AIAL FORUM
NO 2
JULY 1994

aial AUSTRALIAN INSTITUTE OF ADMINISTRATIVE LAW (INCORPORATED)

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The ***AIAL Forum*** is published by

Australian Institute of Administrative Law
PO Box 3149
BMDC ACT 2617

This issue of the ***Forum*** should be cited as (1994) 2 ***AIAL Forum.***

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ISSN 1322-9869

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THE COMMONWEALTH OMBUDSMAN - UPDATED AGENDA

*Philippa Smith**

The traditional role and culture of a Commonwealth Ombudsman has been to impartially review complaints, resolve disputes, and address defective administration where it is found in Commonwealth departments.

Described this way it is a reactive and complaint driven role dealing with the matters that reach us. In my view the role of Ombudsman is also to stimulate and lead change by identifying the matters causing difficulties. The Ombudsman's 'own motion' capacity is an important recognition of that role. Our role is also to stimulate an environment of debate by both agencies and consumers as to what standards of service and decision making should be expected in the public sector. These ideas are not new in themselves but they set a new agenda for the Ombudsman's office over the coming years with the Ombudsman joining the debate about best practice standards and consumer rights.

The Current Situation

My predecessors have outlined[1] some of the functions of the office and the sheer volume of work. Last year the office dealt with some 38,000 contacts (including 22,000 enquiries and 16,000 investigations). This covered 118 agencies (99 Commonwealth, 19 ACT), and many more topics all with a total of 76 staff spread across Australia.

With such a volume of work we can be justly proud of our 'value for money' but the statistics also indicate that the availability of the Ombudsman's office is not as well known or understood as it should be. About 54% of Australians know of its existence but this awareness is linked with education. Those most in need and the least educated may not have easy access to our services. (The same survey indicated that the other administrative tribunals had an even lower profile).

The Changing Environment

The proliferation of specialist tribunals and other review bodies has no doubt improved the administrative fairness of decision making but it has also created a maze for the uninitiated and life's vocation for the more obsessive if 'forum hopping' is allowed to occur.

The distinction between the realm of the public and private sector is now also blurred. The establishment of 'industry ombudsmen' reflects community expectations that the private sector should also provide mechanisms of redress to ensure accountability and fairness by large (private) industries.

The public sector meanwhile is being 'commercialised' and is contracting out services that were once regarded as the domain of the public sector. Community expectations are also changing. Many consumers are more questioning and more aware of consumer rights generally.

The Ombudsman's Role

So what is the role of the Ombudsman's office in this new environment? These changes provide both opportunities and challenges for

* *Philippa Smith is the Commonwealth Ombudsman.*

the office. The low level of awareness about the office, and the proliferation of review bodies, indicates that there is a significant co-ordinating and educative role required so that people are informed about their rights and responsibilities, and about the principles of fairness in decision making.

Compared to other specialist tribunals the Ombudsman has an unique role. Our brief is to review the matter not only from a perspective as to its lawfulness but also as to whether it is fair and reasonable in all the circumstances. This role - and my capacity to undertake own motion enquiries - is important if we are to look beyond the individual case and identify and prevent the systemic causes of complaints.

The recent 'Access to Justice' report[2] put it this way: 'if the Ombudsman were to focus more on systemic issues than individual complaints, complaints that are made will advantage not only the complainants but all people in similar circumstances including many people who may never, or only rarely, make complaints. In this way a focus on systemic problems could be a useful, if largely invisible, improvement in access to justice.'[3] I agree.

In the past the office has been trapped in a somewhat reactive and bandaid role in trying to resolve the complaints it receives. In this context, I am pleased to acknowledge the Government's allocation of some increased funding ($1.3 million) to this office from this financial year onwards so that the office can take on a more active role.

The increased allocation will be used to enhance our work on major projects and in improving our capacity to report on the nature and type of complaints received and standards for administrative practice. The increased funding will also allow for outreach programs to focus on particular Government activities and groups. In 1995-97 such a focus will be placed on aboriginal matters, immigration, employment, education and training (and its links with social security), tax and the Child Support Agency. The fruits of these initiatives should develop over the coming years. I do not, however, underestimate the volume and complexity of work involved in each of these fields. In the arena of tax a recent Parliamentary Committee has recommended the need for a separate Tax Ombudsman within the Commonwealth Ombudsman's office to allow for a greater depth and speciality of knowledge. I agree that we need a greater degree of specialist expertise and staff for the review of tax complaints and tax rulings.

The need for specialist units within the Ombudsman's office is particularly urgent for tax but also needs further consideration and development for other areas of our work (eg FOI). In recent times there has been pressure for a range of specialist ombudsmen known by that name or some other descriptive title. This is pleasing in that it demonstrates that the concept and value of 'Ombudsman' is alive and well. There are, however, some inherent problems. The proliferation of bodies is confusing to the public and creates inevitable gaps and duplication in jurisdiction, not to mention high infra-structure overheads. Such specialist bodies will also need to be continually vigilant to avoid organisational capture arising from their close association with the special public and the organisations subject to jurisdiction.

As indicated above, in the Commonwealth Ombudsman's office we see the need for more specialist units (and networks) within the office

itself, together with a higher profile for these activities. The generalist infrastructure, however, hopefully allows for cross fertilisation of staff and ideas, lower overheads and less potential confusion for consumers.

Other Frontiers

As previously noted the growth of industry Ombudsmen marks another change on our administrative landscape and must be seen as a plea from the consumer to have equal rights and protection in the commercial environment. It has a lot to recommend it, but much still needs to be done to secure at least minimum standards and accountability before the title 'Ombudsman' can be used. If standards are not set, the title may mislead rather than protect consumers.

The issue has some urgency in Australia. In other countries the growth of industry ombudsmen has got out of hand, particularly in North America. It should also be remembered that no matter how high the standards are, industry ombudsmen will always lack two important powers available to parliamentary ombudsmen. That is the statutory power to access information from a third party, and the power to summons a witness on oath. There is also, of course, our power of embarrassment in tabling a report to Parliament.

With these thoughts in mind I question why the Commonwealth Ombudsman's powers should always be limited to functions *owned* by the government. Other factors such as funding by government, the functions themselves, and clientele may be equally relevant.

An increasingly important role of the Ombudsman is finding the onus of responsibility in decision making *between* departments, agencies, *and* the private sector. For example, one recurring issue has been the transfer for people from DSS to DEET benefits and the administrative and consequent eligibility gaps that arise between the departments. The aim should be to achieve a 'seamless' service wherever possible from a client's perspective.

In other cases I find that the office cannot effectively deal with problems where the service is undertaken on a contract basis or by an organisation funded by the Commonwealth government to undertake certain services. It means that buckpassing as to responsibility is possible and that consumers can, or cannot, have the matter reviewed depending on who finally provided the service.

Currently, such matters are often outside my jurisdiction. This is frustrating to both me and the complainant. The Administrative Review Council has released a discussion paper[4] highlighting these and other anomalies as they relate to health, housing and community services. They concluded that it was important that government funded services should have independent complaint mechanisms to ensure an accountability and standard of service for clients.[5] They recommend an enhanced role and jurisdiction for the Commonwealth Ombudsman.[6]

The Government's employment white paper[7] has also recommended the establishment of private employment agencies to operate along side the CES. Again I raised the potential dilemma for clients' having to deal with say DSS, CES and a private employment organisation on similar or the same issues. I pointed out that if someone had a problem it was important to have a one-stop shop. It is also important for the review body to have the ability to trace the cause

of the problem between the various agencies, to identify the administrative gaps and anomalies and, of course, a final point of responsibility. Nor could it be argued that the clients were able to 'shop around' in a competitive market. The Government has moved to make a number of legislative changes which will allow the Ombudsman's office to investigate complaints and systemic issues related to such 'private' employment agencies.[8]

While seeking a broader jurisdiction to allow this office to deal with complaints and service standards in some contracted or *funded* activities, it is clearly not appropriate for the Commonwealth Ombudsman to be involved in complaints relating to many commercial activities. The Ombudsman Act has recently been revised to allow the Ombudsman the discretion to decline an investigation where it relates to commercial activities.[9]

But what should be the boundary lines? A number of our complainants have recently raised issues about the tender arrangements where small businesses have claimed that the Department and/or its agent acted in an unreasonable or unconscionable way. Our investigations have raised important issues of principle, as to the responsibilities of agencies in such dealings.

Equally, Telstra has argued that, given its commercial activities, it should be excluded from the Ombudsman Act and Freedom of Information Act. Again, recent investigations related to the Casualties of Telecom cases, and a steady stream of matters related to yellow pages, silent numbers and the like indicate to me that there are strong public interest grounds as to why administrative review mechanisms are appropriate and valuable in the 'commercialised' setting.

Determinative Powers

Finally, there is the old chestnut as to whether the Ombudsman's office should have determinative powers.

Industry Ombudsmen do, but they do not have the power of referring matters to Parliament in the way that a Parliamentary Ombudsman does.

There is no doubt that some of the appeal of specialist tribunals has been the perception - and reality - of clients getting a quick answer (through determination).

In practice, the vast bulk of cases of the Ombudsman's office are resolved and conciliated within weeks, and even days. This has led to effective and co-operative arrangements with most departments. Similarly, not all cases involve a simple yes/no and we have the flexibility of looking at a range of surrounding issues and circumstances.

Having said this, there may be classes of complaints where determinative powers may be of benefit to all sides. Where defective administration has occurred and act of grace payments are recommended by the Ombudsman may be one example. Another area that may deserve further comment and debate are for those matters dealing with eligibility/benefit issues of less than $5,000 in value. The costs of a protracted debate between the Department and Ombudsman may in such cases outweigh the desirability of retaining a consensual approach.

Mediation

A lot has been said recently about mediation.

Mediation has always been part of the Ombudsman's *modus operandi*. It is not, however, currently recognised in our legislative base focussing, as it does, on consideration of 'defective administration'.

It can be argued, however, that perhaps 80% of all complaints result from either a lack of communication or from no communication at all. Once the parties start to understand each other's viewpoint a resolution may be possible. This outcome evolves from much of our work. In other situations we have effectively set up agreed mediation processes by which civil action through the courts can be avoided. In a recent case this was successfully achieved for an aboriginal housing project worth $2.46 million where the grounds for tender were to be argued through the Federal Court.

This, I believe, is a useful and constructive role for the Ombudsman. Some care, however, is required in the current enthusiasm for mediation. In any alternative complaint resolution process care should be taken to ensure that the complainant is not deprived of something that was his or hers by right, or by law, simply because a decision can be reached by compromise or consensus.

Conclusion

When the Ombudsman was first established in 1976, the office was heralded as part of a new deal of administrative review.

The environment and times pose a range of challenges and opportunities but in my view the Ombudsman's office is still one of the most exciting additions to the administrative framework. The process of improving public administration is as dynamic as the constant changes occurring within that administration. Within that context, the challenge of ensuring fairness and better standards of service will continue to keep us on our toes.

Endnotes

1 D Pearce, 'The Ombudsman and the Rule of Law', (1994) 1 *AIAL Forum* 1; A Cameron, 'Lion hunter', (1994) 1 *AIAL Forum* 29; D Pearce, 'Minding the People's Minder', (1994) 1 *AIAL Forum* 42.

2 Australia, Access to Justice Advisory Committee, *Access to Justice* (1994).

3 *Ibid* paragraph 12.54.

4 Administrative Review Council, *Administrative Review of Funding Programs (A Case Study of Community Services Programs,* forthcoming.

5 *Ibid.*

6 *Ibid.*

7 Australia, House of Representatives *Working Nation, Policies and Programs* (1994).

8 Employment Services Bill 1994, clause 111.

9 *Ombudsman Act 1976*, s6(12).

ADMINISTRATIVE LAW AND SEX DISCRIMINATION: THE REVIEW OF COMPLAINT HANDLING

*Sue Walpole**

Presented to the NSW chapter of AIAL, Sydney, 9 May 1994.

In this paper I will discuss how complaints are handled under the Sex Discrimination Act (SDA) and, in relation to this, the Human Rights and Equal Opportunity Commission's response to the instances of judicial review that have occurred over recent years. I will canvass and offer some insight into proposals to address the issues that have arisen therein.

However, I will commence by first outlining the context and impact of judicial review on complaint handling in my jurisdiction.

Complaint handling in my portfolio area and in the Commission operates within a legal framework, the boundaries of which are the Commission's establishing legislation, the Human Rights and Equal Opportunity Commission Act, the SDA and, of course, the 'federal administrative law package' (the *Judiciary Act 1903*; the *Administrative Appeals Tribunal Act 1975*; the *Ombudsman Act 1976*; the *Administrative Decisions (Judicial Review) Act 1977* (the AD(JR) Act); and the *Freedom of Information Act 1982*). For the present purpose I confine the following discussion to the question of judicial review under the AD(JR) Act and the Judiciary Act.

The legislative intent in the AD(JR) Act was to codify existing grounds of judicial review of administrative action and to overcome some of the technical difficulties with remedies at common law. Consequently in understanding how the AD(JR) Act may apply to my handling of complaints it is necessary to observe some recent common law developments. Specifically, the common law with regard to the duty of procedural fairness has developed considerably in recent years. An important example was *Ainsworth v Criminal Justice Commission*[1] in 1992 when the High Court expressly rejected earlier authority which held that investigators do not owe a duty to afford procedural fairness. The Court held that:

> 'a duty of procedural fairness arises, if at all, because the power involved is one that may "destroy, defeat, or prejudice a person's rights, interests, or legitimate expectations" ... It is not in doubt, that where a decision making process involves different steps and stages before a final decision is made, the requirements of natural justice are satisfied "if the decision making process, viewed in its entirety, entails procedural fairness"'.[2]

The SDA explicity provides for the making of decisions which are clearly of an 'administrative character' and are 'under an enactment'. As an example, the legislation explicitly provides for the notification of complaints to me and decisions by me not to inquire into complaints where specific matters are satisfied. The legislation also provides me with statutory powers to investigate and conciliate complaints and refer them

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to the Commission. It gives the Commission power to receive complaints, refer matters to me, hold inquiries into complaints, etc.

However in relation to both the Commission and myself, it is clear that in the course of accepting, investigating, conciliating, referring and inquiring into complaints, conduct is engaged in, which may be reviewable under the AD(JR) Act. Section 3(3) of the AD(JR) Act provides that where a person has express or statutory power to make a report or recommendation, the making of the report or recommendation is deemed to be the making of a decision. Consequently the act of referral, or failure to refer complaints, either to me by the Commission, or, by me to the Commission for hearing, is reviewable under the Act. In addition, section 6 of the Act makes 'conduct for the purpose of making a decision' reviewable. The 'conduct for the purpose of making a decision' does not need to be undertaken by the actual decision maker for it to be reviewable. Hence it includes conduct that is preparatory to the making of decisions including investigation work and the taking of statements. That is to say, unlike the case of the investigative work done by the NSW Anti Discrimination Board which Mathews J *in NSW Corporal Punishment in Schools Case* in the NSW Supreme Court held was not reviewable,[3] my investigative work and that of the Commission may be reviewable.

In relation to the *Judiciary Act 1903* I note that since 1983 the Federal Court has had an extended jurisdiction under Sections 39B and 44(2A). The effect of these amendments was to invest the Federal Court with jurisdiction to provide administrative law remedies in parallel with those available in the High Court. Consequently applications could now be made to the Federal Court for the remedies of mandamus, prohibition or injunction against an 'officer of the Commonwealth'. It is clear that officers of the Commissioner fall within the definition of an 'officer of the Commonwealth' and these remedies are consequentially available to the parties.

I wish to make some preliminary comments before discussing the issues arising from the legal context I have just outlined.

1. Comparatively few cases have been brought against the Commissioner or HREOC and those that have been brought all relate to the handling of individual complaints and to a considerable degree turn on the facts of those individual cases.

The extent to which the Commission has been subject to judicial review and the outcomes of those incidences of review does I believe, provide something of an indication of the adequate or proper approach and performance of the Commission. In total, over the Commission's seven years of operation, there have been 19 external litigation matters in which the Commission has been a party. Of these matters eight were freedom of information (FOI) and ten were AD(JR) Act matters. Of the FOI cases, half concerned the one substantive matter (including three appeals by one litigant) and two matters were withdrawn. Of the ten AD(JR) Act matters, seven substantive issues have been dealt with and three appeals were run by three litigants. In total six litigants have pursued the Commission in relation to its complaint handling functions. This is from a total of at least 400 parties to complaints over the same period.

This number of parties relates to the 202 complaints referred to the Commission for public hearing over the previous seven years. However, it should be remembered that this total is but a sub-set of the far higher number of matters received, investigated and conciliated by the Commission. In 1992/93 alone the Commission received and commenced investigation on 2,024 complaints.

Notwithstanding this, those cases that have been reviewed offer us some important insights into the implications of administrative law for the jurisdiction.

2 The jurisdiction of federal administrative law is rapidly evolving. However, it is my view that the application of federal judicial review to my area is perhaps more problematic than many because of the novel nature of the dispute resolution process envisaged by the architects of Australian anti-discrimination law.

I refer to what has been termed 'the critical philosophical difference' between anti-discrimination law and the principles of administrative law of which it forms a part. Administrative law is based on the concept of natural justice or procedural fairness, which has as its root the idea of the valiant individual man taking action against the might of the executive as the effective arbiter of State power. Anti-discrimination law on the other hand is based on a legislated set of values and rights that start from the premises that some groups in society need the State to ensure their rights of equality either individually or as part of the group.

Hence, the two notions collide as a result of fundamental individualist and collectivist premises. On the one hand the State is the antithesis of liberty and freedom and the individual is necessarily pitted against its excesses. On the other hand the state is seen in a more benevolent and generous light as the source of protection, freedoms and rights for groups which might otherwise be denied the same. The latter is what ant-discrimination law specifically recognises and contributes to the quest for a fairer society.

Part of the reason for the contradiction between anti-discrimination principles and administrative law principles may lie in the question of how laws are applied and what procedures are used. In ordinary matters of criminal and civil litigation matters are resolved through an adversarial approach and reference to known rules of interpretation. In discrimination law the process is one which adopts an inquisitorial methodology and where rules of interpretation and evidence can be more flexible.

The SDA, like other legislation, has a difficult balancing role in that it has to attempt to advance the rights of certain groups while at the same time preserving the legal requirements of neutrality, objectivity and overall administrative fairness.

For example, it is necessary under the principles of natural justice to remain neutral even though the aim of the legislation is to eliminate discrimination. The objects of the Act make it quite clear that it is to promote the equality of men and women, and to eliminate gender-based discrimination in public life. It is intended that, in the furthering of its objects, the Act will be easy to use, accessible and that the legal formalities will be kept to a minimum.

Legislation and practice requires the individual to bring her complaint to the Commission. The complainant is

required to establish that an instance of discrimination has occurred. The Commission then attempts to conciliate the complaint in a relatively quick and non-contested way. The aim is pragmatic, to find a mutually agreeable solution - not to formally determine and remedy a 'wrong'. However, if the complaint is irreconcilable it will proceed to a hearing where a determination will be made.

The hearing function of the Commission has a statutory basis in section 59 of the SDA. It forms the final stage of the function 'to inquire into alleged infringements ..., and endeavour by conciliation to effect settlements of matters to which the infringements relate'. In addition, the hearings both directly and indirectly address the function of the Commission - 'to promote the understanding and acceptance of and compliance with the Sex Discrimination Act'.

Division 3 of the SDA prescribes the who and how of hearings at the Commission and in doing so expressly provides the Commission with certain powers. In this context, the most empowering provision is that which states that the Commission is not bound by the rules of evidence, may inform itself on any matter in such a manner as it thinks fit; shall conduct an inquiry with 'little formality and technicality'; and with 'expedition'; and may give directions relating to procedures that in its opinion will enable costs or delays to be reduced; and may give such direction as to procedure as it considers appropriate to the ensure that justice is done. This provision provides the Commission with broad powers with which to conduct its inquiries. However, these should in view of my earlier discussion, be read in light of, and applied in accordance with, the principles of administrative law. To a considerable extent then, this has resulted in tension between (the undefined and yet flexible nature of) conciliation, the operation of this provision and these broad principles.

This model has imported aspects of the inquisitorial system of Europe. The growth of this form of administrative methodology is a partial response to the barriers of common law procedure to quick, cheap, accessible justice. The attempt is to provide a user based complaint system which, initially at least, is accessible and non adversarial.

One important aspect of an inquisitorial method is that it can take account of facts which are revealed over time. All the evidence does not have to be argued from the beginning in front of a non-participating judge. Inquiries can be made by the adjudicator and further questions and facts pursued. This process is one likely to be more friendly to women than the advocacy system, particularly in cases where the dreaded work 'sex' arises. It is the common experience of the Commission and particularly in cases of sexual harassment (which comprised over half of my complaint load in 1992/93), where considerable emotional trauma is involved, that the ability of women to add to their initial complaint is crucial. It is also an area where those engaged in judicial review of the Commission's proceedings have had great difficulty.

B v Mathews[4] was a case in which a young woman, 19 years of age, complained that she was forced to leave her employment as an officer manager for 'Tips of Tax' because her employer, Mr Mathews, was sexually harassing her. It had been her first job. the harassment complained of included a series of incidents, and numerous remarks of a sexual nature about her private life and physical appearance.

Her initial letter of complaint to the Commission was supplemented later with other information. This is in accordance with our experience that victims of sexual harassment and of sexually hostile working environments find it difficult to accept, comprehend and articulate the wrong they have suffered. This is often not recounted in one sitting or in the first letter.

The original letter of complaint was a hand written document. A further letter typed at the Brisbane office of the Commission signed by the complainant was forwarded to Mr Mathews. This letter was substantially the same as the original but added information relating to the general pattern of her work whilst in the employment of Mr Mathews.

Mr Mathews commenced a series of legal actions against the respondent and the Commission, seeking review pursuant to the AD(JR) Act. He claimed, amongst other things, that the Commission had edited the letter of complaint. He argued that those whose job it was to investigate the complaint should not assume responsibility for formulating it.

On this point Spender J found that there was no change in either the intent or the impact of the original letters or the typed letter. However, he stated,

> 'I recognise that a perception of lack of impartiality and objectivity can be generated by conduct which suggests that the Commission and the complainant are "on the same side"'.[5]

This instance of judicial review illustrates the inevitable tension between the requirement of procedural fairness and the necessity of pursuing the objects of the Act to ensure the accessibility of the complaint handling function in respect to those it is meant to serve.

It is our experience that the areas where judicial review is most likely to occur include questions such as:

1. Whether the decision maker in a matter is invested with the power purported to be exercised;
2. Whether jurisdictional errors have occurred in the acceptance, refusal or pursuit of a complaint,;
3. Whether complaint handling has been carried out in a manner consistent with any rules of procedural fairness which may apply;
4. Whether errors of law have been made in decisions as to acceptance, rejection and pursuit of complaints including the failure to take into account relevant considerations, taking into account irrelevant considerations and the absence of evidence to justify decisions.

To date, case law has given the following guidance.

1. In *Koppens*[6] and *Mathews* case[7] it was held that administrative law rules applied to the complaint handling process including the rules relating to procedural fairness or natural justice.
2. In the cases of *Proudfoot*[8] and *Ellenbogen*[9] it was held that the SDA and the Human Rights and Equal Opportunity Commission Act conferred statutory powers upon the Commission and the Commissioners. To the extent that these powers may be

exercised by officers of the Commission or others, explicit delegations are necessary.

3. In *Proudfoot's* case[10] it was held that decisions made in the course of complaint handling may be decisions of an 'administrative character' made 'under an enactment' and aggrieved persons will be entitled to statements of reasons which contain the matters set out in section 13 AD(JR) Act and those decisions may be reviewable on the grounds of an absence of evidence to justify them.

4. In *Mathews*[11] and *Proudfoot's*[12] cases it was held that decisions as to whether complaints are within jurisdiction are reviewable.

5. In *Harris*[13] and *Cameron's*[14] cases it was held that officers of the Commission, including the Commissioners, are 'officers of the Commonwealth' and therefore subject to review under s39B of the Judiciary Act.

6. Other issues include whether inquiries by the Commission must include public hearings and who may make orders of a procedural nature with regard to the preparation and presentation by the parties of their cases.

These are important issues requiring a close examination of our law, procedures and corporate values and assumptions. In responding to these issues following my appointment, I have considered the determinations of the Federal Court and observed complaint handling practices, documentation and infrastructure in the Commission with the eyes and ears of one who is new to an organisation. As a result of my observations, in August 1993 I initiated and funded a National Review of Complaint Handling as part of my work program for the 1993/94 financial year. The Race and Disability Discrimination Commissioners have joined me in this Review. As a consequence, the Review was established by the Commission in September 1993 and is focussing specifically on the areas of sex, race and disability discrimination.

The objectives of the Review are:

1. To ensure the effectiveness, flexibility and responsiveness of complaint handling, including where necessary, recommendations for legislative and procedural reform;

2. To improve the quality and coordination of complaint data collection; and

3. To recommend a co-ordinated training package for staff in complaint handling.

The findings of the Review will be derived from a research methodology which has sought to access the body of experience and knowledge of complaint handling which exists both in the Commission and the community. It is a methodology which reflects the fact that the legislative provisions that have been put in place to both resolve complaints of discrimination and fulfil the objectives of the legislation are, in the case of the SDA, now ten years old. (In the case of the Racial Discrimination Act, some provisions are nearly 20 years old. The Disability Discrimination Act's provisions reflect those of the earlier Acts.)

Primary research work which has been undertaken includes a number of surveys of target groups to assess

the services provided by the Commission in the fulfilment of its complaint handling functions. The research conducted will include surveys of enquiries, of complaints, respondents, unions, employers, interviews with legal and other advocates and industrial leaders as well as review of alternative complaints based legislation and the models contained therein, both in Australia and overseas.

I will canvass issues arising in the research to date. These issues are informing discussion in the Review and will inform the Commission's response to its recommendations. Potentially then, the course of this discussion will shape the future direction of conciliation in this jurisdiction.

I will outline some of the proposals being considered by the Review. They are drawn from the premise that complaint handling should be guided by general principles of accessibility for complainants, transparency of decision making, timeliness of complaint handling, fairness, accountability, compliance and effectiveness of outcomes and systematic data collection and evaluation.

(A) In relation to *accessibility* issues, considerable attention has been given to the need to improve the access of persons to the complaints handling process. You will recall that this was one of the issues raised in *B v Mathews*[15], outlined earlier. The review is keen to address the key issues arising in research, namely, facilitated access for special needs groups; public information which sets out complaint procedures in easy to use plain language style; not limiting the complaint handling process to paper based communication; and advocacy assistance for those disadvantaged in pursuing their complaint. This could include the capacity to provide assistance to the complainant to formulate her complaint or at minimum put it in writing. The requirement that a complaint be in writing has been found to be a significant barrier to accessing the complaints process amongst groups the legislation was intended to benefit. As a result several proposals for reform are being considered.

(A)1 Plain English Redrafting

Research suggested access and understanding would be greatly improved especially for non lawyers, if the Act was redrafted in clear and consistent language or 'plain English'.

(A)2 Standardisation of definitions and best practice procedural provisions

There appear to be significant problems arising from the fact of different ant-discrimination legislation, much of which is administered by the Commission or its agents. It is my view that separate Acts should be retained but standardised definitions and common 'best practice' procedural provisions be incorporated into each of the Acts at the time of redrafting the 'plain' English versions of the legislation.

(A)3 Complaints in writing

It is proposed that provisions for receiving complaints should be standardised across the Commission's legislation to allow for complaints being received in person, in writing or by telephone. It has been suggested that the SDA should be amended to include the requirement that the Commission provide assistance to

complainants in either formulating their complaints or reducing them to writing.

(A)4 Other areas

Other areas to be addressed in the course of the Review will be *stronger statutory functions of complaint prevention* (encouraging non-discriminatory practice and compliance programs), *standards setting, resolution promotion* (encouraging development of other complaint resolution mechanisms) and *community development* (liaison, referrals and advocacy promotion), and capacity for Commissioners *to initiate as well as intervene in proceedings* in other jurisdictions.

(B) The next area of concern is *transparency of decision making.* The tracing of the decision making processes.

(B)1 Development of a national approach to policy and procedure

The dispersed locations of Federal and state offices, their different historical development and social and political environments have led to isolation and differences in approach and outcomes. The review is likely to favour priority for the development of a comprehensive Policy and Procedures manual. The manual would draw on 'best practice', on protocols of communication and be an on-going, open and inclusive process for review and development. The manual would consolidate all policy and procedural material in one series of documents which would be updated readily. It should include guidance on:

- who is empowered to make which decision;
- what are the principles of procedural fairness that may apply to individual stages in the complaint handling process;
- what constitutes bias in the administrative law context and the implications of this for conciliators; and
- how to distinguish between investigation and conciliation processes.

Areas to be covered by the Review incorporate development of *specific interest public interest tests and criteria* to guide the exercise of discretions in complaint handling as well as a clearer statutory differentiation of the key elements of complaint handling (receipt, assessment, informal resolution, investigation and conciliation).

(C) In regard to the *timeliness of complaint handling* research uncovered concern that complaint handling processes were occasionally very protracted requiring a high degree of emotional resilience on the part of the complainant. A number of factors have contributed to this, including work load 'bottle necks' as a result the steady emergence of human rights and discrimination issues as key areas of public awareness through the late '80s and early '90s.

(C)1 Institution of case management systems

Research has indicated that the initial response to complaints is critical to effective complaint handling processes and this response needs to be made at a senior level in the Commission. It is proposed that existing inconsistencies in approach be dealt with by:

- clear responsibility at a senior level for deciding on matters of jurisdiction;
- complaints being considered within 24 to 48 hours of receipt;
- clear guidelines on handling of different categories of complaints, eg fast tracking urgent matters, receiving and dealing with complaints orally, directing complaints toward investigation, early conciliation or a hearing at the choice and request of the complainant.

(C)2 Specialisation

As stated the expansion of workloads, the addition of legislation in recent years and the different issues inherent in the different types of discrimination have led to the view that portfolio based specialisation is appropriate and capable of further development and implementation. This will allow more cross-fertilisation between policy and complaint handling areas and further the aim of generic policy development in my portfolio area. It also advances self determination by complainants by allowing their choice of the 'policy' option as a legitimate complaint handling strategy. It raises the notion of the development of service options along a typology of complaints ordered by the hierarchy of outcomes which are sought and specified by the complainant at an early stage of the process.

(D) Fairness

This relates to the issue of procedural fairness and natural justice through the complaints process.

(D)1 Conciliation and investigation

Generally research indicates there is a lack of uniformity in approach to and understanding of the term 'conciliation'. This may reflect the lack of legislative definition of the term and process, although I note that this may not be a disadvantage as legislative prescription could give rise to rigidity. Variables affecting use of the term appear to be training, background, expertise, knowledge of the framework in which conciliation occurs, and the use of conciliation at the different stages of complaint handling. This is a reference to the fact that complaint handling is not a linear process - conciliation can occur during the investigation stage, after investigation, or prior to a hearing.

At the early stages, fusion of roles between investigator and conciliator has raised significant issues related to the different demands and objectives requiring different skills and methods. The same person is required to investigate, determine the facts giving rise to a *prima facie* case of discrimination, maintain neutrality, maintain trust of both parties, offer support to the complainant and act as an advocate for the legislation.

In response to these issues it is proposed that functions be separated in a way that flexibility be retained by:

- amending the legislation to identify the stages of complaint handling;
- designating and delegating staff roles to the stages;
- greater use of informal negotiation by investigators and/or by the parties; and
- placing greater emphasis on the complainant's capacity to determine the course of her complaint.

Other areas to be developed by the Review intended to respond to research findings indicating a capacity

for Commissioners *to intervene in proceedings before the Commission/Tribunal.*

(E) The issues of *accountability and data collection* arise in a number of contexts, not the least of which is the public accountability of the conciliation process. Several options are emerging here related to regular reporting formats against performance standards; regular external evaluation and review; systematic registration and recording of complaints to allow tracking and management of individual complaints; and classification and aggregation of complaints data for use in profiling user, complaint types and causes, and service outcomes and trends.

(F) Related to this is the issue of *effectiveness* which concerns the quantity and quality of outcomes; compliance and enforceability of agreements; consideration of policy matters of public interest arising from individual complaints and recommendations for systemic change where necessary.

Conclusion

By way of conclusion I note that most of these issues will need to be assessed and finalised in the context of either adaption to, or adaption of, the legislative framework and having regard to the potential and prior impact of judicial review. First and foremost then, the findings of the Review will require me and my colleagues at the Commission to identify all the statutory powers derived from the legislation and the positions in which they are vested. Consideration will need to be given to the creation of appropriate delegations including the extent and the scope of the delegations. Concurrently, we would have to comprehensively identify those decisions in the complaint handling process which may be subject to judicial review.

Developments in procedure and law in complaint handling must address issues inherent to the tension between object, process and outcome. This can be identified as the central issue facing me and the Commission in performance of our complaint handling functions, in our response to judicial review and in the links we have and will form with target groups and communities.

The proposals I have outlined go some way toward achieving a better a balance between the requirements of law and the need for proactive intervention on my part to ensure the maximisation of outcomes as envisaged by the legislation.

Endnotes

1 (1992) 106 ALR 11.

2 *Ibid* 18-19.

3 (1986) EOC 92-160.

4 *Mathews v Sheedy and Anor* (1993) EOC 92-504.

5 *Ibid* 79, 581-79, 582.

6 *Koppen v Commissioner for Community Relations* (1986) EOC 92-173.

7 See note 4, above.

8 *Prondfoot v Human Rights and Equal Opportunity Commission* (1986) EOC 92 490.

9 *Ellenbogen v Federated Municipal and Shire Council*

Employees Union of Australia and Ors (1989) 92-252.

10 See note 8, above.

11 See note 4, above.

12 See note 8, above.

13 *Harris v Bryce* (1993) 113 ALR 726.

14 *Cameron v Human Rights and Equal Opportunity Commission and Anor* (1993) 119 ALR 279.

15 See note 4, above.

PUBLIC PARTICIPATION AND RULE MAKING: REG - NEG, THE USA EXPERIENCE

*Kim Rubenstein**

Presented to the Victorian Chapter of AIAL, Melbourne, 23 February 1994.

I had the fortunate experience of spending approximately 18 months in the USA from July 1991. I was first introduced to the concept of 'Reg-Neg' in a *Separation of Powers* course at Harvard which eventually lead me to contact the Administrative Conference of the US ('ACUS'), the equivalent body to the ARC. I was a legal intern with ACUS in 1992. During that time I did some work on the Reg-Neg project and it is that work, and my studies in the US that I draw upon for the purpose of today's address. When I say Reg-Neg I am referring to the process of Negotiated Rule making within US government agencies.

US System of Rulemaking

It is important to begin by explaining the different nature of federal rulemaking in the US. It is governed by s 553 of the Administrative Procedure Act (APA) which requires that notice of the proposed rule making be placed in the Federal Register. The Federal Register is the equivalent of our Government Gazette. This must be followed by some level of participation by interested persons (usually either by written submissions or oral presentation) and finally publication of the rule at least 30 day before it becomes effective. Rules can be challenged in the courts, also under the APA.

The idea for Reg-Neg

In 1991 Judge Wald of the US Court of Appeals for the District of Columbia Circuit stated that 80% of all rules were being appealed through judicial review.

Interested parties who did not support the proposed or settled rule would challenge the legal validity of the rule in the courts. This could often be tactical measure - for instance the rule might involve a certain monetary cost to the company, which may have outweighed the cost of litigation in challenging the rule. Therefore in some circumstances the cost of litigation would have been less than the anticipated cost of the rule. This is just one of the reasons for the high level of litigation over rules. The high degree of litigation is therefore problematic in the proper administration of agencies responsible for the rules.

In order to avoid this costly process, both in time and money, the concept of negotiated rule-making was developed. The basic idea is that a regulatory agency which is considering drafting a rule brings together representatives of the various interest groups or affected persons, for face to face negotiations, with the aim of achieving consensus on the proposed text.

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The Negotiated Rulemaking Act of 1990 sets out findings that Congress made which include:

> Adversarial rule making deprives the affected parties and the public of the benefit of face-to-face negotiations and cooperation in developing and reaching public agreement on a rule...
>
> Negotiated rulemaking can increase the acceptability and improve the substance of rules making it less likely that the affected parties will resist enforcement or challenge such rules in court.

An agency which is thinking of using reg-neg must first determine whether the rule concerned is one that is suitable for this approach. It would then ask a 'convenor', either outside contractors or government employees not normally involved in the area, to assess how well the proposed rule meets the reg-neg process. Then the make up of the reg-neg committee is determined, and the convenor and agency are responsible for making reasonable efforts to ensure that all relevant interest groups are aware of the proceedings. The goal of the committee is to reach consensus on a draft rule. The word 'consensus' is actually meant to mean that each interest represented concurs in the final rule - ie that there is unanimous approval. Once this is achieved the rule is published as a proposed rule in the Federal Register, as the normal rulemaking procedures provide. Negotiations that do not result in a consensus can still be very useful to the agency in that they narrow the issues in dispute and can identify issues that need to be resolved[1].

Reg-Neg in Practice

Most of the work in the area has been done within the Environmental Protection Authority (EPA). It has had much success in the formulation of rules through reg-neg. Other agencies that have used it include the Department of Transportation, Labour, Education and Agriculture, the Federal Trade Commission and the Nuclear Regulatory Commission. Most of the areas are highly technical. I sat in on one of the first meetings of a Hazardous Waste Reg-Neg session within the EPA. There were between 25 and 30 representatives, and they were having much difficulty in reaching a consensus.

Value in Australia

One may ask what value this has in Australia, where we do not have such a history of litigation over delegated legislation, nor do we have the same scope for such litigation within our constitutional and administrative law framework. I would suggest that its value is more fundamental in its approach to representative democracy. It is about the involvement of interested parties in the political process. If one thinks of classical democracy, this fits reasonably comfortably with the notion of grass roots participation. The people who are going to be most fundamentally affected are becoming involved in the process. Further, the harnessing of the expertise and 'know-how' that various interest groups possess is a further advantage that such a system offers. Our political representatives and the members of the government departments do not always have a monopoly on the necessary expertise in a particular area.

There are, however, potential problems in the system. How can you be sure that you have identified all

interested parties, and that all interested parties have a proper and/or equal voice? The US Act provides that the agency should provide resources for those groups that do not have the same resources as large corporations.

There are other legal questions about accountability. Ultimately the agency and Minister in Australia would be accountable for the rule, and would have the final say on the delegated legislation.

Endnote

1 See Administrative Conference of the US, *Negotiated Rulemaking Source Book* (1990).

PRACTISING ADMINISTRATIVE LAW

*Denis O'Brien**

Paper delivered at Seminar conducted by AIAL, Canberra, 15 November 1993

Canberra Perspective

The perspective I bring to this evening's seminar is that of a solicitor in private practice with one of the larger Australian firms. More particularly, the perspective is from one who practices in the Canberra office of a national firm. The perspective is quite different from that of a practitioner with one of the larger firms in Sydney or Melbourne. There, the client base is such that one may have an active administrative law practice acting from interests in, say, the broadcasting area, the customs area, the migration area, etc.

In Canberra, on the other hand, the one client which dominates the landscape and dominates the practice of administrative law is the Government itself. So the practice of administrative law in this city is predominantly a respondent practice.

True it is that, from time to time, one handles the odd administrative law matter for an applicant, whether in the income taxation field, freedom of information, the welfare area generally or perhaps in the migration area.

Other areas too may prove to be fertile fields for the administrative lawyer. I will say a little more about this later. However, as I mentioned above, clearly the largest consumers of administrative law services in this city are the Government departments and agencies. Where does that leave the administrative lawyer in private practice, given that historically the government has used legal resources from within the government sector, principally the Attorney-General's Department, to service its legal requirements? Rather hungry and rather poor, one may think.

Period of change

As many of you would be aware, the provision of legal services to the Government is undergoing a period of historic change. Since the start of the 1992-93 financial year, Government agencies have been paying for the external legal services provided to them by the Attorney-General's Department. In the very near future that regime of user pays will have the added feature of user choice. The result will be that in many, but not all, areas of Commonwealth legal work agencies will be free to make their own choices whether to continue to use the services of Attorney-General's Department or to use other firms. 1 July 1995 was set as the date upon which this quite dramatic change was due to occur. A review under way at present within the Attorney-General's portfolio may result in the bringing forward of that date to 1 July next year, at least in some areas.

In spite of the limitation that is apparently to apply under which the tie to the Attorney-General's Department may be maintained in the case of litigation in the courts, I expect the administrative law area to be one of the key areas where private firms will compete with the Attorney-General's Department for legal work

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from agencies. Many of the firms represented in Canberra (and indeed certain of the firms from outside this city) are now planning for this significant change and are actively developing their profiles within the ranks of Government agencies.

It might be very interesting to run this seminar again in two years time to see what impact the changes have in fact had on the practice of administrative law in Canberra.

Current arrangements

Speculation about the future is not, however, what this evening's seminar is essentially about. The focus this evening is on how an administrative lawyer in private practice in Canberra currently sustains an administrative law practice. I can only draw on my own experience in answering that question. Others may have a different outlook.

I suspect that the answer to the question is not much different from the answer which many who practise as administrative lawyers in other cities would also give, namely, that administrative law is not the sole component of my practice but is merely a part of a broader practice. Even the 'Administrative Lawyer' in Sydney or Melbourne who has, for example, an active town planning appeal practice would often handle a range of further work in the property area.

While recognising therefore that it would be unusual for a practitioner to live on administrative law alone, it may be of some interest to give a brief outline of administrative law practice.

In my firm, we have been fortunate enough to do a considerable amount of work over some years for a handful of significant Government Business Enterprises (GBEs). The principle of the level playing field under which many GBEs operate has meant that they have had greater freedom than Government Departments to use the services of outside firms. The legal needs of GBEs can range across property work, patents and trade marks, contract preparation, taxation and a range of other areas. From time to time administrative law work can also arise, whether in the Federal Court or in the Administrative Appeals Tribunal, whether involving Freedom of Information requests or statements of reasons, or whether the GBE merely wants advice on an administrative law problem. Most of this administrative law work is 'respondent' practice.

Of more interest perhaps is the 'Applicant' work. In my case a good part of this work arises from what American lawyers call 'Regulatory Law'. In some areas, particularly though acting for national associations with headquarters in Canberra, I have been able to build up some sort of profile as a person with a reasonable understanding of a particular regulatory scheme. In the first instance you may find that you are asked to assist the national body in coming to grips with the scheme. Then you may find that constituent members of the body will want to make use of your services when they experience problems in trying to achieve what they want from the Government out of the particular scheme. Occasionally, the problems can be sorted out through personal contact or correspondence with the relevant Department. One's knowledge of Commonwealth administration may help in this regard. In other cases, however, the matter can lead to administrative law proceedings.

The other main source of my administrative law work, although not a terribly significant one, is as the

'Canberra end' of a particular matter which a client brings to the firm in another city. The opportunity for this sort of work probably comes only through the larger national firms. The extent to which it happens of course depends on your being diligent in building up contact with your colleagues in other offices of the firm and making sure that they are aware of the sort of expertise in the Government area which you may be able to offer their client.

Government law work generally

I tend to find within my firm that many of my colleagues think of 'Administrative Law' in very broad terms, not confined to the traditional ambit of that branch of the law. As a result, 'Administrative Law' and 'Government Law' become synonymous, covering almost anything that has to do with Government. And perhaps it is reasonable enough to think of Administrative Law in this more expansive way. Certainly, much Government related work relies on techniques and skills that are familiar to the administrative lawyer, namely an ability to find your way through legislation and legislative instruments and knowledge of the government system and the administrative process. I have, for example, acted for one of the larger private health insurance organisations under the National Health Act in acquisitions by the organisation of the business of other health insurances organisations. The acquisitions are effected by means of schemes of merger under the National Health Act. They are essentially like any other sale of a commercial business, involving due diligence enquiries and establishing the usual contractual basis for such a sale. However, the mergers also require the lawyer to have a good understanding of those sections of the National Health Act regulating the mergers of registered organisations, including the criteria that the Minister or his or her delegate will apply in considering whether to approve the scheme of merger.

In this sort of area, the skills and techniques of the administrative lawyer can play a vital part in the successful resolution of the commercial transaction.

One reason why the administrative lawyer has much to offer in a commercial transaction of this kind is that such a lawyer has a knowledge of, and a feel for, the public interest issues that are involved in the transaction and a capacity to handle the legislative and administrative procedures. The skills and techniques of the administrative lawyer can therefore make a valuable contribution in areas beyond the practice of administrative law in the traditional sense.

PERFORMANCE APPRAISAL - THE FOCUS

*Alan Cameron**

Now that the public sector is becoming familiar with performance measures and appraisal, it is perhaps time to reflect on the measures whereby performance is appraised. Can we rely on set standards or must we always continually re-appraise those standards to examine outcomes, I will explain.

In September 1993, I was invited to be a key note speaker at a conference in Singapore. My topic was '*Complaint Handling in the Public Sector*' a current and recurring theme in my Office for the last two years. I prepared my paper and equipped myself with overheads to demonstrate amongst other points the point that it was profitable for organisations even in the public sector to identify complaints and handle them, rather than to allow them to blow out. I usually demonstrate this point with charts from the private sector and research from United States indicating for example, that for every person that vocalises a complaint, seven nurture a grievance silently and simply take their business elsewhere, and that each unsatisfied customer will speak to 10 people about their dissatisfaction. If one accepts these statistics as being near the mark, clearly the message gets through that it is important to identify grievances and to handle them before they blow out.

I arrived at Singapore Airport at 10.00pm after 8½ hours journey from Sydney, tired and ready for a shower and sleep. I entered the customs hall at the airport to find that another plane had landed, and that the two planes emptying, however, were being filtered through two customs points for non-Malaysians, one custom point for aircrew and another for Malaysians. The crew customs point emptied quickly as did the Malaysian entry point. The visitors from elsewhere waited in a queue, hand luggage in hand, for in my case in excess of 1 hour and 10 minutes, in a temperature that can only be described as tropical steamy. I found the custom officers surly, I was annoyed that the queue was handled badly and that adequate resources had not been invoked for what was a simple problem, that is, dealing with two planes landing at once. It happens all the time in Sydney and you never see queues that last an hour and ten minutes. I wondered why there were no announcements. I protested to a tour guide that I thought that was very poor, he said it happens all the time. Next morning when I read the Singapore Times an article said that business travel magazines voted Singapore the best airport in the world. I revolted. I decided that I would conduct my own survey because I was not going to let this matter go unnoticed. I was clearly very angry still, and affronted that they should claim for themselves something which truly I could vouch for was a lie.

By the time I had arrived to deliver my paper to a group of senior executives from Singapore, Malaysia, Thailand, Hong Kong, I had kept tally of the people I had told this story to. I found

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* *Alan Cameron is Chairman, Australian Securities Commission.*

that I had already spoken to 17 people. I had also learned that Singapore is a population of 3 million. It achieves a great deal of its prosperity from the inflow of 6 million visitors through its airport per annum.

Clearly, the airport is an important part of the economy. Equally clearly was the fact that my grievance had reached more than 10 ears because by the time I had finished speaking at the conference I had reached 70 ears, and I have used this example on a number of occasions and have now lost count of how far my grievance has carried. I don't know if it has any effect on others but each time I tell the story I feel a sense of satisfaction, a sense of making up for the discomfort that I was caused, and in the retelling I certainly have determined never to go to Singapore, except for the utmost pressing reason.

What has this got to do with performance appraisal? I will explain, I had the recollection of visiting Singapore a number of times in the past and indeed I had thought the airport and its services to be outstanding. Why then could this incident occur, an incident that tour guide operators say that it is a common occurrence? Gradually the truth began to dawn on me.

1. Why was the air conditioning inadequate? Had somebody turned the air conditioning down, so as to save expenditure to meet budgets?
2. Why were there inadequate crews manning the customs point? Had management of that shift or that section of the airport determined to meet performance standards or increase efficiency on a budgetary basis by reducing crews? If so, this would not only account for the discomfort of the passengers, but perhaps the surliness of the customs people who themselves felt pressured in performing a task that overburdened them. Also of course, they were affected by the humid conditions. Their surliness was surely the lasting memory that they gave to each and every passenger. Yet would not the person responsible for management in that area perhaps have achieved praise rather than condemnation? Praise for having lived within budgets or below budget.

   Performance appraisal in economic terms can, as this example demonstrates, be indeed a dangerous practice. How far down the track have we gone in assessing performance purely in economic terms? How much attention has been paid by organisations, public and private for appraising customer satisfaction as an ingredient to be added into the equation for measurement? Indeed, how is customer satisfaction information ever gained? To my knowledge, very few if any, performance appraisals call for such information. If my suppositions in the Singapore airport case are correct, clearly indicators that are positive do not disclose very costly mistakes, the cost of which cannot be measured. The cost may not be great but it certainly carries a cost that arguably may exceed any savings for which performance is assessed positively and praised.

One crucial performance measure in the public sector which I hope will be incorporated into reporting requirements is the measure of how agencies resolve their own grievances. Examination of reasons

for failure will produce meaningful performance indicators.

The Ombudsman's Office[1] has for more than two years been changing its direction from an organisation reacting to complaints to one that is actively promoting change through education. The object is to send back grievances for resolution by the agencies from which the complaint originated. In principle public agencies as in private enterprise should be aware of the needs of its customers and be able to identify grievances and have in place the means to resolve conflict. This has led my Office into a field of training and accreditation of public sector personnel in alternative dispute resolution methods, particularly mediation and negotiation. A continual battle is being fought to make conciliation a focus of police complaint handling and this has been ongoing for over five years and through two Parliamentary Inquiries. Complaint identification and complaint handling, therefore, have been raised in profile and brought forward as important issues to be understood and managed in the public sector no less than in the private sector.

Discussions are presently taking place that will, I hope, culminate in the formation of a Public Sector ADR association. The function will be to provide training, accreditation, information and even manage mediator panels for use within the public sector. My Office so far this year has already been involved in the training and accreditation of 120 public sector mediators.

Currently the Ombudsman's office is trialing customer satisfaction counselling in selected agencies. This involves the assessment of the agency's performance through analysis of the complaints its customers make to my office. The outcome we are seeking to achieve is the containment of customer management within the agencies - ie to have complaints treated as management issues wherever possible.

I do not think the move to proactive counselling will result in the elimination of an Ombudsman. Rather it will free up the office to use resources more effectively in helping administration uncover and rectify poor practices.

Endnote

1 At the time of writing Mr Cameron was the Commonwealth and Defence Force Ombudsman (ed).

ADMINISTRATIVE REVIEW COUNCIL - CURRENT PRIORITIES

*Dr Susan Kenny**

Presented to the Victorian chapter of the AIAL, Melbourne, 20 April 1994.

What I want to do is talk about three projects. The first project we have been looking at is administrative review and funding programs and I want to talk about that in some detail. The second project is that on government business enterprises and I want to pass relatively quickly over that for reasons which will become obvious, I think to all of you. Then I want to talk about our environmental decisions project and AAT review and finally, I would like to just draw your attention to the fact that the Minister has given us a reference on tribunals generally. I would like to acquaint you with the terms of that reference and tell you the sort of things we are hoping to do and who we are hoping to hear from. ...

Administrative review and funding

If I can go to the first one, which is the one I find most interesting, that is the project on administrative review and funding programs. The Council decided to look at the funding programs administered by the former Department of Health, Housing, Local Government and Community Services. ...

We determined to take the programs administered by that portfolio as a case study of funding programs and the kind of principles which should be directed to review of funding programs generally. We hope that we can develop principles which are applicable across the board. As is probably fairly obvious, under the funding programs administered by that particular department, the Commonwealth provides funding or services both to individuals directly and indirectly to States and non-government organisations who direct the money and services to other organisations and individuals.

The project itself really concerns two broad areas. The first is the right of consumers to complain about decisions made by service providers. The second is the right of the service provider to complain about the level of funding that the provider has received.

From our perspective, the most exciting area is probably the area governing consumers. The Council has taken the view, and this goes back to the subject if you like of the pamphlet that you received about this talk, that to maintain the distinction between government providers and non-government providers of services, when the money in the end comes from the Commonwealth Government, is artificial. In effect, if a consumer gets poor service because he or she has got it through some intermediary it makes no difference - it is still a poor service and the government is still paying for that service. One can, as it were, follow from the source of the funding to the quality of the service and say it is reasonable to have a level of review of the quality of that service in relation to whatever is supposed to be provided.

We are looking at things like children's services programs, rehabilitation services, Commonwealth community

* *Dr Susan Kennedy is President of the Administrative Review Council.*

housing programs and residential care and came up with probably the fairly obvious view that one thing everyone more or less agreed upon was that consumers should have a chance to go to an outside body to complain about the sort of service they were receiving. In the past, service providers have said, it is sufficient if, for example, there is a complaint about meals in child community services or a complaint about meals in aged care services or a complaint about the kind of training one is receiving under a rehabilitation service, that the complaint be made to the service provider and the service provider could deal with it. Almost everyone from those representing the service providers to those representing consumers agreed that that was insufficient. In the end you need to have someone outside the service provider to arbitrate between the consumer and the provider of services.

So then the problem was really what sort of matters should you be able to complain about. It is the old peas principle if you like. If you are sitting in an aged care home and you think that the quality of your meal is insufficient, should you have a right to complain about that or should it be something which we all think of as more serious - sexual harassment or something like that? The Council came to the view that you could not distinguish between the level of complaints. It was the peas principle that has to apply; in other words, a consumer in receipt of a government funded service should be allowed to complain about anything. That is principle number 1.

Principle number 2 was that, in order to allow consumers to at least have some reasonable expectation of what they could receive, (by reasonable expectation I mean, have an expectation that was at least realistic in general terms) the service provider should be encouraged to provide user rights charters. Of course, to all of you here, that probably sounds fine. But as you all know, there are definite problems attached to user rights charters because some are generally expressed and others express only aspirations. Others attempt to descend to the level of particularity and are included in legislation and the like. The Council's view was that in the end, the object should be at least to articulate what it was the provider was supposed to be doing and to articulate in general terms what the obligations of the service provider were and what avenues for review or what avenues for complaint there were.

If you were sitting in an elderly people's home, you should know what you could do to complain about it, to whom you should go to complain about it and that that complaint should be dealt with within a reasonable to time. Added to that, you should be assured that confidentiality of your complaint would be maintained and that you would not suffer from reprisals. Reprisals were, we heard from almost every group consulted, the major thing which deters most people from complaining. This, I think, fits in with all our experiences. The object of any such user rights charter would be to articulate those principles and safeguard them.

If one then moves one step further, one says, well one can come and complain about anything, one can complain by reference to a set of charters, what next? Almost every group consulted suggested that before you can get to an external review body, you needed to have a degree of internal review by the service provider. In other words, if you are going to complain about the fact that your meals are no good, you should first of all go to the home that it

is supposed to be looking after you and is supposed to be providing you with those services.

In some cases, that kind of internal review mechanism is not realistic. For example, if your complaint is one about sexual harassment, you may not want to make that complaint within the organisation concerned. The Council acknowledged in that sort of case, you should have the right to go directly to an external reviewing body. It is here, having arrived at principles with which no-one would today disagree, one reaches a real problem. Once you are in the area of non-government bodies, who should be the appropriate review mechanism? The Australian Law Reform Commission (ALRC) would seem to favour some kind of complaints body. The mechanism for giving it power should either be voluntary or should be imposed through some sort of legislative background. However, the ALRC is not necessarily committed to that position at present and the Council has tended to prefer a different option. The Council has tended to take the view that the most appropriate body would be the Ombudsman and this, for the following reasons. First, the Ombudsman is already there, so the cost of setting up a complaints body is negligible. Second, the Ombudsman herself has said that she is anxious to bring functions of the Ombudsman's office into the next century and not have it caught up in this century - so she is keen, if you like, to take the Ombudsman's office into the question of systemic problems and also, in our case, into the area of inquisitorial inquiry this would involve a change in her operation.
The third reason why we were keen to adopt the Ombudsman as the appropriate body was that the Council could see that that would assure consumers that there was a degree of objectivity and distance between the Department who was the funder of the service provider, the service provider itself and the man or woman in the street. It seemed to the ARC that the Ombudsman today is regarded as a fairly impartial and objective body to review a complaint and that advantage should be capitalised upon.

The Council, I might add, is not yet entirely committed to that view either. Its ultimate conclusion is yet to be reached. The ultimate conclusion will be reached after consultation with peak organisations and advocacy groups as well as after further discussion with the ALRC.

In turn, this reflects a different approach by law reform agencies. I think from the point of view of the Council, it puts greater emphasis on consulting those bodies interested in the mechanism rather than on simply recommending reform for reform's sake. In this project, we issued an issues paper, then consulted with interested persons in all the major capital cities and got to the point of issuing what is called a final report subject to advice. The advice will be whether in relation, for example, to the body in question it should be the Ombudsman or some other more discrete body. The ultimate report should be presented to the Minister for Justice in July this year.

You get to the point where you say, 'Well, there must be some external review body and it is either the Ombudsman or some other mechanism', and you ask yourself, 'what sort of power should that body have?' The obvious powers I think in this context would be investigatory and recommendatory. I would be interested to get your opinion on it. In our view, there must be a power to refer complaints and findings on complaints to the Department. So the Department, when it is involved in

making its final funding allocations, whether it be on a continuing basis or on a once only basis, will bear in mind that a responsible body has found that there have been certain bad practices occurring within the applicant's domain.

Some suggestion has been made that the 'big stick' should be heavier than that and that there should be a power for such a recommendatory body to, for example, ask the Minister to table a complaint in Parliament. To date, I think most submissions which we have received have been inclined to say 'no, that's too heavy a stick'. They suggest that for the complaints mechanism to work, at least as much as possible on a mediatory rather than on an adversarial basis, you want service providers to feel that when they come to a complaints body, the complaint is capable of a reasonable solution and the end result will be a reasonable one, at least so far as they are concerned - but there is a problem there.

The final problem, which I am sure would have escaped no-one, is that this may mean, in part, the Commonwealth transgressing on the State fields.

The ARC is a Commonwealth body - it is looking at the destination of Commonwealth funding but as most of you would be aware (those of you who are involved at least in the area of Commonwealth grants to State entities), in the end what the ARC is recommending is that State bodies act in a certain way. You might well say, 'Well, realistically how can we hope to go anywhere and in any event, haven't we got some kind of constitutional or other problem?'. We have responded that we think that it would be appropriate for there to be minimum standards. We would call for these minimum standards to be either incorporated into the legislation which makes the funding available (that is, that there be a condition of the grant) or they be included into funding agreements between Commonwealth and State - much as the housing agreement, for example, does today. We have gone one step further - we do not, I think from our point of view, think that it is appropriate to tell States what to do, nor do we think it is appropriate to encourage duplication of processes. The model which the ARC would advocate is that of the minimum standard. The Commonwealth Government should prescribe minimum standards and say to State Governments they may use their own complaints review entities. For example, if a State has its own Ombudsman, that Ombudsman should have the carriage of complaints from service providers. That may not appeal to all people, but the real concern underlying the Council's view is that (1) the system has to be meant to work and (2) we don't want over-duplication of resources.

So far as we are concerned, on the level of consumer rights in relation to non-Government organisations, we would recommend quite substantial changes. The end result should be that some person who is either in an aged person's home or child care centre or is in rehabilitation training or any other like program, should be assured that they know what the quality of the service is that they expect to receive, the person to whom they can complain if it is not adequate and, in the end, that they can go outside the service provider to an independent body and have that complaint heard, subject to requirements of confidentiality and in the knowledge that ultimately something can be done about it. That, from our perspective, is quite a major step forward in the area of consumer rights.

In the other area of the project on funding decisions, I think the Council is probably not going to recommend quite so radical a change. When I talk about funding I mean the decision of the Commonwealth Government to grant some money or some source of money to a service provider or group of service providers. The problem which we face is that in any review, one pre-supposes that there may be a decision to re-allocate funds.

The Government may give more to the applicant who is complaining about lack of funds and take away from others who have already received it because, as we all know, there is a finite pool of funds and it can only be distributed to a certain extent. What the Council has termed 'polycentric problems' then arise. This grand name simply means that you give to one and take from another. In this context, it has been said by most service providers, peak organisations and consumer groups that too much review will actually not only be unnecessary, but will lead to a degree of disjunction in the funding process which will be positively adverse. The Council has, to some extent, tended to back away from the notion that there should be further changes to review of funding allocations. When I say further changes, there are already mechanisms to review funding in certain contexts. We are not saying that that should be diminished - we are simply saying that, in general there is probably no call to extend it.

What we have recommended, and I think will continue to recommend in the final report, is that criteria for funding and government policy should be made very clear at the outset. If funding is to be determined on a predetermined needs analysis, that analysis should be made available to all applicants. The process of decision making should be made abundantly clear to everyone, including the timetable under which decisions are made. This is perhaps quite a radical step in that all applicants, whether successful or unsuccessful, should receive an explanation as to why their application was not granted or was granted - it probably will not concern those to whom it was granted. That, at least from the point of view of peak organisations, is quite a significant step. To date, you can be told 'No, you cannot have your money', and you do not know why - which of course means that you don't know where you stand for future allocations.

The other matter, which is perhaps not of concern so much to lawyers but certainly of concern to those involved in funding allocation processes is that service providers and consumer organisations should be involved in the process throughout.

What I have described applies to once off funding. So far as on-going funding is concerned, and this is a particular problem which arises under particular programs, the Council has recommended that any decisions affecting on-going funding be reviewable. But that really reflects the present position.

Then one comes to removal of funding. In relation to that, as a practical matter, the Department in this case, would not recommend 'defunding' unless the organisation has failed to meet the terms upon which the grants were made or unless the Government changes priorities for funding. The Council has taken the view that in the former case, review should be allowed. In the latter case, it would be obviously undesirable because it would involve that whole concatenation of circumstances that we have loosely called 'political' in the past (but which probably needs to be more clearly articulated) and which involves policy decisions made by the

Minister of the day, with the approval of the Parliament of the day.

That, in substance, reflects the work of the Council in relation to funding decisions. If you go back to the original thesis, if you like, which was suggested in the pamphlet on this talk, the stress is not upon judicial review in that context. It is upon getting external review right - which does not necessarily mean review by the Administrative Appeals Tribunal or any other like Tribunal. It may mean the development of a different set of review guidelines. When you stop and look at the proposed reviewing body, you may say, 'Well, isn't the Ombudsman a fairly conservative choice', or 'isn't a complaints body a fairly conservative choice'. I should add in relation to that, both the ALRC and the Council I think, and certainly the Council has suggested that if it is the Ombudsman, the Ombudsman should work with those people who are involved in the service industry. That is, there should be peer representation of service providers and public advocacy groups. There should be at least a reasonably representative group of people advising the Ombudsman at the time of the nature of the complaint, whether the complaint is well founded and what sort of steps could realistically be taken to cure the complaint. In that context I think that would require a different development in the administrative law context, at least from the Council's point of view.

PUBLIC TENDERS

*Nicholas Seddon**

This paper examines various mechanisms for imposing legal liability on the tendering process. The traditional analysis in contract text books treats the tender as an offer so that no contractual relationship can arise until acceptance of a particular tender. Very little attention has been paid to the rules which govern the period prior to award of a contract. On the traditional analysis this period is free from legal obligation, absent fraud. In this paper it is argued that probity in the tendering process is enhanced by private and public law remedies available to the parties involved in the process.

Introduction

Governments use tenders as a method of procurement which is supposed to ensure that the taxpayer's dollar is spent in the most cost effective way. Across Australia, the requirement to seek tenders for procurement of government supplies is not necessarily mandated by law. For example, the Commonwealth Finance Regulations no longer require tenders to be used but, instead, a more flexible regime has been instituted,[1] whereas in Victoria, for example, tendering must generally be used for procurement worth above a certain amount unless specific exemption is sought.[2] Whatever the rules about seeking tenders, the preferred method for any major procurement is by tender. Tenders should ensure that procurement is by way of 'open and effective competition'.[3]

This method of acquisition has been the subject of a great deal of scrutiny in recent times with a plethora of inquiries, reports, recommendations, comment and analysis. Broadly, it is true to say that this seemingly unexceptionable method of acquisition has been found wanting in a number of respects. The defects which have been uncovered range from the most obvious corruption through to relatively minor things which go wrong and undermine the integrity of the process. In the middle, various levels of incompetence, ignorance of the law, unethical practices, unfair dealings and ordinary carelessness have marred the public procurement process.

To illustrate the very considerable attention which has been paid to the tendering process in recent times it is worth listing some of the inquiries and reports.

- Macphee, *Independent Review of the Civil Aviation Authority's Tender Evaluation Process for the Australian Advanced Air Traffic System* (1992).
- Royal Commission into *Productivity in the Building Industry in New South Wales* (1991) (Commissioner RV Gyles). A *Code of Practice for the Construction Industry* (1992) and a *Code of Tendering for the Construction Industry* (1992) followed this report.
- Standards Australia, *Interim Australian Standard Code of Tendering* 1993.

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- Independent Commission Against Corruption, NSW (ICAC), *Pitfalls or Probity. Tendering & Purchasing Case Studies* (1993), plus various ICAC reports on specific contracts.

- Economic Development Committee (Victorian Parliament), *Inquiry into the Victorian Building and Construction Industry* (1993). Following this inquiry, a letter was sent to some 700 builders asking them to confess or lose the right to tender for government business in the future. This action was ruled illegal in *Master Builders Association of Victoria v The State of Victoria*.[4]

- Trade Practices Commission, Press Release of 29 March 1994 announcing a settlement between the Master Builders Association of New South Wales and the Commission, and the announcement by the Commission and Master Builders Australia Inc of a reform program for the Australian building industry.

- Pearce reports into the Commonwealth sale by tender of satellite pay-TV licences, *Inquiry into Certain Aspects of the MDS Tendering Process 1992-3*, and *Independent Inquiry into the Circumstances Surrounding the Non-requirement of a Deposit for Satellite Pay-TV Licences, and Related Matters*.

The focus of attention in this article is on the less obvious problems which may arise in the tendering process. In a sense, corruption, collusive tendering, cover pricing[5] and unsuccessful tenderers' fees[6] are not particularly interesting because the criminal or trade practices law can deal with these and there is no doubt that they are illegal.[7] The problem, of course, is to find methods of rooting out such practices. Asking each tenderer to sign a statutory declaration that it has not engaged in these practices in submitting its tender for a particular project is one strategy that has been adopted. Codes of practice[8] may have a beneficial effect so long as some real sanction can be applied to those who do not adhere to the codes. Such codes are not, however, legally enforceable.

Before going on to examine those practices or conduct which are the principal focus of this article it is worth noting that a particularly crude method of rooting out corruption adopted by the Victorian government[9] has been ruled illegal by Hampel J in *Master Builders Association of Victoria v The State of Victoria*.[10] The government sent out letters to some 700 builders who had in the past tendered for government work asking them in effect to confess to past collusive practices and asking them to repay to the government any money received which represented the fruits of collusive practices. Failure to respond meant that the builder was assumed to be guilty and would not be eligible to tender for future government work. The Master Builders Association of Victoria brought an action, seeking a declaration that this move by the government was illegal. The Association's standing to bring the action was not challenged and Hampel J said that it undoubtedly had standing. His Honour went on to hold that the action by the government was illegal because it was an abuse of power as it was infected by an improper motive, namely, it amounted

> to a coercive action by the use of economic power to recoup moneys without resorting to the courts for the determination both of the question of liability and quantum. I find the scheme was so unfair and unreasonable as to amount to an abuse of power.[11]

Further, the scheme was objectionable because it put economic

pressure on builders to incriminate themselves. The scheme by-passed the procedures sanctioned by the *Collusive Practices Act 1965* (Vic) which provides for the gathering of evidence which may lead to a criminal prosecution for collusive conduct. As noted in the editorial comment on this case[12] the Victorian government and its instrumentalities are not bound by the anti-competition provisions of the *Trade Practices Act 1974* (Cth) Part IV[13] yet Hampel J effectively held that the government was not permitted to abuse its position of market dominance.

2 Legal liability in the tendering process

This article explores the possible legal bases for challenging the award of a contract or seeking some form of redress when some defect, not amounting to corruption or similar wrongdoing, has occurred in the tendering process. There are a number of legal paths available to the disgruntled tenderer. The existence of these remedies has, it is submitted, a salutary effect on the tendering process. It is not enough to root out corruption and other obvious wrongdoing. It is also essential to impose an enforceable regime of legal sanctions, available for private enforcement, if the process of public procurement is to be truly governed by the principle of open and effective competition. In other words there should be fair dealing in the tendering process. Competition is not just undermined by collusive practices and the like. It is also jeopardised by lesser defects because the market will be cynical about a process which is not properly conducted. The consequence of such cynicism is that in any particular procurement there may be some players who decide not to enter the competition. This view is inspired by what occurs in the United States where the tendering process is constantly challenged by the participants themselves. The courts are very ready to uphold challenges in the name of maintaining the integrity of the procurement process. As a consequence the conduct of tenders in the United States is rigorously scrutinised and effective competition is maintained.

The argument for legal consequences arising out of the tendering process is part of a much wider debate which is attracting some attention. With the general move, characterised by the expression 'new managerialism', whereby the public sector in various ways either attempts to mimic the private sector or else simply hands over formerly public functions to the private sector, concern has been expressed about proper accountability, in the constitutional rather than the financial sense.[14] To what extent is the move to managerialism a development which effectively by-passes the accepted institutions of accountability? Contracting out formerly government functions may mean that important areas of public responsibility are no longer subject to parliamentary scrutiny and may place such activities beyond the reach of public law. This article does not attempt to answer these broader questions but suggests that at least in one area there are possibilities for accountability through various legal mechanisms.

What follows, then, is a discussion of the various ways in which the pre-award period in tenders may be the subject of legal liability.

A Contract

A tender is usually an offer made in response to an advertisement which is an invitation to treat. Acceptance of one of the tenderer's bids then brings into being a contract. Prior to this acceptance no contractual

relationship exists so that there is, on this traditional analysis of tenders, no legal obligation prior to award of the contract. This means that the body seeking tenders is free to accept a non-complying bid (for example, it may be late or it may not comply with the advertised specifications). Equally, if the advertisement provides that the contract will be awarded to the lowest bidder and the contract is then awarded to, say, the second lowest bidder, the advertised promise cannot be enforced. The body seeking tenders is free, on this analysis, to choose whichever bid it pleases, despite what is said in the advertisement. Another consequence of this analysis is that a tenderer may withdraw its tender at any time before acceptance, even after the tenders have been opened. There are variations on this theme as when, for example, the party seeking tenders asks for expressions of interest or enters into negotiations with selected contractors with a view to seeking best and final offers (BAFOs). In these variations on simple tenders there is, again, no legal regime to govern the *process* of tendering.

The possibility that the process of tendering, that is, the pre-award period, is governed by a contract has been recognised in the United Kingdom,[15] the United States[16] and in Canada.[17] The terms of this preliminary contract are determined by what is specified in the tender advertisement. The preliminary contract may be unilateral, imposing obligations only on the body seeking tenders, or bilateral, imposing obligations on both parties.

(1) Unilateral contract

The unilateral approach was adopted in *Blackpool and Fylde Aero Club v Blackpool Borough Council*[18] where it was held that the body seeking tenders was under an implied contractual obligation to give consideration to complying tenders. In that case the plaintiff submitted a tender which complied with the terms of the advertisement and was on time. It was mistakenly thought by the Council to have been late and so was not considered. The Court of Appeal believed that it was appropriate to imply a term because the process of seeking tenders was conducted according to a 'clear, orderly and familiar procedure'[19] which generated an expectation that it would be conducted properly. In other words, the notion of reasonable expectations in the contracting process provided the basis for imposing a legal obligation. It is probably accurate to say that non-lawyers would have such expectations in the tendering business.[20]

Before leaving England, it is also worth noting that in *Harvela Investments Ltd v Royal Trust Co of Canada Ltd*[21] the House of Lords held that there was a preliminary, unilateral contract which made enforceable a promise to award some shares to the highest bidder. The case had other complications relating to whether a referential bid was a valid bid[22] but for our present purposes it has implications both for auctions which are advertised to be without reserve and for the tendering process. If the body seeking tenders promises to award the contract to the lowest/highest bidder, then that promise is enforceable on the basis of a unilateral contract. Of course, in most tenders the body seeking tenders does not give such an undertaking.

In Australia there has been some acceptance of a preliminary contract governing the process of tendering[23] but, in more recent times, there have been two unsuccessful attempts to argue that the pre-award period is governed by a preliminary contract.[24]

The content of such a unilateral contract is limited. The contract is formed with each tenderer who puts in a complying tender and the contract is limited to any undertakings given in the advertisement by the body seeking tenders. The *Blackpool* case shows that a court may be prepared to find an implied term. All that the Court said was that there was a duty to consider a complying tender. It did not say that there was a duty to give proper consideration to a tender, that is, a more extended contractual duty which is akin to a public law duty to make a decision according to proper and rational principles.[25] If Australian courts are prepared to embrace the notion of a pre-award unilateral contract, its precise contents will have to be worked out. It is worth noting in connection with this question that Ian Macphee in his report on the air traffic control system tender[26] concluded that the contract was awarded on a wrong technical basis. In other words, though his analysis was not a legal one, he was prepared to say that the decision to award the contract should be made again because the award was not properly made on the merits.

If the unilateral contract is broken by the body seeking tenders, what remedy has the disgruntled tenderer? It is probably safe to say that he or she can at least recover the wasted costs of preparing the tender. The question of damages was not considered in the *Blackpool* case. Certainly in United States cases, damages have been awarded on this basis. It has been argued in the US that the tenderer should not be entitled to such damages unless he or she can show positively that he or she would have won the contract.[27] After all, in any other event, the tenderer should bear the cost of preparing the tender. This argument has not prevailed, however logical it may seem.

There are other possibilities for remedies. In a Canadian case[28] the court awarded damages on the basis that the tenderer bid a higher price than it otherwise would have if the tendering process had been properly conducted. Damages could in exceptional cases extend to expectation losses. For example, if the tender was one in which there was an undertaking to award to the highest/lowest tender and the disgruntled tenderer could show that he or she would have won, then there is no reason why the court should not award loss of profit damages. Alternatively, it may be sufficient if the tenderer can show that there was a probability of winning. The courts are prepared to award damages on the basis of probabilities.[29] It is conceivable that a disgruntled tenderer could obtain an injunction to stop the process if it is not being conducted according to the announced procedures.

(2) Bilateral contract

The bilateral approach is taken in Canada[30] and caters not only for obligations imposed on the party seeking tenders but also obligations commonly imposed on tenderers, such as not withdrawing the bid within 60 days of opening of tenders and the obligation to provide a deposit or bond.[31] The leading case of *Ron Engineering* has some curious features, not the least of which was that the judge (Estey J speaking for the Supreme Court of Canada) discussed the preliminary contract, which he called contract A, in terms of *unilateral* contract. He did this because of the features of this kind of contract that the tender advertisement constitutes an offer to the world and that acceptance is constituted by an act, namely, submitting a complying tender and so shares those characteristics of unilateral contract. But apart from these features, there is

simply no doubt that the contract is a bilateral one because it imposes obligations on both parties. Another odd aspect of the case was that it involved a bid in which there was a serious mistake. The bidder sought to withdraw the bid without penalty. It was held that it could not because of the binding nature of contract A under which the bidder undertook not to withdraw the bid for 60 days after the opening of tenders. But this meant that the bidder was effectively forced to enter into contract B in circumstances when the body seeking tenders knew that there was a mistake of which it took advantage. Despite these difficulties with the leading Canadian case, it has been followed in a number of cases which have applied the contract A and contract B analysis.

One of the curiosities of the bilateral contract analysis is that if a tenderer puts in a non-complying bid, this would constitute a counter-offer. (In the unilateral analysis it would constitute a non-fulfilment of the requested act and so there would be no contract with that bidder.) What if the body seeking tenders then accepts this counter-offer? The answer to this is that there is no contract A with the tenderer who put in a non-complying bid. But there are contract As with the *other* tenderers who have put in complying bids. It is they who are going to complain about the fact that a non-complying bid has been accepted and they have the contractual basis for such a complaint.

There is no reason why the bilateral contract analysis should not be used in the variety of tendering arrangements which commonly occur, such as seeking expressions of interest or the use of tenders to establish a list of suppliers. The common use 'contract' employed by the Commonwealth government for procurement is in fact a standing offer under which a particular supplier makes a continuing offer to the government which is accepted from time to time, resulting in a series of discrete contracts. Usually there is a panel of selected suppliers. Often the selection of the suppliers will have been brought about by a tender. How does this arrangement fit the two-contract analysis? The process of seeking suitable potential suppliers can be governed by a contract (contract A, as discussed above) with resultant remedies to companies or individuals who have been wrongfully excluded or who have suffered loss as a result of a failure by the government to adhere to the advertised tendering process. One of the terms of contract A in a standing offer arrangement is that there is no guarantee that any orders will be placed so as to form any contract Bs. So the selected suppliers cannot complain if no orders are forthcoming. A selected supplier may be able to complain if the government were to place an order with a supplier who had not been selected. But this would depend on the precise terms of contract A, namely, whether or not it was an exclusive dealing arrangement with the selected suppliers ('If we order, we will order from one of you...').

There is no doubt that the practical implications of the *Ron Engineering* and *Canamerican* decisions, if they were adopted in Australia, would be profound. The drafting of tender advertisements would have to be done very carefully. At present the preferred route for imposing some order on the tendering process is by way of codes. As noted earlier, codes are not legally enforceable. It would be possible to incorporate a code into a contract but this is not how the codes are used. The problem with this form of self-regulation is that the code can be ignored and there may be no sanction. Of course if a tenderer breaks a provision of a

tendering code, it may find that it is excluded from future tenders. But experience with codes shows that they are sometimes loosely applied and there can be 'drift' away from adherence to the code. Another problem is that if the government fails to adhere to a provision of a code then the government is in the position of both being prosecutor and judge of its own conduct. For example, the New South Wales *Code of Tendering for the Construction Industry* provides that the party seeking tenders (the government) should not engage in the practice of a 'Dutch auction', that is where the government talks to selected tenderers with a view to playing them off against each other to secure a lower price. If the government does this (and therefore breaks the code) the only sanction is a Departmental enquiry or, if that does not work, a complaint may be made to the Minister or, ultimately the Premier. This procedure is not very different from what is available if the Ombudsman undertakes an enquiry. At the end of the day what do the dissatisfied tenderers get? A contract remedy, involving the possibility of a damages payout, on the other hand, would be more likely to act as a deterrent to conduct of this kind.

It is my view that, apart from powerful authority from other jurisdictions, the climate of contract law in Australia is such that it would be quite consistent with the evident concern to fulfil the reasonable expectations of the parties for a court to find a pre-award contract.

B Trade Practices Act s52 and Fair Trading Act equivalents

Section 52 of the *Trade Practices Act 1974* (Cth), which prohibits engaging in misleading or deceptive conduct in trade or commerce, may apply to any commercial dealing, irrespective of contract. Misleading conduct prior to, or during the conduct of, a tender could therefore give rise to liability under the Act. The Act binds the Commonwealth and Commonwealth instrumentalities[32] so long as they are carrying on a 'business',[33] which includes a non-profit business. It is not clear what activities come within this definition but it would be unlikely for the Commonwealth to argue that it is not bound by the *Trade Practices Act* when it is engaged in commercial activity. Each State and Territory *Fair Trading Act* has an equivalent section to s52[34] and each Act binds the Crown in right of the relevant State or Territory.[35] Apart from damages under s82 of the Commonwealth Act[36] it may even be possible to use an injunction (s80)[37] to stop the process if there was misleading conduct. It would almost certainly be misleading conduct to announce the rules of a tender and then not adhere to them. There are potentially many other possibilities for the use of s52 in the tendering process.

C Negligence

In the light of the availability of s52 (and its *Fair Trading Act* counterparts) there would be little point in pursuing a negligence action in relation to statements made in the conduct of a tender (unless the government successfully argued that it was not bound by the section). However, such a possibility is still open where the conduct is not so much misleading as simply careless. For example if the body seeking tenders lost the tender or, as in the *Blackpool* case, it negligently thought that a tender was late, an action could be pursued. The English Court of Appeal was reluctant to find a duty of care in that case but it is submitted that there is no reason why a duty should not arise. In *Dillingham Constructions Pty Ltd v Downs*[38] it was held that the New South Wales government was not under a duty to provide Dillingham

with information about disused coal workings under the harbour which Dillingham was to deepen. This information was known to the government and was vitally important. Yet the terms of the contract, the exchanges between the parties about site conditions, including the notice inviting tenders, and the obligation imposed on Dillingham to investigate were such that Hardie J concluded that there was no assumption of responsibility by the government. It was conceded in *Dillingham* that a duty *could* arise in the pre-award period,[39] though not in this particular case. *Morrison-Knudsen International Co Inc v Commonwealth*[40] is to the same effect, that is, the High Court held that a duty of care might arise in the pre-award period but, because the Court was only asked to decide that question of law, the final outcome as to whether there was in fact a duty and whether it was breached was not considered.

The *Dillingham* case has to be viewed against the law as it was in 1972. At that time the law on negligent misrepresentation in Australia was governed by the Privy Council decision in *Mutual Life & Citizens' Assurance Co Ltd v Evatt*[41] which imposed a very restricted duty on people who provided information or advice. Since then the High Court has effectively not followed the strictures imposed in the *Evatt* case[42] and it is at least arguable that the *Dillingham* case would be decided differently to-day if the same facts were to arise. For example, in *Commonwealth v Citra Construction Ltd*[43] Citra was the successful tenderer for a project. The Commonwealth had provided a report to all tenderers, prepared by an independent contractor, which contained errors concerning the sub-surface condition of the site. Citra sued in negligence and was successful, despite attempted disclaimers by the Commonwealth. Campbell J held that the various standard disclaimer terms were not effective to exclude liability in negligence. He went on to hold that the Commonwealth was under a duty of care, relying on the *Morrison-Knudsen* case. The arbitrator had found that there was a clear breach of duty and this was not challenged in the court hearing. The Commonwealth attempted to argue that it was not responsible for the negligence of an independent contractor, relying on *Stoneman v Lyons*.[44] This argument was rejected by Campbell J who found that the Commonwealth had provided the report as its own.

D Estoppel

The pre-award period may generate liability on the basis of estoppel. It is quite easy to imagine an assurance being given or an assumption created by the body seeking tenders which is then not followed through with consequent loss being caused to tenderers. In *Metropolitan Transit Authority v Waverley Transit Pty Ltd*[45] the MTA gave an assurance to Waverley Transit that its contract for a particular bus run would be renewed and that the run would not be put out to tender at the expiry of the current contract. On the strength of this assurance, the bus company spent a considerable amount of money in re-equipping and upgrading its buses. When the contract expired, the MTA did seek tenders and awarded the bus run to another company. The Appeal Division of the Victorian Supreme Court held that the MTA was estopped from awarding the contract to the successful tenderer and that it should award the contract to Waverley Transit for another two years. The *Waverley Transit* case also dealt with administrative law issues.

E Administrative law

At Commonwealth level it is possible to challenge the tendering process under the *Administrative Decisions (Judicial Review) Act 1977* (Cth)[46] so long as the decision to award the contract can be said to have been made 'under an enactment'. This requirement operates somewhat arbitrarily in the contracting area. For the purpose of the 'under an enactment' requirement, neither the *Constitution* s61[47] nor the *Finance Regulations* made under the *Audit Act* 1901[48] are 'an enactment' with the result that a decision to award a contract made by the Commonwealth under its executive power cannot be reviewed under the *ADJR Act*. What if the contract decision were made under a statutory power to contract in the usual form for statutory authorities? Is this a sufficiently close connection to a statutory power to satisfy the 'under an enactment' requirement? The answer to this was Yes.[49] However, some doubt has been thrown on the possibility of using the *ADJR Act* to challenge the award of a contract under statutory power by the decision of the Full Federal Court in *General Newspapers Pty Ltd and Double Bay Newspapers Pty Ltd v Telstra Corp.*[50] The *Berkeley Cleaning Group* case was not followed and there is now some doubt about whether a decision to award a contract under the usual contract making power which is found in statutes which establish statutory corporations is a decision made 'under an enactment'. Davies and Einfeld JJ (Gummow J concurring) argued that the *ADJR Act* relates to decisions taken under a federal enactment which by virtue of the statute affect legal rights and/or obligations.

> A contract entered into by a corporation under a general power to enter into contracts is not given force and effect by the empowering statute. The empowering statute merely confers capacity to contract, whilst the validity and effect of the contract is determined by the ordinary laws of contract.[51]

The court relied on *Australian National University v Burns*[52] in which it was held that *terminating* a contract was not a decision under an enactment, even if the original contract was made by reference to the *Australian National University Act*. It is reasonably clear that terminating a contract is exercising a power under the contract. It is not so clear that making a contract is analogous. If one asks: where is the source of power to make the contract? the answer is 'In the statute'. As Davies J put it in *Post Office Agents Association Ltd v Australian Postal Commission*[53] when discussing the *Berkeley Cleaning Group* case

> The acceptance of the tender was an act done under that power [the general power to do all that was necessary for the performance of the statutory body's functions], not an act done under the contract resulting from the acceptance of the tender.

The court in *General Newspapers* attempted to save the *Berkeley Cleaning* case by saying that it involved a tender process which

> implied rights as between all the parties to the tender process that the tenders would be dealt with in accordance with the conditions of tender and fairly, at least in a procedural sense. Accordingly, the Court may well have had jurisdiction to deal with the dispute though, in our opinion, not under the ADJR Act.[54]

It is clear that a contract awarded *ultra vires* an enabling statute could be challenged under the *ADJR Act*. This much was acknowledged by the Court in *General Newspapers*. Also it is clear that where the tendering process is itself governed by a statutory procedure the process can be challenged under the *ADJR Act*. This is taken up below.

If the award of a contract can be challenged through administrative law,

what aspects of the award process are amenable to review and what criteria should be applied? These are unsettled questions and involve some fundamental issues about the extent to which it is appropriate to apply public law principles to government contracting. Should the government be entirely free to choose any contractor it wishes? Is there, at the minimum, a duty to act honestly when deciding who should be awarded the contract? Is there a more demanding duty to act both honestly and reasonably? Some of these issues were discussed in the *Waverley Transit* case. The reason why the MTA decided, contrary to its assurance, to put the contract out to tender was that it saw an opportunity to break what it perceived to be a monopoly. It was held that this decision was motivated by an improper purpose and could be set aside for want of procedural fairness. So, at the very least the award decision must be made honestly and for a proper purpose.[55] However, the ability to challenge a decision on other grounds may be more problematic.

Another possible ground of review is breach of natural justice or procedural fairness. Although a challenge on this basis has been rejected in some cases,[56] it has been accepted in at least one case. In *Century Metals and Mining NL v Yeomans*[57] 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 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 implications of the *Century Metals* case for tendering are potentially significant. The notion of legitimate expectation was central to the decision and so it might be thought that the case is a special one of limited import because the legitimate expectation was generated by the Minister's specific announcement. Absent that announcement, the applicant would have had little basis for a challenge. But is there a need for a specific undertaking before a legitimate expectation can be generated? Would it not be sufficient that government bodies are expected, in any case, to conduct tenders with probity? This seems to be the assumption made by the Court in the *General Newspapers* case when it specifically mentioned the tendering process as one which required procedural probity. It is of the essence of a proper tendering procedure that the bids should be evaluated impartially and thoroughly. Further, at Commonwealth level, the *Finance Regulations* provide that purchasing must be effected through open and effective competition.[58] The various *Commonwealth Procurement Guidelines* provide further material which would lead a tenderer to expect that certain standards will be adhered to. For example, the Commonwealth is committed 'to maintaining high ethical standards in purchasing and to fair dealing with suppliers'.[59] Whilst the *Regulations* and *Guidelines* cannot form the basis of a direct challenge under the *ADJR Act* they may be sources of policy statements which generate tenderers' legitimate expectations as to the way in which tenders are to be conducted.

F Statutory illegality

If the tendering process is itself the subject of a legislative stipulation then it is possible to challenge the award of a contract where there has been a departure from the legislation. Thus, a tender decision was successfully challenged in *Hunter Brothers v*

Brisbane City Council[60] on the basis that the contract as awarded was void for illegality because the statutory procedure had not been followed. Lee J in *Australian Capital Equity Pty Ltd v Commonwealth*[61] held that stopping a tender process for the sale of television licences initiated under a statutory provision[62] was beyond power. However, it is by no means clear when a court will hold that a departure from the rules will provide the basis for a challenge. In the *Hunter Brothers* case it was argued that there must be some limit to the possibility of challenge when a very detailed procedure is laid down by statute.[63] If there is only one lock on the tender box instead of the prescribed two, is the whole process invalid? In *Gerah Imports Pty Ltd v Minister for Industry, Technology and Commerce* Davies J held that a tendering scheme promulgated by a written instrument under the *Customs Act 1901* (Cth) s266 did not constitute a set of binding rules but rather was an announcement of policy. The consequence was that a party who wished to challenge a departure from the announced rules was unsuccessful. The departure in this case allowed some tenderers, who had failed to comply with a deadline, a second chance to get it right whereas other tenderers had met the deadline. Davies J said in *Gerah*

> I accept that, in a Scheme such as this, which affects an industry, clear rules and fair dealing with all parties within those rules is important. Members of an industry will quickly lose confidence in a scheme if terms of the Scheme, clearly stated, are not complied with.[65]

Yet His Honour concluded that the non-compliance in the case before him did not affect the validity of the whole process. It is by no means easy to reconcile this case with the *Australian Capital Equity* case.

G Complaint to government and to the Ombudsman

It is, of course, always possible for a disgruntled tenderer to complain to the relevant government body or department if something has gone awry in the tendering process. At Commonwealth level, the Minister for Administrative Services formally recognised this process by appointing a Purchasing Complaints Commissioner. In addition it is possible to complain to the Commonwealth Ombudsman (who also acts as Ombudsman for the Australian Capital Territory) who has reported on a number of occasions about tendering.[66] The Commonwealth Ombudsman has investigated government contracting and has made recommendations for *ex gratia* payments. This form of review provides some incentive to conduct public tenders in a fair and proper way. In earlier investigations the Ombudsman's recommendation for an *ex gratia* payment was sometimes thwarted by the Department of Finance who said that no such payment should be made. Now, it is the particular Department's concern (and not the Department of Finance's concern) whether the Ombudsman's recommendation should be acted on. The practice now is to make such *ex gratia* payments.

At State and Territory level there is similarly the possibility of complaining to the Ombudsman and the various State and Territory Ombudsman's annual reports contain many stories about tenders which have gone wrong.

3 CONCLUSION

The integrity and probity of the tendering process is enhanced by the potential for private right of action brought by the very people who are interested in the process being

properly conducted. This is a form of self-regulation which does not require public resources for the policing of government commercial activity. It is relatively early days in Australia for this type of challenge and consequently it is not possible to predict how the courts will react to the range of legal possibilities which may operate in the pre-award period in a tender. Some are already being used. Others - contract in particular - remain to be tested.

Endnotes

1 In 1989 *Finance Regulation* 52, which made it mandatory to use tenders for procurement of suppliers worth more than $10,000, was repealed.

2 See *Treasury Regulations* supplemented by Department of Planning and Development directions. There are differing requirements depending on the type of procurement.

3 Commonwealth *Finance Regulation* 43(1) uses these words.

4 (1994) ATPR 41-297.

5 Cover pricing is where a company tenders for a job at a high price so that it will not be awarded the contract. This happens when the company has enough work yet does not want to be seen to be not interested in government work. It may also result from a collusive deal under which the job is 'awarded' ahead of time to one company by its so-called competitors.

6 This is an arrangement between tenderers under which the successful tenderer pays a fee to each unsuccessful tenderer.

7 It has been argued to the Victorian Parliament's Economic Development Committee that cover pricing is not necessarily in breach of the *Trade Practices Act* 1974 (Cth) - see *Inquiry into the Victorian Building and Construction Industry* (1993) 46. The Committee was unimpressed by this argument and pointed out that such a practice was in breach of the *Collusive Practices Act* 1965 (Vic), whether or not it was in breach of the *Trade Practices Act*.

8 Eg, *A Code of Practice for the Construction Industry* (1992), produced by the New South Wales government.

9 The idea was inspired by the Commonwealth government which has, so far, not been challenged in the courts.

10 (1994) ATPR 41-297. At the time of writing the decision is on appeal.

11 (1994) ATPR 41-297, at 41,969.

12 (1994) ATPR 41,964.

13 See *Bradken Consolidated Ltd v Broken Hill Proprietary Ltd* (1979) 145 CLR 107.

14 Eg, T Daintith, 'Regulation by Contract: the New Prerogative' (1979) 32 *Current Legal Problems* 41; M Freedland, 'Government by Contract and Public Law' [1994] *Public Law* 86.

15 *Blackpool and Fylde Aero Club v Blackpool Borough Council* (1990) 1 WLR 1195; *Harvela Investments Ltd v Royal Trust*

Co of Canada Ltd (1986) AC 207.

16 Of the numerous cases which have found that there is an implied contract prior to award, the leading case is *Heyer Products Co v United States* (1956) 140 F Supp 409.

17 *Ontario v Ron Engineering & constructions Eastern Ltd* (1981) 1 SCR 111; (1981) 119 DLR (3d) 267; *The Queen v Canamerican Auto Lase and Rental Ltd* (1987) 3 FC 144.

18 [1990] 1 WLR 1195.

19 [1990] 1 WLR 1195, 1202 (Bingham LJ). A similar argument was used by Stocker L J at 1203-4.

20 However, for criticism of the decision see Phang, 'Tenders and Uncertainty' (1991) 4 *JCL* 46.

21 [1986] AC 207.

22 It was held that a referential bid, that is, one which seeks to ensure that it will inevitably win by offering more/less by a specified amount than any rival bid, was an invalid bid.

23 *Dunton v The Warrnambool Waterworks Trust* (1893) 19 VLR 84; *Stafford v South Melbourne* [1908] VLR 584; *Brisbane Board of Waterworks v Hudd* (1910) QWN 11. The now defunct Australian Standard *General Conditions of Tendering* AS21240-1981 explicitly made a preliminary contract so that a tenderer who withdrew the tender in breach of condition 8 forfeited a deposit.

24 *Streamline Travel Service Pty Ltd v Sydney City Council* (1981) 46 LGRA 168, 176-177 (Kearney J). In *White Industries Ltd v Electricity Commission of New South Wales* (unreported May 20 1987 SC) Yeldham J expressly declined to decide on an argument put by the plaintiff that there was a contract governing the pre-award period.

25 In the United States the courts are prepared to formulate a contractual duty to give proper consideration to complying bids - see *Keco Industries, Inc v United States* (1974) 492 F 2d 1200, 1203-4.

26 Macphee, *Independent Review of the Civil Aviation Authority's Tender Evaluation Process for the Australian Advanced Air Traffic System* (1992).

27 In *Morgan Business Associates, Inc v United States* (1980) 619 F2d 892 it was held that an unsuccessful bidder whose bid was lost must show, in seeking to recover preparation costs, that it had a substantial chance of being awarded the contract.

28 *The Queen v Canamerican Auto Leas and Rental Ltd* [1987] 3 FC 144.

29 *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 118 (Deane J).

30 *The Queen in right of Ontario v Ron Engineering & Construction Eastern Ltd* [1981] 1 SCR 111; (1981) 119 DLR (3d) 267.

31 In Australia these obligations can only be made enforceable through a deed under seal - a practice which has been adopted from time to time and

which reflects the evident commercial need for enforceable obligation in the pre-award period.

32 See *General Newspaper Pty Ltd and Double Bay Newspapers Pty Ltd v Telstra Corp* (1993) 117 ALR 629 in which there was an unsuccessful attempt to use s52 in connection with an assurance by Telecom that the applicant would be put on a tender list.

33 *Trade Practices Act* 1974 (Cth) s2A.

34 *Fair Trading Acts*- ACT (1992) s12; NSW (1987) s42; NT *Consumer Affairs and Fair Trading Act* 1990 s42; Qld (1989) s38; SA (1987) s56; Tas (1990) s14; Vic (1985) s11; WA (1987) s10.

35 The State and Territory Acts vary in the way they bind the Crown. For example, the *Fair Trading Act* 1987 (NSW) s3(1) mimics the Commonwealth provision in that it only binds the Crown in so far as it 'carries on a business', whereas the *Fair Trading Act* 1985 (Vic) s3(1) binds the Crown without qualification.

36 *Fair Trading Acts* - ACT s46; NSW s68; NT *Consumer Affairs and Fair Trading Act* 1990 s91; Qld s99; SA s84; Tas s37; Vic s37; WA s79.

37 *Fair Trading Acts* - ACT s44; NSW s65; NT *Consumer Affairs and Fair Trading Act* 1990 s89; Qld s98; SA s83; Tas s34; Vic s34; WA ss74, 76.

38 [1972] 2 NSWLR 49.

39 [1972] 2 NSWLR 49, 56.

40 (1972) 46 ALJR 265.

41 (1970) 122 CLR 628.

42 See *Shaddock & Associates Pty Ltd v Parramatta City Council* (1981) 150 CLR 225 and *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340.

43 (1986) 2 BCL 235.

44 (1975) 133 CLR 550.

45 [1991] 1 VR 181.

46 *Australian Capital Territory Health Authority v Berkeley Cleaning Group Pty Ltd* (1985) 60 ALR 284. See also *James Richardson Corp Pty Ltd v Federal Airports Corp* (unreported, Cooper J, 29 September 1992).

47 See *Dixon v Attorney-General* (1987) 75 ALR 300, 306 (Jenkinson J).

48 *Hawker Pacific Pty Ltd v Freeland* (1983) 52 ALR 185. See also *ABE Copiers Pty Ltd v Secretary of the Department of Administrative Services* (1985) 8 ALN 141.

49 See cases cited in footnote 46.

50 (1993) 117 ALR 629.

51 (1993) 117 ALR 629, 636-7.

52 (1982) 43 ALR 25.

53 (1988) 84 ALR 563, 573.

54 (1993) 117 ALR 629, 637. An example of a successful challenge on the basis of administrative law remedies is

Streamline Travel Service Pty Ltd v Sydney City Council (1981) 46 LGRA 168.

55 Cf a recent Privy Council decision *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* (unreported PC 28 February 1994 noted in (1994) 5 *Public Law Review* 131). The Privy Council observed that 'it does not seem likely that a decision by a State-owned enterprise to enter into a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith.'

56 *Cord Holdings Ltd v Burke* (1985) 7 ALN 72; *White Industries Ltd v Electricity Commission of New South Wales* (unreported May 20 1987 NSW SC, Yeldham J).

57 (1991) 100 ALR 383.

58 *Finance Regulation* 43(1).

59 *Commonwealth Procurement Policy Framework* (Oct 1989); and see *Commonwealth Procurement Guideline 3: Ethics and Fair Dealing* (Sept 1989).

60 (1983) 52 LGRA 430.

61 (1993) 114 ALR 50.

62 *Radiocommunications Act* 1983 (Cth) s92A.

63 The cases on the question whether a divergence from statutory tender procedures renders the whole process invalid have not been uniform by any means. Compare *Maxwell Contracting Pty Ltd v Gold Coast City Council* (1983) 50 LGRA 20 (relevant provision was directory not mandatory); *Wade v Gold Coast City Council* (1972) 26 LGRA 349 (provision specifying that tenders be called held to be mandatory not directory); *Attorney-General; ex re Scurr v Brisbane City Council* [1973] Qd R 53 (directory not mandatory); *Capricornia Electricity Board v John M Kelly (Builders) Pty Ltd* [1992] 2 Qd R 240 (directory not mandatory).

64 (1987) 14 ALD 351.

65 (1987) 14 ALD 351 at 365.

66 Almost every annual report has some reference to tendering. A discussion of the Ombudsman's role in such cases is made in Commonwealth Ombudsman, *1987-88 Annual Report* 21-23. See also the *Newsletter* of the Australian Institute of Administrative Law (No 8 of 1991) in which the Deputy Commonwealth Ombudsman describes ways in which the Ombudsman can be of assistance to tenderers.

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