

## LITIGATION

## AUCKLAND LABS CASE APPEAL - A RETURN TO PUBLIC LAW RIGOUR

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The Court of Appeal decision, released late yesterday, overturns comprehensively the High Court decision in the Auckland Labs case. In allowing the appeal, the Court of Appeal has overturned the High Court's decision on both the facts and the law.

As noted in our updates following the High Court decision, a successful appeal was not surprising given that the High Court ruling last year made strong and unqualified statements about the law. (*Bell Gully Updates, March 2007*). The Court of Appeal decision represents a return to a conventional and rigorous approach to judicial review.

In this update, we look at the case to date and in particular the Court of Appeal decision.

### Recap on the facts

Diagnostic Medlab Limited (DML) had been the incumbent, near monopoly, supplier of laboratory services in Auckland. Between December 2005 and June 2006 the three Auckland District Health Boards (DHBs) conducted a Request For Proposal (RFP) process to choose a sole supplier for community laboratory services from 1 July 2007. The contract was awarded to Lab Tests Auckland Limited (Lab Tests). DML challenged this decision on a number of grounds.

The case was considered by Justice Asher in the High Court at Auckland and his decision was released in March 2007. The decision dealt with two main issues. Firstly, whether there was procedural unfairness in the decision-making process as a result of:

- a conflict of interest by Dr Tony Bierre, who had been an Auckland District Health Board (ADHB) member at relevant times up until December 2005; and
- Dr Bierre using confidential information obtained from his ADHB role in Lab Tests' response to the RFP.

Secondly, whether the DHBs were obliged to, or adequately, consulted Primary Health Organisations (PHOs) and GPs.

### The High Court decision

In the High Court, Justice Asher only briefly considered the question of whether a commercial procurement process conducted by a public entity should be subject to judicial review. He considered that entering into service agreements under section 25 of the New Zealand Public Health and Disability Act 2000 (NZPHD Act) constituted the exercise of a statutory power and was therefore open to judicial review. This was a shift away from previous court decisions where tendering

processes undertaken by public bodies were seen not to be amenable to judicial review given their highly commercial nature.

Justice Asher justified his departure from traditional reasoning on the basis that the NZPHD Act, which replaced the Health and Disability Services Act 1993 (HDS Act) “swept away” the HDS Act which “expressly brought a commercial edge to public health”. Rather, the focus of the NZPHD Act was “the improvement of the health of the New Zealand public” and “the commercial context...has gone”. However, it is difficult to conceive of a more commercial decision than the selection of a successful tenderer following a competitive tendering process as was the case here, particularly given the size of the contract in this case.

## **Court of Appeal decision**

### **Justiciability**

The first issue that the Court of Appeal addressed was whether a court should be prepared to consider intervening in a commercial contract. The Court did not expressly uphold the appeal on these grounds but it was quite clear that it considered that there were serious doubts as to whether the High Court should have considered the judicial review in the first place. The Court of Appeal said that contracting decisions made in a commercial context may only be judicially reviewed in very limited circumstances. Concerns about decision-making processes were better dealt with through non-judicial accountability mechanisms rather than judicial review. For example, the NZPHD Act itself provided for a Crown monitor to be appointed and for the Minister to remove one or more members of the DHB board if the Minister was “seriously dissatisfied” with the performance of a Board member. Judicial review was available in relation to

commercial contracts where there was fraud, corruption or bad faith. Further, the Court was prepared to consider extending this in analogous situations. However, the facts here did not amount to such a situation and the High Court Judge did not give proper weight to the commercial context within which the DHBs were operating.

### **Conflict of interest**

The Court of Appeal carefully analysed the facts in relation to the alleged conflict of interest on the part of Dr Bierre. Initially, Dr Bierre had been interested in a “boutique” proposal rather than a proposal regarding all of the laboratory needs in the region. The ADHB had no interest in this proposal. However, the High Court Judge took the view that, from the time of the boutique proposal, Dr Bierre had a conflict of interest.

The Court of Appeal disagreed. Broadly, it said that once the boutique laboratory proposal did not succeed then the conflict of interest he had in that regard came to an end. A second conflict of interest arose when Dr Bierre downloaded the RFP document in late November/early December 2005; but he took a leave of absence from the ADHB very shortly afterwards. That was a sufficient step to deal with the conflict of interest.

In short, the Court of Appeal considered that the High Court Judge had taken far too broad a view of the potential conflict of interest which Dr Bierre faced. A more thorough analysis showed that there were two distinct conflicts. The first had come to an end and the second was dealt with appropriately.

### **Confidential information**

The Court of Appeal then turned to the second main ground dealt with in the High



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Court - the alleged use of “inside” or “confidential” information. The Court began by analysing the NZPHD Act. It said that Parliament wished to encourage practising health professionals to make their expertise available to DHBs. Indeed, it would be impossible for DHBs to function without that expertise. It was therefore accepted that practising health professionals would have some “soft” information as a result of their role. In effect, this was the flip side of involving them more in DHB management.

The Court then analysed carefully the four key areas of confidential information identified by the High Court Judge as being confidential information which Dr Bierre obtained from his DHB role and which he used in the Lab Tests response to the RFP. The Court variously held that the information was either not confidential (or was “soft” in nature) or was also held by the incumbent supplier, DML, as part of the RFP process. The Court remarked that DML intrinsically held a good deal of information from its position as incumbent supplier. In effect it already had an advantage over Lab Tests as the new bidder and Lab Tests had to propose a much lower price in order to succeed in the tender. Implicitly, this meant that for any confidential information to confer an unfair advantage, it would have to be “hard” information rather than very general “soft” information of the type held by Dr Bierre.

### Consultation

The Court of Appeal said that where it was claimed in judicial review proceedings that consultation obligations had been breached, it was necessary to identify the source and nature of the obligations and the way in which they had been breached. DML, in the High Court, had built up a consultation obligation by reference to a range of documents such as Crown funding

agreements. The Court of Appeal preferred to focus on the statute and the purpose of consultation. Account needed to be taken of the contractual framework in the relevant case which would see further consultation with GPs after the contract was agreed. Fundamentally, however, the DHB was not proposing significant changes to a service such as closure of a hospital (which may require consultation) but rather the same service specifications but at a lesser price. Although GPs may have been concerned about which supplier was ultimately chosen, this did not equate to an obligation to consult.

### Other Court of Appeal comments

The Court of Appeal finished by making a number of comments about the breadth of DML’s claim. It said that the claim overstated the role of the courts in this area. If a broad brush approach was taken so that a court could intervene by way of judicial review to ensure “good hygiene in public decision-making”, this would create an “almost indeterminate scope for intervention by the courts in this context”. A more rigorous approach was needed.

### Public sector implications

This decision will have wide application in the Government sector and, as such, is a “must-read”.

Even if the case is appealed to the Supreme Court, which seems likely, there is a distinct prospect that the decision will be upheld. There is such a depth of analysis in the judgment that lawyers advising Government departments and Crown entities will be able to use the judgment as a benchmark against which to test and compare the facts of their own contested contracting processes, as well as their own governing legislation vis a vis the NZPHD Act.

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The decision will be welcomed by public body decisionmakers and, indeed, commercial parties. It retreats from the advances made on traditional judicial review in the High Court judgment and returns to a need for proper rigour and analysis in dealing with statutory and other obligations of public bodies. It will provide public bodies (and their legal advisers) with more certainty when entering into commercial tenders. It will also provide commercial tenderers with more certainty as their participation in tender processes, whether successful or not, will be much less able to be “appealed” to the High Court.

The judgment represents a return to a conventional and more rigorous approach to judicial review.

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