Part Decision of Asher J in the Auckland regional District Health Boards case, March 2007.

Below is a portion of the Judgment of Asher J in the High Court at Auckland relating to the issues of Conflict of Interest (Common law principles and the Public Health and Disabilities Act) and the duty not to disclose information (under Crown Entities Act 2004)
Note this Judgment is currently subject to an appeal and, also note, the Conflict of Interest conflicts refer to the Public Health and Disabilities Act.

Conflict of interest
Conflicts of interest in administrative law
[122] A conflict of interest arises when a person carries out a particular function with two or more interests in conflict. In administrative law, a conflict of interest exists when a person has a private interest in a decision where that person also has a public role. In such a case the person's public role and private interest are in conflict. The result can be a poor decision because private concerns that have nothing to do with the public duty have influenced the decision.
[123] The concept of a conflict of interest is well known in the common law. It has developed particularly in the context of professional and fiduciary duties, the classic example being a solicitor's duty not to be in a conflict of interest with a client. It is also well understood in public law where its usual expression is under the heading of bias or apparent bias.
[124] The public law rule against conflicts of interest is not, as it is in private law, based on a relationship of trust and the need to protect a particular client or person to whom the trust is owed. Rather, the rule exists to protect members of the public affected by the decision from poor decision-making. Conflicts of interest can be seen as an aspect of the administrative law requirement of procedural propriety in decision-making. The corollary is that insisting on procedural propriety helps to uphold public confidence in public decision-making.
[125] It must be recognised immediately that persons elected to public office will often be elected on the basis of express philosophies and policies. They will inevitably make decisions influenced by those stated policies and principles. It is well accepted that, providing the task of decision-making is approached with an open mind, such conflicts are acceptable: *Turner v Allison* [1971] NZLR 833 (CA), *R v Amber Valley District Council ex parte Jackson* [1985] 1 WLR 298. There is a distinction, however, between a conflict arising from the personal views held by a decision-maker, and a conflict arising from a personal financial interest in the outcome of a decision.
[126] A conflict of interest can be benign where the person who is conflicted does not participate in making the actual decision and the decision-makers know about and understand the conflict. If the conflict is declared, the decision-makers can stand the conflicted person down in respect of certain matters, or consider input from the conflicted person while making appropriate allowances for the conflict. The ability to compensate for the conflict cannot extend to voting, however, where the conflicted person could directly influence the outcome or decision.

The undesirability of a conflicted person taking part in decision-making is reflected in cl 36 of Schedule 3 to the PHD Act. Clause 36(4) states that a conflicted member who discloses a conflict may, if the Board permits the member to do so, take part in deliberations but may not take part in any decision.

[127] The difference between a conflict of interest and misuse of information is clearly reflected in the provisions of the Crown Entities Act, where different sections set out duties under each heading. Sections 62 to 72 relate to conflicts of interest and s 57 relates to the misuse of information. A conflict of interest will not necessarily give rise to misuse of the DHB information, but a misuse of the DHB information will generally arise from a conflict of interest. Conflicts of interest can be managed, and this is contemplated by the relevant section. In contrast, managing or permitting the use of confidential information is much more slippery territory. The fact that any such misuse of information is disclosed may not prevent damage to the ARDHBs' fair process.

[128] It is clear that Dr Bierre participated to one degree or another in the ARDHBs' deliberations leading up to the selection of the first preferred provider. It is equally clear that, although participating in the DHBs' deliberations, Dr Bierre did not take part in final decision-making. There is no allegation that the decision makers were biased. Thus, while counsel accepted that Dr Bierre had a conflict of interest as an ADHB member interesting in securing a contract with the ARDHBs, it was submitted for both the ARDHBs and Lab Tests that his disclosure of the conflict was adequate to excuse his involvement in deliberations. Thus, it was submitted that the ARDHBs had not made any procedural error in allowing Dr Bierre's continued involvement.

Conflicts of interest in the relevant statutes

[129] The two statutes that relate specifically to DHBs are the PHD Act 2000 and the Crown Entitles Act 2004. Clause 36 of the Schedule 3 of the PHD Act provides as follows:

36 Disclosure of interests

(1) A member of a board of a DHB who is interested in a transaction of the DHB must, as soon as practicable after the relevant facts have come to the member's knowledge, disclose the nature of the interest to the board.

(2) A member of a board who makes a disclosure under this clause must not (unless sub clause (4) applies, or the Minister, by a waiver or modification of the application of this sub-clause under clause 37, permits) –

(a) take part, after the disclosure in any deliberation or decision of the board relating to the transaction; or

(b) be included in the quorum required by clause 25 for any such deliberation or decision; or

(c) sign any document relating to the entry into a transaction or the initiation of the transaction.

(3) A disclosure under this clause must be recorded in the minutes of the next meeting of the board concerned and entered in a separate interests register maintained for the purpose.

(4) However, a member of the board who makes a disclosure under this clause may take part in any deliberation (but not any decision) of the board relating to the transaction concerned if a majority of the other board members of the board permits the member to do so.

…

[130] "Conflict of interest" is defined in s 6 of the PHD Act as "having an interest in a transaction" (the word used throughout cl 36 of Schedule 3). Section 6 defines "transaction" as follows:

transaction, in relation to a DHB, means—

(a) the exercise or performance of a function, duty, or power of the DHB; or

(b) an arrangement, agreement, or contract to which the DHB is a party; or

(c) a proposal that the DHB enter into an arrangement, agreement, or contract.

Section 6 goes on to define being "interested in a transaction":

(2) For the purposes of this Act, a person who is a member of a board of a DHB or a member of a committee of such board or a delegate of such board is interested in a transaction of a DHB if, and only if, the board member or member of the committee or the delegate—

(a) is a party to, or will derive a financial benefit from, the transaction; or

(b) has a financial interest in another party to the transaction; or

(c) is a director, member, official, partner, or trustee of another party to, or person who will or may derive a financial benefit from, the transaction, not being a party that is—

(i) the Crown; or

(ii) a publicly-owned health and disability organisation;

or

(iii) a body that is wholly owned by 1 or more publiclyowned health and disability organisations; or

(d) is the parent, child, spouse or partner, or spouse of another party to, or person who will or may derive a financial benefit from, the transaction; or

(e) is otherwise directly or indirectly interested in the transaction.

(3) A person is not interested in a transaction for the purposes of subsection (2)—

(a) if his or her interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence him or her in carrying out his or her responsibilities under this Act or another Act; or

(b) because he or she receives remuneration or other benefits authorised under this Act or another Act.

[131] The PHD Act states at cl 6 Schedule 2 that a DHB candidate must provide the electoral officer with a good faith statement disclosing conflicts. Sections 62 to 72 of the Crown Entities Act create a more extensive regime for disclosure of interests. They are more rigorous in that they do not allow a conflicted person to even participate in a discussion (s 66(a)) but by virtue of s 21(3) of the PHD Act they do not apply to DHBs. The less rigorous requirements for DHBs is a

legislative recognition of the fact that DHB members tend mainly to come from the health professions and will therefore have connections with DHBs.

[132] It can be seen that the PHD Act defines "transaction" extremely broadly to include any exercise or performance of a function, duty or power of a DHB. Clearly, funding community laboratory services in Auckland is a function, duty and power of a DHB. A part of performing that duty is considering requests for funding. Further, the reviews carried out by Dr Pilstrom and then by Dr Gollop were part of the exercise and performance of that statutory function.

[133] I am satisfied that the deliberations and steps taken through 2005 towards renewing the DML contract, preparing the discussion documents, and issuing the RFP, were a function, duty and power of the ADHB as defined by (a) and (c) in the first part of s 6. Thus, because the process of selecting a community laboratory services provider is a "transaction", the requirement in 36(4) to disclose conflicts of interest applied to all DHB members involved.

[134] The concept of a conflict of interest in administrative law, while coinciding generally with the "interest in a transaction" concept in the PHD Act, is not constrained by the wording of cl 36. A conflict of interest remains a conflict of interest even if disclosed, or approved, pursuant to cl 36. In other words, even if a conflict of interest has been dealt with in terms of cl 36 it can still, for administrative law purposes, be impermissible if it amounts to procedural unfairness or impropriety. This proposition is developed in the misuse of information section in this judgment.

Did Dr Bierre have any conflicts of interest and, if so, when did they arise?

[135] At the time Dr Bierre was elected to the ADHB in October 2004, he held a part-time lecturing position at the University of Auckland School of Medicine, which was partially funded by the ADHB. He was the managing director of LabTests Auckland Ltd, which was the company he used for his consultancy work.

He was the director of LabTests New Zealand Ltd, a shelf company that had been created so it could be used to provide laboratory-testing services in the future. These matters, which actually or potentially involved the Boards' funding, were clearly in conflict with his role as an ADHB member.

[136] In addition, as previously noted, Dr Bierre attempted throughout 2004 and 2005 to secure ADHB funding for his boutique laboratory, which he started to set up in December 2004. Even after being informed by Dr Jury on 30 March 2005 that ADHB had no policy for the provision of services consistent with his boutique laboratory proposal, Dr Bierre continued to communicate with Dr Jury and Mr Coe of the NDSA about a possible future for his boutique laboratory.

[137] On learning that Dr Bierre was involved in negotiations to secure ADHB funding, Mr Brown's letter of 8 July 2005 informed Dr Bierre that he should be excluded from the regional process considering laboratory testing. While there is no evidence that Dr Bierre took any active steps to obtain a share of the Auckland community laboratory work during the period between mid-July 2005 and mid-November 2005, he was certainly not excluded from the ARDHBs' deliberative process in relation to laboratory testing as Mr Brown had indicated in his letter of 8 July 2005, save for being asked not to participate in some matters

in meetings of 3 and 4 August, which he still attended. Dr Bierre's continued involvement in the process did not, it seems, meet with any protest from Mr Brown, although Mr Brown did inform the Northern Regional District Health Board collaboration meeting on 14 July 2005 of the specific nature of Dr Bierre's conflict of interest.

[138] Dr Bierre's position at ADHB meetings throughout this period remained consistent with his desire to secure funding for his boutique laboratory. He opposed the termination of the SCL contract, which would have given DML a monopoly in the provision of community laboratory services. His position at ADHB meetings throughout this period was not consistent, however, with his having any interest and involvement in a general Consortium bid for all of the Auckland community laboratory services, as that would surely have required the termination of the SCL contract.

[139] Indeed, Dr Bierre's evidence as to the limited nature of his communications with Gribbles in August 2005 when he applied for the job of general manager has not been contested. At that stage there was no suggestion that Gribbles would be involved in a Consortium bid for the Auckland laboratory work. Gribbles was pursuing work in the Northland district and was involved in veterinary laboratory testing. Although on about 23 September 2005 Dr Bierre signed a casual contract of employment with Gribbles on very wide terms, which was wrongly dated 26 November 2003, it did not, he maintains, contemplate a bid in the Auckland market.

[140] In November 2005, however, Dr Bierre began to liase with Gribbles and Healthscope regarding what would later become the Consortium proposal to provide community laboratory services in Auckland. Dr Bierre in his affidavit indicates that he started to develop the idea of a Consortium bid in early December 2005.

However, it is clear from Dr Liz Walker's email of 28 November 2005 that discussions had taken place between Dr Walker and Dr Bierre earlier in November about opportunities for Gribbles in New Zealand, including in Auckland. Neither Dr Bierre nor Dr Walker has detailed the nature of those November discussions.

[141] This was a new and significant development. Given Dr Bierre's position as an ADHB member, as soon as Gribbles raised the issue of the ARDHBs with him, he was in an acute conflict of interest position. As an ADHB member Dr Bierre was obliged to consider the improvement, promotion and protection of the health of the people of Auckland in accordance with the PHD Act. As a consultant with Gribbles and a person with an interest in a consortium that was considering making a proposal, he was obliged to attempt to secure a contract for that Consortium. The two goals were clearly incompatible.

[142] Thus, Dr Bierre's attempt to secure ADHB funding for his boutique laboratory throughout 2004 and 2005 clearly amounted to an attempt to "derive a financial benefit" from the ARDHBs' transaction in terms of s 6(2)(a) of the PHD Act. Dr Bierre's attempt to secure a contract for his Consortium proposal, beginning at some point in November 2005, also clearly amounted to an attempt to "derive a financial benefit" from the ARDHBs' transaction. In addition, Dr

Bierre's role with the Consortium plainly made him a director of a party who would derive a financial benefit from the transaction in terms of s 6(2)(c). There can therefore be no doubt that Dr Bierre had a conflict of interest in the sense of being interested in the "transaction" for the purposes of 36(1) when he was pursuing a contract for his boutique laboratory throughout 2004 and 2005 and when he was pursing a contract for his Consortium proposal from November 2005.

Did Dr Bierre adequately disclose his conflicts of interest?

[143] Dr Bierre's disclosure of interest to electors in August 2004 provided under cl 6 of Schedule 2 of the PHD Act read as follows:

I hereby disclose the following conflict of interest with the Auckland District Health Board that may arise in the future. I am currently employed as a parttime Senior Lecturer at the University of Auckland School of Medicine. The Auckland District Health Board (ADHB) is the major funder of pathology services in the Auckland region. All pathologists working in the region served by the ADHB are either employed by the ADHB or have a contractual relationship with the ADHB. At present I am not employed by ADHB nor have a contractual relationship with the ADHB. However, there is a possibility that this may change in the future and may represent a conflict of interest. While certain matters were disclosed, the statement did not inform electors of any intention on Dr Bierre's part to seek ADHB funding for his own embryonic laboratory services company.

[144] Nor was such an intention stated in the specific statement completed by Dr Bierre on 8 December 2004 to be registered on the ADHB interests register. The practice of ADHB members appears to have been to simply list the member's role in any companies with which a member was involved. The statement in response from Dr Bierre read as follows:

1. Senior Lecturer (Part-time), Department of Molecular Medicine and Pathology, University of Auckland
2. Owner/Director, ZKTHB Ltd
3. Managing Director LABTESTS Auckland Ltd
4. Director LABTESTS New Zealand Ltd
5. Member, Medical Advisory Committee, New Zealand Breast Cancer Foundation

[145] Any specific disclosure of Dr Bierre's intention to provide laboratory services would have been recorded in the minutes of the ADHB meeting and entered in the interests register pursuant to 36(3). It was not, and it can be concluded that Dr Bierre did not disclose any such intention.

[146] To be meaningful, a disclosure statement should disclose the *nature* of any conflict of interest that might arise so that other DHB members can properly assess it. Indeed, cl 36(1) of the PHD Act stipulates that the "nature" of the interest must be disclosed. Disclosing the "nature" of a conflict involves more than simply providing the name of a company in which the DHB member has an interest. The name of a company might not give any indication of the kind of work the company carries out. The name "LabTests" did give an indication of the type of work that might be carried out by that company, but it gave no indication as to whether the company was actually carrying out that sort of work, or wished to

carry out laboratory tests in the future, and if so whether ADHB funding would be sought.

[147] Dr Bierre's intention to open a laboratory and seek funding from December 2004, the fact that his company LabTests was operating as a boutique laboratory between March and June 2005, and the fact that he sought ADHB funding for it, should have been formally disclosed. Only that sort of disclosure statement would have adequately informed a person examining the interests register of the true nature of Dr Bierre's interests.

[148] Mr Davison QC for Lab Tests submitted that the obligation to disclose did not arise until the proposal had reached the level of advancement or progress that it was a "real prospect". The point at which disclosure should take place is not so easily encapsulated. In any event I am satisfied that from Dr Bierre's point of view he saw himself as having a real prospect for funding from December 2004.

[149] Dr Bierre thus clearly remained in default of his obligation under cl 36 of Schedule 3 to disclose the nature of his conflict of interest during his attempts to secure funding for his boutique laboratory throughout 2005. The extent of his default is demonstrated by Mr Brown's reaction on learning that Dr Bierre was actively negotiating for ADHB funding. In his letter of 8 July 2005 he noted that Dr Bierre had failed to "expressly declare" his conflict of interest. Mr Brown revealed the seriousness of the nature of Dr Bierre's conflict by saying in his letter that the ADHB had placed "considerable stock" on Dr Bierre's advice and that it had been "central" to decisions that the ADHB had taken.

[150] Dr Bierre responded to Mr Brown's reprimand by refusing to accept that there had been any failure on his part to address his potential conflict of interest. His response was consistent with a continued indifference to the conflict inherent in his role as both an ADHB member and a potential provider. He did indicate that he had decided to close down ("mothball") his laboratory.

[151] Further, Dr Bierre does not appear to have considered there to be any conflict of interest even after he was, by his own acknowledgement in early December 2005, actively developing the idea of a Consortium bid. In his exchange of emails with Ms Ritsma between 7 and 9 December 2005, it was Ms Ritsma who pointed out the conflict of interest to Dr Bierre. The ARDHBs' employees and members became aware of his intentions only through Ms Ritsma's circulation of the email exchange with Dr Bierre. It was the exchange with Dr Smith on 21 December 2005 that led to his standing down from the Board. Dr Bierre did not, therefore, properly disclose the true nature of his conflict of interest until it was disclosed by Ms Ritsma in December 2005. Thereafter, he stood down from the Board after meeting with Mr Smith on 21 December 2005.

Did the ARDHBs adequately deal with Dr Bierre's conflicts of interest?

[152] The ARDHBs' failure to act on Dr Bierre's conflict of interest had unfortunate consequences. Dr Bierre was able to endeavour to influence and mould the Boards' thinking to be consistent with his commercial goals. His role should have been formally considered by the ARDHBs under the procedure in cl 36(4) of Schedule 3 of the PHD Act. If it had been, Dr Bierre, given his strong desire for ADHB laboratory funding, would have been stood down as Mr Brown

on 8 July 2005 indicated he should be, from considerations involving laboratory testing and the regional process that was underway.

[153] Dr Jury and Mr Coe were aware of Dr Bierre's boutique laboratory and desire for funding for his boutique laboratory because Dr Bierre spoke to them in support of his requests. Further, Dr Bierre says that he spoke to at least one ADHB member a Dr Di Nash, in mid-2005 where he informed her of his boutique laboratory and sought her support. Dr Nash has not filed an affidavit. It was not until ADHB chair Mr Brown received the letter from Dr Hutchison in July 2005, that the ADHB became fully aware of the true nature of Dr Bierre's conflict of interest.

[154] At the time Mr Brown became aware of the conflict, the Board should have considered Dr Bierre's conflict of interest pursuant to cl 36 of Schedule 3 of the PHD Act, given his position at the heart of policy-making for the pending RFP. The position of Dr Bierre was very different from the common conflict that can arise in DHBs, where members commonly have working or professional relationships with DHBs or their associated organisations. As a potential proposer who stood to directly gain from the outcome of the process he should have been stood down entirely from any involvement in the ARDHBs' considerations of community laboratories from that point.

[155] Indeed, this was Mr Brown's initial reaction, expressed in his letter of 8 July 2005. It is possible that Mr Brown took no further action because Dr Bierre's letter of 11 July 2005 had stated that he was "mothballing" his laboratory. This may have been interpreted by Mr Brown as a promise that Dr Bierre would no longer have any involvement in seeking funding for his own laboratory interests. However, given the significance of the issue, that should have been clarified. If Mr Brown had checked he would have found that Dr Bierre had not abandoned his attempts to secure funding for his own laboratory but had rather put them temporarily on hold. His conflict of interest continued, and the ARDHBs' failure to prohibit further involvement amounted to a serious procedural error.

Conclusion on conflicts of interest

[156] Dr Bierre was in a conflict of interest from the time he started sitting on the ADHB in December 2004. Throughout his time as an ADHB member he was interested in securing ADHB funding for his own laboratory, which amounted to an attempt to further his own private financial interests. Dr Bierre had an even more serious conflict of interest once he began discussions with Gribbles and others in November 2005 about a general proposal to provide laboratory services in Auckland in response to the pending RFP.

[157] Dr Bierre's initial concern about his conflict of interest in July 2004, Mr McKernan's reaction on 2 June 2004, Dr Hutchison's comment on 27 June 2005, Mr Brown's reaction on 8 July 2005, Ms Ritsma's reaction on 7 December 2005 and Mr Smith's position later in December 2005, were all correct. Dr Bierre's conflicts of interest were a serious threat to the integrity of the ARDHBs' process.

[158] From the time Mr Brown became aware of Dr Bierre's serious conflict of interest, the ADHB was obliged to address it. The action taken by the ARDHBs was entirely inadequate. Indeed, apart from Dr Bierre's abstention from voting in the 4 August resolution, there was no action. The ADHB could have recorded the

disclosure in the Minutes and entered it into a separate interests register pursuant to clause 36. It could then have voted on whether Dr Bierre could take part in any deliberations. For the reasons I will set out in the next part of this judgment, it would then have had to conclude that Dr Bierre should cease to have any involvement in deliberations relating to laboratory services and the RFP. In allowing Dr Bierre to continue to be involved in discussions about laboratory services, while he wished to bid for them himself, the ARDHBs permitted this process to be damaged. They were being influenced by a person who was driven by his own interests, rather than the interests set out in the PHD Act.

[159] Unfortunately, no action was taken until 21 December 2005 when, after the email exchange with Ms Ritsma and being spoken to by Mr Smith, Dr Bierre agreed to stand down. By this time, however, Dr Bierre had a detailed knowledge of the thinking of the panel and the ARDHBs' members. The ARDHBs missed another chance to address the conflict of interest by failing to reiterate in February and March 2006, when it was clear that Dr Bierre was planning to submit a proposal, that his involvement in entering a proposal was inappropriate and impermissible.

Finally, the ARDHBs' receipt of the Consortium proposal, despite being aware of the conflict of interest, amounted to another missed opportunity.

[160] The ARDHBs had a duty to ensure that they conducted their affairs fairly and properly. This duty arose not only from cl 36 of Schedule 3 of the PHD Act but also from a public law duty to conduct public affairs with probity. The ARDHBs' failure to prevent Dr Bierre's involvement in the ARDHBs' attempt to reform the provision of community laboratory services, meant that the only pathologist involved was seeking outcomes that suited his commercial goals rather than the ARDHBs' statutory objectives of improving and protecting public health. The ARDHBs' failure to prevent Dr Bierre's involvement damaged the integrity of the ARDHBs' considerations and undermined public confidence in Board processes. The ARDHBs' failure to respond adequately to Dr Bierre's conflict of interest created the platform for Dr Bierre to use knowledge and information acquired from his ADHB position to make a proposal with the opportunity arose.

Use of the ARDHBs' information for private purposes

The concept of misuse of the ARDHBs' information

[161] The plaintiff submits that Dr Bierre used, or appeared to use, his unique knowledge, influence and relationship derived from his position as an ADHB member to procure a material advantage both for himself and for the other participants in his consortium. I now consider this allegation and what it means for the ARDHBs' decision-making.

[162] The concept of misuse of confidential information is well known in our civil law. The action for breach of confidence is a right of action based on equitable principles, sometimes overlapping with, although never dependent on, a fiduciary duty: *AB Consolidated Limited v Europe Strength Food Co Pty Ltd* [1978] 2 NZLR

515 (CA). It has even been expressed as a property right with remedies sounding in tort on occasions, as discussed in Todd *The Law of Torts in New Zealand* (4 ed 2005) para 15.5.01. However, this is a different concept to misuse of information in the public arena. In private law misuse of information turns on the abuse of a relationship of confidentiality causing loss to the person whose confidence has been abused. In public law, the misuse of information turns on damage to the public process, where, in the words of s 57(2)(b) of the Crown Entities Act, the public process is "prejudiced".

[163] While the PHD Act provides a mechanism for dealing with conflicts of interest in cl 36 of Schedule 3, it is silent on the misuse of information. The Crown Entities Act, however, deals with both conflicts of interest (in ss 62 to 72) and the misuse of information in s 57. Section 57 reads:

57 Duty not to disclose information

(1) A member of a statutory entity who has information in his or her capacity as a member that would not otherwise be available to him or her must not disclose that information to any person, or make use of, or act on, that information, except—

(a) in the performance of the entity's functions; or

(b) as required or permitted by law; or

(c) in accordance with subsection (2); or

(d) in complying with the requirements for members to disclose interests.

(2) A member may disclose, make use of, or act on the information if—

(a) the member is first authorised to do so by the board or, in the case of a corporation sole, by the responsible Minister; and

(b) the disclosure, use, or act in question will not, or will be unlikely to, prejudice the entity.

[164] Section 21(1) of the PHD Act states that a DHB is a Crown entity. Section 21(2) states that the Crown Entities Act applies to each DHB, except to the extent that the PHD Act expressly provides otherwise. The PHD Act does expressly provide otherwise in respect of the disclosure of interest provision in cl 36 of Schedule 3. This is why s 21(3) lists the conflict of interest sections in ss 62-72 of the Crown Entities Act as provisions of the Crown Entities Act that do not apply to DHBs. However, s 57 of the Crown Entities Act is not listed in s 21(3) of the Crown Entities Act as a provision that does not apply to DHBs. The duty not to disclose information in the Crown Entities Act pertaining to a Crown entity must therefore be intended to apply in respect of DHBs.

[165] Section 57(1) sets out the circumstances in which information can be disclosed or used or acted upon. Unsurprisingly, the circumstances in which information can be legitimately disclosed or used or acted upon, are circumstances where the information is used is in the performance of the entities' functions, or as required by or permitted by law. DHB members are allowed to make use of or act on the information for other purposes if they have first obtained express authorisation from the DHB, and second, the use of or disclosure of the information will not prejudice the entity. Thus, it will be a breach of s 57 of the Crown Entities Act for a DHB member to use DHB information other than for permitted purposes unless, first, the member has obtained the

DHBs' authorisation and, second, no prejudice will be suffered by the entity. Under the section, DHB authorisation of the disclosure alone will not be sufficient. [166] The terms "information" and "prejudice" are not defined in the Crown Entities Act. Information will have its ordinary meaning of "something told; knowledge": *New Zealand Oxford Dictionary*, (2005). "Prejudice", in the context, has the meaning of damaging or impairing the DHB's function. Prejudice to the entity would include prejudice to the integrity of the entity's decision-making process. If the entity is making poor decisions because of a breach of the duty on a Board member not to disclose information, it can be said to have been prejudiced.

[167] Section 57 does no more than state in legislative form what must in any event be what is properly and fairly required in terms of DHB procedure. It would be procedurally improper for a DHB to allow its private information to be used for other than DHB purposes, in such a way as to prejudice the functioning of the DHB. A competitive proposal situation is only one example of a situation in which misuse of DHB information could be damaging.

[168] Generally, there can be no way to fix a misuse of confidential information, as the party using that information will have secured an advantage over other parties who do not have it. The user's improper advantage relative to others in the decisionmaking process will jeopardise the chances of the decision-maker reaching the best decision. The integrity of the decision-making process can be damaged regardless of whether or not other DHB members knew about the use of the DHB information. The public will suffer if procedures are not set in place in an attempt to ensure that the best outcome is reached.

[169] None of the usual administrative law categorisations easily apply to misuse of confidential information. The rationale behind the rule against bias, namely the need to maintain public confidence in public bodies, is relevant. However, bias relates to the decision-maker. Were this situation one of bias, the danger would be that the ARDHBs and evaluation panel members might unfairly lean one way or another because of particular sympathies. This case is different. Here the process was open to manipulation by one of the proposers because of that proposer's unique and privileged knowledge arising from connections with the decision-maker. If there is a principle here, it is that a DHB should not allow insiders to an administrative process to use significant information gained as a consequence of their position, for their personal advantage.

[170] There does not appear to be any case law that directly grapples with the use of information issues that arise in this case. I have, however, been assisted by the decision of *LGS Group Inc v Canada (Attorney-General)* (T.D.) [1995] 3 FC 474. That was an application for judicial review of a decision of a Minister to rescind a contract between the Minister and the applicant. The contract in question was the result of an RFP process where the successful applicant had been assisted by an independent contractor who had been extensively involved in preparing the RFP document. A clause in the contract prohibited a former public office-holder from deriving any direct benefit from the contract. It was concluded that it would have been impossible for the consultant to have divorced himself from his knowledge of the philosophy and methodology behind the RFP.

[171] That case was different from the present situation, in that the subject of the review application was the Minister's decision to rescind the contract because of a breach of the clause not to derive benefit, and not the wrongful use of information. However, the Court referred at [41] to the insider's ability to advise the proposer on the "expectations and mindset" of those who would review the proposal. The Court emphasised the object of enhancing public confidence in the integrity of public office holders, and the "principle" of ensuring that "former public office holders do not take improper advantage of their previous office": [48].
[172] The assumption by that Court that information as to the "expectations and mindset" of the decision-makers had been used wrongfully, gives rise to the question of whether the wrongful use of such information can be assumed in certain situations, without specific proof being required. Mr Illingworth suggested in oral submissions that a person in Dr Bierre's situation could have an "onus of persuasion" to show that no wrongful advantage had been obtained.
[173] As a matter of common sense, questions must be asked when a person who has been on a decision-making body involved in the lead-up to a request for proposals or tenders, then participates in a proposal to that same body. It can be expected that the proposer will have knowledge of the decision-maker's expectations and mindset beyond that of any other proposer in the absence of an explanation to the contrary. I will return to this issue after examining the evidence.
[174] Mr Illingworth rightly accepted that a DHB should act even-handedly and consistently in relation to valuable confidential inside information. However, he submitted that there would always be information inequities in a commercial competitive tender situation. He pointed out that, as the incumbent, DML had a great deal of information that no other competitor could acquire. Further, he contended that the information available to Dr Bierre was information that would have been available in any event to all parties by the end of the RFP process. In essence he argued that as the information was later available to all interested parties, there was no advantage and no prejudice to the ARDHBs' process.
[175] Thus it is necessary to determine whether Dr Bierre used information that would not have been otherwise available to him or others to the particular advantage of the Consortium proposal. Once the facts of Dr Bierre's knowledge are determined, the issue becomes what the Board should have done.
[176] I have set out earlier in this judgment the history of Dr Bierre's involvement in the ARDHBs' matters between December 2005 and December 2006. I will now proceed to consider certain specific categories of information that he acquired, and examine whether they were used and to what advantage, if any.
What information, if any, was acquired by Dr Bierre as an ADHB member?
[177] Dr Bierre was intimately involved in the development of the ARDHBs' thinking on community laboratory matters for the 12 months between his first ADHB meeting in December 2004 and his stand-down in December 2005. He was the only specialist pathologist on the ADHB. As a former clinical director of cytopathology and chairman of DML's board of management, he was an expert in community laboratory services in Auckland. This expertise had developed further after he left DML. He lectured at Auckland University, carried out research

into the laboratory situation in New Zealand, and for his MBA did consultancy work.

[178] His knowledge about how pathology services worked in Auckland did not come from his role as an ADHB member. Indeed, he undoubtedly contributed to the knowledge of laboratory services of the other ADHB members and employees. I also see no evidence that he developed any sort of emotional hold over any particular ADHB member or employee, although he appeared to have their confidence and his views on pathology matters were treated with great respect. His views were not, however, always followed. He lost a vigorous debate with Dr Gollop, for instance, about the termination of SCL.

[179] What Dr Bierre did do, however, was become privy to the thinking of the ARDHBs' leading members, employees and consultants who were involved in the review of laboratory services and the ensuing RFP process. He was aware of their attitude to DML and its processes. A knowledge of how persons in a decisionmaking position think can be commercially useful information. It is relevant that cases such as *Black v Taylor* [1993] 3 NZLR 403 (CA) at 406 recognised that a valuable knowledge about a party's thinking and attitudes can be gleaned from a professional relationship (while it is recognised that the standards required of solicitors in a conflict of interest situation are entirely different and much more stringent than apply here). The advantages of knowing a person's characteristics, in that case a client's weakness, fears and reactions, were recognised as being "information", which could indeed be used against the original client. While there were certain specific pieces of information that I have referred to that were used by Dr Bierre, he also had the more general sort of information referred to in *Black v Taylor*, similar to the knowledge of the "expectations and mindset" referred to in the *LGS Group Inc v Canada (Attorney-General)* case. During his time on the ADHB he would have gained an intimate knowledge of what the decision-makers were thinking and how they would react to certain proposals. I turn now to the details of that knowledge.

[180] Dr Bierre became aware of the ARDHBs' desire for an open-book exchange of accounting information from the successful bidder. This was a concept probably favoured by the ARDHBs before Dr Bierre became a member. However, the ARDHBs' view was developed by Dr Bierre's frequent statements of the need for "open-book accounting". For instance, the motion he moved at the audit meeting on 4 May 2005 that there be such "open-book" accounting reflected a similar wording in LabTests' bid in respect of histopathology and cytopathology services earlier that year. Given Dr Bierre's position as the only expert pathologist on the Board, the fact that he was advocating the idea would have made it assume an even greater significance in the ARDHBs' thinking.

[181] DML was aware of the ARDHBs' desire for an open exchange of accounting information. DML made a policy decision not to comply. Dr Bierre's knowledge that the ARDHBs sought open-book accounting in itself did not necessarily amount to a great information advantage. However, DML did not appear to realise just how uncomfortable the ARDHBs were with its refusal to co-operate on transparency. Dr Bierre was aware of the discomfort. He had helped to create it.

[182] In addition to emphasising the need for “open-book” accounting, when discussing matters with the ADHB and its employees and consultants, Dr Bierre painted a picture of DML as taking exorbitant profits and refusing to co-operate with the ARDHB attempts to change the status quo. Dr Bierre suggested that this was why DML would not disclose their costs. In his email of 18 May 2005 to Mr Smith of the ADHB, Dr Bierre referred to DML’s “culture, past behaviour and critical requirement to continue to return super profits” and said that if they were given a monopoly “they will be holding all the cards”. He repeated his references to DML’s monopoly position, and on 31 May 2005 emailed all ADHB members advising again that organisations were making “super profits”. Mr Keenan in his memorandum that followed on 13 July 2005 used Dr Bierre’s phrase “super profits” twice. Given that Dr Bierre was a former senior executive of DML, his disparaging statements about DML’s profits were undoubtedly given considerable weight.

[183] By the time of the RFP Dr Bierre was aware that the ARDHB perceived DML to be making excessive profits. He had helped to create this perception. While DML was undoubtedly aware that the ARDHBs wanted it to fully disclose its profit margins, it was not aware of the extent of the dissatisfaction of some of the ARDHBs’ members and staff consultants with DML. The notes of DML discussions through the lead up to the RFP show an awareness of the ARDHBs’ desire for “open-book” accounting but show no recognition of the level of the ARDHBs’ concern. Dr Bierre, on the other hand, was well aware of how DML was regarded by the ARDHBs and by members of the evaluation panel.

[184] While on the ADHB, Dr Bierre also obtained information about the thinking of ADHB members and staff as to the level of savings that they wished to achieve.

[185] The public documents that had been issued, such as the Pilstrom Report, disclosed a wish for only relatively modest savings. For instance, the Pilstrom Report referred to potential savings in the order of $2 to $3 million per annum.

[186] Mr Keenan’s confidential memorandum circulated to Dr Bierre, on the other hand, referred to minimum savings on the current spend in the first year of $20 million. Dr Bierre himself had informed ADHB members of considerable savings being enjoyed by South Island DHBs. Such savings could only be achieved by a radical reduction in overheads of the sort ultimately reflected in the Lab Tests’ bid, which greatly reduced the number of community laboratories and pathologists and phlebotomists employed.

[187] Dr Bierre and the Consortium knew that a saving in the region of $20 million was the sort of saving that influential ADHB personnel involved in the RFP process were looking for. The proposal that Lab Tests ultimately put in offered savings of over $16 million per annum.

[188] Its appeal to the thinking of the evaluation panel members is reflected in the fact that in their initial consideration of the proposal on 18 May 2006, six of the seven members gave Dr Bierre’s bid ten out of ten on value for money, and the other nine out of ten. In contrast, three members of the evaluation panel initially marked the DML proposal on a value for money basis at zero, one other at three out of ten and three others at five out of ten. The zero rating of value for money

given by three evaluation panel members to the DML bid and its comparison to the near perfect rating for the Consortium bid seems unjustified. A good service was being offered by DML with a low profit return to the provider. DML's profit margin at that point was below 6%. While the perception that the DML price was too high would reduce a value for money score, it is very hard to understand how a zero score could have been considered appropriate by members of the evaluation panel. I attribute this to the fact that the DML bid was completely out of tune with the thinking of the evaluation panel members, and, as Dr Bierre planned, the Consortium bid in contrast was precisely attuned.

[189] Dr Bierre also understood that some of the ARDHBs' members and employees like Mr Keenan were looking for a complete change in the way in which the laboratory services were set up in Auckland, if it were necessary to reduce costs. This is developed in the next section.

How it was used to the advantage of the Lab Tests proposal?

[190] Dr Bierre's understanding of the thinking of the ARDHBs and evaluation panel members can be seen in his strategy paper of 21 March 2006, which he prepared for the Consortium. He stated:

[The Consortium] will win this RFP if we are able to: …

- change the business model or paradigm sufficiently so the incumbent finds it difficult to adapt and is seen to be trying to maintain the status quo.

[191] While the Consortium through Dr Bierre knew that this would create a winning proposal round, DML did not. When DML prepared its proposal it was not thinking in terms of changing the business model or paradigm. Its offer rather offered adaptations to the status quo.

[192] In his paper of 21 March 2006 Dr Bierre noted that the proposal to be put forward would reduce the collection centres to between 40 and 42. He proposed that approximately 50% of collection would be through the collection room network and 50% at the time of GP consultation. He was able to propose such radical changes knowing they would appeal to the evaluation panel and the ARDHBs members.

[193] The Consortium proposal stated in no fewer than four different places that a move to collection by general practitioners was a core aspect of the bid. A typical phrase was "[The Consortium] believes collection is a core primary health organisation (PHO) activity". It was stated in the proposal that the key driver was to change the "current service paradigm". Phrases that Dr Bierre had used in his earlier communications to Consortium members were used in the final proposal that he drafted, as were others that he had used in his time on the ADHB. For instance the phrase "decreases the information asymmetry" recalls his use of the term "information asymmetry" in his confidential paper to members of the ADHB on 23 May 2005. He had referred in that paper to the need to address the "underlying structural issues", which was a theme of the Consortium bid.

[194] The views of Dr Bierre, expressed in his strategy paper of 21 March 2006 and which featured in the Consortium proposal, pick up on themes expressed by Mr Keenan in his paper of 14 July 2005. Mr Keenan's views as to radical savings and his negative views on DML had been particularly noted and approved by

Dr Bierre.
[195] Dr Bierre knew that a proposal for a radical change, drawing on these particular themes, was in tune with the thinking of critical persons involved in the Board processes. He knew what the vice chairman of the ARDHBs thought was a "good outcome". Mr Keenan's views were widely circulated. His paper of 13 July 2005 had been presented the next day at the regional meeting of the DHBs.
[196] Dr Bierre's unique awareness of what the ARDHBs wanted is reflected in the emphasis in his proposal for PHO collections and also referred to by Mr Keenan in his reference to "GPs/Primary Sector relationships". The task of collection would be placed more on general practitioners, alleviating the need for separate collection rooms. The Consortium proposal mentions in no fewer than four places that collection is a "core PHO/GP activity." While there is no evidence that this was an idea developed by Dr Bierre over the preceding year, Dr Bierre knew it would be well received (as it was), because of his understanding of the way that the ARDHBs and evaluation panel members thought.
[197] An indication of the extent of this advantage can be seen in the assessment made of Dr Bierre's position by Healthscope when it considered what percentage Dr Bierre should have of the Consortium in May 2006. In the paper addressing the proposal for the Healthscope board of May 2006, a justification was put forward for giving Dr Bierre a substantial shareholding in the new company that would hold the contract. It was stated:
The key attributes Dr Bierre brings to [The Consortium] are:
- expertise and knowledge of pathology service provisions in the Auckland region;
- a sound network of supporters within the healthcare/DHB system;
- a position on the Auckland DHB providing *excellent lines of communication by information*; and
- being *a major influence in the restructuring model* for pathology services provision.

[emphasis added]
[198] The first two bullet points are unexceptional. However, the next two indicate the extent of the advantage that Dr Bierre gave to the Consortium bid. His position on the ADHB was seen to provide excellent "lines of information." It was stated that he had been a "major influence" in the restructuring of the model. These statements show that those in Gribbles and Heathscope who had worked with Dr Bierre on the proposal had seen him as having used information he obtained as an ADHB member for the advantage of the Consortium proposal. He was seen as having influenced the restructuring model for pathology services. This matter would not have been worthy of comment if the information had been generally available. The value of having influenced the restructuring model was that it enabled the Consortium proposal to exactly respond to the ARDHBs' wishes.
[199] Mr Ross submitted that the unique advantage that Dr Bierre's knowledge of this information gave is confirmed by the value placed on his involvement by Healthscope Limited. He had 15% of the Consortium shares at the time of the

proposal. He has not had to contribute any working capital, and it seems that the Consortium has now spent in excess of $17 million in setting up the new service. The only financial contribution that Dr Bierre made was to acquire shares in the new Lab Tests company for the payment of $83,000.

[200] If the initial expectation of Healthscope and Dr Bierre that the contract will return 12.6% earnings before tax is realised, Dr Bierre will earn close to $1 million per year for his $83,000 investment. While this does not take into account the repayment of advances by Healthscope, those repayments will add to the value of Dr Bierre's equity. In addition, Dr Bierre will receive a salary as the chief executive officer of Lab Tests.

[201] Dr Bierre's position can be contrasted to that of Ms Mathias. Dr Bierre is the CEO of Lab Tests, and she is the manager in charge of establishing collection centres in the transportation network. She is a very experienced Auckland professional in the health area, who has held very senior positions. However, she is not a former ADHB member, nor a prime organiser of the RFP. The shareholding that her family company was allocated was 5%.

[202] It is not possible to draw too much from Dr Bierre's employment package. He is undoubtedly a skilled pathologist and would have had value to Lab Tests without his ADHB experience. However, I infer from the wording of the Healthscope paper to which I have referred that the shareholding given to Dr Bierre was perceived by Healthscope to be in part a recognition of the advantage he brought to the Consortium proposal arising from his former role as an ADHB member.

[203] That advantage was his knowledge of what the ARDHBs wanted, and what would make a winning bid. That was information that he should not have used. The Consortium's use of that information debased the proposal process and made it unsound on an objective basis. It prejudiced the ARDHBs' function to make good decisions about providing good health services for Aucklanders.

[204] It was submitted for the ARDHBs that there was not a level playing field in any event, because of DML's advantages as the incumbent, which included a detailed knowledge of costs, and the practicalities of running community laboratories in Auckland. Those undoubtedly were advantages for DML, but they were unavoidable and were known and understood by the ARDHBs and evaluation panel members. The advantage to Lab Tests, on the other hand, was distinctly avoidable, and if the disclosure process had been properly followed at the outset by Dr Bierre, and he had fully disclosed his interest as a proposer and stood down from all considerations from the beginning, it would have been avoided.

[205] DML wanted to keep its contract and adopted a commercial approach to attempt to do so. I have no doubt that if it knew that savings in the order of $20 million per annum were what the ARDHBs wanted, while perhaps preferring the level of service offered by status quo, it would have tailored its bid to meet that expectation. Indeed, DML's willingness to meet the ARDHBs' standards can be seen throughout negotiations during the bid process. DML was aware that the ARDHBs were not happy with the cost of the DML bid, but was struggling to find out what exactly it was that the ARDHBs wanted. Their file notes show them

seeking assurances that the status quo of services was to continue. They were not informed as to the level of savings desired. Lab Tests, on the other hand, did know what level of savings was desired because of Dr Bierre's intimate involvement in the ARDHBs' processes.

[206] The confidential information that Dr Bierre had was not of the traditional type of trade secrets or hard facts. But he knew, after a year's intimate experience with key decision-makers on the ARDHBs, what they wanted. This gave the Consortium proposal a huge advantage. I have already noted how in terms of value for money, the Lab Tests proposal completely carried the day, and was completely in tune with the thinking of members of the evaluation panel.

What the ARDHBs should have done

[207] The ARDHBs, on becoming aware that Dr Bierre might be involved in a proposal in December 2005, should have refused to entertain any bid involving him, given his involvement in deciding on the ARDHBs' strategy and matters preliminary to the RFP. Any such proposal would be tainted by Dr Bierre's knowledge as an insider. The ARDHBs should have made this position clear to Dr Bierre in December 2005, when it became a possibility that he would enter a proposal. Further, as it became clearer through February and March of 2005 that he was leading the Consortium proposal, the ARDHBs should have made it clear that such a proposal involving him would not be accepted. Then, when a proposal was filed by the Consortium showing Dr Bierre with a 15% interest, this should have been rejected pursuant to cl 43 of the RFP, or the whole RFP process suspended or cancelled.

[208] The ARDHBs' failure to take any of these steps was a serious error. A process which permits a particular party to use confidential information about the particular wishes of a decision-maker to its advantage is much less likely to achieve the best result for the public than a proposal process that is procedurally fair.

Was the stand-down by Dr Bierre sufficient?

[209] Mr Illingworth for the ARDHBs argued that Dr Bierre's withdrawal from the decision-making process in December was a vitally important aspect of the case. He relied on the withdrawal of a conflicted judge after the decision of *Re Pinochet* [2000] 1 AC 147 to demonstrate how withdrawal from participation in a decisionmaking process can be sufficient to remove any suggestion of bias. The second House of Lords decision, made without the judge, was sufficient even though the judge remained a member of the House.

[210] However, I do not think that the analogy between the *Pinochet* case and the present situation is apt. A decision-maker in a judicial or quasi-judicial situation who may have a conflict of interest can stand down, and his or her colleagues can proceed with a fair hearing providing there is no apparent bias. This is not a case about bias of the decision-makers. The difference here is that the stood-down member, Dr Bierre, did not drop out of the process. He was fully involved in the ongoing process of determination, not as a decider but as a proposer. Rather than cease to have anything to do with the ongoing process, he was at the heart of it. Dr Bierre should have stepped out of the process altogether. Standing down in December was not enough.

Did Dr Bierre's information advantage disappear?

[211] It is argued for the ARDHBs and Dr Bierre that the advantage enjoyed by Dr Bierre evaporated in the course of the exchanges during the proposal process.

[212] The minutes of DML's October 2005 think-tank meetings show that DML appreciated that the ARDHBs wanted a "killer" deal in terms of value for money and wished to gain work for the hospital laboratories. The minutes show a clear decision by DML to avoid an "open-book" or margin based on "return from assets" approach to the RFP. It was noted that DML had various options in relation to the RFP proposals, including offering reduced levels of service, a feature of which could include the reduction of collection rooms. DML's knowledge will be referred to in more detail later in this judgment in relation to the consultation submissions.

[213] However, the minutes and the DML affidavits reveal that DML did not appreciate, as Dr Bierre did, that DML was perceived by persons on the ARDHBs and related entities as a monopolist making super profits and committed to opposing significant change. While the DML minutes show DML knew the ARDHBs were seeking a "killer" deal, there was no appreciation of quite the level of savings being sought.. A reduced service was just one of quite a number of options DML noted and did not pursue. As I have stated, I have no doubt that if DML had appreciated the level of savings desired by the ARDHBs' members, that at least an alternative bid would have been on a greatly reduced basis similar to that proposed by Lab Tests.

[214] I do not consider that the RFP expressly stated a desire for such savings. If it had, DML would have responded, as it did later in attempts to meet the ARDHBs' expectations. The RFP itself did not indicate that profound changes to the structure of the service were expected in order to save costs. It referred on a number of occasions to the requirement of a "high quality" pathology service. There was reference to "maintaining or improving service quality", to a "comprehensive, quality pathology service", to a "quality, cost-effective and sustainable pathology service" and at cl 3.1(k) to "the provision of pathology services as currently provided (seven days per week)". Indeed, at cl 1.1 it was stated that "the service specification is to, at least, maintain the current mix and type of community pathology services provided".

[215] On 19 December 2005 Dr Arthur Morris, chief executive of DML, had written to Dr Gollop commenting on the general and open nature of the draft RFP and asking a number of very detailed questions. He suggested on quite a number of occasions that the RFP should be changed to specify that particular aspects of the service be "as currently provided".

[216] In a meeting that took place on 10 January 2006 attended by Dr Morris, Mr Coe and Dr Gollop, various points raised in the letter were discussed. Dr Morris took notes in the letter. He noted:

General theme _status quo + mod =

His other notes are also consistent with expecting no significant changes to the status quo. He said in his affidavit that Dr Gollop confirmed to him that the general theme of the RFP was that the status quo would apply to the level of

service to be purchased. He was not cross-examined on this point. While Dr Gollop and Mr Coe demurred somewhat on the reference to the "status quo", I am satisfied given Dr Morris's testimony, the file note and the contents of the RFP, that DML reasonably did not envisage that major changes to structure of the existing service would be acceptable. This is why Dr Bierre's Consortium had such an advantage, understanding as Dr Bierre did the acceptance of the ARDHBs of the possibility of fundamental change.

[217] Following the submission of the proposals on 10 April 2006, the proposals were considered by members of the evaluation panel and discussed at a meeting on 19 April 2006. There was clear disappointment with the DML bid, which was described as "business as usual" and noted for its "lack of imagination," just as Dr Bierre would have anticipated.

[218] Dr Morris and Mr Frank Tuck of DML met with Dr Gollop and others of the evaluation panel on three occasions, the first of which was on 21 April 2006. Dr Gollop expressed his disappointment at the price offered. It was made clear that significant change in the DML offer was required if it was to be entertained. There was some discussion about substantially reducing collection centres to 50 rooms.

[219] There was a further meeting on 26 April 2006 where Dr Gollop made it clear to the DML representatives that they had underestimated the ARDHBs' appetite for change. It was made clear that the overriding issue was the DML price.

[220] This led to a letter from DML on 28 April 2006 where it made a proposal based on a collection network of 50 rooms with longer opening hours. A schedule was attached setting out proposed closures for some of the existing laboratory rooms. The revised price was $24 million less than the first offer over five years – a reduction of just under $5 million per annum. The amended proposal did not involve any reduction in the number of pathologists or phlebotomists. There was also, for the first time in the DML proposals, a reference to more involvement of the PHOs in laboratory testing, again in response to some indications in the April meetings that this was a matter in which the ARDHBs were interested. The letter concluded:

We believe this proposal addresses the issues we were asked to address. If, however, you have ideas that would lead to further costs savings please discuss them with us. We will return to you any realised savings from such recommendations.

[221] There was a further meeting following that letter between DML representatives and evaluation panel representatives on 4 May 2006. Dr Gollop advised that the new price was still not good enough and that there was a perception that the price was too high. At this point the return that DML expected after tax on its proposal was only 5.1%, so it can be readily understood that DML found it difficult to understand or respond to the attack on its price. The minutes record questions from Dr Morris as to whether there were other areas in which they could cut costs. Dr Morris in his affidavit states that he asked to be told of any other differences in the level of service that were contemplated. The response from the evaluation panel appears to have been along the lines that

DML was the incumbent, and would have to decide on the sort of proposal to make.

[222] Dr Gollop in his affidavit states that DML continued to resist proposals for change in the round of discussions following the lodging of the proposals. However, this is not entirely surprising. DML had lodged its proposal on the basis that it did not anticipate substantial change to the status quo. It was disadvantaged relative to Lab Tests from that point on as it tried to understand exactly what the ARDHBs wanted. It had already committed itself to a position with its April 10 proposal. Naturally, as the incumbent it would have intuitively resisted suggestions that the status quo change. In fact, DML did respond to the request for change after lodging its initial proposal, and its further proposals involved the reduction of collection rooms and a very substantial reduction of its net profitability, at least in the short term.

[223] I do not consider that these communications can be seen as ameliorating the unfair procedural advantage enjoyed by Dr Bierre's Consortium. The evaluation panel members did not give any detail of the Lab Tests proposal, presumably because of confidentiality obligations. They undoubtedly thought that the signals that they were giving to DML were frank and fair, but they did not negate the advantage that Dr Bierre's Consortium had had from the beginning. From the moment that the proposals were lodged on 10 April, DML was disadvantaged. Its proposal was based on the existing business model, Dr Bierre's avowedly was not. DML had lodged a bid very much out of sympathy with the thinking of the evaluation panel members, whereas the Consortium proposal had hit the exact notes of Board concern. The extent to which DML had failed to catch up from this is reflected in its zero and low ratings for value for money on 18 May 2006, even after lodging its amended proposals with profit margins below 4%.

[224] In summary, DML lodged its proposal on 10 April 2006 on the basis that it knew it had to cut costs, but that that there could not be radical reductions because the ARDHBs were not contemplating radical changes to the structure of the existing service. Dr Bierre's Consortium, on the other hand, lodged its application knowing that there was a perception that DML was making super profits and that radical costs savings, in Mr Keenan's view of $20 million a year, were required. Dr Bierre's Consortium also anticipated that calling for increased general practitioner collections would strike a chord with the ARDHBs. From 10 April 2006 when the bids were lodged, DML was out of sympathy with the evaluation panel and ARDHBs' thinking, while the Consortium proposal exactly met the evaluation panel and ARDHBs' thinking, save for initial concerns as to the Consortium's viability. The procedural error in allowing Dr Bierre to participate in the bid despite his conflict of interest and knowledge was not purged by the round of discussions that followed the lodging of the initial proposals.

Conclusion as to the use of information by Dr Bierre

[225] In terms of s 57 of the Crown Entities Act, Dr Bierre was making use of information that he had acquired in his capacity as an ADHB member that would not have otherwise been available to him. He knew, but DML did not, that the ARDHBs considered that DML was making super profits, and that it wanted a

radical new structure plan from which it could extract savings of up to $20 million per annum. He knew they would be receptive to the idea of placing more collections with general practitioners. In terms of s 57(2) he did not use the information in the performance of the ARDHBs' functions, or as required or permitted by law. He used it for his own personal advantage in the Consortium proposal. He did not obtain authorisation to use it from the ADHB. In any event, its use prejudiced the ARDHBs, and could not have been authorised. Its use damaged the integrity of the ARDHBs' processes by giving one party an unfair advantage over another, and thereby jeopardised the chances of reaching the best decision.

[226] This meant that Dr Bierre was in breach of s 57. Further, the ARDHBs' knowledge of his conflict and their consequent inaction made the process procedurally unfair. The Consortium proposal had a significant advantage over the DML proposal. The public were not getting the benefit of a fair RFP process.

[227] Dr Bierre should have appreciated that as an ADHB member involved in the processes leading up to the RFP he could not participate in the bid. It could not be fair for him to do so. The ARDHBs, for their part, should have appreciated that Dr Bierre's involvement in a proposal was unacceptable. The evaluation panel and ARDHBs' knowledge of Dr Bierre's conflict of interest from December 2005 could not purge his information advantage. What was required was that Dr Bierre abstain from participation in any way in the Lab Tests' bid. It was not procedurally fair to allow one party to obtain an improper advantage over another.

[228] I consider that it was impossible for Dr Bierre to divorce himself from his knowledge of the ARDHBs' philosophy and wishes. Even if there were not specific pieces of information that could be isolated and referred to, it can be inferred that the Consortium gleaned a significant and improper advantage from the involvement of Dr Bierre. It is important from the point of view of public confidence in the integrity of public office holders that they are not perceived to have taken advantage of their previous office.

[229] I am satisfied to the civil standard that Dr Bierre had actual knowledge of the ARDHBs' information, which gave the Consortium proposal a significant advantage. Although I have mentioned an onus of persuasion, I do not have to turn to such a concept. I conclude that Dr Bierre's use of that information which he had acquired as an ADHB member in the Consortium proposal, and the ARDHBs' acceptance of that Consortium proposal in the circumstances, constituted a clear procedural impropriety.

General conclusion on Dr Bierre's involvement

[230] Dr Bierre should have declared the conflict of interest arising out of his ADHB membership and his desire to bid for ADHB funding for his own laboratory at the outset of his ADHB membership and certainly from the end of December 2004 when his plans to open his own laboratory had firmed. The necessity to disclose became even stronger when he actually applied for ADHB funding in March 2005, and stronger again in November 2005 when he had discussions with Gribbles about the Auckland pathology situation.

[231] The issue is not so much what Dr Bierre should have done, but how the

ARDHBs should have reacted. The immediate reaction of quite a number of persons when first presented with Dr Bierre's situation was correct: he was in a conflict of interest position that needed to be addressed. Unfortunately nothing of substance was done when those views were expressed. Mr Brown's comment in his letter of 8 July confirmed the "central" role of Dr Bierre in relation to laboratory matters and accurately expressed the view that his failure to expressly declare his conflict of interest might have "compromised" the ARDHBs' process.

[232] The compromise that his conflict of interest constituted could have been contained by the ARDHBs providing Dr Bierre had abandoned any interest in bidding for the ARDHBs' funding himself. It is clear from his affidavit that he never did so. Mr Brown did not check whether Dr Bierre had abandoned his plans when he had the exchange with him in July 2005, or act on his perception that the conflict of interest would prejudice the ARDHBs' process. Dr Bierre remained on the ADHB, and then lodged the Consortium proposal.

[233] In summary, the ARDHBs' procedural errors in relation to Dr Bierre were:

a) The ADHB failing to act in July 2005, when it became fully aware of his conflict of interest, to ensure that he would not be a proposer, or to prevent his further participation in laboratory matters.

b) The ARDHBs failing to advise in December 2005, when they became aware of Dr Bierre's possible involvement in the Consortium proposal, that such a proposal would be unacceptable because of his position as an ADHB member.

c) The ARDHBs failing to make it clear from January through to April 2006 as Dr Bierre's involvement became more likely, that a proposal from the Consortium involving him would be unacceptable.

d) The ARDHBs failing to refuse to receive the Consortium proposal in April 2006 when it became clear that Dr Bierre was involved as a shareholder.

Together these errors constituted a serious procedural error. They were a breach of the rules of natural justice and specific breaches of cl 36 of Schedule 3 of the PHD Act and s 57 of the Crown Entities Act. I will consider the consequences of these errors in the last section of this judgment.