

ADMINISTRATIVE LAW DIMENSIONS OF COMMONWEALTH TENDERING AND CONTRACTING

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Accountability and government tendering and contract

Accountability is a fundamental principle of good government. It is particularly important in the area of government tendering and contracting where proposals can involve significant expenditure of public money. One of the important ways in which accountability is maintained in the Commonwealth system of government is through the administrative law mechanisms. They are available to provide a means of redress for individuals affected by the actions of government agencies.

However, it is not universally accepted that administrative law remedies should have a role to play in contracting activities. Some would question whether administrative law is well adapted to operate in the contracting context. On the other hand, there would probably be general acceptance that, because tendering and contracting activity in the government sector involves the expenditure of public money, the activity needs to be attended by greater opportunity for external scrutiny and review than is generally available when the activity is engaged in by the private sector. This paper considers the extent to which administrative law mechanisms may be available to provide that scrutiny and review.

A further dimension of government contracting concerns the contracting out of the delivery of services. Where services are delivered by government, members of the community will generally have access to administrative law remedies in relation to the service delivery. However, those remedies may no longer be available once service delivery is contracted out. The potential loss of administrative law remedies is something that may need to be addressed in the design of the particular outsourcing contract and in the management of the contract. This paper discusses the extent to which administrative law remedies may be available in this context.

Judicial review of agency tendering and contracting decisions

ADJR Act generally not available to challenge

The *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) enables review to be sought in the Federal Court of 'decisions of an administrative character made under an enactment'. For a conclusion to be reached that a decision is made under an enactment, the decision has to be required or authorised by the enactment. Generally, tendering and contracting decisions made by a Commonwealth department do not satisfy this test because the decision to award the contract cannot be said to have been made 'under an enactment'. The authorities say that, for the purposes of the 'under an enactment' requirement of the ADJR Act, neither section 61 of the Constitution, under which Commonwealth agencies exercise general executive power, nor the *Financial Management and Accountability Regulations* made under the *Financial Management and Accountability Act 1997* (FMA Act)

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provide a basis for saying that the particular conduct is engaged in 'under an enactment'. The accepted view is that contracts made by Commonwealth departments are made under general executive power rather than legislative power.

In *Dardak v Minister for Regional Services, Territories and Local Government*,¹ the position was explained by Justice Hill as follows:

The FMA Act does no more than impose an obligation on a chief executive to manage the affairs of an agency in a particular way, relevantly here, in compliance with regulations... It is hard to see that these provisions require or authorise the acceptance of a tender. Nor is such a requirement or authorisation to be found in the Commonwealth Procurement Guidelines, which do no more than require that behaviour be in accordance with law.²

But ADJR Act can sometimes apply

In some circumstances, there will be a statutory basis for the particular tendering or contracting action so that it can be said that the action concerned was taken under an enactment. This will often be the case where the action is taken by a statutory authority. Unlike Departments, statutory authorities are creations of statute and they draw all their powers from statute.

However, the contractual process can also be found to have a statutory basis in other circumstances so as to give room for the ADJR Act to apply. In *Century Metals and Mining v Yeomans*³ the full Federal Court concluded that procedural fairness had not been observed in circumstances where a number of companies were bidding to take over a phosphate mining operation on Christmas Island from the Commonwealth. The court based its reasoning on the fact that the Commonwealth had created legitimate expectations relating to the process by which a company would be chosen and these expectations were not fulfilled. The proceedings were capable of being brought under the ADJR Act because the contractual process in that case had a statutory basis in a special Ordinance dealing with the winding up of the phosphate mining operation.

Review under Judiciary Act, section 39B

If, as will generally be the case, the ADJR Act is not available, judicial review proceedings to challenge tendering or contracting action will need to be brought by means of the prerogative writs (now referred to by the High Court as 'constitutional writs'). The source of the constitutional writs is section 75(v) of the Constitution. Under that section the High Court has original jurisdiction to grant a writ of prohibition or mandamus or an injunction against 'an officer of the Commonwealth'. The Federal Court has a parallel jurisdiction under section 39B of the *Judiciary Act 1903*.

Some government tendering and contracting actions may not be amenable to review under this jurisdiction. For example, a tendering or contracting process entered into by Telecom or Australia Post is not reviewable by means of the constitutional writs because neither body is an 'officer of the Commonwealth'.⁴ However, employees of Commonwealth departments are clearly 'officers of the Commonwealth' whose actions are reviewable by means of the constitutional writs. So also are Ministers.

If, as is normally the case in the Commonwealth, a contracting process does not have a statutory basis so that any review proceedings have to be brought under section 39B, several of the grounds of review will have no application. For example, the ground that the decision-maker acted in excess of power in making the particular decision would ordinarily have no relevance to contracting action taken in the exercise of executive power.⁵ However,

as the cases below illustrate, review on the grounds of breach of procedural fairness or other grounds may be available in particular instances.

The instances where section 39B proceedings have been brought to seek judicial review of Commonwealth public tendering procedures are relatively few. That is not to say that, in a suitable case, an application under section 39B would not be successful. Examples of cases where legal challenges to tendering decisions have been brought are as follows:

- *Waverley Transit Pty Ltd v Metropolitan Transit Authority*.⁶ That was a case arising in Victoria. The Supreme Court of Victoria expressly rejected a submission by the MTA that its decision to accept a tender for the operation of a bus route service was not amenable to judicial review on any administrative law grounds. The Supreme Court said that the *Transport Act* did not demonstrate that the Parliament intended that the power not to renew a contract for the provision of transport services could be exercised by the MTA without regard to the rules of natural justice. It found that, in the circumstances where a long-standing contractual relationship existed with the plaintiff, the MTA was required by principles of administrative law to act fairly. The Supreme Court granted the plaintiff a declaration that the decision of the MTA was void and of no effect and an injunction preventing the MTA from proceeding with the contract made with the other party.
- *MBA Land Holdings Pty Ltd v Gungahlin Development Authority*.⁷ In that case the ACT Supreme Court set aside a decision by a public authority to award a contract. It found the authority had breached procedural fairness obligations to the applicant and other unsuccessful tenderers in accepting a revised offer price after the close of tenders. Justice Higgins held that the decision to award the contract following the tender process was amenable to judicial review. The decision was not subject to review under the ADJR Act of the Australian Capital Territory because it was not a decision under an enactment. However, because the authority was a statutory authority performing a function in the public interest, the court considered that the decision had the necessary public element to attract common law judicial review. It should also be noted that the decision does not articulate the precise basis upon which the court considered that procedural fairness obligations were breached.
- *White Industries Ltd v Electricity Commission of NSW*.⁸ In that case it was held that the nature of the power to contract by the acceptance of any one of a number of tenders was inconsistent with an obligation to observe the principles of natural justice. Nor did the court grant relief on other grounds. It noted the submission of the NSW Solicitor-General that an exercise by the Crown of its common law right to contract was not subject to judicial review on the basis of taking into account relevant or irrelevant considerations but found it unnecessary to consider the argument. This case was distinguished by the Full Federal Court in the *Century Metals* case and would seem to be inconsistent with the *MBA Land Holdings* case.

If in the process of assessing tenders an agency departs unfairly from the evaluation procedure set out in its request for tenders (RFT), it may well expose itself to a judicial review action on the ground of breach of the rules of procedural fairness.

Position in the United Kingdom

In the UK, it had for a long time been assumed that decisions relating to government procurement activities were not reviewable. However, the English courts too have in more recent times shown some preparedness to entertain applications for judicial review, at least where some 'blacklisting' action has been involved:

- In *R v Lewisham Borough Council, ex parte Shell UK Limited*⁹ there was a challenge to a decision by the council not to deal with Shell because other companies in the same group had trading links with the then apartheid regime in South Africa. The Queens Bench division held that the decision of the Council was made at least partly to persuade Shell to put pressure on the companies to sever the links with South Africa. It was held that this was an irrelevant consideration and a declaration was granted that the decision was unlawful.
- In *R v Enfield London Borough Council; ex parte Unwin*¹⁰ it was held that decisions to strike the applicant from the Council's list of contractors and to refuse to allow the applicant to tender for the renewal of an existing contract were subject to the requirements of procedural fairness.

Ombudsman

The Ombudsman has the function, broadly speaking, of investigating defective administration within the public sector. Section 5 of the *Ombudsman Act 1976* says that the function of the Ombudsman is to investigate action, being action that relates to a matter of administration, taken by a Department or a prescribed authority and in respect of which a complaint has been made to the Ombudsman. The Ombudsman is also permitted to investigate such action on his or her own motion.

Tendering and contracting action is clearly within the scope of the Ombudsman's power to investigate. There have been cases where the Ombudsman has recommended that compensation be paid to an unsuccessful tenderer as a result of defects in a tendering process.

FOI Act and confidential information

The *Freedom of Information Act 1982* (FOI Act) gives the public a right of access to documents in the possession of government agencies. Generally, agency documentation prepared for the purpose of a particular tendering process will be accessible under the FOI Act, as will documentation prepared in the tender assessment process. It will generally be difficult for an agency to establish a claim for an exemption in respect of any of this material. See, eg, *Department of Employment, Workplace Relations and Small Business v The Staff Development and Training Centre*¹¹ where the Federal Court upheld a decision of the Administrative Appeals Tribunal refusing a claim for exemption in respect of an operations manual used in the tender process to assess the financial viability of Job Network tenderers.

Tenders and other documents supplied to an agency by tenderers as part of a tendering process are also accessible under the FOI Act, subject to the potential application of certain of the exemptions under the Act. It is necessary to give some consideration to those exemptions and then to consider the extent to which claims for exemption may be affected by the recent Senate Order on disclosure of agency contracts.

Exemptions under FOI Act

Section 43 of the FOI Act exempts documents the disclosure of which would disclose information about the business affairs of a person and could reasonably be expected to have an adverse effect on those business affairs. This exemption may be relevant to a broad array of information. It has, eg, been held to exempt the disclosure of information about a company's pricing structure.¹²

Section 45 of the FOI Act exempts documents the disclosure of which would found an action for breach of confidence. The exemption covers both documents subject to an equitable obligation of confidence and a contractual obligation of confidence.¹³

An equitable obligation of confidence will arise where:

- the information is specifically identifiable;
- the information has the necessary quality of confidentiality (and is not, eg, public knowledge);
- the information has been given and received on a mutual understanding of confidence; and
- disclosure of the information, were it to occur, would be an unauthorised use of the information.¹⁴

A contractual obligation of confidence will arise where parties have contractually bound themselves to keep the information concerned confidential.

Disclosure under Senate Order and Commonwealth Procurement Guidelines

On 20 June 2001 the Senate made an order requiring Ministers to table, twice yearly, a letter of advice stating that all of their FMA Act agencies have placed on their internet site a list of contracts valued at \$100,000 or more, which have not been fully performed or which have been entered into in the previous 12 months. The order arose out of concerns expressed in a report by the Senate Finance and Public Administration Committee in 2000 that:

The level of information available to the Parliament and to the public about government contracting has not kept pace with the increased rate of contracting out.¹⁵

The effect of the order, as subsequently amended, is to require the listing for each contract of:

- contractor details;
- subject matter of the contract;
- value of the contract;
- whether the contract includes confidentiality provisions and the reasons for them.

The Government has agreed that Ministers should comply with the order.

Under the Commonwealth Procurement Guidelines issued by the Minister for Finance under regulation 7(1) of the FMA Regulations, agencies are further required to report in the *Gazette* all contracts entered into valued at \$2,000 or more.

Interrelationship of public accountability obligations with FOI Act exemptions

At the stage before a contract is awarded, a tenderer would ordinarily assume the confidentiality of its proposal. For example, a tenderer would assume that the proposal would not be made available, under the FOI Act or otherwise, to other prospective tenderers or to anyone else. At the post-award stage too there may be expectations of confidentiality both on the part of unsuccessful tenderers and the winning tenderer. However, in the light of the Senate Order there are now some difficulties in the way of any far-reaching

confidentiality claims being made for material in a tender proposal that is subsequently incorporated into a contract with an agency.

The public accountability obligations of the Commonwealth which the Senate Order reflects suggest that it is good practice for agencies to set out in their tender documentation what the 'ground rules' of disclosure will be. In that regard, the Department of Finance and Administration has suggested the inclusion in agency tender documentation of information concerning agency disclosure obligations and the inclusion in the tender documents of a clause spelling out the limits of the confidentiality obligations the Commonwealth will undertake. These suggested provisions, which can be found on the DOFA website,¹⁶ are set out in Attachment A to this paper.

Those considering doing business with the Commonwealth will note that the provisions provide little comfort as to the potential for information supplied by them to become publicly accessible, at least so far as the winning tender is concerned. Clearly, it is in the interests of a tenderer to indicate in its tender the information that it regards as confidential should the tender be successful. The tender should also spell out the reasons why the tenderer says it is necessary to keep the information confidential.

One effect which the DOFA tender provisions would appear to have is to attract the exemption in section 45 of the FOI Act to all tenders received in the period prior to the award of the contract and to the tenders of unsuccessful tenderers once a contract has been awarded. That is because the undertaking of confidentiality which the Commonwealth gives under those provisions is a contractual obligation of confidence in respect of the documents concerned which section 45 will protect.

Position in the Australian Capital Territory

The *Government Procurement Amendment Act 2003* is due to come into force this year. It repeals the *Public Access to Government Contracts Act 2000* and amends the *Government Procurement Act 2001*. Under the amendments chief executives of agencies must keep an electronic register of contracts valued at \$50,000 or more. The register must indicate whether any clause of the contract is confidential and, if so, must indicate what the clause relates to. The agency must make the public text (which excludes any clause that is confidential) of contracts publicly available. The Act sets out the grounds on which an agency can agree that particular information is confidential and requires the use in the contract of a model confidentiality clause relating to that information.

Duty of good faith and fair dealing in tenders and contracts

Implied term of good faith and fair dealing

In recent times, the authorities have discussed the applicability of the principle of good faith and fair dealing in contract law. This principle has a relationship with public law principles and has been held to operate both in relation to Commonwealth Government contracting¹⁷) and in relation to commercial contracts generally.¹⁸ In the *GEC Marconi Systems case* Justice Finn indicated that a covenant of good faith was to be implied despite a clause in the contract excluding all implied terms.

A breach of the implied term of good faith may give rise to a claim for damages or other relief.¹⁹

Pre-award contracts

If a pre-award tender contract arises in a tendering process, that contract will ordinarily contain the implied term of fair dealing discussed above. Indeed, in the *Hughes Aircraft* case, Justice Finn suggested that there will always be such a term if the tendering body is a government agency. He said:

Given the view I earlier expressed that fair dealing is, in effect, a proper pre-supposition of a competitive tender process contract (especially one involving the disposition of public funds), and given that a public body is the contracting party whose performance of the contract is being relied upon, a necessary incident of such a contract with a public body is ... that it will deal fairly with tenderers in the performance of its tender process contracts with them.²⁰

The critical question, therefore, is when will a pre-award tender contract arise.

*Transit New Zealand v Pratt Contractors Limited*²¹ concerned an engineering contractor who twice submitted the lowest tender bid but did not get the contract. The Court of Appeal of New Zealand noted that, historically, the process of procuring tenders was not treated by the courts as contractual in nature. The freedom of the invitor to accept or reject any tender was regarded as fundamental to the tender concept. Invitations to submit tenders were almost invariably treated as preliminary communications which took place before any contractual offer was made. While tenderers might be involved in considerable work and expense in tender preparation, they were understood to assume the full risk that no contractual entitlement would eventuate from their efforts. However, the Court of Appeal noted that in a number of cases there had been a fresh analysis of the nature of duties owed to each other by inviters and tenderers during the period prior to the letting of the contract. The trend in those decisions had been towards a greater readiness by the courts to recognise that parties may become bound by a preliminary contract to the processes that would be followed. (One may interpolate here that the *Hughes Aircraft* case is one such case).

In the *Transit* case, the NZ Court of Appeal said that, where the request made no express commitment concerning the manner in which tenders received would be addressed, that may indicate that the invitation was no more than an offer to receive them. On the other hand, a rigorous and comprehensive expression of requirements to be complied with by tenderers might give rise to an implied promise by the invitor to consider a conforming tender if others are considered.

In the present case, the tender documentation expressed a commitment by the invitor to abide by a particular process of tender evaluation and tenderers would have understood Transit to be binding itself to follow that process. This was a strong indication of the contractual element of mutual intention to create legal relations. The fact that the request also reserved the right for Transit to reject all tenders did not displace that indication.

In the result in the *Transit* case, the Court of Appeal was satisfied that, although there was a process contract which carried with it an implied duty of good faith, Transit had not breached that duty when it had not followed certain of its own internal procedure manuals.

In the *Hughes Aircraft* case, Justice Finn found that Airservices Australia had breached a pre-award process contract. The tender document held out to the plaintiff Hughes and the other tenderer Thomson constituted a 'binding statement of the procedures to be followed'. A particularly critical factor in that case were the steps taken by Airservices Australia to obtain the agreement of the two tenderers to the tender document to which they were asked to respond.

Factors which may suggest existence of a pre-award contract

Whether or not a particular case gives rise to a pre-award contract depends upon a consideration of the particular circumstances. Relevant factors are:

- whether the tender documentation has been the subject of a process in which agreement of tenderers is sought to the documentation before the documentation is issued as a request for tender - such circumstances will point strongly towards the existence of a pre-award contract;
- whether the principal has, in the tender documentation, set out a detailed process for tender evaluation, including detailed criteria for that evaluation - this may be indicative of the existence of a pre-award contract;
- whether the tender documentation includes words indicative of a contractual relationship²² - this will be indicative of the existence of a pre-award contract.

It obviously makes sense for principals to insert provision in their RFTs which go as far as possible towards negating the existence of a pre-award contract. Eg:

1. *The principal may accept the whole or part of a tender.*
2. *The principal will not necessarily accept the lowest priced tender or any tender.*
3. *The principal reserves the right to stop or vary the tender process, or to re-tender, at any time.*
4. *Nothing in this RFT, or in any tender responding to this RFT, is to be construed as creating any binding contract (express or implied) between the tenderer and the principal.*

Of course, clauses of this kind will not be effective in negating the existence of a pre-award contract if principals take actions or make statements in the tender process indicating that they are in fact binding themselves to a particular process.

Contracting out of government services

Changes in public sector administration over the past ten years have seen an increased reliance on contractors to provide services to the public. At the Commonwealth level, the establishment of Job Network, as a national network of private and community organisations engaged under contract to find jobs for unemployed people, is but one example.

The contracting out phenomenon has been the subject of much consideration²³ and it is not appropriate in this paper to embark on a full examination of the topic. It is, however, appropriate to say a few words about the administrative law dimension of the management of an outsourced service delivery contract.

Judicial review

In Report No 42, *The Contracting Out of Government Services*, the Administrative Review Council suggested that there might be some scope for relying on section 39B of the Judiciary Act to obtain judicial review of actions of contractors.²⁴ The Council considered that, in the circumstances of an outsourced service delivery contract, the High Court might modify the criteria for determining whether a person was an 'officer of the Commonwealth' so as to encompass a contractor who was engaged by the Commonwealth to perform specified services for a monetary sum, and was subject to direction and control by the Commonwealth.

In my view, it is not clear that the High Court would go this far. In any event, it would be a rare contract which placed a contractor in a position analogous to an employee in subjecting

the contractor to direction and control by the principal. I doubt whether, under the current structure of Commonwealth judicial review, a contractor's actions could be brought within the scope of the prerogative or constitutional writs.

Ombudsman review

It is not clear on the face of the *Ombudsman Act 1976* that the Ombudsman is able to investigate the actions of private sector contractors providing services on behalf of government agencies. However, the Ombudsman is given jurisdiction under section 5 of the *Ombudsman Act* to investigate 'action that **relates** to a matter of administration taken...by a Department or by a prescribed authority' and it may often be possible to frame a complaint about a contractor as a complaint about the agency.

The Ombudsman has reported that in practice, by taking a broad view of the jurisdiction granted under section 5, the Ombudsman has been able to investigate complaints about contractor action.²⁵ If the jurisdictional hurdle is cleared, the Ombudsman's powers of investigation under section 9 are capable of being used to obtain information from the contractor.

In its response of 22 April 2002 to the 379th Report of the Joint Committee of Public Accounts, *Contract Management in the Australian Public Service*, the Government indicated that the Ombudsman should have the jurisdiction to investigate actions of private sector companies contracted by agencies to provide services to the public and that it proposed to introduce amendments to the *Ombudsman Act* to achieve this. The amendments have not yet emerged, although the Secretary of the Department of the Prime Minister and Cabinet, Dr Peter Shergold, announced at the 2003 National Conference of the Australian Institute of Administrative Law that the Government was proceeding with them.

Under the *Ombudsman Act* the only area in which there has been a statutory extension of the Ombudsman's jurisdiction to cover contractors is the area of the Job Network. The Act includes eligible case managers under the *Employment Services Act 1994* within the meaning of 'prescribed authority' for the purposes of the Ombudsman Act.

FOI Act

In its August 1998 report, *The Contracting Out of Government Services*, the Administrative Review Council recommended that the FOI Act be amended to deem documents in the possession of a contractor relating directly to the performance of the contractor's contractual obligations to be in the possession of the government agency. The Government has not made a substantive response to this recommendation.

In some of the FOI Acts in the States the concept of documents 'in the possession of' any agency is extended to documents to which the agency has a right of access.²⁶ So long, therefore, as the contract between the agency and the contracted service deliverer gives the agency rights of access to documents held by the contracted service deliverer, FOI rights in those jurisdictions extend to those documents.

Under the Commonwealth FOI Act the only area in which there has been a statutory extension of FOI rights to cover contractors is the area of the Job Network. The Act includes eligible case managers under the *Employment Services Act 1994* within the meaning of 'agency' for FOI purposes.

Privacy

Commonwealth agencies are required to comply with the Information Privacy Principles (IPPs) in the *Privacy Act 1988* (Cth) when dealing with personal information. Many private

sector companies are now also obliged to meet privacy obligations as set out in the National Privacy Principles (NPPs) in the Act.

If a company enters into a contract with a government agency for the provision of services, the company will be a 'contracted service provider' for the purposes of the Act. Section 95B requires the agency to take measures in the contract to ensure that contracted service providers and their subcontractors do not breach the IPPs.²⁷ The broad effect of section 95B is therefore to subject a contracted deliverer of services to the same privacy regime as applies to the public sector agency.

The Privacy Commissioner's website²⁸ sets out model clauses that may be used by agencies in their contracts with service providers in order to assist agencies to meet their responsibilities under section 95B.

Complaints may be made to the Privacy Commissioner about privacy breaches by contracted service providers and the Privacy Commissioner has power to award compensation in appropriate cases.

Auditor-General

The Auditor-General's power under section 18 of the *Auditor-General Act 1997* (Cth) to conduct performance audits of aspects of the operations of the Commonwealth public sector enables the Auditor-General to audit contracts entered into by Commonwealth agencies. The Auditor-General has powers under section 32 to direct any person to provide the Auditor-General with information in connection with an audit.

The Department of Finance and Administration website²⁹ contains model access clauses which agencies might wish to include in their contracts, enabling the Auditor-General to gain access to the premises and records of contractors for the purpose of performing the Auditor-General's functions.

Archives

The *Archives Act 1983* (Cth) provides a framework for Commonwealth record-keeping practices. It is an offence under the Act for a person to engage in conduct that results in the destruction of Commonwealth records or the transfer of the custody or ownership of Commonwealth records, except as permitted by any law or in accordance with a procedure approved by the National Archives of Australia.

The Archives authorises the destruction or transfer of records by issuing 'Records Disposal Authorities'. To facilitate the transition of service delivery to contractors, the Archives has issued a General Disposal Authority. The *General Disposal Authority* stipulates that only those records which are reasonably required by the contractor to fulfil their obligations should be transferred. All other records should be retained by the agency for sentencing in accordance with applicable Records Disposal Authorities.

Summary

This paper has considered the extent to which Commonwealth tendering and contracting decisions are within the reach of administrative law remedies. The paper indicates that:

Judicial review

- The ADJR Act is generally not available to review contracting and tendering decisions.

- Review may be available under section 39B of the Judiciary Act and, although several of the grounds of review may not apply, review on the ground of breach of the rules of procedural fairness may be possible. Tender processes should therefore be conducted in a way that ensures that procedural fairness obligations are met. This is in any event the practical effect of the Commonwealth Procurement Guidelines to the extent that they make specific provision for the ethical conduct of procurement.

Ombudsman

- The Ombudsman has jurisdiction to investigate complaints arising out of tendering or contracting action by agencies.

FOI

- Agency documentation prepared for the purpose of a tendering process will generally be accessible under the *FOI Act*. If the confidentiality provisions suggested by DOFA are used in agency tender documents, the exemption in section 45 of the *FOI Act* will apply to all tenders received in the period prior to the award of the contract and to the tenders of unsuccessful tenderers once a contract has been awarded. The contract awarded to the successful tenderer will be subject to the disclosure obligations of the Senate Order.

The paper has also discussed the operation in government contracts of the principle of good faith and fair dealing - a principle closely allied with public law principles. The paper indicates that, whenever a pre-award contract has come into existence, it will be found to include an implied term of good faith. The paper discusses the circumstances which may give rise to a pre-award contract and steps that might prudently be taken by an agency in an attempt to negate the existence of such a contract.

Finally, the paper has discussed the extent to which delivery of services under an outsourced service delivery contract may be subject to the reach of administrative law remedies. The paper indicates that:

Judicial Review

- Despite a possible contrary view expressed by the Administrative Review Council, judicial review of actions of a contractor is unlikely to be available.

Ombudsman

- By taking a broad view of jurisdiction, the Ombudsman has been able to investigate actions of contractors. Amendments of the *Ombudsman Act* have been proposed to make the Ombudsman's jurisdiction more explicit here.

FOI

- The *FOI Act* will generally not extend to documents in the possession of the contractor unless the contract extends *FOI* rights to them.

Privacy

- Contracted service providers as defined in the *Privacy Act* are subject to the Information Privacy Principles and agencies are required to include provisions in the contracts requiring the service providers to take measures to ensure they do not breach the IPPs.

Auditor-General

- The Auditor-General has power to audit agency contracts with service deliverers. In undertaking such audits the Auditor-General can direct the contractor to provide relevant information.

Archives

- Where delivery of a service is outsourced, disposal authorities issued by the Archives govern the transfer of records to the service deliverer and the sentencing of records.

Endnotes

- 1 (2002) 65 ALD 451 at 461.
- 2 In Queensland, which has a Judicial Review Act similar to the ADJR Act, a similar conclusion was reached in relation to procurement action: *Concord Data Solutions Pty Limited v Director-General of Education* [1994] 1 QdR 343.
- 3 (1991) 100 ALR 383.
- 4 *Businessworld Computers Pty Ltd v Australian Telecommunications Commission* (1988) 82 ALR 499; *Post Office Agents Association Limited v Australian Postal Commission* (1988) 84 ALR 563.
- 5 This ground would, however, be relevant if it could be argued that entry into the particular contract would exceed the reach of the Commonwealth's executive power.
- 6 (1988) 16 ALD 253.
- 7 [2000] ACTSC 89.
- 8 Unreported, Supreme Court of New South Wales, Yeldham J, 20 May 1987.
- 9 [1988] 1 All ER 938.
- 10 The Times, 16 February 1989.
- 11 [2001] FCA 382.
- 12 *Drabsch and Collector of Customs* (1990) AAT No. 6328, unreported.
- 13 *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279.
- 14 *Corrs Pavey Whiting and Byrne v Collector of Customs* (1987) 14 FCR 434.
- 15 *Inquiry into the Mechanism for Providing Accountability to the Senate in relation to Government Contracts*, June 2000, p.iii
- 16 www.dofa.gov.au
- 17 See *Hughes Aircraft Systems International v AirServices Australia* (1997) 146 ALR 1; *GEC Marconi Systems v BHP IT* [2003] FCA 50, at paras 920 – 922.
- 18 *Mobile Innovations Ltd v Vodafone Pacific Limited* [2003] NSWSC 166. In that case, Justice Einstein held that 'as a general proposition, the current state of the law in New South Wales is that there will usually be implied by law into commercial contracts made between parties at arms length, a term requiring the exercise of good faith in the performance of such contracts' (at para. 613).
- 19 See *Burger King v Hungry Jacks* [2001] NSWCA 187. Special leave to appeal has been granted by the High Court.
- 20 146 ALR at 42.
- 21 [2002] 2 NZLR 313.
- 22 For example, wording such as that considered in *Cubic Transportation Systems Inc v State of New South Wales* [2002] NSW SC 656, 'the irrevocable offer shall be given in consideration for the Principal agreeing to consider the Proposal'.
- 23 See, eg, *The Contracting Out of Government Services*, Administrative Review Council, Report No. 42, August 1998.
- 24 Paras 6.23, 6.41.
- 25 See Ron McLeod, *Twenty five years of the Commonwealth Ombudsman* (2003) 36 *AIAL Forum* 15 at 18.
- 26 See, eg, *Freedom of Information Act 1992* (Queensland), s.7.
- 27 They will also remain subject to NPPs 7-10
- 28 www.privacy.gov.au.
- 29 www.dofa.gov.au

ATTACHMENT A

MODEL TENDER CLAUSES SUGGESTED BY DOFA

General statement suggested by DOFA for inclusion at front of agency tender documentation

The Commonwealth is subject to a number of specific requirements, which support internal and external scrutiny of its tendering and contracting processes.

These include:

- (a) the requirement to publish details of agency agreements, Commonwealth contracts and standing offers with an estimated liability of \$2,000 or more in the Purchasing and Disposals Gazette; and
- (b) the requirement to report a list of contracts valued at \$100,000 or more and identify confidentiality requirements in accordance with the Senate Order on Department and Agency Contracts.

Tenderers should also note that the Parliament and its committees have the power to require the disclosure of Commonwealth contracts and contract information to enable them to carry out their functions.

The Commonwealth will treat as confidential any information provided by tenderers/prospective suppliers prior to the award of a contract. Once a contract has been awarded, the Commonwealth will not keep such information confidential if it was provided by the successful tenderer/supplier unless:

- (a) the supplier requests that specific information should be kept confidential;
- (b) the specific information is by its nature confidential; and
- (c) the Commonwealth agrees to that request.

In considering a request for confidentiality, the Commonwealth will consider whether disclosure would cause detriment to the contractor or other third party and the circumstances under which the information was disclosed. The Commonwealth will also consider whether confidentiality is supported by the underpinning principles of Commonwealth procurement such as Value for Money, Accountability and Transparency.

The Commonwealth cannot provide an absolute guarantee of confidentiality because certain confidential information may be required to be disclosed by law or to the Parliament or the Auditor-General.

Model clause suggested by DOFA for tender documents

1. Confidentiality

- 1.1 The Commonwealth undertakes to keep confidential any confidential information provided to the Commonwealth by tenderers prior to the award of contract and, in respect of unsuccessful tenderers, after contract award.
- 1.2 The obligation of confidentiality in clause 1.1 does not apply if the confidential information:
- (a) is disclosed by the Commonwealth to its advisers or employees solely in order to consider the tender responses;
 - (b) is disclosed by the Commonwealth to the responsible Minister;
 - (c) is disclosed by the Commonwealth, in response to a request by a House or a Committee of the Parliament of the Commonwealth of Australia;
 - (d) is authorised or required by law to be disclosed; or
 - (e) is in the public domain otherwise than due to a breach of clause 1.1.
- 1.3 The Commonwealth will agree to keep confidential any specific information provided under, or in connection with, the contract where it is appropriate to do so having regard to the matters covered by the Commonwealth's Guidance on Confidentiality of Contractors' Commercial Information.¹
- 1.4 To enable the Commonwealth to consider whether it agrees to keep specific information confidential tenderers must include in their tender any request that information is to be treated as confidential following the award of a contract to it, specifying the information and giving reasons why it is necessary to keep the information confidential.
- 1.5 The Commonwealth will consider any request made under clause 1.4 and will inform the tenderer whether or not the Commonwealth, in its sole discretion, agrees to the request and the terms under which it agrees.
- 1.6 The terms of any agreement will form part of the contract to be awarded at the completion of the tender process.

Endnote

¹ The document, *Confidentiality of Contractors' Commercial Information*, can be found on the DOFA website (www.dofa.gov.au). That document recognises that a legitimate claim to confidentiality will include where disclosure of the information would damage the business interests of the contractor, such as by the disclosure of commercially sensitive information.