

Key Topic: Conflicts of Interest /Duty not to disclose information.

On 20 March 2007 the High Court, in Auckland, delivered its decision in the Diagnostic Medlabs Ltd v Auckland regional DHB'S (and others) case. There has been a great interest expressed in this case by board members in our 'family of boards'.

In brief, between December 2005 and June 2006 the three Auckland regional District Health Boards conducted a request for proposal process to choose a contracting party to provide community pathology services to the Auckland region from 1 July 2007. The contract was awarded to Lab Tests Auckland. The other contender was the incumbent, Diagnostic Medlab.

Diagnostic Medlab brought legal proceedings to challenge the decision to enter into the Lab Tests contract and the contract itself.

The High Court found in favour of Diagnostic Medlabs Ltd and found the decision to award the contract to Lab Tests was ultra vires (beyond its powers) and that the contract is invalid and of no effect. The decision is being appealed and a definitive conclusion is a while away. The High Court decision is nevertheless of interest to board members.

The High Court divided Diagnostic Medlab's claims into four heads of claim. The first head of claim was based on the involvement Dr Bierre had with Lab Trusts and with the Auckland regional district health boards, and the implications of his knowledge and involvement. Dr Bierre was a Auckland District Health Board member. Dr Bierre was also a shareholder in the Lab Tests consortium and the Court found he had been an instrumental part of Lab Test's proposal.

Various interests were declared by Dr Bierre including his submitting a conflict of interest statement when being elected to the health board in 2004; at the first meeting of the board he referred to having a conflict of interest; he stood aside at a certain time. The Court considered the adequacy of those actions. Diagnostic Medlabs succeeded in its claim based on conflict of interest, and misuse of information.

The Court considered the nature of conflicts of interest including the statutory requirements contained in the New Zealand Public Health and Disability Act 2000 and in sections 62 to 72 of the Crown Entities Act. District health boards are Crown entities but the conflict of interest provisions in the Crown Entities Act (sections 62 to 72) do not apply to district health boards, instead health boards are subject to their own 'less rigorous regime'.

While the comments in the decision in respect to conflicts of interest were in respect to the Public Health and Disabilities Act's provisions, some of these comments are applicable to all Crown entities as some of the provisions of these Acts are similar.

The misuse of information provisions in the Crown Entities Act do apply to district health boards, and the Court found that Dr Bierre was in breach of section 57 of the Crown Entities Act.

In respect of both these issues the Court also outlined the general principles that apply.

A copy of that part of the decision which relates to these issues is attached. If you would like to read the decision in its entirety, it can be located on the Ministry of Justice's website.

Remember there is an appeal. In the meantime, boards, particularly Chairs, may wish to consider their own procedures and practices in these areas. The next topic provides some questions you may wish to consider.

A Possible list of matters to consider re Conflicts and the Duty not to Disclose.

A number of board members from a variety of our boards have raised the implications of the ARDHB decision with us. We cannot of course provide any legal advice and Entities should always consult their own Legal advisers if they have legal or related concerns. However this Court decision has caused boards to focus on these issues. Conflicts of interest and related issues have been a recent focus of our Governance programme and they are very much in the public arena. We enclose below a list of some of the issues you may wish to discuss or consider. There will be many more! The considerations below do not all necessarily directly arise from the ARDHB case but rather the case is a catalyst to canvass these issues. The list below applies to Crown Entities but may also be useful for other Crown connected boards.

- *Have we properly updated our Board policies to ensure that they take cognisance of, and are consistent with, the requirements of the Crown Entities Act (which came into force in 2005)?*
- *Do we have an adequate procedure in place to ensure specific conflicts are notified or to advise where the nature of the original interest has materially altered, even where there may be a general conflict registered (eg a board member may have noted she is an executive of a company but also needs to further declare an interest should that company be part of a consortium that may tender for a specific contract with the board)?*
- *Is our Interest register updated regularly?*

- *Are board members aware of the wide range of associated persons or entities who also need to be declared in any Interests register?*
- *Could the integrity of any board process (e.g. board consideration of a major tender) be jeopardised by a “conflict”?*
- *Are we satisfied that the steps and actions that we take when a conflict is identified are appropriate, relevant and compliant with the law and our policies?*
- *Have we considered the implications of s. 57 of the Crown Entitles Act (duty not to disclose information) and do we have an appropriate process in place?*
- *Do we have relevant procedures in place for the board to authorise a Board member under s 57(2) to disclose information because it is unlikely to prejudice our entity?*