had already reported an unfavourable variance, against its planned position, of \$2.1 million for the three-month period ending 30 September. In his letter of 4 December, Mr Atkinson reported that by 31 October the position had further deteriorated, to the point where the Board was \$3 million behind plan. Mr Atkinson blamed \$1.5 million of this on the recent nurses' pay settlement, and signalled that there were \$2 million in unrealised efficiencies for the Board. It was clear that the Hawke's Bay Board's deficit was worrying and was getting worse. The fact that much of the deficit comprised unrealised efficiencies highlighted the need for a strong Board that could work well with management to turn this position around quickly.
30. Subsequent figures, when they became available, confirmed the difficult, and deteriorating, financial position that the Hawke's Bay Board found itself in. For the six months ending 31 December 2007, the Board recorded a deficit of

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\$3.017 million, or 1.6% of revenue. By February, the projected deficit for the full 2007/8 financial year was \$7.7 million.

31. This result was by far the worst among the eight DHBs whose size is roughly comparable to Hawke's Bay's. I was advised, in a document written by my Economic Adviser, and dated 1 February 2008, that only two other comparably-sized Boards, Taranaki and Southland, were running deficits at all, that the value of the Hawke's Bay Board's six-month deficit was at least \$2 million worse than the next biggest, and that officials emphasised that the DHB lacked a credible plan to address this. I was also advised that the nursing and management/administration expenses in Hawke's Bay formed a higher proportion of the Board's expenditure than for any of the comparably sized Boards. A copy of that advice is annexed and marked "DC2".
32. What concerned me particularly was the likelihood that the difficulties that existed within the organisation were affecting the Board's ability to address the deteriorating deficit effectively. When I wrote to the Board on 20 February 2008, I was sceptical that the Board had the ability to get to grips with this worsening position. By that time I was aware that the Chief Executive was on stress leave and may not return, and I was aware of reports of deep divisions within the Board itself. Nonetheless, I hoped that the Board might convince me otherwise, and could demonstrate that it had a plan to bring the budget back into balance.
33. In public, the Board had repeatedly criticised the Population Based Funding Formula, and tried to say that the formula was the reason that its finances had fallen behind. This was also the Board's explanation when it wrote to me on 26 February in response to the various concerns I had raised with it ("the Board's funding shortfall is caused by general under-funding and the "adjusters" used in the Ministry of Health's population-based funding method, particularly the rural adjuster which includes patient transport").
34. The Hawke's Bay DHB was not the only Board to complain about the Population Based Funding Formula. In fact, the Ministry advised me that this formula advantaged the Hawke's Bay Board relative to other DHBs, because there is a higher proportion of Maori within its catchment area, and this increases the funding it is entitled to. Nonetheless, after Mr Atkinson wrote

to me on 4 December 2007, I instructed officials to check Hawke's Bay's funding to confirm that it was receiving everything it was entitled to.

35. I discussed the Hawke's Bay Board's monitoring status with the Ministry in December 2007. I was surprised that its status had not been elevated from "standard" to "performance watch" earlier, given the seriousness of the issues. There are three monitoring tiers, standard, performance watch and intensive monitoring. These are stepped processes. I was advised that processes were already underway to elevate the Hawke's Bay Board to Performance Watch, and that Boards are generally given at least six months at each level before the status is further reviewed. The Hawke's Bay Board was placed on performance watch in January 2008 following notice given in December 2007. A copy of the letter putting the Board on Performance Watch, dated 12 February 2008, is annexed and marked "DC3".
36. My key concern was that in its 4 December letter the Board itself had identified unrealised efficiencies as a particular cause of its deficit. By February 2008 it had made little progress in this regard. Most importantly, the Board had no financial recovery plan in place. I was not impressed by its subsequent attempt to blame management for this lack of progress. If the failures to realise efficiencies had arisen from management rather than from the Board's direct decisions, then that was a governance issue that the Board should have addressed.
37. I discuss in more detail below the way that the Board's financial position contributed to my decision to dismiss the Board. It is fair to say, however, that I would not have dismissed the Board on the basis of its financial position alone. While I would always have been alarmed by a Board that had an escalating deficit and did not appear to have any credible plans to bring things back into balance, this kind of situation can be addressed in other ways provided the organisation is functioning effectively. It was the combined effect of the deteriorating financial position and the other factors I identify that had, by February, caused me to lose confidence in the Board's ability to govern the organisation effectively and that ultimately persuaded me that I must intervene.
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The Auditor-General's Report

38. The report from the Office of the Auditor-General, released on 28 January 2008, raised concerns about the Hawkes Bay DHB. It noted a number of areas where urgent improvements were needed, particularly around the management of conflicts of interest and procurement policies, and the organisation's ongoing financial sustainability. While many of these failures could be regarded as issues for management, ultimate responsibility lies with the Board. Management is accountable to the Board, and the Board had to be prepared to accept responsibility for things that were not being done. Again, I would normally have been confident that the shortcomings identified by the Auditor-General's report could be remedied in a normally functioning organisation. The fact that so many criticisms were evident, however, contributed to the overall picture of a poorly functioning Board. More importantly, by February I was increasingly concerned that it was beyond the capability of the Board to provide the governance necessary to put things right. The Audit New Zealand report is annexed and marked "DC4".
39. It is also worth noting that this was a very experienced Board. Most members, including the Chair (whose involvement dated back to 1996), had been in place for at least six years. Inexperience, which might in other cases have helped to explain problems of this kind, was certainly not a factor in this case.

Behaviour of the Board

40. I now turn to the combination of events that caused me to lose confidence in the Board's integrity and judgment, and which convinced me that the Board could not provide the leadership necessary to get things in Hawke's Bay back on track.

Discussion with Mr Atkinson on 13 November 2007

41. On 13 November 2007 I rang Mr Atkinson to advise him that, in light of the need to consider the Review Panel report, I did not feel able to make a permanent appointment to the Chair of the Board and did not propose to make any ministerial appointments to the Hawke's Bay Board at that time. I was at pains to reassure Mr Atkinson that I was happy for him and the appointed members to continue while the Review Panel process continued in

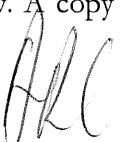
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order not to disrupt the functioning of the Board any more than necessary. I stated that I had no presumption that the reappointments would not be made and I asked for his continued assistance in ensuring the Board functioned effectively. The call was intended as a friendly and personal chat – I wanted to explain the delay in finalising the Hawke's Bay appointments and hoped to establish a positive rapport with Mr Atkinson, with a view to building the kind of constructive relationship that I have with other Chairs.

42. Against this background, Mr Atkinson's remarks in the course of this conversation shocked and concerned me. Mr Atkinson insinuated that if he were not reappointed as Chair, information on "preventable deaths" of cardio-thoracic patients on the waiting list at Capital & Coast DHB might become public – his words were that this information would be "damaging in the public domain". He also said that he was managing a great many problems in Hawke's Bay and it "would be a great pity if they all 'came out' in the public domain".
43. I was astonished by Mr Atkinson's comments, especially in the context of what was intended as a relationship-building call. Leaving aside my surprise at the suggestion that Hawke's Bay patients had died while on a waiting list, I was extremely concerned by the unmistakeable overtones in Mr Atkinson's comment, namely that if he himself were not reappointed as Chair then material was likely to be made public that would embarrass the Government. This conversation significantly affected my confidence in Mr Atkinson, because it implied that he was prepared to put his own interests as Chair, ahead of the wider interests of the Board and the people he had been appointed to serve.
44. I immediately discussed our conversation with Jim Turner, at that time the Senior Adviser in my office, and asked him to contact the Ministry straight away to initiate inquiries into what Mr Atkinson might have been alluding to. My file note of the phone call is annexed to this affidavit and marked as "DC5".
45. I also asked Anthony Hill, Deputy Director-General for Sector Accountability and Funding at the Ministry of Health, to investigate the allegations Mr Atkinson had made about Capital & Coast DHB. Mr Hill reminded me he was

a close friend of the Chief Executive, and accordingly would pass this request on to another official.

46. On 21 November 2007 Mr Atkinson telephoned me to discuss a draft report he had received from the Auditor-General's Office. Mr Atkinson told me that there may be employment issues arising from this report, and cautioned me that Anthony Hill was "best friends" with Mr Chris Clarke, the Chief Executive. I told Mr Atkinson that I was aware of this friendship; Mr Hill had disclosed it, and had no involvement in relation to matters connected with the various Hawke's Bay reviews.
47. I was concerned by Mr Atkinson's tone, and the fact that the obvious disharmony between him and Mr Clarke had extended to his warning me about officials who might be sympathetic to his CEO. To say the least, this conversation did not reassure me that the Board and management were working well together. I made a file note of this conversation. A true copy is annexed to this affidavit and marked as "DC6".
48. As well as these telephone conversations, I was not impressed by the Board's public behaviour, and its use of the media as it related to the Ministry and to the Government. As I have explained earlier, the relationship between DHBs and the Crown should be one of co-operation and mutual support. Numerous public comments from the Hawke's Bay Board indicated that they were seeking to point the finger at the Ministry and the Government as the source of the difficulties that had arisen in their organisation.
49. Examples of this are these are:
 - 49.1 On 6 December 2007, Mr Atkinson was quoted in *The Dominion Post* as having said that my decision to await the outcome of the Review Panel's inquiry before appointing a Chair would put the health of Hawke's Bay people in jeopardy. A true copy of the article headed "Bay health 'threatened by lengthy inquiry'" is annexed to this affidavit and marked as "DC7".
 - 49.2 On 8 December 2007 the *Hawke's Bay Today* reported Kevin Atkinson as telling the Board that the health of Hawke's Bay people was being jeopardised by the Ministry's delay in the governance review. A copy



of the electronic article is annexed to this affidavit and marked as "DC8".

49.3 On 10 December 2007 *Hawke's Bay Today* published an article by Mr Atkinson stating that his views on governance differed from those of the independent Review Panel. He engaged in a long defence of what he claimed was his style of governance. I was concerned that, with the Review Panel process still incomplete, Mr Atkinson was seeking to pre-empt the Panel's findings, and to undermine, in advance, the Panel's conclusions. That article is annexed to this affidavit and marked as "DC9".


49.4 On 13 February 2008, the *Dominion Post* quoted Kevin Atkinson, commenting on the board's year-end deficit, as saying:

"It was never a realistic goal to cut \$5 million from the board's costs, but [the Board] had factored that expectation into its budget simply to get it signed off by the health minister, who refused to accept anything less than a break-even budget."

I was particularly troubled by this comment. Mr Atkinson was effectively saying that the Board had sought to deceive me. I note that later, when it became apparent that I took grave exception to this comment, Mr Atkinson said that he had been misquoted, though I am not aware of his ever seeking a correction or retraction from the newspaper. A copy of the electronic article is annexed to this affidavit and marked as "DC10".

49.5 On 14 February 2008 a Board member, Dr David Davidson, was reported on Radio New Zealand as describing the lack of permanent appointments to the board as very destabilising. Dr Davidson later rang me to say that he was misquoted. A copy of the transcript of that interview is annexed to this affidavit and marked as "DC11".

49.6 In a similar vein, Mr Atkinson was reported in *Hawkes Bay Today* on 14 February as saying that working on a day-to-day basis was frustrating and emotionally difficult. A copy of the article is annexed to this affidavit and marked as "DC12".



50. I did not regard this frequent and pointed use of the media to criticise the Ministry, and by implication the Government, as an appropriate way for a Crown Entity to conduct itself. From my time as Associate Minister of State Owned Enterprises, I was well aware of the “no surprises” policy which, among other things, requires Crown Entities to warn shareholding Ministers about any adverse media comment and to use discretion and good judgement in making public comment regarding the interface between their entities’ affairs and matters of Government policy. In this case, not only was there a complete departure from a no surprises practice, but the reverse was the case. My office was regularly contacted by *Hawke’s Bay Today* and *The Dominion Post* for balancing comment in response to criticisms emanating from the Board. Such behaviour is very much at odds with the type of collegial, co-operative relationship I expect to have with DHBs.
51. I was also concerned that National MPs Craig Foss (MP for Tukituki) and Chris Tremain (MP for Napier) had met with Mr Atkinson in early February 2008, and that Mr Atkinson had not allowed the chief executive to attend the meeting, contrary to Ministry of Health policy and ministerial directive. The day after the meeting, opposition spokespeople raised Mr Atkinson’s comments in the House by way of oral questions.
52. I was aware that Board members had engaged a local Public Relations firm. The role of the firm was reported in a *Hawkes Bay Today* article which is annexed to this affidavit and marked “DC13”.
53. Stepping back from the individual incidents, I did not consider that it was appropriate for a Crown entity to seek to put public pressure on their Minister and the Government in this manner. Such conduct would not be tolerated in any corporate environment, and even allowing for the fact that Board members had been elected, their public attacks on the way I had chosen to make decisions around the chairmanship indicated that the Board misunderstood the kind of mutually supportive relationship that a DHB, the Ministry and the Minister must have. Mr Atkinson’s remarks during our conversations indicated that he was not afraid to use political pressure to get what he wanted, and the public remarks of Mr Atkinson and other Board members were consistent with this approach. As I noted at the start of this



affidavit, responsibility for the delivery of services is shared between Boards and the Crown, and it is important that we are able to work together constructively.

54. It is certainly not my view that Boards should be required to refrain from public comment on important matters within their jurisdiction. However, in my mind, there is a clear distinction between a Board explaining its own decisions, and Board members individually, or collectively, attacking Government policy to advance their own interests. The frequency and deliberate nature of these media interventions conveyed the impression that the Board saw the media as its prime means of communication with the Ministry and me.

Senior clinicians

55. I was also informed by communications that I had with a number of senior Hawke's Bay clinicians. On 11 February, I received a letter from Dr Dinesh Arya, the Board's Chief Medical Adviser, and three other senior clinicians: Dr Papps, the Director of Nursing; Dr Grayson, the Clinical Director, Surgery & Quality & Risk; and Ms Chris McKenna, the Associate Director of Nursing. They urged me to make an immediate decision on the chairmanship of the Board, noting the urgent need for good governance, and noting that further delay would "only heighten the tensions within our DHB". A copy of the letter is annexed and marked "DC14".
56. This letter troubled me. It implied that presently the Board was not enjoying good governance, and referred directly to tensions within the DHB. The letter was diplomatically worded, but I suspected that there was more behind it. I asked Dr Ian Powell, the Executive Director of the Association of Salaried Medical Specialists, with whom I had significant involvement at the beginning of this year on other health issues, about the authors of the letter. Dr Powell knew Dr Grayson, and commended him highly to me as a man of unquestioned integrity and impartiality, who commanded the respect of his colleagues. As a result of his favourable comments on Dr Grayson's character, I decided to call him.



57. I telephoned Dr Grayson shortly after I received the letter, to discuss the situation in light of the various options that were open to me. In particular, I asked him whether he thought that appointing a new Chair, perhaps in conjunction with a Crown Monitor, would be sufficient to meet his concerns. Dr Grayson told me that he had been able to observe the relationship between the Board and management closely, and that it had deteriorated to the point of complete dysfunction. He said that, particularly as a result of the Review Panel's inquiry, neither party trusted the other. He spoke about the Board's tendency to intervene inappropriately in matters that should have been left to management, and also said that past attempts to mediate between them in past years had not been particularly successful.
58. Dr Grayson told me that, in his view, only the removal of the Board and its replacement with a commissioner would ensure that the organisation could devote its energy and resources to the provision of health care services, rather than managing the divisions that had emerged. Dr Grayson also disclosed to me that he is married to Penny Andrews, the legal adviser for the DHB.
59. On 19 February I received an email from Dr Richard Tustin, a senior specialist at the Hawke's Bay Hospital. Dr Tustin expressed his strong disapproval of the Board, and indicated that, in his view, many of the Board's public utterances were untrue. Like Dr Grayson, he painted a picture of a Board that intervened inappropriately into management's province and affirmed Dr Grayson's view that the relationship between Board and management had become dysfunctional. His dismay with the Board's ongoing conduct was such that he had felt compelled to resign and leave to take up a position in Australia. I telephoned Dr Tustin that evening and he reiterated his comments to me orally. A copy of Dr Tustin's email is annexed and marked "DC15".
60. I appreciated that the comments of Dr Grayson and Dr Tustin represented only one point of view, and I was also aware that some clinicians strongly supported the Board. What was telling, however, was that the Board, and those who supported it, were critical of management, and those who supported management were critical of the Board. The deep division between the two camps was obvious.



Breakdown in Relationship between Board and Management

61. The clinicians' comments concerned me greatly. I was less influenced by their assessments of who was right and who was wrong than by the fact that there had been such a significant breakdown in trust and confidence between the Board and senior management and the effect such a breakdown could have on the organisation.
62. I had been troubled by the relationship between the Board and management at least since I had spoken to Mr Atkinson on 23 November, when he had sought to warn me about Mr Hill's association with Mr Clarke; Mr Atkinson was concerned about the possibility that one of my senior officials might take management's "side". Of course the organisation needed to be cohesive, with the Board and management working together, and to have a healthy and constructive relationship with the Ministry and me. What I saw in the months that followed confirmed that the relationship between management and the Board effectively ceased to function.
63. While I was not privy to the detail, I understood that much of the delay in the report of the Review Panel arose from the various parties seeking to influence the panel's findings at the expense of the others. I was told that the majority of the Board, Mr Hausmann, and management had all instructed lawyers to protect their respective positions.
64. A further factor that persuaded me that matters had become critical was the news, in the second week of February, that the Chief Executive had taken two weeks' stress leave not long after returning from his summer vacation (with no guarantee of return). The fact that this had occurred against the background of a bitter, and increasingly public, dispute, persuaded me that I had to take action to resolve the situation immediately. The chief executive's absence, at such a critical time, meant that there was no-one at the top of the organisation to provide the leadership the DHB so urgently required. The fact that he had succumbed to stress so early in the year was also fairly clear evidence of an unhealthy environment within the upper echelons of the organisation.
65. As is discussed in more detail below, later communications from the majority of the Board sought simultaneously to deny that there was a serious problem

between the Board and management and to place responsibility for the difficulties that existed on Mr Clarke and Mr Hausmann. While the various events I have outlined above caused me to question the Board's motives and to doubt their integrity, my objective had never been to decide who was right and who was wrong in the underlying dispute. My sole objective was to get the DHB working again so that the matters that needed urgent attention could receive it. As provided in the Public Health and Disability Act, however, it was the Board, and not management, that was accountable to me, so it was not open to me to intervene directly with management.

66. In summary, by the middle of February, it appeared to me that the breakdown in the relationship at the top of the DHB had become intractable, and I suspected that it would have been beyond the capability of any Board to resolve. Certainly, I was not confident that this Board, which had been so confrontational, and so determined to advance its "side" of the dispute, had the capacity to put its differences behind it and work productively with its management team. The crisis was continuing to escalate, and I decided that it was imperative that I should act.

DECISION

67. It was clear to me that it would not be tenable, given my responsibilities as Minister of Health, and to the people of Hawke's Bay, to allow things to continue as they were. In short, the situation had reached a crisis that needed to be resolved. In deciding how to proceed I drew, in part, on advice I had received in November when dealing with the situation that had arisen at the Capital & Coast District Health Board, updated for the Hawke's Bay situation. In summary, my options were:

- 67.1 Rely solely on the existing monitoring and intervention framework;
- 67.2 Appoint a Crown adviser to assist the Board;
- 67.3 Appoint a Crown Monitor to report directly to me;
- 67.4 Appoint a new Chair, and new appointed members, who might be able to bring a new direction to the Board;
- 67.5 Some combination of the above;



- 67.6 Dismiss the Board and appoint a commissioner; or
- 67.7 Remove individual members.
68. The existing monitoring and intervention framework relies on reporting from officials. It is difficult for this to reach into the boardroom. I was aware that the Board had been placed on performance watch, and that officials were taking a close interest in the DHB, but this was simply too slow a process to deal with the situation as it existed in February 2008.
69. A Crown adviser provides advice and support to the Board but cannot act independently of the Board, or report directly to the Minister. Given the level of conflict within the organisation, I regarded option this as inadequate; moreover, it would have relied on a level of consensus that did not exist.
70. I had used Crown Monitors in conjunction with a new Chair at Capital & Coast, and considered this appropriate in another instance, and indeed seriously considered this option throughout this process. Crucially however, this option was not focussed specifically at the governance layer and would not have prevented the existing Board members, should they have wished to do so, from undermining the position of the Chair and the Monitors. That option would have left largely intact the same group that had dominated the Board during the escalation of the crisis, and they would still have been able to command a majority.
71. Removal of one or more individual from the board was dismissed early on because of the high statutory threshold required and, more importantly, because I did not consider it appropriate or possible for me to take sides on internal board disputes and to ascribe definitive blame to individuals.
72. Our discussions proceeded over several days, and I asked officials to develop a range of options and scenarios which went through a number of iterations. Over time I narrowed my options to two – (a) the combination of Monitors, a new Chair and new appointed members, or (b) appointment of a Commissioner. I was clear that selecting the Commissioner option was a very serious step to take and not one that I should agree to unless I was convinced that no lesser option would achieve the required outcome.




73. In the following paragraphs I provide more detail as to the process by which I reached exactly this conclusion. In doing so I wish to make clear that I explicitly ruled out reaching a substantive judgement on the merits or demerits of individual board members engaged in disputes with each other or management. I also ruled out direct intervention at the management layer because that was not an option open to me under the Act. I was also very conscious that a good proportion of the members of a DHB Board are elected by the people of the region.

Decision-making process

74. This was not the first occasion on which I had had to consider how a crisis within a DHB should be handled. In November and December 2007 I took detailed advice as to how to deal with another serious situation that had emerged at Capital & Coast DHB, so I was familiar with the various accountability options under the Act. On that occasion, I decided on 13 December 2007 to appoint a new Chair and a Crown Monitor to Capital & Coast DHB.
75. At Capital & Coast the nature of the underlying issues was different from those at Hawkes Bay. In the case of Capital & Coast I was advised that there were multiple complex problems in terms of management systems, clinical governance and project and financial management surrounding the transition to the new regional hospital. Crucially, while there had been some criticisms of senior management, there was no evidence that the Board would be incapable of rising to the challenge provided that strong leadership and appropriate governance support could be provided. In the Hawke's Bay case, the balance of concern was much more squarely at the governance level and the governance/management interface rather than at the level of managerial or clinical systems. The immediacy of the crisis at Hawkes Bay was even more pressing.
76. Notwithstanding this, the decision to appoint a new Chair and Monitor at Capital & Coast was made with the caveat, in my public comments, that I would require an improvement in a defined period. I explicitly preserved the option of intervening further, and kept open the option of appointing a commissioner.

77. Advice and option development traversed each of the possible options referred to in paragraphs 67 to 72 above, and who might be available to take up different roles depending on which option was selected. We recognised that once a decision was made it would clearly need to be implemented rapidly.
78. The Hawke's Bay decision was progressed at a number of meetings with my office advisers and officials where I had asked for a number of options to be developed, making clear that no decisions had been made nor could be made until a proper process had been followed. I received advice from advisers in my office, Ministry officials and from the Solicitor-General personally. This reflected the seriousness with which the Crown viewed the Hawke's Bay situation. I relied particularly on the Solicitor-General's advice. Given the integrated nature of his legal advice to me and my decision-making process, I have sought and obtained the Attorney-General's approval to waive Crown privilege in relation to the legal advice I received and relied upon, viz.: the oral advice from the Solicitor-General, and the two pieces of written legal advice I received from the Chief Legal Adviser of the Ministry of Health, dated 19 February and received 26 February. Annexed to this affidavit and marked "DC16" is a copy of my memorandum to the Cabinet Policy Committee, to which the advice of 19 February is attached. Also annexed to this affidavit and marked "DC17" is the 26 February advice.
79. Careful consideration was given to process and natural justice considerations. Collectively we considered whether notice to the Board would be required and, if so, what period of notice would be appropriate. This involved consideration of the balance between the need for clear and decisive action that would give the DHB a new start, relatively unencumbered by previous conflict, with the need to ensure that the Board had an appropriate and fair opportunity to present any matter it wished to raise.
80. On 19 February I held a meeting with officials and advisers where the balance of opinion moved towards giving direct consideration to governance action in the shortest possible timeframe in order to avoid further difficulty being created during a transition period. Officials indicated that they wished to reflect further on process considerations overnight.

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81. I met again with officials and advisers on the morning of Wednesday 20 February prior to my raising the matter with my Cabinet colleagues at the Cabinet Policy Committee (POL) that met that morning. At that time the balance of officials' opinion was in favour of option 3, which leaned towards a short period of notice during which a Crown monitor/s would support an interim Chair with a strong brief to restore the board/management interface. At that time my officials and advisers leaned against moving straight to the installation of a Commissioner, and suggested that it might be sufficient to provide a short period to allow the Board to resolve its own difficulties.
82. I agreed to reflect this preference, on balance, with my colleagues at POL. The paper I tabled at POL is at **DC16**, above. The POL minute is annexed to this affidavit and marked "**DC18**".
83. There is a strong constitutional convention that the discussions at Cabinet and Cabinet Committees are confidential; they are not recorded formally. But it is important to note that the former Minister of Health, the Hon. Mrs King, recused herself from the discussion and left the room. It is also important to note that, at the Committee meeting the Solicitor-General clarified orally that, rather than being unavailable because of natural justice concerns, option 1 (the appointment of a Commissioner) was an option available to me as long as the Board was advised that I was thinking about appointing a Commissioner and given a reasonable opportunity to respond before I made a final decision. I was advised that a week's notice would be sufficient in the circumstances, and that such a process would satisfy natural justice concerns. Pursuing that option would remove the risk of existing board members undermining corrective action proposed by a new Chair and Monitors.
84. Following the POL meeting I convened a follow-up meeting with advisers, officials and the Solicitor-General in my office to further assist my process of decision-making. In particular, I tested the notice period required to satisfy the requirements of natural justice.. The Solicitor-General reaffirmed his advice that a period of one week would be sufficient in the circumstances, and we clarified the grounds that would be set out in the letter. I asked the Solicitor-General, with senior advisers from my office and the Ministry, to lead the drafting of the letter of notice to the Board.
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Letter to the Board 20 February 2008

85. My letter to the Board Chair was sent on 20 February and is annexed to this affidavit and marked “**DC19**”. In it I set out four reasons for my serious dissatisfaction with the Board’s performance, and that I was considering appointing a Commissioner. In the letter I advised the Board that I would make my decision on 27 February 2008, and that the Board had until 1pm 26 February 2008 to provide a response in writing to me. I had made no final decision about the best way to deal with the Board at this stage, though my preliminary view was that the best way to cut through the various dysfunctional relationships that existed may well be to appoint a commissioner. That said, I did not want to take this step if I could avoid it. I kept an open mind, and would have been very receptive to a response from the Board that indicated a degree of insight into the difficulties that existed, and if it had outlined a plan to address and resolve the various areas of conflict and poor performance.
86. I hoped that the Board would not engage in further attempts to assign blame for the various problems to other people, but would show me that the issues were in hand, and that it was committed to getting on with the job of running a well functioning District Health Board. If the Board was not capable of solving the problems that had emerged, it did not matter particularly how they had arisen.
87. Having been advised that it would be a sufficient period, I asked for a response within a week because I considered that the situation could not be allowed to drag on any longer. The situation within the DHB was continuing to deteriorate and my confidence, and public confidence, was declining by the day. As discussed above the Board’s financial difficulties were becoming acute, and I was also aware that ongoing uncertainty regarding the status of the Board was causing instability within the region. For example, the Mayors of Napier and Hastings, with the apparent support of the Mayors of the Wairoa District and Central Hawke’s Bay and the Chairman of the Hawke’s Bay Regional Council, wrote to me on 19 February urging me to “prioritise and sort ... out” the leadership of the DHB by 1 March 2008. They observed that the uncertain tenure of the Chair and the Board had resulted in a lack of confidence in the



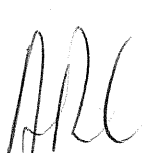
Government's ability to deliver health outcomes for the Hawke's Bay region. Annexed to this affidavit and marked as "DC20" is a copy of that letter.

88. While the councils hoped that my intervention would produce a different outcome – the reappointment of Mr Atkinson as chairman – I took note of their advice regarding how urgent things had become. Their advice regarding the need to move urgently was consistent with that of Dr Grayson and his colleagues, and reinforced my view, and that of my advisers, that I could not allow things to remain unresolved for any longer. If the Board had produced a response that allayed my concerns, I would have moved quickly to appoint a Chair, and to make other appointments.
89. Having given the Board a week to respond, I was reassured by Mr Atkinson's indication, on Radio New Zealand the next morning, that this time frame gave the Board enough time to respond to the issues I had raised. A transcript of Mr Atkinson's remarks on Morning Report that morning is annexed to this affidavit and marked as "DC21".
90. In my letter I specifically requested that the Board members refrain from publicly discussing my letter and the Board's response. However, by 21 February media comment by two Board members – David Davidson and Mr Atkinson – caused me further doubts about the Board's ability and commitment to remedying the dysfunction in their relationships with the government and management. Dr Davidson effectively blamed me for the situation, stating that the Board had written to me several times in preceding months regarding their financial position and had not "even had the courtesy of a reply". Transcripts of comments on National Radio on 21 February are attached and marked as "DC22" and "DC23". I should add that Dr Davidson's accusation was untrue on both counts – the only letter Mr Atkinson had written to me about funding was the one referred to in paragraph 29 above.
91. The only other recent letter from the Board had been sent to my predecessor and was dated 19 September 2007. I had replied to both shortly after I returned from leave by letter dated 28 January 2008. These letters are annexed and marked "DC24" and "DC25" respectively.



92. As I added in the interview with me that followed, I was very surprised to hear a Board member on the radio at all, given the request I had made for the Board to refrain from escalating matters further by commenting publicly.
93. I received a letter from Mr Atkinson on behalf of the Board by fax in my office on 7.06pm 21 February 2008. Mr Atkinson requested clarification of matters in my letter of 20 February, including examples of what I considered to be “public challenge” to me and as to the Board’s use of the media to advance personal agendas. A copy of the letter is annexed to this affidavit and marked “DC26”.
94. As I was in Auckland for the weekend I called a meeting by teleconference of my advisers and officials on the Friday afternoon to discuss how appropriately to respond to the Chairman’s letter. I agreed to the substantive approach that is set out in my reply dated 22 February, annexed to this affidavit and marked “DC27”. I advised that my concerns about the Board’s behaviour had been exacerbated by events since 20 February 2008, in particular the decision by Board members to disregard my request that they not debate my letter in public.
95. Mr Atkinson also rang me on the night of 21 February 2008 to request an informal meeting between him and me over that weekend. I thought carefully about this request, however I decided to keep to the formal process that had been set out in my letter of 20 February 2008.
96. On 25 February 2008 I was advised the Board had filed an application for an injunction preventing the release of the Review Panel’s report. As noted above, I regarded this as an extraordinary development that was entirely inappropriate for a Crown entity when faced with the release of an already long delayed independent report. I already had grave doubts about the Board’s judgment, and this development only deepened them.

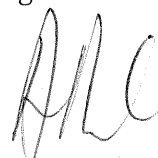
Board’s Response

97. On 26 February 2008 I received a copy of the response of a majority of the Board members. I also received a separate “minority” submission from Mr Peter Hausmann. Those submissions are annexed to this affidavit and marked “DC28” and “DC29” respectively.
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98. I sought legal advice on whether I should take account of Mr Hausmann's submission. The advice, contained in the document entitled "Hawkes Bay District Health Board decision – process" is **DC17**, above. The advice was that I may take into account all the material provided by the majority of the Board and by Mr Hausmann, that the weight to be placed on Mr Hausmann's submission was a matter for me though I should bear in mind that much of it was untested, and that I may publicly release both submissions with my decision.
99. Given the stark differences between Mr Hausmann's submission and that of the rest of the Board, I decided that I could not give any weight to Mr Hausmann's views where they differed from those of the rest of the Board. Given that he had been at the centre of a number of controversies within the Board, and his actions were under investigations, I treated Mr Hausmann's comments with caution. That said, the deep division between Board and management, though presented very differently, was plain from both documents.
100. I formed no view as who was right and who was wrong as between the majority of the Board and Mr Hausmann, but both responses confirmed to me that relationships between the Board and management, and the Board and staff, had become so badly compromised as to be beyond repair. I was concerned that if the situation had been allowed to continue, the safe delivery of health services would have been jeopardised. Moreover, the depth of breakdown between the board and management was underlined by the material from the Chief Executive that was attached to Mr Hausmann's submission.
101. I asked officials to comment on the contentions regarding the Board's financial performance as presented in the "majority" Board submission. My office economic adviser prepared a paper for me on the morning of 27 February. His analysis rejected the Board's explanation for much of the deficit (the Board had sought to blame the nurses' settlement). He noted that the settlement could account for only a small part of the Board's deficit. He went though, and rejected, each of the other explanations the Board had offered.
102. Significantly, my office economic adviser noted that the Board's 26 February letter made no mention of the factor Mr Atkinson had cited, on 4 December

2007, as largely responsible for the deficit, namely unrealised efficiency savings. His paper noted a declining month-by-month performance from the Board. A copy of my adviser's paper is annexed to this affidavit and marked as "DC30".

103. Moreover, the reasons identified by the Board related to matters directly within its control or were matters that it could have developed strategies to counter. The Board did not present a credible recovery plan, nor did it give any indication that it had the ability or commitment to prepare one.
104. Turning to the divisions between Board and management, in the end it was for the Board to manage its relationships in a way that ensured that such divisions did not arise, or at least were not allowed to assume the proportions that they had in Hawke's Bay. By February 2008, the divisions within the organisation were so deep that much of the Board's energy in coming months would inevitably have been expended on conflict resolution rather than the provision of health services.
105. Ultimately, I decided that the Board's submission of 26 February did not satisfy me as to my concerns about its performance (as set out in my letter of 20 February) and its ability to deal with the problems at Hawke's Bay DHB. To a large extent – particularly in the sections headed "The board's relationship with the chief executive and management", "Peter Hausmann's appointment to the board", and "Management's handling of the Community Services RFP and Wellcare Contracts" – it amounted to more of the same finger pointing that had characterised the Board's relationship with others over last several months. Overall the Board's response was not the constructive and insightful response I had hoped to receive.
106. At the time I was making my decision I did not have access to the then-incomplete independent Review Panel report, and had no knowledge of its contents, however when it was later released I noted that the Panel identified the same tendency; it noted that the Board's response to criticism was to blame others while accepting little responsibility itself.
107. I also saw no indication that the Board had any plan to restore relationships with key stakeholders, such as Board management, senior clinicians, and me. There was no acknowledgement of any contribution the Board might have



made to the nature or extent of the conflict and dysfunction that was evident to me. There was no demonstration of willingness to address the conflict that had arisen with the management team. Indeed, the Board sought to persuade me that, despite the fact that it had engaged a lawyer to pursue disciplinary proceedings against the chief executive, no serious conflict existed. I should add that I strongly disagreed with the comment that “ultimate accountability for the actions of all management and service delivery performance lies with the chief executive”. As is set out in the PHD Act, accountability lies with the Board.

Decision

108. Copies of the Board and Hausmann responses had been forwarded to me in Auckland. I asked my staff to prepare draft communications materials for both the Chair/Monitors option and the appointment of a Commissioner, and to prepare for a decision and an announcement on the afternoon of the Wednesday. These draft press releases, covering both options, are annexed to this affidavit and marked “DC31” and “DC32” respectively. I flew to Wellington on the morning of the Wednesday and met with advisers in my office where I held a final summary discussion of the evidence. I tested the views of my advisers as to whether any significant new information had arisen in the Board’s response which might give us confidence that an option other than the appointment of a commissioner would meet the needs of the Hawke’s Bay situation.
109. We re-traversed the options set out in paragraphs 67-72 above. Our starting point was that the problems were so serious in nature, and so urgent and pressing, that only the governance-level interventions available in the accountability framework could deal adequately with them. I reconsidered whether a Crown Monitor/Chair option would be more appropriate given the response I had received from the Board, including that the Board would be prepared to support appointment of a Crown Monitor. On balance my view remained that the financial deterioration lacked a credible and detailed response, that the breakdown in relationship between Board and management was so severe, and the behaviour of the Board towards the Crown so dysfunctional, that I had no reason to be optimistic that leaving the current



Board intact would deliver an appropriate resolution in the time required. Despite the Board's written response the behaviour exhibited by Board members in the media, and their extraordinary action to injunct the Review Panel report, reaffirmed in my mind that no lesser option would suffice.

110. I asked all my officials to leave my office and I had a quiet period of reflection of some 30 minutes where I went over in my own mind one final time all the options and arguments. I reflected particularly on the fact that the Board had recently been elected, as it is a very significant step to dismiss a democratically elected Board. Nonetheless, in that period of reflection I reached two clear conclusions. First, that if my decision had to turn on a substantive judgement as to which members of the Board and management were substantively right, and which were wrong, I had insufficient evidence upon which to base such a decision of that nature. In that event it would be improper of me to take the serious step of appointing a Commissioner. Second, in my heart of hearts I concluded that there was sufficient compelling evidence of dysfunction (no matter how individual blame was apportioned) that the Board was incapable of discharging its responsibilities to the people of Hawke's Bay to run a safe, well-functioning DHB in its current state, that I had a duty to act decisively. I decided that the situation could not continue and that no lesser option than the appointment of a Commissioner could give the Board the unencumbered new start it required.
111. I came to the view that no other option but to dismiss the Board would remove the source of conflict and dysfunction in the DHBs governance. It would have unfair and impractical to put a new Chair into that environment. Given my lack of confidence generally in that Board, which was not ameliorated by its submission, I did not consider that a new Chair would have been able to restore good governance in a reasonable period while the existing Board members remained. Nor was I persuaded that there was any real prospect of the Board members being willing to work with a new Chair (if one could have been found) in a supportive and collegial fashion.
112. Similarly, I did not consider that the appointment of a Crown Monitor would address the issue at the heart of the problem, namely the relationship between the Board and management. A Crown Monitor is useful where technical

assistance, support or access to particular expertise is required. I did not consider that a Monitor would be especially useful or effective in this situation. As to the criticism that the Board had only just been elected, as previously noted I did not consider this was a completely 'new Board' as has been claimed. Such a view was not consistent with the practical reality of the situation. Almost all the Board members had been on the Board during the 2004 - 2007 term (only two new members were elected in October 2007) and the majority had been members since 2001. The dysfunctional relationship between the Board and others had persisted for some time (another matter the Review Panel later confirmed), and I considered that I could not correct this through simply appointing new members to the Board.

113. While I understand the reaction of dismissed Board members, this decision did not amount to a "siding" with management, or Mr Hausmann, or with disgruntled clinicians at the expense of the elected Board. Rather, my decision was a recognition that things could not continue as they were.
114. As previously arranged, I advised the Board orally of my decision by ringing the Chair, Mr Atkinson, at 3.25pm on 27 February. In the discussion, Mr Atkinson expressed regret that the matter had been traversed through the media rather than by a direct conversation "man to man". The irony of his comment was not lost on me, as I was aware that TV3 was filming the conversation at his end by prior arrangement, in the presence of journalists from *Hawkes Bay Today*. I advised him that at 3.30pm I would issue a notice removing the Board and appointing Sir John Anderson as Crown Commissioner.
115. I then issued a minute of my decision, to take effect from receipt of my written notice to the board and Sir John Anderson. A copy of the minute is annexed to this affidavit and marked "DC33". I also sent a letter to Mr Atkinson outlining my decision and why I was seriously dissatisfied with the Board's performance. A copy of this letter is annexed to this affidavit and marked "DC34".
116. In the interests of complete transparency, and as previously advised, I publicly released my letters to the Board of 20 and 27 February and the submissions I had received.

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Specific Allegations

117. I have read the applicants' second amended statement of claim. Without going through each of the allegations in paragraph 40(a) and (b), where the applicants assert that there was no basis for me to become seriously dissatisfied with the Board's performance, I do not dispute that some aspects of the Board's historic performance had been satisfactory. However, the fact that some of the Board's performance indicators had been adequate could not outweigh the fact that in many other respects, which I have detailed above, the Board's performance fell well short of what I believe a Minister should reasonably expect in the circumstances. A number of crucial issues had arisen by early 2008 that I did not believe this Board was capable of resolving.
118. A consistent theme in the applicants' claim is that Mr Hausmann was a key source of information for me, and that I was heavily influenced by him in deciding to dismiss the Board. Nothing could be further from the truth. I have never met Mr Hausmann. I do not know him. I was acutely aware that there was conflict between him and other members of the Board and that allegations against him were under investigation. I knew that his views represented a minority of one on the Board. For these reasons, I viewed his contribution to the debate surrounding the future of the Board with caution. As I have repeatedly said, I did not form a view of, or rely upon, the allegations that he made in his letter to me. Mr Hausmann's letter did further illustrate the highly divided nature of the organisation, but this fact was already clear to me without his contribution.
119. Turning to paragraph 40(c), the applicants allege that I took account of a number of "irrelevant considerations". Dealing with each in turn:
- 119.1 I did have regard to the employment relationship between the Board and its chief executive at a general level. I was conscious of the accountability relationship between me and the Board rather than me and management. However, the general state of the Board's relationship with the Chief Executive was an important symptom of the dysfunctional relationship that had come to exist between the Board and management, though it was far from the only symptom.

- 119.2 I did not have regard to the employment relationship between the Board and “one of its clinical staff”. I do not even know which clinician is being referred to.
- 119.3 Similarly, I did not have regard to the “former employment relationship between the Board and a former clinician employee”. Again, I do not know which employee the applicants are referring to.
- 119.4 I was disappointed by the Board’s refusal to respect my request that members refrain from further public comment in the week leading up to my decision. I regarded those comments that were made, which were confrontational and far from constructive, as symptomatic of the unsatisfactory way in which the Board was conducting its relationship with the Ministry and me. That said, those comments did not determine my evaluation of the Board’s letter of 26 February, or to my ultimate decision.
- 119.5 I formed no view as to the correctness or otherwise of Mr Hausmann’s comments, other than to note that they highlighted the divisions within the organisation that I was already aware of. I would have dismissed the Board even if the “majority” Board submission had been the only one I received.
- 119.6 I did take account of the views of Drs Grayson and Tustin. I was influenced to some degree by Dr Grayson, given his role on the Clinical Board, the favourable reports I had received regarding his character and what I regarded as his very reasonable and compelling assessment of the situation on the ground. Having said that, I was also well aware that not all clinicians shared his views. What mattered most to me was the picture of a divided organisation. While Dr Grayson convincingly described these divisions to me, his comments did no more than confirm the impression I had already formed based on comments from a number of sources, including Mr Atkinson.
120. Next, I address the “relevant factors” that the applicants allege, in paragraph 40(d), I failed to take into account. In this paragraph, the applicants appear to allege that I disregarded those things that were working well in Hawke’s Bay. I

did not. While I had no reason to be concerned at the quality of clinical service delivery, it was clear that the deteriorating finances of the Board would impact upon the sustainability of those services in the relatively near future. Ultimately, the dysfunctional relationship between the Board and management, including the absence of the Chief Executive contributed to an atmosphere that was difficult for clinicians to operate in. This was reflected in the senior clinicians' letter imploring me to make an urgent decision. The clinical services that were working well did not entitle me to overlook the serious crisis in the governance of the organisation that had arisen by February 2008. I needed the Board and management of the organisation to be working together to address the Board's financial difficulties, to improve efficiency and to improve the delivery of services.

121. Nor did I overlook the fact that the Board had only recently been elected. The fact that the Board enjoyed the confidence of the community was the factor that made me pause longest before deciding to dismiss it rather than to take one of the other steps available to me. It is a very significant step to dismiss a democratically elected Board, and I would never undertake such a step lightly.
122. Next, I deal with the various "false and/or misleading" pieces of information that the applicants allege I took into account (paragraph 40(e)). In addition, the applicants appear to allege that I relied on Mr Hausmann and Mr Clarke as the sources of this information.
123. The short answer to most of the allegations in paragraph 40(e) is that I did not rely on them in reaching my decision.
124. I certainly reached the view that relationships between Board and management at the DHB had become dysfunctional and that there was a breakdown in trust and confidence between Board and management. I also understood that there was a division between the Board and some clinicians (though I also understood that other clinicians strongly supported the Board). I did not rely on Mr Hausmann as the source of any of this information.
125. Beyond that, I did not take account of any of the matters listed in paragraph 40(e). I repeat, I did not form a view of the accuracy of any of the specific

allegations made by Mr Hausmann, and was not influenced by his remarks in any way when reaching my decision.

126. In light of this, I did not consider that there was any need for me to put Mr Hausmann's allegations to the rest of the Board, as the applicants argue I should have (see paragraph 40(f)).
127. Dealing with the allegations in paragraph 40(h), I gave careful consideration to the range of options available to me. As already detailed, I do not regard the various "intervention" options available to me as a hierarchy. Rather, I took the view that I should select the option that would best address the particular problem that had arisen. I took the view, for the reasons outlined above, particularly in paragraphs 109-112, that dismissing the Board was the best of the various options available to me in the particular circumstances that had arisen in Hawke's Bay.
128. I turn to the allegations in paragraph 41. I did not decide to dismiss the Board until 27 February 2008. As I have said, I did so only reluctantly and after satisfying myself that the appointment of a Commissioner would best resolve the crisis that had arisen.
129. In addition, I repeat my comments set out above. Nothing Mr Hausmann said caused me to dismiss the Board, nor did it contribute to my decision to dismiss the Board. The correspondence referred to in paragraph 41(a) and (b) predated my appointment as Minister. Of those letters written to me after I took over the Health portfolio, my replies were simply standard letters of acknowledgement from my office.
130. Next, the applicants refer to a draft document prepared by one of my senior officials, Dr Bruce Anderson, on 19 and 20 February and allege that it is evidence that I had made up my mind to dismiss the Board more than two months before I actually did so. The draft cabinet memorandum referred to a proposed term for Sir John Anderson and Mr Roche, the proposed Deputy Commissioner, of 13 December 2007 to 5 December 2010.
131. I am advised that these dates appeared in Dr Anderson's draft because he had used an earlier document, prepared with respect to the Capital & Coast District Health Board, as a template. This is plain from the text of the draft itself.



Despite the body of the document being concerned with the Hawke's Bay Board, the "Recommendations" section reads "The Minister of Health recommends that Cabinet *note that I intend to choose from two options for appointments to the Capital & Coast DHB board*". 13 December 2007 was actually the date that Sir John's appointment as Chair of the Capital & Coast Board was scheduled to commence. I repeat that the various options and scenarios that were available were under active consideration right up to the time I made my decision.

132. The above paragraphs also answer the various allegations regarding breaches of natural justice.

Response to comments in Kevin Atkinson's affidavit

133. I turn to some of the specific allegations in Mr Atkinson's second affidavit dated 22 August 2008.
134. Mr Atkinson states at paragraph 33 that Minister Hodgson's letter of 9 July 2007 approving the District Annual Plan ("DAP") represented a "glowing endorsement of the Board's performance". The 9 July 2007 is simply the standard letter sent thanking boards for their input, even those who were late in providing their DAP. At that time it was not yet as clear that the Board's plan was unrealistic, and the critical variance from the Board's forecast budget was not yet manifest. The letter is annexed to this affidavit and marked "**DC35**".
135. Mr Atkinson alleges at paragraph 50 that he wrote to the Minister of Health three times (6/11/06, 19/9/07 and 4/12/07) of the "anomalies" the Hawke's Bay DHB experienced due to population based funding model but "never received a meaningful response." The first two of these letters were sent to Minister Hodgson. My office or the Ministry responds to all letters addressed to me as Minister, and I have addressed at paragraph 34 above my request to the Ministry of Health to check the calculation of population based funding for the HBDHB. As I have said, I was advised that there was no substance to Mr Atkinson's claim that the Board was under funded.
136. At paragraph 104, Mr Atkinson alleges that my letter to Mr Hausmann dated 13 February 2008 (responding to Mr Hausmann's request for leave from the

Board) indicated that my decision to dismiss the Board had been made by that date (see Exhibits HH and II to Mr Atkinson's affidavit). He states: "...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."

137. The letter referring to events having overtaken Mr Hausmann's request was not written on 13 February, but in mid-March. Mr Hausmann wrote to the Director-General on 30 January 2008, and sent a separate copy to me, seeking approval to take leave from his position on the Board. The standard process with letters of this kind is for my office to issue an initial acknowledgement with the substantive reply drafted by the Ministry. My Private Secretary acknowledged Mr Hausmann's letter on 11 February, and then sent the file, including the acknowledgement, to the Ministry for the substantive reply to be drafted. The Ministry of Health date stamp on that letter shows that the Ministry received it on 13 February, and that a reply was due by 12 March. As the letter also shows, a draft reply was due in my office by 7 March.
138. As for the substantive reply, which indicated that "events have now overtaken your letter", the stamp in the top right hand corner of the file copy simply records the file details, including the fact that Mr Hausmann's letter was received into the Ministry for the preparation of a reply on 13 February 2008. I have inquired within my office; I am advised that my records indicate that I signed the letter out to Mr Hausmann on or about 20 March.

Conclusion

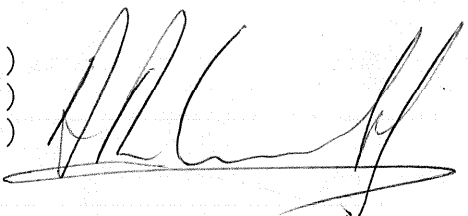
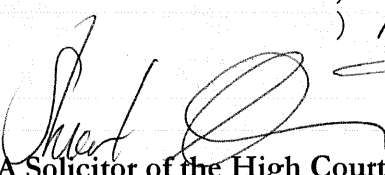
139. In summary, I consider that my decision to dismiss the Board was appropriate, was in keeping with the advice I received, and accorded with the evidence as I saw it. It turned on proper considerations of the governance/management relationship and Board-Crown relations that are necessary and appropriate in respect of any DHB or similar Crown Entity. Presented with the same facts I would make the same decision again. Although the contents of the Independent Review Panel report were not available to me, I consider that the results of this independent process effectively confirmed the validity of the



decision I made. Annexed to this affidavit and marked "DC36" and "DC37" are both volumes of the final Review report.

140. Moreover, in my view subsequent actions by the Commissioner and his deputies have proved to be well considered and effective in restoring confidence in the organisation.
141. In my judgment, this Board, which had been divided and mired in conflict among themselves and with management had the potential to cause great damage to the delivery of health services in Hawke's Bay. I am confident that subsequent actions by the Commissioner and his deputies to provide a clear and consistent governance framework, and leadership to the organisation, have provided the best opportunity for addressing the difficulties that had arisen. Moreover, the resources that were devoted to pursuing these conflicts, and have subsequently been devoted to this litigation, further indicate the degree to which priorities had become distorted in Hawke's Bay. The divisions that were at the heart of the problems within the organisation were so bitter and entrenched that a return to that environment would be highly undesirable.

SWORN at Wellington this 5th
day of September 2008
before me:



A Solicitor of the High Court of New Zealand

Stuart Duncan Stevens
Solicitor
Wellington