IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2021-485-746
[2022] NZHC 3547

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER	of an application for judicial review
BETWEEN	NEW ZEALAND INSTITUTE OF INDEPENDENT RADIOLOGISTS INC Applicant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: 30 November and 1 December 2022

Appearances: J A Farmer KC and P Glennie for the Applicant
C J Curran and N J Fenton for the Respondent

Judgment: 20 December 2022

JUDGMENT OF COOKE J

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[1] The applicant for judicial review in this proceeding is an incorporated body representing a group of radiologists, each of whom supply radiology services to the Accident Compensation Corporation (the Corporation). The applicant was incorporated in September 2021 to advance the views of its members on radiologist services. It challenges decisions made by the Corporation to continue to accept radiological services from competing radiologists whom the applicant contends are not appropriately independent. In particular the applicant contends that the Corporation should not allow medical professionals who refer patients to radiologists to be shareholders in the entities which provide the radiologist services. The applicant says that this involves a conflict of interest which is prohibited under the contract that the Corporation has with both the referrers and the providers, and that the Corporation is wrong to continue to accept services from these parties.

[2] In support of the challenge the applicant has filed evidence from Dr Adrian Balasingham, the Chair of the applicant and Director of one of its members, Pacific Radiology Ltd. In addition expert economic evidence is provided by Mr James Mellsop. In responding to the claim the Corporation has filed evidence from Mr Stafford Thompson, the Manager – Clinical Oversight and Engagement at the Corporation, and Dr John Robson the Corporation's Chief Clinical Officer.

Background

[3] The Corporation is required to implement the accident compensation scheme in accordance with the Accident Compensation Act 2001 (the Act). In order to do so it is necessary for the Corporation to contract with health providers for the provision of services. One of the services provided is diagnostic imaging. That includes "low-tech imaging" such as x-rays and ultrasounds, and also "high-tech imaging" including CT scans and MRI scans. The type of scans that are in issue in this proceeding are the high-tech imaging scans.

[4] The Corporation contracts with 40 high-tech imaging providers, 18 of whom are District Health Boards. The remaining 22 are privately owned companies. Those 22 high-tech imaging providers also provide high-tech imaging services for other private health needs, including when a patient has private health insurance.

[5] The contractual arrangements of the Corporation are set out in a standard form agreement (the Agreement). The Agreement comprises the standard terms applicable to all services, and it applies to every provider of health services to the Corporation for the full range of medical services contemplated by the ACC scheme. The Agreement will then have a schedule setting out the standard terms relevant to the particular services being provided. The Agreement is accordingly a contract that is entered by both entities that provide high-tech imaging services (referred to as "Providers") and medical practitioners, often surgeons, who refer their patients for such scans (referred to as "Referrers"). The schedule to the Agreement for high-tech imaging services includes the price that may be charged by Providers which is fixed by the Corporation through the Agreement.

[6] The Agreement at the centre of the arguments in this case came into effect in August 2018. Of particular significance is cl 18 which provides:

> **Avoiding conflicts of interest**
>
> 18.1 You confirm that, as at the start date, you have no conflict of interest in providing the Services or entering into this Contract. You must do your best to avoid situations that may lead to a conflict of interest.
>
> 18.2. If a conflict of interest arises, you must tell us immediately in writing. You and ACC must discuss, agree and record in writing whether the conflict of interest can be managed and, if so, how it will be managed. Each Party must pay its own costs for managing a conflict of interest.
>
> **Refusing financial incentives**
>
> 18.3. If you have a financial interest in an entity that supplies, procures or manufactures products or services, you must obtain ACC's written approval before using those products or services to provide the Services described in the Service Schedules.
>
> 18.4. If you procure products or services to provide the Services, you must not accept or receive (or permit any service providers to accept or receive) any incentive, rebate or reward for the procurement. You may not receive any gift, voucher, cash, trip or travel, merchandise or equipment or any discount, rebate or credit towards such items or an incentive or reward in any other form.
>
> 18.5. You must also not accept or receive (or permit any service providers to accept or receive) any incentive or reward for recommending any products or services.
>
> …

[7] The Agreement defines what a conflict of interest is in cl 1 the following terms:

> **Conflict of interest**
>
> When personal or business interests or obligations conflict with obligations under this Contract. A conflict of interest may apply to either of the Parties or to its service providers. It may be:
>
> (a) actual: where the conflict currently exists
>
> (b) potential: where the conflict is about to happen or could happen
>
> (c) perceived: where other people may reasonably think that a person is compromised.
>
> A conflict of interest means the independence, objectivity or impartiality of a Party or service provider can be questioned.

[8] At the hearing I asked what the position was before August 2018 as this was not addressed in the evidence. Following the hearing it was confirmed that there was a contract in essentially the same terms in place from 2016.

[9] It is common ground that some Providers have arrangements with Referrers which means there is a conflict of interest as defined by the Agreement. Three entities, or groups of entities have been the focus of the applicant's argument, namely:

(a) Beyond Radiology, an entity established in August 2020 that became a contracted provider to the Corporation in August 2021. This entity is owned by individual surgeons, or their family members. It has plans to expand its shareholding to include other similar medical practitioners.

(b) The Radiology Group or "TRG", which owns two subsidiaries — Waitemata MRI Ltd and Northland MRI Ltd. Waitemata MRI Ltd is owned as to 42.5 per cent by a company whose shareholders include a number of Referrers. Similarly Northland MRI Ltd is owned as to 35 per cent by a company owned by Referrers.

(c) New Zealand Radiology Group, trading as Mercy Radiology. This is not owned by any Referrers, but is owned by a company (Healthcare Holdings Ltd) which in turn owns a number of controlling interests in other healthcare businesses, including entities that are Referrers.

[10] It is not suggested that these arrangements fall within cls 18.3–18.5 of the Agreement, but it is agreed that when a Referrer holds an ownership interest in a Provider a conflict of interest as defined by the Agreement arises. That may also be so for other arrangements.

[11] Although the focus of this proceeding is on radiology services, the issue that emerges from medical practitioners having ownership interests in other healthcare providers is relevant to the medical profession more generally. That issue has been addressed by other bodies. Those bodies have not prohibited such arrangements, but have indicated that the conflicting interests must be managed. The Medical Council of New Zealand standards provide, for example:

> 19 Some doctors, or members of their immediate family, own or have a financial interest in retirement homes, surgical facilities, pharmacies or other institutions where care or treatment is provided. If you are in this situation you should avoid conflicts of interest wherever possible. For example, if you are a general practitioner with an interest in a nursing home, you should not usually provide primary care services to patients in that home. If a conflict of interest is unavoidable, you must advise the patient of the conflict and ensure that it does not adversely affect your clinical judgement. For example, if a family member has an interest in a pharmacy you must not allow that interest to influence your prescribing practice or the advice you give to patients and should advise patients of this conflict when, because of geographic proximity, they are likely to use that pharmacy to fulfil a prescription you have provided. Similarly, if you have an interest in a private surgical facility you should ensure that this does not affect your judgement when arranging treatment at the facility and advise patients you intend to refer of the conflict.

[12] Similarly the Code of Ethics of the Royal Australian and New Zealand College of Radiologists provides in principle six:

> 5. You must provide full disclosure of any interest, financial or otherwise, that you have when referring the patients to institutions or services, and in such an event you must make patients aware of alternative options.

[13] Under s 42C of the Medicines Act 1981 a person who issues prescriptions cannot hold an interest in a pharmacy.

[14] The Corporation's approach to addressing this issue has evolved over time following the Agreement coming into effect in August 2018. In May 2021 it sent an email to Providers concerning conflicts of interests, drawing attention to the provisions

of the Agreement. It followed that up with the communication on 21 October 2021 in which it said:

> One way in which [an] actual, potential or perceived conflict of interest could arise is through certain business arrangements or structures, where those making referrals for services have a financial interest in the provider to whom the referral is being made. By way of example, clinical services providers that are shareholders or directors of (or otherwise having a financial interest in) a company that provides radiology services would in our view be something that could create a conflict of interest for both the clinical service provider as the referrer, and the radiology service provider. In accordance with the parties' respective contractual obligations, ACC would expect disclosure of such an arrangement or structure.
>
> Disclosure and transparency are key to understanding and potentially managing any actual, potential or perceived conflict of interest. In the spirit of openness, we have made our expectations very clear to you so as to support you in meeting the requirements of your contract with us. We ask that you review your business arrangements and carefully consider whether there are any disclosures that you need to make. We are very happy to discuss this with you and answer any questions.

[15] The Corporation subsequently issued High Tech Imaging Services Operational Guidelines effective from 1 December 2021. Those Guidelines said:

> **7.2 Ethical Referrals**
>
> We insist that investigations, treatments and procedures should only be conducted when necessary and appropriate. If it is not in the best interest of the client, it should not be undertaken. Where there may be perceived or actual conflicts of interest either through business ownership or similar relationships, you as supplier are required under our Standard Terms and Conditions (Clause 18) to tell us immediately in writing and we will then consider whether the conflict can be managed. A common example is where a referrer holds an ownership position in a radiology supplier.

[16] As these communications suggest, the Corporation has not prohibited any Provider or Referrer from having such ownership interests. Rather it has decided to manage the conflict issues that arise from that ownership. The manner in which the Corporation has decided to manage such conflicts includes the use of Conflict Management Plans (CMPs) which are separately entered between the Corporation and relevant high-tech imaging Providers. Such a CMP has been entered in relation to Mercy Radiology, and one of the entities associated with TRG. The other entity associated with TRG, and Beyond Radiology, are still in discussions with the Corporation concerning a CMP.

[17] The Corporation is also able to monitor referral practices for the services. In early 2022 the Corporation identified some unexpected referral activity in relation to three referring consultants. It has met and discussed those referral practices with two of those consultants, and its investigations into those matters is continuing.

The applicant's argument

[18] By way of summary, the applicant argues that the Corporation has failed to enforce the obligations under cl 18, particularly the obligation under cl 18.1 that the relevant Providers and Referrers do their best to avoid situations that may lead to a conflict of interest. Such ownership interests of Referrers in Providers are adverse to the provision of independent radiologist services because the Referrer has a financial interest in the service being provided. This leads to over referral, sub-optimal referrals and excessive referral expenditure. As such cl 18.1 of the Agreement is consistent with the Corporation's duty under s 262(3) of the Act to deliver services in a manner that is cost effective.

[19] It is argued that the Corporation has failed to enforce the contractual terms at all from 2018 through to 2021, and then elected not to enforce the requirement in cl 18.1 but instead has entered into arrangements with breaching Providers that allow the infringing arrangements to continue. By doing so the Corporation acted in a way that:

(a) is irrational and unreasonable, by failing to enforce the obligation that it originally imposed that required Referrers and Providers avoid such conflicts altogether;

(b) involves a failure to take into account a mandatory relevant consideration, namely the consideration arising from s 262(3) of the Act that services be delivered by the Corporation in the most cost effective efficient way; and

(c) involves a breach of the applicant's members' legitimate expectations arising from the terms of the Agreement that all relevant Providers and Referrers have been required to sign.

Implications of Referrer ownership

[20] In order to address the applicant's grounds of judicial review it is necessary to make some initial findings related to the potential implications of a conflict of interest arising from the Referrer having an ownership interest in a Provider.

[21] I accept the evidence of Dr Balasingham and Mr Mellsop that there are potential adverse effects arising from such ownership. In particular, such arrangements create an incentive that could compromise appropriate clinical judgement. The Referrer is indirectly financially advantaged by referring a patient to the Provider. This has the potential to lead to:

(a) over-referral – where patients are referred to the Provider when, under clinical criteria, they do not need a scan; and

(b) sub-optimal referral – where the Referrer refers the patient to the Provider in which they have an interest notwithstanding that there may be a different Provider who provides better service.

[22] The applicant argued that these implications could adversely affect patient care. It is true that unnecessary scans expose a patient to radiation when it may not be clinically required, but any such risk is very small. I also accept that there might be some risk associated with a patient being referred to other than the best Provider, but again I see that risk as very small. I also consider the suggested harm arising by "over-diagnosis" — which Dr Balasingham describes as a situation where the patient is "correctly diagnosed with a condition but the condition would not have impacted on that patient's quality of life if it had not been discovered" — with scepticism. I regard such potential adverse implications as immaterial.

[23] For these reasons I do not consider there are high risks of sub-optimal patient care arising from such ownership arrangements. The more likely adverse implication is that more tests than necessary will be ordered which will have adverse financial implications for the Corporation. I accept that the risk of unnecessary expenditure is relevant when considering the implications of the conflict of interest.

[24] It is important not to overstate such risks, however. The reality is that a significant number of clinical professionals will have a financial interest in the clinical services they provide to patients in a range of other routine circumstances. A private surgeon who recommends an operation can be paid for that operation by a patient, or the patient's insurer. Even a general practitioner who recommends that a patient come back to see him or her more regularly has a financial interest in the subsequent appointments. This point could be made about almost any professional who charges for their services. In the end all professional services depend on professional judgement, here the clinical judgement of surgeons and other professionals. The fact that that professional may have a financial interest in the entity that provides other health services raises an issue, but it is an issue that is common to the medical profession, and many other professions.

[25] Such issues arise not only from Referrers having ownership interests in Providers. There are a number of other arrangements that give rise to similar issues. For example, Referrers and Providers may share premises in the same building. Or they may have common shareholders, as is the case with Mercy Radiology where Healthcare Holdings Limited has ownership interests in both Referrers and Providers. So there are a range of arrangements where there are other interests that could be said to have the capacity to affect the clinical judgement of the Referrer.

[26] I also accept the evidence of Mr Thompson and Dr Robson that there are potential benefits arising from Referrers having ownership interests in Providers. Such ownership interests can encourage greater co-ordinated care for the patients. There has been some criticism of the New Zealand health system being disjointed. The associations that can be formed between Providers and Referrers where there may be common systems, greater co-ordination of service provision, and generally greater understanding of the services each provide can give rise to benefits. Greater co-ordination is encouraged by common ownership or shareholdings.

[27] I also accept that permitting such ownership interests can promote the establishment of new Providers, including in geographical areas that are not served by current Providers. It can also lead to greater competition in areas where there are existing Providers. Referrers are able to identify gaps in service provision which can be met by the establishment of a new Provider. An example of this kind of situation

is a not-for-profit research facility in Gisborne/Tairāwhiti called Mātai. This is an entity with Referrer ownership interests serving an area that does not have a local Provider. Its establishment not only allowed services to be provided locally, but has the potential to bring down wait-list times for Providers outside the district. It is also relevant that there is only one high-imaging Provider in several areas in New Zealand, including Wellington, Christchurch, Gisborne, Hawke's Bay, Dunedin, Invercargill, Nelson and Timaru. Allowing competition by new entities that have Referrer ownership interests may be of benefit to patients.

[28] In his submissions Mr Farmer KC accepted that the situation involving Mātai might be one where the Corporation could accept the conflict of interest arising from Referrer ownership. He initially indicated that this might be so in relation to areas that had a single private Provider, but in reply argued that there were adverse consequences in allowing Providers with Referrer ownership operating in those areas. That was because Providers with Referrer ownership would have an inherent competitive advantage which would ultimately lead to the incumbent being forced from the market. I am not in a position to address that argument, however. There is insufficient evidence before the Court to show that these kind of market dynamics will likely arise. The applicant's economist, Mr Mellsop, provided no such evidence. I do accept, however, that it is relevant for the Corporation to consider the market implications for the delivery of services overall by allowing Referrer owned Providers to enter a market to compete.

[29] Given the above findings, I accept the Corporation's argument that there is a relevant balancing of considerations for the Corporation when it has decided what approach should be taken to the conflict arising from Referrer ownership of Providers. I also accept the Corporation's evidence that it is possible to monitor Referrer practices as a way of ensuring that adverse implications do not arise from such ownership interests. Mr Thompson explained that the Corporation had recently made significant improvements to the use of data to monitor referral patterns, and gave the example of the Corporation identifying unusual referral patterns in relation to three Referrers in recent times. In the case of at least one Referrer an investment in the Provider seems to have been contemplated at the time. In any event, the evidence establishes that the Corporation has the capacity to monitor, and has monitored, referral practices to ensure that the possible adverse implications do not arise.

[30] I accordingly accept the Corporation's evidence that there are potential benefits, as well as potential adverse implications in allowing Referrers to have ownership interests in Providers. I also accept that there are ways in which the potential burdens can be managed other than through the prohibition of such arrangements.

Standard of review

[31] Before addressing the grounds of judicial review advanced in light of these findings there is a preliminary question.

[32] Both parties, but particularly the Corporation, provided extensive written submissions directed to the standard, or nature of review that the Court should engage in, in relation to contracting decisions of the Corporation. Relying on the decisions of the Court of Appeal in *Attorney-General v Problem Gambling Foundation of New Zealand,*[1] and *Lab Tests Auckland Ltd v Auckland District Health Board,*[2] the Corporation argued that the scope of judicial review decisions was limited, and did not extend to incorporate the grounds of judicial review advanced by the applicant in the present case. These two decisions build on the decision of the Privy Council in *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* where it was indicated that decisions to enter commercial contracts would not be subject to judicial review absent fraud, corruption or bad faith.[3]

[33] One way of addressing the question raised by these authorities is to focus on the legal limits or controls that exist with respect to contractual powers. The role of the Court in judicial review is to ensure that public decision-making is exercised lawfully. That involves identifying the scope of discretionary powers exercised by the public body, and what the legal limits or controls on the exercise of those powers are. This will be so in relation to decisions to enter contracts, and also the exercise of contractual power under those contracts. There will be some commercial/contractual arrangements of public bodies that have no relevant public law limitations associated

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1 *Attorney-General v Problem Gambling Foundation of New Zealand* [2016] NZCA 609, [2017] 2 NZLR 470.

2 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776.

3 *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC) at 388.

with them, as they simply involve a public body entering a commercial bargain.[4] But in other contexts the public body can be entering contractual arrangements in order to fulfil particular statutory functions. When that is so, the role of the Court is to ensure that the relevant exercise of power by the public authority is in accordance with law, as it always is in judicial review.

[34] Such legal limits on decision-making can have both substantive and procedural content. They will normally be found in the statute under which the public body operates. Both *Problem Gambling* and *Lab Tests Auckland* involved challenges by decisions of public bodies to enter particular contractual arrangements. In both cases there were statutory provisions that were relevant to, and accordingly controlled the public authorities' powers to enter contracts.[5] In both cases there was no inconsistency with the statutory requirements, and the Court of Appeal found that there were no other public law constraints. For this reason the Court of Appeal concluded that the judicial review proceedings should have been dismissed in both cases.

[35] Relevant legal requirements can arise from sources other than empowering statute, however. *Ririnui v Landcorp Farming Ltd* involved a decision by a public body to enter a contract to sell land. In dismissing the claim for judicial review the Court of Appeal applied the principle referred to in the above authorities — that a decision to enter a commercial contract was unlikely to be the subject of judicial review in the absence of fraud, corruption, bad faith or analogous circumstances.[6] But the Supreme Court overturned the Court of Appeal as it identified a relevant limitation on the power to dispose of land subject to claims under the Treaty of Waitangi arising from the statute, and in a statement of corporate intent established under it.[7] Similarly in *Moncrief-Spittle v Regional Facilities Auckland Ltd* the Supreme Court dealt with a decision by a public body to cancel a contractual arrangement.[8] It agreed with the Court of Appeal that the cancellation of the contract engaged issues under the New Zealand Bill of Rights Act 1990 which had to be addressed before the decision could be assessed as lawful, and that judicial review was accordingly available on a

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4 See *Petrocorp Exploration Ltd v Minister of Energy* [1991] 1 NZLR 641 (PC).
5 *Problem Gambling*, above n 1, at [3]–[8]; *Lab Tests Auckland*, above n 2, at [56].
6 *Attorney-General v Ririnui* [2015] NZCA 160 at [77]–[78].
7 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [64]–[76]
8 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138.

wider basis than outlined in *Mercury Energy* or *Problem Gambling*.[9] The Court disagreed with the conclusion of the High Court that judicial review was not available at all because what was involved was only a private decision.[10] The Supreme Court nevertheless agreed with the Court of Appeal that the cancellation was lawful as the restriction arising from the Bill of Rights had been complied with.

[36] So it can be an oversimplification to say that contractual decisions by public bodies involve only limited judicial review scrutiny. The most straightforward question is to ask what the legal limits on the exercise of discretionary powers are in a particular case, and then assess whether the public body has complied with them. I approach the present case on that basis.

Assessment in this case

[37] This is not a case concerning the entry of a contract, but rather the exercise of powers by the Corporation under the contracts it has entered. There are no provisions in the Act, or in any subordinate legislation governing the entry of contracts by the Corporation or the exercise of power under those contracts. But that does not mean there are not legal controls on the exercise of such powers.

[38] The Corporation exercises discretionary power in at least three relevant ways. First it decides whether to enter the Agreement with a person who makes a disclosure to it that a conflict exists under the first sentence of cl 18.1. Secondly it decides what action it will take in relation to any party who is in breach of the second sentence of cl 18.1 because the party has failed to do its best to avoid situations that may lead to a conflict by entering arrangements between Referrers and Providers. Finally it exercises express contractual powers by deciding how any conflict is to be managed under cl 18.2.

[39] Looked at purely as a matter of the law of contract, the Corporation has no obligation to act in a particular way in any of those circumstances.[11] A party to a contract may decide to take no action at all when another party is in breach, for

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9 At [108]–[113].

10 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2019] NZHC 2399, [2019] 3 NZLR 433.

11 Subject to the limits on discretionary power as a matter of contractual interpretation as recently comprehensively described by Isac J in *Woolley v Fonterra Corporation-Operative Group Ltd* [2021] NZHC 2690, from [411].

example. So no obligation arises under the law of contract by virtue of a breach of the obligation of counter-parties to do their best to avoid conflicts under cl 18.1. To succeed with a claim for judicial review the applicant will need to establish a legal obligation on the Corporation to act in a particular way arising from its public functions.

[40] The Agreement here was a standard form contract to be entered by all providers of services to the Corporation to enable the Corporation to fulfil its statutory functions. The Corporation would not be able to implement the accident compensation scheme without contracting health providers to provide the necessary services to those injured by accidents. The standard form Agreement is accordingly in the category identified by Hammond J in *Lab Tests Auckland* — where the public body exercises a kind of regulatory authority through contracts.[12]

[41] Classifying the standard form Agreement in this way does not identify the nature of the legal limits on the contractual powers, however. Those limits are only identified by a careful examination of the relevant statutory provisions, and any other relevant public law principles. The contract cannot illegitimately fetter a public body's statutory duties,[13] and contractual decisions can be susceptible to judicial review. As the Court of Appeal explained in *Webster v Auckland Harbour Board*:[14]

> The issues of invalidity and statutory power of decision are interconnected. They cannot satisfactorily, we think, be considered separately. Undoubtedly a public body which has, as here, lawfully entered into a contract is bound by it and has the same powers under it as any other contracting party. But in exercising the contractual powers it may also be restricted by its public law responsibilities. The result may be that a decision taken by the public body cannot be treated as purely in the realm of contract; it may be at the same time a decision governed to some extent by statute.

[42] The relevant question accordingly becomes what the public law responsibilities of the Corporation are in this case.

[43] The applicant here relied on the following provision of the Act:

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12 *Lab Tests Auckland Ltd v Auckland District Health Board*, above n 2, at [354]–[358].
13 *The Power Corporation Ltd v Gore District Council* [1997] 1 NZLR 537 (CA).
14 *Webster v Auckland Harbour Board* [1983] NZLR 646 at 650.

262 Functions of Corporation

(1) The functions of the Corporation are to—

(a) carry out the duties referred to in section 165; and

(b) promote measures to reduce the incidence and severity of personal injury in accordance with section 263; and

(c) manage assets, liabilities, and risks in relation to the Accounts, including risk management by means of reinsurance or other means; and

(d) carry out such other functions as are conferred on it by this Act, or are ancillary to and consistent with those functions.

…

(3) In carrying out its functions, the Corporation must deliver services to claimants and levy payers, as required by this Act,—

(a) in order to minimise the overall incidence and costs to the community of personal injury, while ensuring fair rehabilitation and compensation for loss from personal injury; and

(b) in a manner that is cost-effective and promotes administrative efficiency.

…

[44] The applicant focuses primarily on s 262(3). I accept that the Corporation must exercise its contractual powers in a manner that is consistent with its statutory duties as identified in s 262(3), and indeed the policy of the Act generally. That includes a statutory obligation to carry out its functions in a cost-efficient manner under s 262(3)(b). But I also accept Mr Curran's submission that s 262 only outlines duties upon the Corporation in a general, or overarching way. It only describes the Corporation's functions. It does not purport to create particular legal requirements in relation to any individual decisions, or particular matters to be addressed by the Corporation in implementing the Act. Section 262(3)(a) prescribes what is to be the objective or goal in the exercise of the functions as reflected by the words "in order to", and s 262(3)(b) introduces a corresponding obligation concerning the "manner" in which the Corporation is to deliver its services to both claimants and levy payers. These are not statutory provisions that contain prescriptive requirements, let alone requirements that control how the Corporation must exercise its contractual powers in any particular situation. Rather I accept Mr Curran's submission that they specify what the organisational attitude of the Corporation must be.

[45] This is confirmed when the wider statutory context is considered. The concepts in s 262(3)(a) reflect the purposes of the Act specified in s 3, and can be seen as a reiteration of those purposes when Parliament has described the Corporation's functions. The references in s 262(3)(b) to cost effectiveness and administrative efficiency are consistent with ss 50 and 51 of the Crown Entities Act 2004, which applies to the Corporation. The provision accordingly reflects the duties that Crown entities are generally under. So both elements of s 262(3) reflect general duties of an overarching kind.

[46] I accept that s 262(3), and the purposes of the Act more generally, provide legal limits, or controls relevant to the exercise of contractual powers by the Corporation. But before it could be said that the exercise of the contractual discretion exceeded the legitimate scope of the power exercised by the Corporation in a specific situation it is likely that something that very clearly breached the duties would need to be involved. The section, and the Act more broadly, contemplates that the Corporation will exercise judgement over how it fulfils its functions, and how the policy of the Act is to be fulfilled. When particular decisions are made by the Corporation, particularly in implementing cover under the ACC scheme, there are more precise legal requirements applicable to particular ACC claims. It is not uncommon for these to be litigated before the courts through the appeal functions. But in terms of the general functions of the Corporation, and the purposes of the Act, the Corporation has been given a degree of latitude by Parliament.

[47] I address the particular grounds of review advanced against that background.

Failure to address mandatory relevant considerations

[48] First the applicant argued that the Corporation had failed to take into account mandatory relevant considerations arising by virtue of s 262(3) when it has decided how to proceed.

[49] The approach to identifying mandatory relevant considerations in relation to statutory powers of decision is well-settled, and set out by the Court of Appeal in *CREEDNZ Inc v Governor-General*.[15] Here I do not accept that s 262(3) creates a

[15] *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA).

mandatory relevant consideration, either express or implied. A mandatory relevant consideration is a factor that the decision-maker must address when making a particular decision. It is a consideration that must be weighed. But s 262(3) does not create such a consideration or factor of this kind. Rather, it is an overriding, and general, duty.

[50] The applicant's argument accordingly involves an inaccurate characterisation of s 262(3). The section does not create a decision-making criteria that must be balanced when making particular decisions. The only way an applicant for judicial review could demonstrate unlawfulness arising from s 262(3) would be if the decision was substantively inconsistent with the duties in s 262(3). For the reasons already explained, given the general nature of those duties that is only likely to be possible in circumstances where a breach of the duties was very clearly apparent.

[51] Moreover I also accept that when making decisions on the approach it would adopt the Corporation had the kind of objectives referred to in s 262(3) squarely in mind, such that it cannot be said that such matters were not taken into account.

[52] For these reasons, this ground of review is dismissed.

Unreasonableness/irrationality

[53] The applicant argued that the Corporation's decisions were irrational and/or unreasonable and ought to be set aside on this basis.

[54] The applicant argued that the Corporation had initially prohibited conflicts of interests arising from Referrers having ownership interests in Providers by providing that the Providers and Referrers "… must do your best to avoid situations that may lead to a conflict of interest". But it then failed to ensure that this primary obligation was adhered to, and it accepted arrangements that were a clear breach of this requirement. This change in approach was irrational, including because of the existence of the obligations under s 262(3).

[55] In some circumstances the Court will set aside a decision when its lack of rational basis means that it is inconsistent with what Parliament intended in bestowing the discretionary power. But I do not need to address the basis, or limits of that

potential ground of review in any detail. That is because I do not accept that the Corporation's approach was irrational in any sense. The formulation of the contractual obligation in cl 18.1 of the Agreement was not directed towards ownership interests by Referrers and Providers, or even the radiology sector. It is a standard term in the Corporation's contracts for all services that are needed for the ACC scheme. The contracts were entered into with effect from August 2018, although similar terms existed prior to then. I do not consider it irrational for the Corporation to decide how it would react to a particular kind of conflict of interest as identified by its standard form Agreement in the particular context in which it arose. The issue that arose here involved a particular kind of service being provided in the context of particular ownership arrangements. The Corporation acted in a rational way in deciding how to respond to this issue when it arose.

[56] I also do not accept the applicant's argument that the Corporation's decisions were unreasonable. It is again not necessary to address the debate about variable standard unreasonableness in this context. It seems to me that the relevant question is to ask whether the decisions of the Corporation were reasonably open to it. I accept that it was reasonably open for the Corporation to adopt the approach that it has. This involved addressing the implications of the conflict of interest by managing the potential conflict by CMPs, and monitoring the services provided by Referrers and Providers in accordance with the CMPs to make sure that there are no adverse implications arising from these ownership arrangements. The Corporation decided that this was better than prohibiting the ownership interests. From the Corporation's point of view that is a sensible approach as it manages the potential disadvantages arising from such ownership interests, but nevertheless secures the advantages that can exist from such arrangements. The Corporation described the approach as a flexible and balanced one which it regarded as best securing the purposes of the Act. I see no reason to disagree with that characterisation.

[57] It is significant that the applicant has pointed to no evidence to demonstrate that the potential adverse implications arising from Referrers having ownership interests in Providers have manifested themselves in some way. There is no evidence of excess referrals, or unsatisfactory patient outcomes. There is evidence that Referrers have the tendency to refer to Providers in which they have ownership interests to the disadvantage of members of the applicant. But there is no evidence

that this leads to any adverse outcomes, either for the patients, or for the Corporation. The applicant's case is solely based on the *potential* for such adverse implications. But the Corporation is of the view that it can manage those risks in other ways, and there is nothing to demonstrate that that is not so.

[58] The applicant's economist, Mr Mellsop, considered that the CMPs put in place were more likely to be effective than other conflict management mechanisms, but considered there needed to be some cost to a Referrer for making inappropriate referrals to provide a counteracting incentive. Only then would the moral hazard arising from the conflict be fully addressed. But I consider that this is a theoretical point only, and that it is perfectly satisfactory for the Corporation to use the CMPs, and the monitoring of referrals, as mechanisms to address such risks.

Unreasonableness and delay

[59] Although it was not argued as a separate ground of challenge, it is appropriate to address the applicant's argument that the Corporation failed to take action in the initial stages after August 2018 which would entitle the applicant to declaratory relief.

[60] In particular, the applicant characterised the Corporation's approach in three phases — the first between August 2018 and May 2021 where it took no action at all, the second between May and December 2021 when it began gathering information but took no enforcement action, and the final between December 2021 and the present where it began to monitor referrals more actively, and it elected to manage conflicts of interest. The applicant argued that, at least in relation to the initial periods, the Corporation had failed to undertake its function consistently with its duty under s 262(3).

[61] I accept that there were periods where the Corporation did not take active steps in relation to this issue. I also accept that the Corporation does not appear to have squarely focused on the fact that cl 18.1 created a legal obligation on Referrers and Providers to do their best to avoid what the Agreement defined to be a conflict. When Referrers took steps to obtain ownership interests in Providers they appear to have acted inconsistently with that obligation. But for the reasons explained above that does not mean that the Corporation had any duty to take any particular action. There

is no evidence that the Corporation has been paying too much for the relevant services, or that the services provided to patients are not appropriate. The evidence shows that when increases in referrals were identified they were investigated by the Corporation. For those reasons, there is nothing that would suggest that the Corporation has exercised its contractual powers in a way that is not consistent with its statutory duties. There is accordingly no unlawful exercise of power that could warrant the Court granting any kind of declaratory relief.

[62] I agree that the existence of such conflicts of interest do create a situation that the Corporation needs to manage, however. It is perhaps surprising that the Corporation has not fully emphasised that the Providers and Referrers have a contractual obligation to "do your best to avoid situations that may lead to a conflict of interest" under cl 18.1. CMPs have also not been entered with all of the Providers/Referrers that may have conflicts of interest as defined by the Agreement. For example, Beyond Radiology became a high-tech imaging provider for the Corporation in August 2021 but no CMP has yet been entered. One of the explanations for this is that Beyond Radiology shareholders do not currently include high-imaging Referrers. Although the Corporation will seek to want to manage its relationships in a sensitive way, it is nevertheless appropriate for CMPs to exist when conflicts as defined arise under the Agreement. In the end the Corporation has the contractual power to require steps to be taken, and it should not hesitate in exercising that power when it is necessary to ensure an appropriate CMP is entered.

[63] But notwithstanding those matters, the applicant is well short of demonstrating that the Corporation has failed to exercise its discretionary powers consistently with its obligations under the Act, or otherwise unreasonably or irrationally.

[64] These grounds of judicial review are accordingly dismissed.

Breach of legitimate expectation

[65] The applicant's final ground of review is that the Corporation's approach amounts to a breach of the legitimate expectations of the members of the applicant arising from the terms of the Agreement, including cl 18, which all such Providers and Referrers were required to enter.

[66] In particular, the applicant contends that through cl 18 the Corporation represented that it would require providers to avoid conflicts, and it would actively manage any conflicts that could not be avoided. It says that its members have legitimately and reasonably relied on that commitment to their disadvantage by complying with the requirement of cl 18, while Providers who have Referrers as owners have taken patients away from them.

[67] As an initial response to this ground of review, the Corporation invited the Court to apply the conclusion of the Court of Appeal in *Problem Gambling* where the Court said:[16]

> Again, in light of our findings as to the appropriate scope of review, we do not consider that breach of legitimate (procedural) expectations and breach of mandatory rules was an available ground of review. …

[68] As the Court indicated, this conclusion was reached as a consequence of the Court's scope of review analysis. But the current context is different from that in *Problem Gambling* as the Corporation exercises powers under a standard form agreement to administer the provision of services that are necessary for it to comply with the Act generally, and in that sense the contractual powers involve a form of industry regulation. In any event, at least as I understand it, the Court of Appeal finding is that the elements of legitimate expectation could not be satisfied in the particular context they were addressing. I do not understand the Court's conclusion to be that legitimate expectation could not arise even if its elements were satisfied.

[69] The elements of legitimate expectation were set out by the Court of Appeal in *Comptroller of Customs v Terminals (NZ) Ltd* in the following way:[17]

> [125] Where legitimate expectation is raised, the inquiry generally has three steps. The first is to establish the nature of the commitment made by the public authority whether by a promise or settled practice or policy. This is a question of fact to be determined by reference to all the surrounding circumstances. A promise or practice that is ambiguous in nature is unlikely to be treated as giving rise to a legitimate expectation in administrative law terms.
>
> [126] The second is to determine whether the plaintiff's reliance on the promise or practice in question is legitimate. This involves an inquiry as to whether any such reliance was reasonable in the context in which it was given.

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16 *Attorney-General v Problem Gambling Foundation of New Zealand*, above n 1, at [100].
17 *Comptroller of Customs v Terminals (NZ) Ltd* [2012] NZCA 598, [2014] 2 NZLR 137.

> [127] The third, and often most difficult part of the inquiry, is to decide what remedy, if any, should be provided if a legitimate expectation is established.

[70] Here, I accept Mr Fenton's argument that none of these elements are satisfied.

[71] Mr Farmer correctly submitted that a commitment, or representation, can arise by implication, and that it can be established by a well-established practice followed by a decision-maker.[18] The fact that a standard clause exists in an industry-wide agreement could, in some circumstances, give rise to a legitimate expectation that the contractual term would not be departed from unless, or until, the contractual term was changed. I also accept that a breach of legitimate expectation can arise when a public body has misinterpreted its earlier polices or advice.[19] But there are several related difficulties with the argument that the Agreement gives rise to a legitimate expectation here.

[72] First, the Agreement does not involve any promises to persons other than the parties to it. Neither has the Corporation given any commitment, or provided any advice to the industry participants that the requirement that parties do their best to avoid conflicts under cl 18.1 will be strictly enforced in relation to conflicts arising from ownership interests. There was no representation about enforcement of this contractual obligation that the applicant can rely upon. Indeed the communication to the industry has been to contrary effect. The participants were notified in May and October 2021 that the Corporation expected conflicts to be disclosed, and then managed. That was reiterated in formal Guidelines which applied from December 2021 which were specifically directed to ownership interests.

[73] Secondly, the terms of cl 18.2 expressly provide for conflicts of interest to be managed by the Corporation. The applicant cannot contend that the Corporation has acted inconsistently with a commitment arising indirectly from the Agreement by deciding to address the conflicts by such management. That option was expressly contemplated by the Agreement. The fact that the Corporation has emphasised the

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18 See also *Green v Racing Integrity Unit Ltd* [2014] NZCA 133, [2014] NZAR 623 at [14]; *Te Pou Matakana Ltd v Attorney-General* [2021] NZHC 2942, [2022] 2 NZLR 148 at [87].

19 *H.T.V. Ltd v Price Commission* [1976] I.C.R. 170; *R v Inland Revenue Commissioners ex parte Preston* [1985] 1 AC 835 at 865–867 (HL).

approach contemplated by cl 18.2, rather than taking alternative action for breach of the promise in cl 18.1, is something contemplated on the wording of the Agreement.

[74] Thirdly, there has been no reliance on any commitment made by the Corporation under the second element of legitimate expectation. "The presence of reliance … helps distinguish a *legitimate* expectation from one that is a mere hope that a course of action will be pursued".[20] There is no evidence that Providers represented by the applicant elected not to enter the kind of arrangements that the applicant challenges in this case because of cl 18.1. Indeed there is some evidence that some Providers in the applicant group have made arrangements of a similar kind, such as sharing premises. Moreover I do not consider that it would have been reasonable for any such Providers to have assumed that such ownership would be prohibited by the Corporation without first making direct contact with the Corporation to seek confirmation, particularly given the possibility for conflicts to be managed in accordance with cl 18.2. Failing to seek such a confirmation can mean that reliance is unreasonable.[21]

[75] Finally, and in any event, the claim would fail on the third element. Even if such a representation had been established, all that an applicant for review would be entitled to would be a procedural remedy — an opportunity to be heard before the commitment was no longer to apply. Relief in the form of a substantive outcome is only granted in special cases, and only if it does not usurp the function of the public body.[22] This is not a case where a legitimate expectation of a substantive outcome could arise. It must be open to the Corporation to manage conflicts in the manner contemplated by cl 18.2 if the Corporation considers this the best way for it to achieve its functions. Moreover, here the Corporation has made its position clear — it has advised that it will seek to manage any conflicts of interest arising from ownership by Referrers of Providers by management under cl 18.2, including through CMPs. The suggestion that the applicant group is entitled to a procedural remedy in those circumstances is artificial. The Corporation's approach was well communicated to all participants and those in the applicant group have had a full opportunity to make

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20 *Green v Racing Integrity Unit Ltd*, above n 18, at [15].
21 *Comptroller of Customs v Terminals (NZ) Ltd*, above n 17, at [130].
22 At [155].

representations on that approach. That satisfies any legitimate expectation to be heard before that approach was adopted. Any legitimate expectation has already been met.

[76] The applicant's challenge based on legitimate expectation is dismissed for these reasons.

Conclusion

[77] I accept that the members of the applicant's group have concerns about competitors having referring surgeons as partial owners, including because of the competitive advantage this may give those Providers. I also accept that there are legitimate questions to ask arising from the financial incentives that exist for such Referrers. Under cl 18.1 of the standard form Agreement Referrers and Providers were supposed to use their best endeavours to avoid the conflict that arise from those sorts of arrangements. But from the Corporation's point of view any risks that arise from over-referral, or suboptimal referral practices are able to be managed in other ways, and there are benefits from having closer relationships between Referrers and Providers that are associated with such ownership. It also potentially leads to greater competition. Moreover it is not the Court's function to decide whether such arrangements are a good idea or not. The Court's function is limited to ensuring that the Corporation is acting lawfully. The applicant is well short of establishing that it is not.

[78] The application for a judicial review is accordingly dismissed. The respondent will be entitled to costs. If costs cannot be agreed I will receive a brief memorandum from the respondent within 15 working days, to be responded to by the applicant within 15 working days. Each memorandum may be no longer than five pages plus a schedule.

Confidentiality

[79] Both before and after the hearing the parties sought certain orders by way of confidentiality, as confirmed by joint memorandum dated 22 November 2022. The orders cover information that the Corporation has obtained under the Agreement concerning the business structures, and business plans of both Providers and Referrers.

[80] At the hearing the parties agreed to orders continuing such confidentiality. I accept the view that protecting the confidentiality of commercially sensitive information is appropriate, particularly when the information has been obtained through the exercise of regulatory functions where there is an express confidentiality clause as there is in the Agreement.[23] As I indicated at the hearing, however, I was concerned about the scope of the confidentiality orders. It is recognised that patients of Referrers and Providers where ownership interests are in existence should be made aware of these interests given the importance of transparency. For that reason I do not accept that the confidentiality orders made by the Court should extend to the identity of the Referrers and Providers in question. I expressly exclude from the confidentiality order an order protecting the identity of those persons.[24] I have referred to the names of the Providers during the course of this judgment. I also observe, should the point ever arise in the future in relation to an application to search the Court file, that there may be a need to balance such considerations in relation to the scope of any continued orders.

Cooke J

Solicitors:
Dentons Kensington Swan, Auckland for the Applicant
Russell McVeagh, Wellington for the Respondent

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23 See *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [7].

24 The identity of Referrers whose referral practices have been investigated by the Corporation is to be confidential, however, given that the investigations are incomplete.