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TENDERING (1)

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The move to managerialism

The public sector is increasingly encouraged to think and act like the private sector. It is to be expected that this trend will carry with it not just commercial habits but also commercial consequences. The public sector must increasingly expect to be judged by commercial standards of dealing.

Of course, the old notion that the Crown was immune from private law liabilities has gone long ago. But there are still some signs of this kind of thinking in the law. It is thought to be inappropriate in certain circumstances to impose a contract or negligence liability on government bodies when they are engaging in peculiarly governmental tasks or programs. I would argue that this kind of thinking becomes less appropriate as government bodies not only behave, but profess to behave, like private bodies.

Let me illustrate the general point I am making about private law displacing public law. The Australian Broadcasting Corporation (ABC) entered into a contract worth more than $500,000 without obtaining the Minister's approval. This was contrary to the *Australian Broadcasting Corporation*

In this issue ...

Included with this issue ...

Members Notes

Act 1983 (Cth).[1] On one view, the contract was simply illegal. It was beyond power. It was a legal impossibility. But the commercial view of it would be that people or companies dealing with the ABC should not have to be concerned to worry about whether the ABC has complied with its own Act. In company law now, the idea of a company acting beyond power is finished as a way of escaping contracts. So, too, with the ABC, according to the High Court. It was held that the ABC was bound by the contract despite the non-compliance with the Act.[2]

I wish to outline my views about the impact of commercial legal norms in one particular area - tendering.

The changing law of contract

Before looking at this particular area, I want to say some things about the law of contract generally. It has been changing quite profoundly in Australia.

The old idea of a contract was that a contract either is or it is not. There was a clear rule which said when a contract came into being, namely, when an offer has been accepted. The clearest illustration of this rule is signing on the dotted line. Before you do that, you are not bound. After you do that, you are bound by all that is in the document (the 'terms' or 'conditions' of the contract). But this idea is changing. In recent times, the courts have started to push back the time of legal responsibility into the negotiating period. That is, it may be possible that certain legal obligations arise *before* the signing of a contract.

Two developments are to be particularly noted. The first is the increasing use of what lawyers call estoppel. This idea crops up throughout the law and it means, broadly, that a person cannot blow hot and cold. More specifically, a court will prevent (estop) a person who has led another into believing that a certain state of affairs exists from denying that state of affairs if the other has acted on that belief. Its particular impact on the law of contract is that a court may find that a contract must be deemed to exist even when the usual formalities for entering into the contract have not been observed. This will be so if one party has by words or conduct led the other into assuming that a contract is in existence despite the lack of formalities and that other party has acted on that assumption.

The idea of estoppel in contract is best illustrated by the facts of the leading case, Waltons Stores v Maher.[3] The case involved a long term lease of a property together with the erection of a suitable retail store for Waltons. Before the formal exchange of contracts, Waltons said in effect that the deal was going ahead and, because there was some urgency to get started, the other party then demolished a building and started to build the required building. Waltons knew this was going on and said nothing. There was never a formal exchange of contracts and after some two months Waltons announced that it was not going ahead. The High Court said there was a contract.

The other major development in the law of contract is section 52 of the *Trade Practices Act 1974* (Cth) and its State clones in the various State Fair Trading Acts.

Subsection 52(1) of the Trade Practices Act provides:

> A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

The Commonwealth and Commonwealth authorities are subject to this legislation (Trade Practices Act, section 2A) in so far as they are engaged in a 'business', which includes a non-profit 'business'. It is not clear how far this definition goes but it would certainly cover Commonwealth instrumentalities engaged in, for example, water and sewerage, hospitals, nursing homes and electricity authorities. Any purchasing activity, I would argue, is business. The Commonwealth was bound by the Trade Practices Act in Phillip & Anton Homes Pty Ltd v Commonwealth[4] - a case involving the auctioning of residential blocks in the Australian Capital Territory. The Commonwealth did not even argue the point and conceded that it was in 'business'. 'Conduct' includes making statements, giving advice, etc. The section has been interpreted in a way which makes liability strict. Strict liability means 'without proof of fault'. Thus if something is said which is misleading or deceptive, it is no answer to say 'I did my best' or 'I was very careful'.

The significance of this section is potentially great. It means that in any circumstances of commercial relations, not just negotiating for a contract, there is an ***absolute responsibility not to mislead.***

Tendering

This process of pushing legal responsibility back in time to the period which, on traditional contract principles, was free of liability, is about to happen to tenders, in my view. The traditional view of tenders is that the body seeking tenders invites offers, that each tenderer makes an offer and one tender is then accepted. No obligations can arise before acceptance. (There are variations, of course, such as seeking expressions of interest. On the traditional analysis, an expression of interest is not an offer and so no contract can be formed from a mere expression of interest.) The practical implication of this analysis is that a tender offer may well be made which does not comply with the stipulations of the advertisement seeking tenders, and yet be accepted. It is up to the body seeking tenders to decide which offer if most attractive. More generally, thee is no obligation on the body seeking tenders to adhere to the stipulated tendering process.

I see the *process* of tendering, that is, the period between the initial advertisement and the decision to accept a particular tender, as being governed by legal obligations in four possible ways.

(i) Negligence

Even on the traditional analysis of tenders, duties may arise prior to the formation of contract. Mistakes made by the body seeking tenders, for example, the provision of incorrect information, could give rise to liability in the tort of negligence.[5]

Claims of negligence have also been made in connection with the tendering *process* itself.[6] It may be negligent of a public body not to comply with statutory or otherwise stipulated procedures if this causes loss to others.[7]

(ii) Estoppel

In my brief description of estoppel I perhaps did not make it clear that estoppel may be used in any circumstances where one party has acted on another's representation or promise - in other words it does not have to operate to bring about a contract. For example, the Commonwealth was estopped from relying on the Statute of limitations in Verwayen v Commonwealth[8] because it had said it would not plead the statute as a defence in an action by one of the *Voyager* sailors. In another case the Government Insurance Office (Qld) said in a letter, 'liability is not in issue', meaning that the settlement of a personal injuries claim was restricted to damages questions only. The GIO was estopped from arguing liability.[9] The point is that, in relation to tendering, a *part* of the tendering process may be governed by this type of argument in a particular case. A tenderer who prepares a tender in compliance with the tender advertisement and who fails to win the contract because of a departure by the body seeking tenders from its own advertised procedures and terms has a possible basis for arguing estoppel.

(iii) Section 52 of the Trade Practices Act

Similarly, it may be misleading conduct to advertise a certain tendering procedure and then not stick to it. Section 52 may apply to *any* aspect of the negotiating process, just as estoppel may be used in any dealings. It may, for example, be misleading conduct to tell a tenderer who has submitted a system for evaluation that its system is operationally and technically excellent and then to drop that tenderer from consideration without explanation.

Section 52 is generally thought not to apply to promises, but only to conduct and misrepresentations. But the distinction between promises and representations has been notoriously difficult and some section 52 cases are now emerging where that distinction has become blurred. Thus a promise to accept the lowest tender may arguably be enforceable under section 52.

(iv) Contract

The fourth way in which legally enforceable obligations may be imposed on the tendering process is through contract. The traditional view - that a contract only comes into being when the tender is accepted - has been supplemented in England and Canada by decisions of courts (at the highest level in Canada) which hold there to be a preliminary contract before the main contract. I will adopt the language of the Canadian Supreme Court and call the two contracts contract A and contract B. Contract B is the ordinary contract for the supply of machines or whatever. But contract A governs the tendering process before contract B comes into existence. Contract A comes into existence when a tenderer puts in a tender in response to the advertisement.

What are the consequences of contract A? At the very least, it may impose on the government a *contractual* obligation to give proper consideration to complying tenders. In the English case,[10] a proper tender was put in in time but was not considered because it was erroneously thought to be late. The English Court of Appeal held that there wa a preliminary contract which had been broken by the body seeking tenders.

The Canadian cases have gone much further and have held that obligations may be imposed on *both* parties during the tendering process. In one case (the Ron Engineering case[11]), the tenderer was obliged to pay a deposit and not to withdraw the tender for sixty days. It was held that the tenderer should forfeit the deposit because it attempted to withdraw the tender because it had a serious mistake in it. In another case (the Canamerican case[12]) the body seeking tenders, Transport Canada was held to be in breach of terms of contract A. The facts of the case are complicated and need not be set out here. The case involved bids for airport car rental concessions by car rental firms. The plaintiff, Canamerican, was in fact a successful bidder but complained that Transport Canada had also granted a concession to a competitor of Canamerican contrary to the procedures set out in the tender documents. Canamerican was successful in this claim and was awarded damages measured by the amount by which Canamerican's tender was higher than it need have been.

There are other Canadian cases involving tendering in which a contract is used to impose reciprocal obligations during the tendering process. Broadly, the duty to deal fairly with tenderers (for example, not to change a procedure without informing all tenderers) has been imposed.

The implications of these decisions, if they were to be followed in Australia, are serious because they remove a degree of flexibility in the tendering process. On the one hand it is important for the probity of the tendering process that the body seeking tenders, particularly a government body of instrumentality, should adhere to its own stipulated terms and procedures; and there is no doubt that imposing contractual obligations would keep the government bodies on the straight and narrow. On the other hand, a degree of flexibility must be maintained if the whole purpose of seeking tenders - to obtain the most competitive offer - is not to be undermined. Further, the drafting of a tender advertisement must be treated in the same way as the drafting of a contract (for that is what it is), if the Canadian analysis is to be followed in Australia.

It is perfectly possible, as a matter of contract law, to stipulate a very flexible contract A. For example, the body seeking tenders reserves the right not to accept any tender, to accept non-complying tenders, to negotiate separately with a particular tenderer, etc. So long as this is made perfectly clear in the tender advertisement, no problem should arise. But the problem is whether such flexible tendering procedures, are acceptable as a matter of proper public administration. This leads us back to our starting point: how 'private' do government bodies want to be in their commercial dealings?

The problem of remedy

So far, little has been said about possible remedies available to the disgruntled tenderer. Whether the basis for a claim is breach of contract, negligence, section 52 or estoppel, the problem will often be that remedial action will be too late: the contract will have been let to another. It may be possible to ask the court to set the contract aside on the basis that it was invalid because statutory procedures governing the tendering process were not complied with.[13] But courts may show some reluctance to set aside contracts because government bodies have not complied with their own procedures.[14]

The most obvious remedy is reliance damages, that is, either the wasted expenses of preparing the tender or the difference between the tendered amount and what would have been tendered, as in the Canamerican case. Expectation (loss of profit) losses are more problematic. If it could be shown that, had the body seeking tenders observed the proper procedures and terms, the plaintiff would have won the contract, then it should be possible to claim loss of profits, if they can be ascertained. Courts are prepared to award expectation damages in speculative cases: the amount of profit is discounted according to the probability that the profit would have been made.

There is a causation problem, whether reliance or expectation losses are claimed. The plaintiff must show that the breach of duty or obligation *caused* a loss. This may be very difficult to prove even when it is established that the plaintiff's tender did not receive proper treatment or consideration. it may not have won anyway. On the other hand, this difficulty does not appear to have troubled the courts in the cases mentioned above.

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1 See subsection 70(1).

2 Australian Broadcasting Corporation v Redmore Pty Ltd (1988) 84 ALR 199.

3 (1988) 164 CLR 387.

4 (1988) APR 40-838.

5 See for example Morrison-Knudsen International Co Inc v Commonwealth (1972) 46 ALJR 265; Defence Construction (1951) Ltd v Municipal Enterprises Ltd (1985) 23 DLR (4th) 653. In Dillingham Constructions Pty Ltd v Downs (1972) 2 NSWLR 49 a negligence action was not successful but it was acknowledged that a duty of care could arise in a pre-contractual relationship.

6 Blackpool Aero Club v Blackpool Borough Council [1990] 1 WLR 1195. The negligence action was not resolved by the court because it found liability in contract. See further discussion below.

7 Hull v Canterbury Municipal Council [1974] 1 NSWLR 300; GJ Knight Holdings Pty Ltd v Warringah Shire Council [1975] 2 NSWLR 796. These were not

tender cases but illustrate the general proposition.

8 (1990) 170 CLR 394.

9 Newton, Bellamy & Wolfe v SGIO (Qld) [1986] 1 Qd R 431.

10 Blackpool Aero Club v Blackpool Borough Council [1990] 1 WLR 1195. See too Harvela Investments Ltd v Royal Trust Co of Canada Ltd [1986] AC 207 in which a promise to sell shares to the highest bidder was held to be enforceable by means of a separate contract preliminary to the actual sale.

11 The Queen in right of Ontario v Ron Engineering & Construction Eastern Ltd (1981) 119 DLR (3d) 267.

12 The Queen v Canamerican Auto Lease and Rental Ltd (1987) 37 DLR (4th) 591.

13 Streamline Travel Service Pty Ltd v Sydney City Council (unreported September 11 1981 (Kearney J); digested in The Shire & Municipal Record, vol 74 (March 1982) 518-9) and briefly discussed by Aronson and Whitmore Public Torts and Contracts (1982) at 216.

14 Australian Broadcasting Corporation v Redmore Pty Ltd (1988) 84 ALR 199.

TENDERING (2)

Dr R A I Bell*

- edited speaking notes from a presentation to the Australian Institute of Administrative Law, 19 November 1991, Canberra

When speaking of government contracting, the Department of Administrative Services (DAS) and perhaps a couple of other large agencies, such as Defence and Telecom, come to mind. However, all agencies are involved to a greater or lesser extent, whether it be for major engineering or procurement projects, or minor purchases of stationery or cleaning services. Given the diversity of functions, expertise and resources among these agencies, it is not surprising that the Ombudsman's office receives a corresponding diversity of complaints.

Indeed, it is one of the features of the Ombudsman's office that it is well placed to compare agency practices and to suggest ways in which lessons can be carried from one agency to another. This evening I propose to focus on just a few major features of the tender and contract processes of government where there seem to be significant changes under way.

In her article 'Administrative Law, Government Contracts and the Level Playing Field',[1] Dr Margaret Allars seems to say that there is a fundamental inconsistency between 'new managerialism' and administrative review. To the extent that new

managerialism is merely a swing away from excessively prescriptive government procedures towards more flexible and responsive management, I see no conflict. In my view administrative review is simply an overlay designed to improve public administration. It need not - indeed, should not - interfere with proper exercise of expertise and discretions. The only likely conflict would occur if the review mechanisms took over from routine decision making.

Dr Allars has focussed a lot on Crown privileges and related immunities. We seem rarely to come across such issues, possibly because we focus on administrative aspects rather than ministerial policy decisions. I think it is also more and more widely accepted that governments which seek to abrogate contracts without at least fair compensation will encounter political criticism and, in the long run, a commercial world reluctant to deal with them. Much the same can be said of statutory *ultra vires* - compare the courts' reluctance to require an outside contractor to inquire as to whether the Australian Broadcasting Corporation has complied with a statutory procedure in relation to the contract considered in Australian Broadcasting Corporation v Redmore Pty Ltd.[2]

Against that background, let me turn to the work of the Ombudsman's office in the field of government contracting.

The Ombudsman's role

There is often a misapprehension of how the Ombudsman's office approaches investigation of decisions. In fact, we apply a test of reasonableness similar to that applicable under the *Administrative Decisions (Judicial Review) Act 1977.* Was the decision reasonably open to the decision-maker on the available information? We also recognise the importance of technical expertise,local knowledge, etc. This is no different from considering actions of a legal adviser, physician, engineer, etc. We get external expert advice if necessary. We do not attempt to impose our own view of the preferable decision (cf the Administrative Appeals Tribunal). These principles apply equally in respect of commercial activities of government.

Challenges to the Ombudsman's role in 'commercial' matters

I will illustrate this and other points which I intend to make tonight by reference to a series of examples of actual complaints:

- An agency was responsible for licensing the use of certain Commonwealth intellectual property - the same agency officer was involved both in licensing and on the board of a joint venture. It was not clear he could objectively evaluate conflicting offers. The agency queried the Ombudsman's role in a 'commercial' matter.

- A person contracted to write a newsletter for an agency on a $-per-page basis. The agency increased the page content by 50% but declined to make a similar increase in the payment. The agency initially challenged the Ombudsman's role in a 'commercial' decision. Higher authority saw the light and paid up.

The Supreme Court of Canada has held in British Colombia Development Corporation v Friedmann[3] that 'matters of administration' can encompass the commercial activities of government. There is, perhaps, some doubt here in light of certain Victorian decisions, but most agencies seem to accept the Ombudsman's role, albeit reluctantly. A recent change in DAS's attitude, for example, acknowledges the benefits of Ombudsman review - see the recent article in DAS's 'Better buying' (No. 8, October 1991), with a photo of one of our officers and inviting both agencies and contractors to approach the Ombudsman. Indeed, the Ombudsman can be presented as an asset which is not available to private-sector competitors with DAS.

The Minister for Administrative Services, Senator Nick Bolkus, has indicated in recent discussions that he supports this general attitude.

Let me now turn to some specific examples of complaints which we have investigated and which illustrate both our approach and the ways in which our administrative review mechanism can contribute to better government contracting.

The tender process

I take the aim of the tender process to be to get the best value for public money and to avoid patronage and corruption by giving all comers an equal opportunity.

Errors/misrepresentation by agency before tender

- An agency sold a concession for a national event. There was a complaint that the situation had been misrepresented. We negotiated $5500 compensation.

- Misleading advice was provided by an agency to a contractor, including lack of explanations. The agency did not keep to the contract. We convened a meeting of the parties. Settlement of $26,500 negotiated.

- A complainant alleged that an agency had misled him as to the difficulty of a delivery contract. The contractor subsequently wanted out. We negotiated a satisfactory solution.

Change of conditions after tenders invited

- An agency asked a complainant to produce a prototype. After he did so, the project was shelved.

Having mentioned those cases, it is fair to note that there is a proper role for post-tender negotiation, which may include use of information gained during the tender. The critical thing is that this be fair and above board and that tenderers, preferably, are informed of the possibility beforehand.

Confidential information leaked

- A license was granted to use certain Commonwealth intellectual property. The same agency officer was involved both in licensing and on the board of a joint venture. There was a perceived risk that he could have passed on confidential information during negotiations regarding the licensing of rival firms.

. A complainant alleged that an agency had revealed his confidential prices and that this had allowed a competitor to undercut him. Investigations revealed that the prices were properly disclosed at the end of the first stage of a two-stage tender process.

. Confidential information about a tender was leaked by an agency to a rival tenderer. There were also leaks in the reverse direction. The agency claimed that this was an industry characteristic. The Australian Federal Police had investigated but there was insufficient evidence for prosecution, discipline or civil action. However, agency procedures were subsequently improved as a result of our investigations.

Delay in making contracts

. There were many complaints that an agency was excessively slow to finalise certain contracts. After we investigated, finalisation was expedited and the manual was updated by the agency.

There is normally no right to be awarded a contract, and tender documents would usually make this clear. But where many people have been involved and where the failure is simply due to administrative delay, there may be a case for criticism on the basis of raising false expectations.

Failure to implement announced policy

. A complainant had agreed to supply Australian-made equipment, but DAS approved the purchase of wholly-imported (and slightly cheaper) goods, contrary to the Government's Australia-New Zealand preference policy. DAS declined to compensate, as it believed the complainant was trying to avoid the consequences of the head contractor's liquidation. DAS did, however, concede a misunderstanding of the preference policy.

Whether chosen on merit

Agencies are not bound to take the lowest tender. The emphasis is now on value for money. But this brings with it the responsibility to justify decisions which are not obviously correct on their face.

Best price not taken

. A tender was not accepted. The reasons were unclear. We arranged for the release of relevant documents to the complainant. (DAS/Australian Purchasing Group had trouble with the application of the *Freedom of Information Act 1982*). We also convened a 3-way meeting, at which the explanations were accepted (small firm, insufficient experience).

. An agency accepted the third-lowest tender. No explanation was given to the other tenderers.

. A lowest tender was not accepted, because of doubts that the firm could perform in time.

Best technical merit not taken

. Two tenders of similar technical merit were submitted. The price of the better one was much higher - not the best value for money.

. The technical specification for a tender related to a specific commercial product and others were, thereby, wrongly excluded.

Pressure is now on some government agencies to 'go commercial' and sell their services, intellectual property, etc in competition with the private sector. This has led to a fresh round of problems, of the kind common where an agency has both a regulatory and a provider role.

Conflict of interest

. A license had been granted to use certain Commonwealth intellectual property. The same agency officer was involved both in licensing and on the board of a joint venture. It was not clear that he could objectively evaluate conflicting offers.

Corruption

. A whistleblower alleged favouritism in awarding tender contracts and that senior officials had gained personally. On investigation, the complaint was not sustained.

Last week, the Minister for Administrative Services, Senator Bolkus, announced[4] that DAS had adopted a new Code of Conduct, as a result of allegations of conflicts of interest in information technology contracts. The Code covers conflict of interest by requiring clear separation of functions and declaration of interests, and also provides for protection of confidential commercial information.

Breach of contract

Governments do change. The priorities of the one government can change. The same can apply within individual agencies, for good reason and as a consequence of external influences. Such changes may result in a conflict between public and private interests. But less meritorious factors may have a role to play as well.

Changes of conditions after contract let

. A complainant contracted to write a newsletter for an agency at $ per page. The agency increased the page content by 50% but declined a request for a similar increase in payment. However, a higher authority saw the light and paid up.

. Two agencies merged. Each had a contract for supply of the same goods. The merged successor was entitled to use the cheaper.

. A complainant had a contract with an agency and did additional work which was not written in to the contract. The agency nevertheless agreed to pay $6000, as it got 'value for money'.

Breach of contract

. An agency refused to honour a contract for the sale of certain apparatus. It agreed to honour

the contract after our intervention. It also revised standard contracts and staff instructions.

. A contract was cancelled. The contractor was entitled to 30 days notice. We negotiated a $1200 payment in lieu.

Some agencies are too willing to tell a complainant to sue when they have breached a contract. We consider litigation should not be necessary where liability is clear.

Delay in payment by agency

. A contractor was entitled to payment by the agency within 28 days. The agency was late. The contractor's bank charged him on his overdraft. The agency agreed to pay the contractor $6000 compensation.

. A late payment to a contractor by a service agency was due to an accounting system which first waited for payment from the client agency.

Fairness

Risk management

. Goods were sent to an agency in two consignments. The agency was 'too busy' to count the goods until both consignments were received. The complainant was thereby denied the opportunity to check on any missing items promptly. A few items were found to be missing. Who carries the risk?

Unfair

. A best tender was disallowed because the tenderer failed to declare a conviction recorded 23 years earlier! The agency accepted that there was a misunderstanding. Query the relevance of such an old conviction anyway.

. A private collector complained that an agency reserved a portion of its production of collectors items for dealers. We accepted that there were fair commercial and public policy justifications for the practice.

. An agency asked a complainant for a list of books to use in a certain program. He provided one, saying he did so hoping for orders and that the agency was not to use the list for any other purpose. The agency used it to call for quotes from others. This breached confidence, infringed copyright and was grossly unfair.

. Generally, we cannot help subcontractors. The DAS policy of isolation by main contractor is usually reasonable.

Remedies

Loss of profits on tenders

. An agency agreed to offer act of grace compensation for lost profits when a tender was wrongly evaluated. The payment was deferred pending the outcome of the International Sugar Mills case[5] and was eventually dropped. It

might now have succeeded under new act of grace guidelines.

Compensation for costs of tendering

. A tender was evaluated negligently. A report by the Ombudsman pursuant to section 15 of the *Ombudsman Act 1976* recommended compensation for tendering costs. This was rejected by the Government.

Inadequate explanation

. A dispute over Australia-New Zealand content was resolved by explanation.

. A tender was not accepted. The reasons were unclear. We arranged for the release of relevant documents to the complainant. (The agency had misunderstood the application of the Freedom of Information Act). We convened a 3-way meeting. The agency explanations were accepted (small firm, insufficient experience).

. An agency accepted the third-lowest tender. No explanation was given to the other tenderers.

DAS recognises that there is a public interest in giving tenderers an explanation of why they missed out.[6] They will at least be more likely to have goodwill and to be willing to tender again. They may also be able to gain resources or expertise which will enable them to compete more successfully in future. DAS has recently announced that, as a matter of policy, it expects to give adequate explanations. And, of course, acceptable explanations can give the public confidence that their taxes are being spent to best advantage - a thoroughly proper objective of administrative law also!

The inability to obtain a financial remedy seems to have discouraged complaints about defective tender evaluation. While this may provide short-term comfort for agencies and the exchequer, it means that an avenue for scrutiny of tenders may be lost. The longer term consequence may be a less effective tender process, more costly contracts, and less likelihood that patronage or corruption will be identified.

In recent years, Ombudsmen have indicated that, while they may no longer press for compensation for lost profits, they may seek compensation for tendering costs in suitable cases. Other remedies, such as being included on a period contract, may also be considered.

* Dr Bell was, at the time of giving this talk, Deputy Commonwealth Ombudsman.

1 University of New South Wales Law Journal 12 [1989] 114.

2 (1988) 84 ALR 199.

3 (1985) 14 DLR (4th) 129.

4 The Canberra Times, 14 November 1991.

5 See Commonwealth Ombudsman, Special Report No 2 - The Industrial Sugar Mills Case involving the Department of Defence (May 1986), Parliamentary paper no 144/1986.

6 The Canberra Times, 12 November 1991.

REVIEW OF THE AAT

The Report of the Review of the Administrative Appeals Tribunal was presented to the Attorney-General, Mr Michael Duffy MP, and to the President of the Tribunal, Justice Deirdre O'Connor, on 29 November 1991.

The Report has made a large number of recommendations as to the membership of the Tribunal; its proceedings; its case management; its administrative affairs; and as to amendments of the *Administrative Appeals Tribunal Act 1975* and Regulations.

The Report discusses the history and philosophy of the Tribunal; the often debated questions of informality of procedures and of the appropriateness or otherwise of adversarial procedures; and the extent to which the Tribunal may adopt an interventionist or inquisitorial role.

The recommendations for amendment of the AAT Act, while rejecting the conferral on the Tribunal of a general power to award costs, include two significant recommendations in relation to costs.

The Report has recommended that the Tribunal have power to award costs against a party where the conduct of a case by that party has merited such an award, such as by a failure to comply with an order of the Tribunal.

The Report also endorses a proposal made by the representative of the Department of Finance that, in all cases, costs be awarded against the respondent (or an applicant which is an agency of government) if the other party is successful. Agencies would receive supplementation to cover the liability for costs, which would include the costs of the Tribunal on a marginal cost basis. The Report regarded the proposal as 'innovative and as being exemplary in terms of justice to the community'.

The recommendations made in the Report were unanimously supported by all members of the Steering Committee, which included the President of the Tribunal; a Deputy President and a Senior Member of the Tribunal; the President of the Administrative Review Council; the Secretary of the Attorney-General's Department; an Assistant Secretary of the Department of Finance; and the Registrar of the Tribunal. The Report does contain a dissenting opinion by one member of the Committee, expressing opposition to the making of term appointments of full-time members of the Tribunal. However, as the AAT Act has since 1988 provided for both term and tenured appointments of full-time members, no recommendation reflected this one division of opinion.

The Report can be regarded as having set the Administrative Appeals Tribunal on a firm course in its administration and in its decision-making, including in that the facilitation of pre-hearing settlement of disputes, and as giving it a sound financial base for the future.

PROCEEDINGS OF THE 1991 ADMINISTRATIVE LAW FORUM

Members have previously been advised that they will be provided with a copy of an edition of the Canberra Journal of Public Administration containing the proceedings of the 1991 administrative law forum, 'Fair and open decision making'. Unfortunately, that edition has not yet been printed. It is expected to be ready early in 1992 and will be sent to members in due course.