Tendering for Government Business: process contracts, good faith, fair dealing, and probity

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I. INTRODUCTION

"*Nothing is easier than the expenditure of public money. It does not appear to belong to anybody. The temptation is overwhelming to bestow it on somebody*".
-Calvin Coolidge, twenty-ninth President of the United States

It is difficult to overstate the importance to every sector of the Australian economy of the goods and services procured by all levels of government—Federal, State, and local. At one end of the spectrum, vast sums are spent on products of which governments are the only customers, such as transport infrastructure or defence hardware. At the other, routine purchases for the operations of the public service still involve substantial sums, due to the sheer number of government employees for whom procurements must be made. The potential for the corruption in government spending is equally significant, and examples abound. The recent conviction of former Queensland cabinet minister Gordon Nuttall in relation to the awarding of government contracts in exchange for kickbacks is a clear demonstration. The repeated investigations of RailCorp (formerly the New South Wales State Rail Authority), by the Independent Commission Against Corruption, revealing endemic fraud, overspending, and corrupt awards of contracts, is another.

With billions of dollars involved, there is a clear need for care to be exercised in ensuring that value for money is obtained, and in a manner consistent with the priorities and responsibilities of government. While the two examples above are indicative of the worst outcomes of a failure to properly monitor and control the use of public money, the risk of inefficiency and overspending is present even in the absence of criminal conduct. One mechanism that is frequently utilised in seeking to obtain value for money is the competitive tender, however that process gives rise to its own difficulties unless it is properly managed. Since the well-known *Hughes Aircraft Systems* case was decided in 1997, there have been a number of other instances where unsuccessful tenderers have brought actions against government bodies relating to improprieties in tender processes.[1] Such an outcome is inevitably costly and embarrassing for the body concerned, regardless of whether the tenderer's claim succeeds.

Both the potential for corruption, and the risk of flawed processes have given momentum to the trend towards a focus on 'probity' in government procurement, on a State and Federal level. Probity concerns the transparency, accountability, and procedural fairness and integrity of a procurement process, and is accordingly of concern to any lawyer

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[1] *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1.

advising a government entity, or a commercial party that supplies or wishes to supply to government. Despite the adoption of detailed guidelines in many jurisdictions, aggrieved tenderers nonetheless continue to challenge the conduct of procurement processes before the courts.

There are a number of learned articles, some referenced in this paper, regarding the theoretical underpinnings of the process contract, and comparing developments in overseas jurisdictions. While touching on theory, the purpose of this paper is to examine the state of the law as it stands in Australia, to provide a comprehensive picture of relevant authorities, and to propose practical guidelines for government agencies and tenderers, to safeguard against unforeseen consequences. The authors seek to address the key questions that lawyers advising both governments and tenderers will need to be able to answer. Furthermore, drawing on the authors' experiences in probity advisory and auditing work, this paper will propose a framework for best practice by governments in tender processes.

An overview of government procurement

The term 'procurement' covers the full range of government purchasing, by the Commonwealth, the States, local governments, and all of the departments, authorities, and other instrumentalities thereof. This ranges from the significant purchases—such as a fleet of submarines, or a new highway—to routine acquisitions—consultancy services, or boxes of pens. A complex procurement might involve, for example, the sale of government owned land, the design and construction of a purpose-built building on that land, and the lease-back by the government of the completed development. At the upper end of complexity, the authors were involved with a recent procurement valued at some $2 billion, comprising six separate alliance contracts (see below) for the construction of a water infrastructure network in Queensland.

Fundamentally, the same principles are applicable in procurement of any size, as the same objectives are to be achieved. As well as the goal of obtaining value for money, which is common to all procurement by the government and private enterprise, there are also additional dimensions: the need for transparency and accountability in the use of public money; and the need to expend money consistently with the advancement of the broader aims of government.[2]

These objectives are enumerated in various legislative and/or policy requirements, such as the 'Procurement Principles' described in Division 1 of the *Commonwealth Procurement Guidelines*:[3]

- Value for Money;

[2] See, eg, Queensland Government, Department of Public Works, *State Procurement Policy*, September 2010.

[3] Commonwealth Government, Department of Finance and Deregulation, *Commonwealth Procurement Guidelines*, Financial Management Guidance No. 1, December 2008, paras 4-8. The *Guidelines* bind Commonwealth officials by virtue of the *Financial Management and Accountability Regulations 1997*.

- Encouraging Competition;
- Efficient, Effective and Ethical Use of Resources; and
- Accountability and Transparency.

Many of the States have legislation and policies containing similar formulations.[4] Consistent with these objectives and principles, governments are generally required by legislation or policy to procure goods and services by way of competitive processes such as inviting tenders, over a certain price threshold.[5] Even below the threshold, there may be requirements to 'go to market' to determine the best source for the proposed procurement, for example, by obtaining a number of quotes from a pre-determined 'preferred supplier' panel.

Furthermore, the same principles will continue to be relevant, regardless of the size of the purchase. These principles recognise the onus that is upon government to be a 'moral exemplar' in its commercial dealings,[6] and behave properly towards citizens, be they counterparties in the procurement process, or taxpayers who are entitled to expect that public money is properly and efficiently spent.

A number of different mechanisms are available for a government entity when going to market, including issuing a request for information (**RFI**)(sometimes known as a call for expressions of interest—**EOI**), a request for tender (**RFT**)/request for offer (**RFO**)(there is no useful distinction, and the term RFT is used in this essay), or a request for proposal (**RFP**). While no precise definitions are universally recognised, these processes are generally well understood. An RFT/RFO process seeks bids in relation to a clearly defined requirement for goods or services. Conversely, an RFP invites proponents to respond to a problem or requirement of the government expressed in more general terms, by designing and costing a solution or tailored product package.

Sometimes a two-stage process will be used, where an RFI/EOI is used to identify proponents to compile a short list, ahead of a RFT/RFO/RFP process.

In relation to complex or large procurements, a third stage may be added whereby short listed tenderers from the second stage are invited to submit a further 'best and final offer' (**BAFO**), subsequent to negotiations.

It is worth briefly noting that this established paradigm is being challenged in relation to high value, high profile procurements, by the emerging practices of 'early contractor involvement' and 'alliance contracting'. Rather than a competitive process throughout, an EOI is sought in relation to a project where there will typically be very few proponents—

[4] For example, the 'sound contracting principles' in the *Local Government Act 2009* (Qld) s 106(3) and the *City of Brisbane Act 2010* (Qld) s 103(3) essentially replicate the Commonwealth principles, with the addition of 'environmental protection'.

[5] Eg, *Commonwealth Procurement Guidelines* para 8.4 ($80,000 generally, $9million for construction procurement); *Local Government (Finance, Plans and Reporting) Regulation 2010* (Qld) s 175 ($150,000); *Local Government Act 1993* (NSW) s 55 ($100,000);

[6] See *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1 at 41.

perhaps only two—meeting the threshold for qualifications. That proponent will then be invited to co-operate and share information with the government agency in developing, detailing, and costing a solution. The final contract shares both risk and reward between the parties.

Originating in the United Kingdom, these procurement methods have been taken up in Australian jurisdictions, and the legal issues that they raise are unique.[7] Their efficacy is not without controversy, and it remains to be seen whether they will prevail over traditional methods as the preferred approach to substantial government procurement.[8]

Terminology surrounding the various types of procurement is not consistently defined, and often the word 'tenderer' will be used for a proponent in any of the procedures, not just in relation to an RFT, and is used in this manner in this essay. The term 'invitor' is used for the government department, statutory authority, or government owned corporation issuing an EOI/RFP/RFT.

The role of the probity professional

The authorities and literature regarding government tenders frequently refer to individuals described as 'probity auditors' or, sometimes, 'probity advisors'. The role of probity auditors is to be an independent supervisor of tender processes for procurements that are large, complex, high-profile, sensitive, or controversial.

There is no consistent definition of the role, or of the distinction (if any) between auditor and advisor. In some descriptions, the advisory role is undertaken throughout the process, and the auditing role is done at the end.[9] Elsewhere, the term 'probity auditor' is used as a catch-all, and this paper will adopt that convention for convenience.

In general, the probity auditor oversees the course of inviting tenders or proposals, and of the evaluation thereof, to ensure that these processes are transparent, fair and equal to all proponents, and conducted in accordance with relevant documentation. This typically includes not only the document creating the process (ie, the RFT/RFP/EOI), but also an evaluation plan, to be used by the invitor's staff in assessing proposals, and ideally also a probity plan to guide the staff throughout the process. The latter documents provide guidance on issues such as confidentiality of information and conflicts of interest, which are also within the domain of the auditor.

The probity auditor is not a member of the tender evaluation panel, although he or she should be present at meetings thereof. While remunerated by the government invitor, the

[7] For a comprehensive introduction to early contractor involvement in the Australian context, see Quick R, "Queensland's ECI Contract" (1997) 14 ICLR 4.
[8] See, eg, Victorian Government, Department of Treasury and Finance, *In Pursuit of Additional Value: a benchmarking study into alliancing in the Australian Public Sector* (October 2009) pp 87-8.
[9] See discussion in Box J and Forde M, *Probity and Managing Procurement: how to avoid corrupting the process* (LexisNexis Butterworths, 2007) Chapter 7. See also Commonwealth Government, Department of Finance and Deregulation, *Guidance on Ethics and Probity in Government Procurement*, Financial Management Guidance No. 14, January 2005, para 8.

auditor is not an employee or agent of the government, and must be sensitive to the concerns and issues raised by the tenderers.

Frequently probity auditors are experienced professionals such as lawyers, accountants, or engineers. Probity services will form part of their broader practice, and they bring their professional experience to bear on the task.

In the event that the probity auditor is a lawyer, he or she is not contracted to provide legal advice. However, there will often be an overlap between legal and probity issues, as this paper will demonstrate, and the auditor will often need to work with the invitor's legal team to prevent or resolve these problems. In the same manner as governments maintain legal services panels, the Victorian and Queensland Governments have established probity services panels, and it is likely that other states and the Commonwealth will follow.

II. THE PROCESS CONTRACT

Implication of the process contract—Hughes Aircraft Systems

The statement made by Priestley JA in *Renard* is cited by Finn J in *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1 at 36, and is an important starting point for the decision in the Hughes case, which is a watershed in introducing probity concepts into Australian law.

The facts of *Hughes* are complex. Hughes was a tenderer for a large project involving upgrading air traffic control systems. Airsystems Australia was the successor of the Civil Aviation Authority (**CAA**), a government business enterprise overseeing the tender process. An initial tender process, with six selected tenderers, had resulted in a short-list consisting of Hughes and one other tenderer, Thompson. Ultimately Thompson was successful, but the tender process was subsequently determined to be *"unsound and unfair"* in a review directed by the responsible Minister.

A second request for tender was issued to Hughes and Thompson *only*, with certain selection criteria as well as the general tender process described in correspondence. A representation was made that an independent auditor would supervise the tender process, and would ensure both that the proper procedures were followed, and that the process was conducted fairly.

Finn J summarises the complaints of Hughes into *"seven distinct rubrics"* (at 23) which may be further simplified for present purposes:

1. *Evaluation and selection failures*: the CAA failed to evaluate the tenders in accordance with the methodology and priorities set out in correspondence and the RFT;

2. *Political interference*: the CAA took account of the communications made by or on behalf of responsible Commonwealth ministers or else treated those communications as directions to the CAA board;
3. *Audit failure*: the CAA failed to contract an independent auditor to verify, and failed to ensure that the auditor verified, that the tender process procedures were followed and that the evaluation was conducted fairly;
4. *Improper interests and affiliations*: the CAA allowed a board member, itself and the responsible Department to have improper interests in, or affiliations with, Thomson or the Thomson bid;
5. *Breach of confidence*: the CAA did not ensure strict confidentiality was maintained in respect of the tenders and permitted disclosure both of Hughes' tender information to Thomson, and of Hughes' and Thomson's tender information to the Department and the responsible Minister;
6. *Price reduction/unacceptable variation*: The CAA took account of a price reduction by Thomson and a variation to its tender, submitted after the final submission of tender materials;
7. *Fair dealing*: the CAA failed to conduct the tender evaluation fairly and in a manner that would ensure equal opportunity to Hughes and Thomson. For practical purposes the conduct relied upon to make this out is all of the particular actions and events that found the previous six complaints.

Hughes' primary causes of action were for breach of contract and violations of the *Trade Practices Act*, with negligence at common law, and equitable estoppel as essentially coextensive alternative claims (at 24).

Hughes successfully argued that the request for tender and surrounding correspondence constituted a 'process contract' between the CAA and Hughes, governing conduct during the tender process, up to the formation of the primary contract for the work the subject of the tender.

Doctrinal basis for the implication of a process contract

In contrasting *Hughes* with an earlier English Court of Appeal decision, *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195, one learned author remarks that:[10]

It is, however, suggested that the situation in [Hughes] *was quite <u>different</u> from that which existed in the Blackpool case. In the latter case, the court was, in effect, literally <u>implying</u> a collateral contract de novo in order to do justice in the situation at hand. In* [Hughes]*, on the other hand, there was, arguably at least, a tangible offer by the defendant to the plaintiff as well as the other tenderer to the effect that if the latter were to respond via a definite tender, the defendant invitor would undertake to abide by the criteria and process that it had itself set out in its invitation. Indeed, this suggests an*

[10] Phang A, "Tenders, Implied Terms and Fairness in the Law of Contract" (1998) 12 JCL 126 at 130. Original emphasis. The author was, at the time of writing, an academic at the National University of Singapore, and is presently a Judge of Appeal of the Supreme Court of Singapore.

alternative route by which contractual obligations could arise, viz by way of either a unilateral or a bilateral contract.

The reasoning of the Court of Appeal was expressed at 1201 by Bingham LJ (as his Lordship then was) that, while the Blackpool Borough Council was not strictly bound by the terms of the request for tender on its face:

This is a conclusion I cannot accept. And if it were accepted, there would in my view be an unacceptable discrepancy between the law of contract and the confident assumptions of commercial parties, both tenderers … and invitors.

Bingham LJ notes at 1201-2 that the tender process generally reflects an imbalance of power between the parties, where the tenderer has imperfect information, and is required to commit substantial time and resources with no guaranteed outcome. However, this alone is not the basis for the implication of a contract, and Bingham LJ continues:

But where, as here, tenders are solicited from selected parties all of them known to the invitor, and where a local authority's invitation prescribes a clear, orderly and familiar procedure—draft contract conditions available for inspection and plainly not open to negotiation, a prescribed common form of tender, the supply of envelopes designed to preserve the absolute anonymity of tenderers and clearly to identify the tender in question, and an absolute deadline—the invitee is in my judgment protected at least to this extent: if he submits a conforming tender before the deadline he is entitled, not as a matter of mere expectation but of contractual right, to be sure that his tender will after the deadline be opened and considered in conjunction with all other conforming tenders or at least that his tender will be considered if others are. Had the club, before tendering, inquired of the council whether it could rely on any timely and conforming tender being considered along with others, I feel quite sure that the answer would have been "of course." The law would, I think, be defective if it did not give effect to that.

Phang notes quite aptly that the *Blackpool* case is remarkable for the implication of a contract, where a conventional analysis might create the appearance only of a mere invitation to treat.[11] The authors of this paper would, however, respectfully stop short of Phang's assessment of the case, that *"doctrinal integrity becomes unimportant simply because the ends take precedence over the means."*[12]

And while the idea of a *"clear, orderly and familiar procedure"* has become a touchstone in complaints relating to tender processes,[13] and the conduct discussed by Bingham LJ might found an action in estoppel or misrepresentation under Australian law, the courts have stopped short of finding the existence of contracts without clear evidence of a meeting of the minds and an intention to be bound.

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[11] Although, as noted in *Ipex ITG Pty Ltd (in liq) v State of Victoria* [2010] VSC 480 at [32], the reasons of Bingham LJ were, although expressed in expansive terms, nonetheless confined to the facts of that case.
[12] Phang, 'Tenders, Implied Terms and Fairness in the Law of Contract', at 132.
[13] See, eg, *Dalcon Constructions Pty Ltd v State Housing Commission* (1998) 14 BCLC 477, where the plaintiff's pleadings actually used this terminology in pleading the existence of a process contract.

When is a request for tender not a process contract?

The finding in *Hughes* of a process contract containing a duty of good faith was made on a number of separate bases, each of which would have been sufficient to establish the duty. The first basis, implication ad hoc, turned on mutual intentions which were clear on the facts of the case, with no need to resort to a generalised policy objective, that *"the integrity of the bidding system must be protected where under the law of contract it is possible so to do"*.[14] Inevitably, such circumstances will not be present in every government tender.

Finn J refers to the High Court of New Zealand in *Pratt Contractors Ltd v Palmerston North City Council* [1995] 1 NZLR 469 at 478-9 (emphasis added by Finn J):

Authority makes it clear that the starting point is that a simple uncomplicated request for bids will generally be no more than an invitation to treat, not giving rise to contractual obligations, although it may give rise to obligations to act fairly. On the other hand, it is obviously open to persons to enter into a preliminary contract with the expectation that it will lead in defined circumstances to a second or principal contract … Whether or not the particular case falls into one category or the other will depend upon a consideration of the circumstances and the obligations expressly or impliedly accepted.

Subsequently the New Zealand Court of Appeal in *Transit New Zealand v Pratt Contractors Ltd* [2002] 2 NZLR 313 at [77] stated that:[15]

Whether a request for tenders gives rise to a process contract, once a conforming tender is submitted, is in all cases a question of whether all the elements of contractual formation are made out at that point. Analysis of the terms of the invitation to tender is the starting point. Where the request makes no express commitment concerning the manner in which tenders received will be addressed, that may indicate the invitation was no more than an offer to receive them. On the other hand as Blackpool and Fylde Aero Club Ltd v Blackpool BC [1990] 1 WLR 1195 indicates, the rigorous and comprehensive expression of requirements to be complied with by tenderers may give rise to an implied promise by the invitor to consider a conforming tender if others are considered. The law does not, however, have a policy which inclines towards enforcement of implied promises by invitors, even if they are public bodies, and whether there has been a binding promise as to process is to be ascertained by applying general principles of contract law concerning contract creation and implied terms.

And most recently, in *Ipex ITG Pty Ltd (in liq) v State of Victoria* [2010] VSC 480 at [24] Sifris J noted that:[16]

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[14] (1997) 146 ALR 1 at 29, distinguishing *R v Ron Engineering and Construction (Eastern) Ltd* (1981) 119 DLR (3d) 267.

[15] Emphasis added. The decision was followed in *State Transit Authority of New South Wales v Australian Jockey Club* [2003] NSWSC 726 at [28]; *Cubic Transportation Systems Inc v State of New South Wales* [2002] NSWSC 656 at [34]; *Ipex ITG Pty Ltd (in liq) v State of Victoria* [2010] VSC 480 at [33]-[43].

[16] See below as to the relevance of the doctrine of 'legitimate expectation'.

Tenderers may be in the unfortunate position where the intention of the parties — judged objectively by the tender documents — is not to bind themselves contractually to the process, despite the tenderer having spent substantial time and money and having a legitimate expectation in relation to the process.

Ipex concerned an RFT for information technology systems integration services. The RFT document contained detailed evaluation criteria, along with language mandating adherence to these criteria: words such as 'will' and 'must'. Sifris J found at [44]-[46] that there was a process contract, describing the clauses in the RFT as *"promissory in nature, to abide by a process particularly in relation to the evaluation of tenders."* This finding was made notwithstanding the existence of typical disclaimers as to the wide discretion of the Victorian government to not award a contract. The tenderer was held to have justiciable contractual rights to have the evaluation criteria applied as described in the RFT.[17]

Seddon, in *Government Contracts*, an authoritative text frequently cited in judgments, comments that:[18]

…it is open to the body seeking tenders to frame the request for tender in any way it thinks fit, including a disclaimer statement which could have the effect of excluding contractual relations altogether.

However, Seddon qualifies this statement, noting that, while it is true as an expression of the black-letter law of contract, *"whether, in public tenders, it is appropriate for government to state that it is not necessarily bound by the terms of its own request for tender is another matter."* [19]

Regrettably, the ambiguity in the RFT in *Ipex* is likewise present in many tender documents. Recently, the authors reviewed a clause as follows, in a document intended *not* to constitute a process contract (emphasis added):

No contractual relationship, <u>other than</u> arising out of these EOI Terms and Conditions, will arise between [the invitor] *and any Proponent or prospective proponent until a Project Agreement or another binding agreement has been executed by* [the invitor] *and the successful Proponent.*

The inescapable implication of that clause is that the EOI Terms and Conditions did themselves constitute a contractual relationship, and only circumstances external to those Terms and Conditions were excluded from consideration.

III. THE DUTY OF GOOD FAITH

[17] [2010] VSC 480 at [70]. While described as a request for tender, the process in *Ipex* was essentially a request for proposal, with a broad scope for proponents to meet the needs described in the document.
[18] Seddon N, *Government Contracts: federal, state and local* (4th edition, 2009) p 330.
[19] Seddon, n 18, p 271 n 75.

A precursor to good faith—Renard Constructions

The doctrine of 'good faith' in contracts in Australian law has emerged following the decision of the New South Wales Court of Appeal in *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234. The case was argued and decided on the principles generally governing commercial contracts, with no reference to the fact that the proprietor of the works was a public body. The environment surrounding government contracts has changed substantially since *Renard*, as this paper strives to demonstrate.

Briefly, the facts were as follows: Renard was a contractor, and the Minister was the proprietor of works relating to several pumping stations. The Minister purported, by strict application of the contract, to take over the works and exclude Renard from the sites. Renard had fallen behind, and the Minister's delegate had concluded, in an arbitrary fashion, that Renard had ceased to be fit to perform the works. Renard had been called upon to show cause why the contract ought not to be terminated, and had done so, but that material was not considered. Renard treated the purported termination as a repudiation of the contract, and began arbitration proceedings.

The relevant concept from the judgment in *Renard* is summarised in a passage from the reasons of Priestley JA (at 268):

the ideas of unconscionability, unfairness and lack of good faith have a great deal in common. The result is that people generally, including judges and other lawyers, from all strands of the community, have grown used to the courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance. In my view this is in these days the expected standard, and anything less is contrary to prevailing community expectations.

As is the case throughout *Renard*, the quoted passage speaks in terms of general commercial contracts, not specifically government contracts. Furthermore, Priestley JA decided the case on other grounds, and the other judges' reasons did not refer to good faith, but only a requirement upon the government officers to exercise the powers under the contract in a reasonable manner.[20]

Duty of good faith as a legal incident of government tenders

Drawing on the above comments in *Renard*, Finn J in *Hughes* found that the process contract had implied into it a term that the CAA would conduct the tender process fairly,

[20] Though see the discussion in Wallwork A, "A requirement of good faith in construction contracts?" (2004) 20 Building and Construction Law Journal 257 at 265-6, where a number of authorities are discussed which either dispute the existence of a distinction between good faith and reasonableness, or actually consider reasonableness to be a more stringent standard.

both ad hoc on the facts, and as a legal incident of a government tender. In making the latter finding, Finn J focused on the dimension which was ignored in *Renard* (at 40):

To say the matter is one of contract does not, though, exhaust the appropriate characterisation of the parties to this contract. The CAA, as I have noted is a public body — a body whose owners are, ultimately, the Australian community whom the authority serves under and in accordance with its statutory mandate.

Although *Hughes* was not argued in reliance on public law, Finn J nonetheless referred to procedural fairness as a clear example that the law does impose such duties on the government. Further reference was made to 'model litigant' rules, standards under various common law rules, and the need for governments to act as moral exemplars (aat 41-2). As such, Finn J was able to conclude that (at 38):

Irrespective of what should be taken to have been the intentions of the parties, both the type (or class) of contract and the relationship of the parties were such as gave the tenderers the right to expect, and the CAA the obligation to exhibit, fair dealing in the performance of the contracts.

And, ultimately, that (at 42):

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

The statement regarding the intentions of the parties should be understood as a reference to the earlier finding that a duty of good faith could also be found to be implied ad hoc on the specific intentions of the parties manifested in the case. *Hughes* is not authority for the proposition that a duty of good faith can be implied into a contract over the contrary intentions of the parties—however, it is difficult to imagine a government expressly seeking to exclude good faith.[21]

Cubic Transportation Systems—a more cautious view of good faith

The first authority to examine the reasoning in *Hughes* regarding tender processes was the judgment of Adams J in the case of *Cubic Transportation Systems Inc v State of New South Wales* [2002] NSWSC 656. *Cubic* concerned a tender by the NSW Department of Transport, for the development of an integrated ticketing system for public transport in the greater Sydney area. An 'Initial Call for Proposals' was made for the purposes of creating a short list (essentially an EOI), and then a subsequent 'Call for Proposals' (ie, RFP) was issued to proponents on that list. A second short list, of four proponents, included a consortium headed by Cubic, and of those four, the Cubic consortium and a

[21] As to which, see *Alcatel Australia Ltd v Scarcella*, discussed below.

company called ITSL were issued a 'Call for Revised Offers' (essentially BAFOs). Ultimately the government preferred the proposal of ITSL, and Cubic applied to the Supreme Court for an order restraining the government from entering into a contract.

Cubic contended that the Call for Revised Offers (**the Call**) was a process contract, accepted by the submission of a conforming tender. However, the Call contained a clause disclaiming that any contractual relationship existed, save that the proposals submitted constituted irrevocable offers from the proponents to the government, incapable of being withdrawn for twelve months. The Call further stated that the government considering the proposals was the consideration for the offer to which it related, but the government was nonetheless not bound to consider any offer. Short listed proponents were similarly expressed not to be owed any legal obligations whatsoever, unless and until a final contract was executed.

The Call included disclaimers, stating that no warranty was given regarding the accuracy of information given to proponents, nor that reasonable care had been used in preparing or providing such information. Another term reserved the right not to proceed whatsoever, or to proceed on materially different terms or in relation to a different scope to the tender document. Finally, an exclusion clause stated that the proponents could not make any claim in relation to the exercise or non-exercise of any rights under the Call. There was, however, an expressed requirement to comply with the government's Codes of Practice and Tendering (albeit not one incorporated into the contract), and a probity auditor was appointed to supervise this.

The wording of the Call was complicated, and clearly directed to excluding a process contract, a duty of good faith, and any prospect of a misrepresentation claim. At the same time, it did so by tortuously complex provisions and mechanisms. Adams J comments at [19] that *"it seems almost impossible that the Call was drawn by a lawyer, having regard to the obscurities and confusions of even the most important provisions … it is difficult to believe that any responsible and literate person actually read it through."*

Cubic contended that a term of fair dealing was implied, and suggested five independent bases for the implication: as a necessary incident of a government tender contract, per *Hughes*; to give the contract business efficacy; as a term implied by the tender evaluation plan, or alternatively a supplementary plan; and as a term implied by the Codes of Practice and Tendering (at [28]).

Adams J considered the finding in *Hughes* regarding the implication in law of a duty of good faith into government tender contracts, but adopted a divergent view, in part on account of the invitor's intention to derive operating profit from the project, and the involvement of commercial parties as equity holders on the invitor's side. Accordingly, *"the Government was entitled to place considerable (if, perhaps, not exclusive) weight on commercial considerations*".[22]

[22] At [40]. A number of the transport operators on the invitor's side were private companies, in addition to the government-owned providers.

In distinguishing the approach in *Hughes*, Adams J refers at [41] to:

a *very great gulf between the public policy considerations underlying cases such as Haoucher and Annetts v McCann, (supra) dealing with human and civil rights and those which should apply to determining the nature and extent of contractual obligations between Government and large commercial corporations. I confess to some feelings of scepticism that these contexts are usefully regarded as part of the same general notion as to how Governments should behave, especially where it is sought to enforce special obligations on Government negotiating as a contractor for goods and services. If the requirement of fair dealing is to be implied in "as a generalisation of universal application, [being] the standard of conduct to which all contracting parties are to be expected to adhere throughout the lives of their contracts" (76 FCR at 193, emphasis added), it is difficult to see that jurisprudence developed to protect human and civil rights and subject the executive to the requirement to act within its legislative remit will provide a useful point of reference as to whether such a term should be implied or, if so, its appropriate standard.*

Adams J found that, while a term of fair dealing was implied, it arose as a matter of law in the circumstances, but not as a legal incident of government tenders. Citing *Burger King Corporation v Hungry Jacks Pty Ltd* (2001) 69 NSWLR 558 at [159],[23] his Honour noted that there was no meaningful distinction between a term of reasonableness, and one of good faith—they are expressions of the same doctrine. Accordingly, *"the obligation of the Principal and of the Government was to act honestly, reasonably and fairly"*. The Codes of Practice and Tendering had a *"minimal"* significance under contract, as their requirements were *"merely elaborations of what would at all events be contained within the requirement of acting reasonably and in good faith"* (at [44]).

Limitations on findings of good faith

In *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211 at [158], Le Miere J considered the judgment in *Hughes* and stated that, *"whether or not a term of good faith or fair dealing is implied in the process contract cannot be usefully divorced from the content of such a term."*

In *Dalcon Constructions Pty Ltd v State Housing Commission* (1998) 14 BCLC 477, a Western Australian case, Templeman J remarked that *"it is not difficult to come to the conclusion that a body such as the Commission ought to act honestly, impartially and in good faith in dealing with tenderers"*. In that case, the *"clear, orderly and familiar procedure"* relating to the Commission's tenders processes was easily made out, as the Commission routinely tendered for highly similar housing projects in a predictable manner.

Templeman J did not directly approach the issue of whether there was a process contract, but rather found that in any event the putative term could not be implied *in fact*. In particular, it could not be implied that the Commission would act *impartially* in awarding

[23] Cf. *Far Horizons Pty Ltd v McDonalds Australia Ltd* [2000] VSC 310.

contracts, in circumstances where there were published policies favouring regional contractors, and those with Aboriginal involvement, as well as declining to award contracts to tenderers who they felt to be overburdened with work.[24]

Dalcon is a cautionary example for those litigating in relation to process contracts, as the plaintiff's case was held to fail on a threshold point—the term said to be implied was improperly framed, and could not be made out on any set of facts. There is no detailed analysis of whether there was a more narrow implied term than that propounded by the plaintiff, however there were findings of fact that, even if a term of good faith and honesty was implied, it would not have been breached.

Similarly, in *White Industries Ltd v Electricity Commission of NSW* (Unreported, Supreme Court of New South Wales, Yeldham J, 20 May 1987), a case which predates *Hughes Aircraft Systems*, Yeldham J expresses doubt that the New South Wales government was bound, in tendering for electricity suppliers, to act in accordance only with 'sound business principles', noting that *"plainly policy and political implications must enter into any direction which the Minister does give"*.[25]

Part I of this article refers to the various formulations of 'procurement principles' or 'sound contracting principles' enshrined in legislation and policy documents. These principles form an obvious starting point for the content of implied terms. Indeed, in some cases, they may be explicitly referenced in EOI/RFT/RFP documents.[26]

In theory, these aspirational formulations are supportive of the notion that government invitors owe a duty of good faith to proponents. In practice, however, the statements are typically too general to give enforceable content to that duty. In *K C Park Safe (Brisbane) Pty Ltd v Cairns City Council* [1997] 1 Qd R 497 at 501, Thomas J refers to the 'sound contracting principles' described at note 4, above, and states that:[27]

That is a very general provision. It sets out relevant considerations, but they are so broad that it is difficult to prove breach, especially when all five factors are required to be taken into account at the same time, involving a balancing exercise that may make it difficult for an applicant to show that there must have been an error. …The relevant factors on which the Council could properly decide to cease negotiations are practically endless.

[24] Though the latter reference may be disingenuous, as taking into account a tenderer's workload may be seen not as partiality, but rather a proper and practical criterion for awarding a project.
[25] However, Yeldham J concluded that, as the Minister acted in accordance with business principles in any event, it was not necessary to decide the issue.
[26] For example, the authors' experience with Brisbane City Council tender documents is that they are stated to be subject to the Council's Procurement Manual, which expressly binds the Council's officers to observe certain principles.
[27] Citing *Minister for Aboriginal Affairs v Peko- Wallsend Ltd* (1986) 162 CLR 24 at 40–2.

Thomas J acknowledges that the *Local Government Act* required the Council to tender, and to do so in conformity with the principles.[28] Nonetheless, as further discussed below, demonstrating a failure to observe these broad standards will pose substantial difficulties. Much ink has been spilled over the concept of what constitutes 'value for money' in a government tender, and there is no absolute consensus on how it is to be achieved.

The notion that the cheapest compliant tender must be selected to achieve value for money is at odds with the commentary on the topic, even leaving aside the need to balance other procurement aims, and was soundly rejected in *Ipex*.[29] The question of what constitutes 'value for money' has been described as being a "*subjective business judgment*".[30] In *Concord Data Solutions Pty Ltd v Director-General of Education* [1994] 1 Qd R 343 at 346, the converse position was argued: that a more expensive tender nonetheless "*would on fair economic analysis be found to be more beneficial*". Thomas J refused to entertain this point, describing it as "*a complex question capable of endless debate*".

Fairness in exercising discretion

In *Lewenberg and Lewenberg v Victoria Legal Aid* [2009] VSC 288, the applicant firm of solicitors sought orders in the nature of certiorari and mandamus in relation to a late EOI regarding inclusion on a particular VLA panel.[31] The firm also alleged that certain correspondence from VLA had created a legitimate expectation that the late EOI would be considered. While finding that the EOI did not comprise a process contract, Smith J nonetheless held that it "*gave rise to obligations to act fairly*".[32] Citing *Hughes Aircraft Systems*¸ VLA argued that it was bound to reject the late application because (at [68]):

- *the process was established as set out on the notice and empowered by the Act,*
- *it said applications would not be accepted that were late,*
- *VLA has an obligation to the public to act fairly,*
- *it would be unfair to other potential applicants to make an exception for the plaintiff — they might have submitted a late application if they expected exceptions.*

Accordingly, the VLA was said to have no discretion to consider the late EOI. Smith J held at [71]-[72] that, as the legislation did not require late EOIs to be disregarded, the

[28] At the time sections 395, 398, and 404 of the *Local Government Act 1993* (Qld): these provisions are closely replicated in the 2009 Act.
[29] [2010] VSC 480 at [63] et seq. For a discussion of the different formulations of the concept of 'value for money' and the issues involved, see, eg, Victorian Government, Department of Treasury and Finance, *In Pursuit of Additional Value: a benchmarking study into alliancing in the Australian Public Sector* (October 2009) pp 17-20.
[30] [2010] VSC 480 at [66].
[31] The decision was one of an administrative character, but in any event these remedies appear to be available in relation to commercial decisions made in the exercise of prerogative power, ie, the bulk of government tender processes. See part IV, below.
[32] At [67], citing *Pratt Contractors Ltd v Palmerston North City Council* [1995] 1 NZLR 469 at 478-9 (NZHC).

policy adopted was one of the VLA's own choosing, and that the VLA ought to have considered whether to make an exception. According fairness involved a balancing exercise, not a strict and unthinking application of rules. Smith J also noted that it would have been in the public interest to consider the broader range of firms, including the applicant and others who had sought to enter late EOIs. Somewhat ambiguously, Smith J stated that *"fairness to all could have been provided by having a system for dealing with late applications"*—although no suggestion was made of what this might have been, or how prejudice to those firms that applied on time could be avoided.

His Honour further found that a *"legitimate expectation"* that the EOI would be considered was created by a letter from the VLA to the plaintiff stating as much, and that it was irrelevant that, had the letter not been written, the EOI would have been late in any event. As a result of each of these factors, an order quashing the decision to reject the plaintiff's application was made. Further relief was deferred, subject to the actions of the parties.

While not entirely analogous to an EOI in relation to, eg, a construction project, *Lewenberg* is significant to the extent that a duty to act fairly, on the basis of the call for EOIs, was created, notwithstanding the absence of process contract. Also of note is the view of Smith J, fairness is not to be ensured by a strict mechanical application of rules, even if the same rules are applied to all proponents, but by a more flexible and considered, ends-based approach.

However, the authors would cautiously suggest that, where the proponents to a tender are commercial entities accustomed to tendering in an environment where time limits are strictly enforced (eg, construction or information technology), this may not be the case. *Lewenberg* would be accordingly confined in its application. At the same time, Smith J averts to the issue of the public good requiring the consideration of the broadest range of proponents possible—this would, at least in theory, be equally applicable to any project.

IV. APPLICABILITY OF ADMINISTRATIVE LAW

Legitimate expectations and procedural fairness

Thus far, this essay has concentrated on tenderers' rights and remedies in contract. While administrative law remedies may seem to be an obvious approach for aggrieved tenderers to take, there is a body of authority that limits their applicability to government contracting in general, and tender processes in particular.

Hughes was not decided on the basis of administrative law, notwithstanding that Finn J averted to the concept of procedural fairness. Indeed, Finn J found (at 42) that the term of good faith implied at law did not impose on the CAA *"the obligation to avoid making its decision or otherwise conducting itself in ways which would render it amenable to judicial review of administrative action."* Rather, while the impugned conduct of the CAA might also have given rise to judicial review, the concepts were not co-dependent. The distinction was highlighted by the rejection of claims in relation to *apprehended* bias

and ultra vires conduct of members of the selection board, on the basis that no *actual* effect on the process, comprising a breach of contract, could be shown.[33]

In *White Industries*, Yeldham J stated that:[34]

I regard the nature of the power to contract by the acceptance of any one of a number of tenders to be inconsistent with an obligation to observe the principles of natural justice. A potential "right" to gain a beneficial contract is not subject to the rules of natural justice.

This principle has been supported in Queensland in *AMT Helicopters Pty Ltd v Brisbane City Council* [2000] QSC 53 at [30] and, with some qualification, in Victoria in *State of Victoria v Master Builders' Association of Victoria* [1995] 2 VR 121 at 166.[35] In *AMT Helicopters*, Wilson J expressed *"considerable doubts"* as to whether a tender document could give rise to a legitimate expectation that its procedure would be followed, in the administrative law sense.[36]

In *K C Park Safe*, Thomas J notes that:[37]

It is well established that when the government (or the Crown) contracts, it exercises its own prerogative power. Unless some particular statutory system is being applied, the making and breaking of governmental contracts are not matters for judicial review. They are matters for application of the ordinary commercial law.

Similarly, in *Hawker Pacific Pty Ltd v Freeland* (1983) 52 ALR 185, the Commonwealth Department of Transport was held not to have made a decision under an enactment either by entering into a contract with a tenderer to supply aircraft, or by making a purchase order under that contract, notwithstanding provisions in the *Finance Regulations* necessitating a tender for a purchase over a certain amount, and specifying the manner in which purchase orders must be made. Fox J found that the Department contracted under a prerogative power, and *"compliance with the Regulations is but a step leading to the awarding of the contract"* (at 189).[38]

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[33] (1997) 146 ALR 1 at 106-7; followed in *Cubic Transportation Systems Inc v State of New South Wales* [2002] NSWSC 656 at [43], [163]-[164].

[34] Citing Lee J in *Macrae v Attorney-General (NSW)* (1985) 7 ALD 97; *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 at 408-9 (HL).

[35] Citing *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.

[36] [2000] QSC 53 at [32], citing *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 679-82.

[37] [1996] 1 Qd R 497 at 501; citing *Australian National University v Burns* (1982) 64 FLR 166; *Blizzard v O'Sullivan* [1994] 1 Qd R 112; *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164 at 172–173. Followed in *AMT Helicopters* [2000] QSC 53 at [31] et seq. See also *CEA Technologies Pty Ltd v Civil Aviation Authority* (1994) 122 ALR 724 (FCA).

[38] *Hawker Pacific* was distinguished by Cooper J in *James Richardson Corporation Pty Ltd v Federal Airports Corporation* (1992) 117 ALR 277 (FCA), although Cooper J subsequently declined to follow that decision in *Giorgas v Federal Airports Corporation* (1995) 37 ALD 623, after it was disapproved by the Full Court in *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164. See also the

In *Cubic Transportation Systems*, Adams J referred to *K C Park Safe*, *White Industries*, and *AMT Helicopters*. Contrasting *Chu v Minister for Immigration and Ethnic Affairs* (1997) 78 FCR 214, his Honour stated at [60] that:

It is important to bear in mind that the discussion of this question in Chu and the long line of immigration cases occurs in a context where the administrative decisions can have devastating consequences for the individuals involved concerning, as they do, not only where they can live but the future well-being of their families. It is one thing to make decisions about administering the law and quite another about administering a commercial contract, even if the Government is a party. The former process is very far removed from commercial competition to make a profit out of a Government contract.

In view of this, Adams J was reluctant to apply the doctrine of bias, especially apprehended bias, to decisions relating to the tender process, and indeed the government was entitled *"to take advice from any source which it thinks appropriate"*—the tender not being akin to an administrative or quasi-judicial process.

Local governments—an exception?

Thomas J considered that the exception to this general principle is where a local government, being purely a creation of statute, contracts in exercise of defined powers granted by legislation, such as the (now superseded) *Local Government Act 1993* (Qld). However, *K C Park Safe* was distinguished by the Court of Appeal in *J J Richards & Sons Pty Ltd v Bowen Shire Council* [2008] 2 Qd R 342 at [18]-[22]. Significantly, the reservation of rights in the RFT document to unilaterally terminate the tender process was upheld (at [22]):

The decision of the High Court in Tang makes it clear that a decision by a governmental agency to enter a contract is not a decision under an enactment merely because the agency is a creature of statute which confers legal personality and the capacity to contract upon the agency. In this case the source of the Council's legal power to terminate the tender process is either the Council's power to enter into contractual relationships which is a characteristic of any legal person, or, more immediately, the liberty expressly reserved by the Council to itself under the terms of the tender document. So far as the Council's decision to recommence the tender process is concerned, this decision involved the exercise of a power common to all legal persons to associate with others, commercially or otherwise. In either case no authority for the decision was afforded by the LGA.

In view of *J J Richards*, it is difficult to see how a tender process, even where the process was required by statute for procurements of a certain size, comprises a decision or decisions under an enactment affecting rights or obligations, *at least* since the decision of

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remarks in *Griffith University v Tang* (2005) 221 CLR 99 at [68]-[69], per Gummow, Callinan, and Heydon JJ.

the High Court in *Griffith University v Tang* (2005) 221 CLR 99.[39] Indeed, the authors are not aware of any authority under which a local government's conduct in relation to a tender has actually been found to be amenable to judicial review on this basis.

In *Concord Data Solutions Pty Ltd v Director-General of Education* [1994] 1 Qd R 343 at 353, Thomas J cites *Hunter Brothers v Brisbane City Council* [1984] 1 Qd R 328 and *Maxwell Contracting Pty Ltd v Gold Coast City Council* [1983] 2 Qd R 533 as authorities for the premise that local governments' tender awards are *"administratively reviewable"*. Respectfully, those cases appear to be authority for the more limited point that, where a statute requires a procurement over a certain limit to go to tender, and the government fails to do so, or fails to observe other statutory provisions in so doing, any resultant contract will be void on account of being beyond power.[40] Thus, similarly, in *Photo Fair Pty Ltd v Rockhampton City Council* (1988) 66 LGRA 226, a declaration issued that a tender process was contrary to law for failing to meet a strict statutory requirement, however a judicial review was not undertaken.[41]

However, these authorities did not go so far as to find that a decision in relation to a tender is a 'decision under an enactment' for the purposes of judicial review.[42] Reference may be had to *Chapmans Ltd v Australian Stock Exchange Ltd* (1996) 137 ALR 433, which concerned the respondent's removal of the applicant company from the ASX register. While the ASX was empowered under legislation to maintain the register, and the listing rules governing the register were referred to in the legislation, the Full Court of the Federal Court held that the rules bound the parties inter se only as a matter of contract, and accordingly there was insufficient 'proximity' between the decision under the rules, and the legislation.[43]

Similarly, in *General Newspapers Pty Ltd v Telstra Corporation* (1993) 117 ALR 629, Davies and Einfeld JJ held at 636-7 that *"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."* A decision to award a contract without going to tender was held not to be reviewable, as the statute conferred a general power to contract, without any requirement to tender. In *CEA Technologies v Civil Aviation Authority* (1994) 122 ALR 724, Neaves J followed *General Newspapers*, and upheld a challenge by the respondent authority to the competence of a judicial review application in relation to a tender for the supply and installation of certain equipment. The *Civil Aviation Act 1988* (Cth) established functions of the Authority, and

[39] See especially [91]-[93].
[40] Thomas J also refers to *Australian Capital Territory Health Authority v Berkeley Cleaning Group Pty Ltd* (1985) 60 ALR 284 (FCAFC), regarding a statutory authority's power to tender: this authority was disapproved in subsequent Federal Court decisions and ultimately overturned in *Griffith University v Tang* (2005) 221 CLR 99 at [83].
[41] Cf. *Attorney-General ex rel Scurr v Brisbane City Council* [1973] Qd R 53, which held a similar requirement to advertise tenders to be directory, not mandatory.
[42] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.
[43] Per Lockhart and Hill JJ at 440-1; citing *CEA Technologies Pty Ltd v Civil Aviation Authority* (1994) 122 ALR 724 per Neaves J; *Lewins v Australian National University* (1995) 133 ALR 452 at 460 per Lee J.

conferred powers in relation to those functions, including the power to contract. However, such general provisions were not found to require or authorise the Authority's decisions to enter into individual contracts (at 731).

It is submitted that these principles continue to apply to a government agency required to invite tenders under legislation for contracts of a certain amount. Whilst the legislation may require a process to be undertaken, as long as the requirement is in general terms and no procedure is specified, there will be insufficient 'proximity' to any discrete decision made in relation to a tender process. Furthermore, where a process contract exists between the parties, the process outlined will bind the parties only under that contract, and decisions thereunder will not have the character of decisions under an enactment.

Limits on justiciability

Even in *K C Park* Safe, there was no finding that judicial review was actually applicable to the facts. *K C Park Safe* was an application for an interlocutory injunction. The conclusion expressed by Thomas J, while not excluding the prospect of judicial review, described the tenderer's prospects of success as narrow (at 505):[44]

It seems to me that the authority's right to reject is an essential part of the process of tendering, and that every tenderer knows this. Section 404(3) [of the *Local Government Act 1993* (Qld)] *expressly confers such a power. Also virtually every tender involves the tenderer in a degree of expense, and in the usual course such expenses are something that the tenderer must be prepared to forgo. That is not to say that tenderers are not entitled to fair play, but the rules of the game are fairly basic ones. From the tenderer's point of view it is something of a gamble and the tenderer is looking for a valuable benefit. Even conduct raising the tenderer's hopes will not necessarily deprive an authority of the right of summary rejection.*

In *Concord Data Solutions*, judicial review was rejected in relation to a Queensland government tender, notwithstanding the *"veritable statutory smorgasbord"* of legislation and policy bearing on that process.[45] In so deciding, Thomas J remarks, obiter, on the inappropriateness of judicial review in relation to tenders:

Examination by the courts of alleged non-compliance with these financial requirements and of whether use was made of irrelevant considerations would be a very time-consuming process, not only for the courts, but also for those involved in the financial business of government and those who deal commercially with State Government organs.

[44] The *Local Government Act 1993* (Qld) is now repealed, and the equivalent provision is subsection 177(8) of the *Local Government (Finance, Plans and Reporting) Regulation 2010* (Qld).
[45] [1994] 1 Qd R 343 at 350-3. *K C Park Safe* and *Concord Data Systems* were both followed in *Medtek Pty Ltd v Chief Health Officer for the State of Queensland* (Unreported, Supreme Court of Queensland, Williams J, 29 September 1997), and it is noted therein that they have been followed in other unreported decisions.

A number of authorities avert to the 'legitimate expectations' of tenderers (as well as those of the invitors, in some cases) as to how they will be treated, but appear to use the expression in the general sense of the words, rather than an administrative law context. The passage in *Ipex*¸ quoted above, is one example.[46] *Ipex* also cites a similar remark in *Dockpride*, where the expression was equated to *"the commercial realities of the … tender process"*, rather than to any sort of public law right or remedy.[47] Le Miere J in *Dockpride* in turn refers to the above passage of Bingham LJ in *Blackpool*, which uses the formulation *"the confident expectations of commercial parties"*, which may be seen as a less ambiguous description of what is really meant by 'legitimate expectations' in *Ipex* and *Dockpride*.

Particularly given the range of other remedies available, it is suggested that the ambiguity regarding the justiciability of legitimate expectations in relation to government tenders militates against its use as a remedy by aggrieved tenderers.

Relief against exercise of prerogative powers

The abovementioned authorities make it clear that prerogative power is exercised by the Commonwealth and the States when contracting, and it also appears that local governments and statutory authorities do so also, notwithstanding that there may be statutory fetters on the manner in which the power is exercised. Accordingly, relief predicated upon decisions in relation to tenders being decisions under an enactment is not available.

However, a line of authority stemming from *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, followed in *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 75 ALR 218, has recognised that the exercise of prerogative power is, in fact, amenable to common law administrative law remedies.[48] Thus, in *State of Victoria v Master Builders' Association of Victoria* [1995] 2 VR 121, the doctrines of legitimate expectation and procedural fairness were applied to a Victorian Government task force's compilation of a 'black list' of construction contractors forbidden from tendering for State and local government work. Tadgell J (Ormiston and Eames JJ agreeing as to the form of order), made a declaration that any contractor being reviewed by the task force was entitled to procedural fairness, and that the standard form letter issued by the task force to contractors did not accord such fairness. Ormiston J stated that (at 149):

there would be, and is, no good reason for denying citizens a right to claim that the acts of the executive arm of government, and in particular the acts of government officials acting on behalf of the executive, were ultra vires or otherwise illegal. Merely because the Crown in right of the state has effectively the powers and rights of any citizen does

[46] [2010] VSC 480 at [24]. See below as to the relevance of the doctrine of 'legitimate expectation'.
[47] [2005] WASC 211 at [128]; cited at [2010] VSC 480 at [41].
[48] A discussion of the early development of this doctrine may be found in Wheeler F, "Judicial Review of Prerogative Power in Australia: issues and prospects" (1992) 14(4) Sydney Law Review 432.

not mean that it cannot be prevented from pretending to assert an authority which it does not have in the exercise of those powers or rights.

Higgins J (as his Honour then was) of the ACT Supreme Court followed the *Master Builders' Association* case in *MBA Land Holdings Pty Ltd v Gungahlin Development Authority* (2000) 206 FLR 120. The respondent statutory authority called for proposals for the leasing and development of certain land, and the sum offered for the lease was a criterion in awarding the project. The issue arose that some tenderers had not specified whether their offers were inclusive or exclusive of GST, and clarification was sought. One tenderer, Landco, responded by expressing a new, increased sum as its GST-exclusive bid. Landco's bid was preferred, and the applicant developer applied to the Court for judicial review under the *Administrative Decisions (Judicial Review) Act 1989* (ACT), and for certiorari and declaration.

Higgins J rejected the argument under the legislation, on the basis described in the authorities discussed above, that the tender process was undertaken in the exercise of prerogative powers. However, it was held that a public function was nonetheless being performed, and powers under statute exercised. For this reason, the decision was amenable to judicial review at common law, notwithstanding that no decision under an enactment was made. Higgins J stated at [220] that:

It follows that the GDA was obliged to accord tenderers procedural fairness, to act according to law and not unreasonably. The obligation to accord procedural fairness to tenderers also arises by virtue of an implied agreement by the GDA to the same effect pursuant to the Conditions of Tender. It implicitly agrees with all tenderers to do so. However, that agreement does not exclude the public law obligations imposed on the GDA by its status and function. The "public elements" referred to, inter alia, in R v Panel on Take-overs and Mergers; ex p Datafin PL [1987] QB 815 and in State of Victoria v MBA (Vic) (supra) are sufficient to attract public law remedies as well as, possibly, private law remedies.

Higgins J made declarations that the GDA acted unlawfully in considering Landco's modified tender, and that the lease offered to Landco was invalid, and made an order setting the lease aside. His Honour rejected the submission that relief should be refused on the discretionary grounds that the applicant's tender had already been determined to be less preferable than not only Landco but another unnamed tenderer, and further that price was not the only factor in determining the most preferable tender, so that the modification by Landco was not necessarily determinative of the outcome.

V. MISREPRESENTATION, NEGLIGENCE, AND ESTOPPEL

Relevance of the Australian Consumer Law

Tender processes may, and generally have, comprised conduct 'in trade or commerce' for the purposes of the *Trade Practices Act 1974* (Cth). It was noted in *Dockpride* (at [208]) that "*conduct towards tenderers in the course of a tender for the purchase and*

development of land is conduct in trade or commerce. That is not any less so because the body calling for tenders is required to have regard to matters other than the profit motive".

The broad protections of the Act are an ideal mechanism for protecting tenderers, as the need to prove a process contract is avoided, as is recourse to the difficult and uncertain law regarding administrative remedies. The *Trade Practices Act* has now been subsumed in the new Australian Consumer Law, and renamed as the *Competition and Consumer Act 2010* (Cth). The relevant aspects of the legislative regime remain unchanged, and the authorities to date remain relevant.

The new regime maintains the restrictions on the application of the *Trade Practices Act*, binding the Crown in right of the Commonwealth and the States, as well as statutory authorities and local governments, only to the extent that they 'carry on a business'.[49] Business is defined as including *"a business not carried on for profit"*. Subject to this inclusion, it has been held that a business comprises *"activities undertaken in a commercial enterprise or as a going concern"*.[50]

Generally speaking, the ordinary activities of government, carried on by a department or an authority, will not amount to a business. A government entity tendering in the open market for procurements will accordingly not have a business character, if it is done wholly in relation to such ordinary government activities: the additional fact of the tender process does not transform the character.[51]

Accordingly, a series of authorities have held that government tenders do not comprise carrying on a business, in relation to, for example: crockery for the armed services;[52] sterile fluids for hospitals;[53] and the operation of immigration detention centres.[54] Other conduct found not to comprise a business, while not discussed in the specific context of tendering, is also instructive in demonstrating the types of activities excluded: acquiring and slaughtering infected cattle;[55] developing a building solely for ministerial offices;[56] and the employment of staff by the Defence Materiel Organisation.[57]

By contrast, in many instances, governments were found to have acted in the course of carrying on a business, for the purposes of liability under the *Trade Practices Act*. Thus, in *Paramedical Services Pty Ltd v Ambulance Service (NSW)* (1999) 217 ALR 502 at

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[49] *Competition and Consumer Act 2010* (Cth), ss 2A, 2B, 2BA; see, eg, *Fair Trading Act 1987* (Qld), ss 24-6 as amended by *Fair Trading (Australian Consumer Law) Amendment Act 2010* (Qld).
[50] *RP Data Ltd ACN 087 759 171 v State of Queensland* [2007] FCA 1639; citing *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 at 303; *Corrections Corporation of Australia Pty Ltd v Commonwealth* (2000) 104 FCR 448 at 451.
[51] *Corrections Corporation of Australia Pty Ltd v Commonwealth* (2000) 104 FCR 448 at [15].
[52] *Sirway Asia Pacific Pty Ltd v Commonwealth* [2002] FCA 1152.
[53] *ACCC v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1.
[54] *Corrections Corporation of Australia Pty Ltd v Commonwealth* (2000) 104 FCR 448.
[55] *State of New South Wales v RT & YE Falls Investments Pty Ltd* (2003) 57 NSWLR 1.
[56] *National Management Services (Australia) Pty Ltd v Commonwealth* (1990) 9 BCL 190.
[57] *Knevitt v the Commonwealth* [2009] NSWSC 1341.

[79] et seq, the respondent statutory authority was held to carry on a business when it supplied first aid services at events such as sporting matches. In contrast to the bulk of the authority's work, as an emergency services provider, the services at events were provided for remuneration (although not necessarily for profit). Furthermore, the provision of first aid training services was done in the course of carrying on a business. These activities were capable of being carried on, and indeed were carried on, by companies in the broader community, including the plaintiff.

Similarly, the activities of Telecom as a statutory authority selling telephone handsets was held to be a business activity,[58] as were the trading activities of the ABC.[59] In supplying property valuation data gathered in the course of statutory activities to businesses, the Queensland Department of Natural Resources and Mines was also held to be carrying on a business.[60]

Although the above cases were decided on the relatively clear issue of whether a business was, or was not being carried on, others have turned on finer issues of wording. In *J S McMillan Pty Ltd v Commonwealth* (1997) 147 ALR 419, the Australian Government Printing Service called for tenders relating to the outsourcing of various parts of the Commonwealth's printing work. Proponents would tender for both the assets, and the provision of the bundle of services related to the assets purchased. The plaintiff brought an action under section 52 of the *Trade Practices Act*, alleging misrepresentations in the course of the tender process, which impeded the plaintiff's bid. Emmett J held that the Commonwealth through the entity of the AGPS had been carrying on a business of supplying printing services, being as it did so for remuneration, on a regular basis, in a businesslike manner comparable to that of private entities. However, the Commonwealth, in procuring the services from the AGPS (which was not run as an autonomous organisation), did not carry on a business, but merely acquired services incidental to the ordinary activities of government.

As such, in disposing of the AGPS assets, and tendering for the continued acquisition of services by the Commonwealth, the government was not acting in the course of carrying on business. Emmett J held at 437-8 that:

A once off decision to cease engaging in the activities of AGPS, to dispose of the plant and equipment relevant to those activities, to undertake not to engage in those activities in the future and, <u>in the capacity of client</u>, to invite private enterprise to take on those activities, is not conduct in the carrying on of a business: nor is the conduct of offering plant and equipment for sale and offering the opportunity to perform [printing, graphic design, and editorial] *activities for government departments the carrying on of a business.*

[58] *Tytel Pty Ltd v Australian Telecommunications Commission* (1986) 67 ALR 433.
[59] *Sun Earth Homes Pty Ltd v Australian Broadcasting Corporation* (1990) 98 ALR 101.
[60] *R P Data Limited (ACN 087 759 171) v State of Queensland* [2007] FCA 1639.

What conduct in relation to a tender will be misleading or deceptive?

In *General Newspapers Pty Ltd v Telstra Corporation*, an alternative claim under section 52 of the *Trade Practices Act* was also rejected. In so doing, Davies and Einfeld JJ observed at 642-3 that *"in the ordinary course of commercial dealings, a certain degree of "puffing" or exaggeration is to be expected. Indeed, puffery is part of the ordinary stuff of commerce. So also is a certain degree of "put-off" evasion or obfuscation by commercial people seeking to resist disclosing information which is confidential. Discussions in commerce are so understood"*.

As such, a government body engaging in a commercial tender is under no greater obligations of candour than a private company in the same situation. Any 'false hope' given to tenderers by statements such as *"your company is on the tender list"* were not to be regarded as promissory representations, nor was the statutory corporation required to disclose information about negotiations outside the putative tender process, that would ordinarily be regarded as confidential. General Newspapers was also unable to show any detriment caused by reliance on any representation.[61]

At the same time, it is possible to envision representations that tenderers would be entitled to rely on. For example, if it were represented that certain criteria were to be used in determining which tenderer would be selected, and there was a substantial departure from those criteria, a tenderer could claim that, but for the reliance on the published criteria, the tenderer would never have submitted a tender, or would have submitted a tender in different terms. Substantial differences between the tender document and the evaluation plan would corroborate the misrepresentation.

Two particular scenarios may be envisioned. In the first, a tenderer might rely on misleading criteria to submit a tender for a project for which that tenderer never had any real chance of succeeding. In that case, the available damages would be likely to be limited to the costs thrown away in preparing the tender. It is also possible that a tenderer that does meet the requirements for consideration is denied a contract due to changed criteria, and can claim for damages, or relief barring the government agency from entering into a contract with another tenderer.

It is not clear whether the success of the latter claim would require proof that the aggrieved tenderer actually would have succeeded under the published criteria—difficult to ascertain where weightings are not published—or merely that the change is sufficiently fundamental that the published criteria clearly amount to an actionable misrepresentation. While the evaluation plan would become available to the plaintiff in the course of discovery of documents before a trial, there is nonetheless a need for lawyers drafting pleadings to have a clear idea of the case at an earlier stage, and caution ought to be exercised in relation to minor deviations from the plan which cannot be clearly shown to have changed the outcome of the tender process.

[61] (1993) 117 ALR 629 at 642-3.

A detailed discussion of the authorities regarding causation in relation to misrepresentation claims under statute is beyond the scope of this paper. Nonetheless, it is relevant to note that it is well established that section 82 of the *Trade Practices Act* did not require a plaintiff to demonstrate that the misrepresentation was the sole cause of loss, in order to recover damages representing the full extent of that loss.[62]

Claims in tort for misrepresentation

Discussing the law of negligent misstatement in depth is similarly beyond the scope of this paper. However, the authors would note that the common law action will typically be available even when the Australian Consumer Law protections are not applicable, due to the government agency not acting in the course of carrying on business. However, the remedies are weaker than those under statute, especially as the abovementioned provisions regarding recovery of the full amount of a loss do not apply.

Estoppel

In addition to claims in contract, misrepresentation, and negligence, *Hughes Aircraft Systems* also contained a claim that the Civil Aviation Authority was estopped from proceeding to award a contract other than in conformity with the process represented to the plaintiff in the RFT and in correspondence. Finn J found it unnecessary to consider the claim, as Hughes had already succeeded on other bases. Nonetheless, given the complexities and limitations inherent in each of the actions discussed above, it is worth considering whether estoppel may provide an answer when the other remedies do not.

Both estoppel by representation, and the traditional doctrine of promissory estoppel are limited in their utility, in that they do not provide an independent cause of action. However, the general doctrine of equitable estoppel avoids this limitation, and would be relevant in certain tender situations. The tenderer would need to demonstrate that:[63]

1. The tenderer assumed that a particular legal relationship existed between the tenderer and invitor, from which the invitor was not free to withdraw—ie, that a particular process would be followed, or particular criteria used;
2. The invitor had induced the tenderer to adopt that assumption—ie, by representations in an RFT/RFP or other correspondence;
3. The tenderer acts or abstains from acting in reliance on that assumption—by submitting a tender, or adopting a particular form for that tender;
4. The invitor knew or intended that the tenderer would so act;
5. The tenderer's actions or omissions would occasion detriment if the assumption was not fulfilled; and
6. The invitor has failed to act to avoid that detriment, by fulfilling the assumption or otherwise.

[62] *Henville v Walker* (2001) 206 CLR 459; *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109.
[63] *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 428-9, per Brennan J.

Such a cause of action would not necessarily be coextensive with other actions, as it would potentially apply to an EOI process, or an RFT/RFP that did not constitute a process contract. Furthermore, where a process contract document contains the typical broad disclaimer provisions, estoppel would assist a tenderer to whom representations were made *outside* the contract, that particular things would be done in addition to what is stipulated in the contract, or that strict rights under the contract reserved to the invitor would not be exercised.

If the elements are made out, equity will intervene if it would be unjust or unconscionable for the invitor to proceed to the detriment of the tenderer.[64] Where parties are at liberty to withdraw from contract negotiations, there is authority that it will generally not be unconscionable to do so.[65] There is authority that the tenderer's assumption, and reliance on that assumption, would need to be reasonable,[66] although an exception may exist where the invitor knew of an unreasonable assumption and said nothing.[67]

The range of remedies available in equity are broad, but it should be noted that a tenderer will not necessarily be compelled to make good an invitor's assumptions. It may be that damages will be an adequate remedy, for example, in which case the invitor would still be at liberty to contract with another tenderer.[68]

VI. DAMAGES

Having established that a range of causes of action are available to aggrieved tenderers, there remains the questions of when damages will be available, and in what amount.

The *Hughes* case provides no assistance: while liability questions were determined, the separate component of the trial regarding quantum of damages never proceeded to judgment. However, Finn J reserved costs of the trial on the basis that it was not clear that Hughes would recover 'substantial damages' as sought.[69] Likewise, the failure of the substantive claims in *Cubic* and *Dockpride* meant that no discussion of damages was entered into.

In *J S McMillan Pty Ltd v Commonwealth*, the inherent difficulty in determining the value of a tenderer's loss, in the case of improper conduct by the invitor, was discussed at 434:

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[64] *Commonwealth v Verwayen* (1990) 170 CLR 394.
[65] *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 at 585-6 per Kirby P, at 620 per Rogers AJA.
[66] *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485.
[67] *Fleming v State of New South Wales* (Unreported, Supreme Court of New South Wales, Young J, 10 November 1997). Respectfully, the reasoning on this issue appears to be circuitous: if an assumption was prima facie unreasonable, but the defendant knew of the assumption and remained silent, it follows that the assumption may become reasonable on the basis alone that it was not corrected and therefore a further misrepresentation was made by silence.
[68] See *Halsbury's Laws of Australia* at [190-350].
[69] *Hughes Aircraft Systems International v Airservices Australia* [1997] FCA 1011.

It is almost impossible to quantify that loss or damage. By the request for tender, the Commonwealth reserved the right to short list additional tenderers. Further, by the request for tender, the Commonwealth made clear that it was not obliged to accept the highest or any of the tenders.

In that instance, the relief sought was an order requiring the addition of the plaintiff company to the short list of tenderers, without an order of damages. The plaintiff's claim ultimately failed on the basis that no conduct contrary to the *Trade Practices Act* was made out, but Emmett J indicated at 434-5 that:

I would, if s 2A makes the Trade Practices Act applicable to the conduct in question, make an order under s 87 of the Trade Practices Act requiring the Commonwealth to short list the McMillan consortium pursuant to cl 1.8 on p 48 of the request for tender, to furnish to the McMillan consortium the information made available to short listed tenderers hitherto and to give the McMillan consortium the same opportunity to lodge a best and final bid as has been given to the other short listed tenderers.

However, a matter coming to court during a tender process, rather than after its conclusion, is exceptional. In the majority of cases, an attempt to quantify damages will need to be made.

Naturally, the cause or causes of action will be relevant to the assessment of damages, and the difference between damages in tort, in contract, and under trade practices legislation is beyond the scope of this paper. The relevant factor in any case is what loss has actually occurred on account of the government body's conduct.

In the event where a finding that a concluded tender process was invalid, whether for breach of contract, failure to accord procedural fairness, or otherwise, it is submitted that compensation of all tenderers for costs thrown away in preparing their tenders would be the starting point for damages.[70] In a complex construction, engineering, or ICT tender, these costs could run into the millions of dollars. In theory, if the government were to subsequently run a fresh process, and the tenderers were in a position to resubmit their original tenders in substantially the same form, their losses would be mitigated to the extent that the initial expenditure continued to be of utility.

However, given that an award of damages would generally be made at the same time as a court order invalidating a tender process, the reality is that hypothecation as to future matters could not be taken into account. Furthermore, an aggrieved tenderer may wish to seek damages only, without seeking orders restraining the government entity from contracting, especially if the level of acrimony meant that the tenderer no longer wished to do business with that entity.

[70] See, eg, *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377, where wasted expenses in attempting to salvage a non-existent tanker were compensated, even though the claim for loss of expected profits failed.

The law is quite capable of assessing and awarding damages for loss of a chance of profit, and will award damages notwithstanding that the chance would most likely not have come to fruition.[71] However, the likelihood of the profit eventuating is a relevant factor in determining the amount of damages.[72] Where the aggrieved tenderer is on a short list of two or three tenderers, the prospect of substantial damages is therefore very real.

Finally, it is noted that, in theory, exemplary damages for gross breaches of probity may also be available in tort or under trade practices legislation, however not for breach of contract.[73]

VII. BEST PRACTICE AND CONCLUSIONS

Use of exclusion and limitation clauses

In nearly all tenders, the RFT/RFP document will contain boilerplate exclusions or reservations of rights to the invitor, covering matters ranging from accepting late or non-conforming tenders, to permitting selected tenderers to modify their tenders, to unilaterally abandoning the tender process. Whilst establishing a selection process, a tender document may nonetheless reserve the right to modify or depart from that process Such terms are common to private sector tenders, and also frequently appear in government tenders.

It is worth reflecting on Seddon's comments as to the appropriateness of government bodies seeking to exclude fetters on their behaviour and behaving in a 'hard-nosed' commercial manner. At the same time, there is a public interest in the efficient use of government money, and taxpayers may well feel aggrieved if their representatives are perceived to be 'soft' in relation to getting the best deal.

These contrasting priorities are reflected in the law regarding good faith generally, and Wallwork notes that:[74]

Much of the concern about the state of the law arises from the tension between the existence of a general requirement to act reasonably and a party's wish to specifically identify powers that it wants to be able to exercise for its own legitimate business purposes (without consideration of the other party's interests). Examples of principal's powers and functions which should be considered in this light include powers of suspension and termination, the superintendent's unilateral right to extend time and approval rights concerning security providers, insurers and subcontractors.

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[71] *Chaplin v Hicks* [1911] 2 KB 786; *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377; *Fink v Fink* (1946) 74 CLR 127; *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64; *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332.
[72] *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638.
[73] *Butler v Fairclough* (1917) 23 CLR 28 at 89.
[74] Wallwork, n 20 at 268.

In *Hughes Aircraft Systems*, Finn J averted to these issues (at 25), and while the case was fundamentally decided on contract law principles, there nonetheless remains undertones of public law in the judgment.

It is evident from many of the cases cited in this paper that disclaimers are not always effective in preventing tender documents from being treated as process contracts. At the same time, it is clear that the law will not imply a process contract where the clear intention of the parties is otherwise, and there is no 'meeting of the minds' in relation to a contract's formation. One recent request for proposal reviewed by the authors contained the following clause:

By issuing this RFP, [the invitor] *is under no obligation (whether equitable or legal) to proceed either in whole or in part with the procurement of the goods and/or services to which the RFP relates.* [The invitor] *is not committed contractually or in any way to any person who may receive the RFP or submit a Proposal.*

In the authors' view, this clause is effective in disclaiming the existence of a process contract. It is clear that there can be no agreement to be bound, an element which remains integral to finding the existence of a contract, even under the line of authorities which move away from the offer/acceptance model.[75] At the same time, representations are made throughout the document as to the procedure to be followed, and as to adherence to a procurement manual. Notwithstanding the absence of a process contract, the clause would not have shielded the invitor from estoppel or misrepresentation claims if the prescribed procedure was departed from to a tenderer's detriment.

By contrast, where a process contract is created, it is difficult to imagine a government expressly stating that it owes no duty of good faith to tenderers. Indeed, such an exclusion may not even be effective. In *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349 at 368, Sheller JA states that:

If a contract confers power on a contracting party in terms wider than necessary for the protection of the legitimate interests of that party, the courts may interpret the power as not extending to the action proposed by the party in whom the power is vested or, alternatively, conclude that the powers are being exercised in a capricious or arbitrary manner or for an extraneous purpose, which is another was of saying the same thing.

In view of the attitude taken by courts in relation to good faith and fairness, even on more conservative views such as those of Adams J in *Cubic*, and bearing in mind the moral obligations of government entities, it is submitted that governments ought not to rely heavily on limitation clauses. Rather, the preferable approach for both minimising legal risk and achieving probity and integrity is to 'grasp the nettle' of process contracts and the requirements thereunder, and manage that process according to law.

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[75] See, eg, *Hyatt Australia Ltd v LTCB Australia Ltd* [1996] 1 Qd R 260 at 264; *Vroon BV v Foster's Brewing Group Ltd* [1994] 2 VR 32.

Better processes through better contracts

It is clear that tender processes are of central importance to all governments in properly discharging their functions. It is similarly clear that the volume and scale of procurements makes government business highly attractive to the market. In spite of these facts, and of the adoption of detailed guidelines by all levels of government, tender processes continue to end in litigation. One significant factor is the size of the contracts involved in large procurements: relative to an infrastructure or information technology contract worth tens or hundreds of millions of dollars, even the lengthiest and costliest trial will constitute a reasonable calculated risk, particularly where the aggrieved tenderer is on a short list of two or three. The absence of a High Court decision relating to process contracts, or even a decision of an intermediate appellate court, and the divergent views exemplified by the judgments of Finn J in *Hughes* and Adams J in *Cubic*, means that litigants are in a position where they are still able to test the limits of the law.

The adoption of procurement principles and probity plans, which ought to generally satisfy even the more exacting standard set down by Finn J, has inevitably gone some way to improving the situation. However, the observations of Adams J in *Cubic* at [32] are apposite: *"Aspirational statements may provide a warm inner glow but they are no substitute for unambiguous language targeted at actual risks with clearly stated consequences"*. Policy documents and manuals should not be used as a veneer of good faith to disguise a process in which the principles of probity are not adhered to.

In the view of the authors, there are four fundamental steps that should be taken to address the legal and ethical obligations of government entities in relation to tendering. First, as often as is practical and appropriate, governments ought to explicitly adopt process contracts when issuing RFPs and RFTs, and use clear words to define the terms of those contracts. Given the risk of a contract being implied, and the potential ineffectiveness of disclaimers in this regard, it is submitted that governments ought to be more prepared to 'grasp the nettle' of process contracts, and then manage that framework carefully. In relation to EOIs prior to an RFP or RFT, generally a process contract will not be apposite, and care should be taken not only to use clear words in the documentation, but not to allow the process to become one where a process contract might be implied.

Secondly, rather than a clause merely stating that government officers are bound by a procurement manual or other policy document, efforts ought to be made to clearly integrate the applicable policies into the process contract. This will eliminate ambiguity from the tenderers' standpoint, but also will assist government officers in fulfilling their responsibilities. Against the myriad of policy documents and considerations with which public servants must deal on a daily basis, if special primacy is to be given to probity, this will only be truly achieved by incorporating probity principles as specific requirements, compliance with which is clearly demonstrable and auditable. This invariably requires more than just the high-minded 'motherhood statements' of the sort criticised by Adams J in *Cubic*.

Third, communications from the government on any issues of substance should, as far as possible and appropriate, be made in writing. To the extent that verbal discussions inevitably will be required, they should be documented immediately, and the notes thereof provided to the tenderers for comment and correction. Any disputes that might arise as to the content of a conversation will accordingly be resolved at the time, and the proper meaning agreed on. This is already common practice in relation to internal government communications between or within departments.

Governments should use clear and consistent language as to when communications comprise representations upon which tenderers may rely, as opposed to mere statements of intention or aspiration. Ideally, a protocol for communications should be adopted, under which only documents marked in a certain way would constitute representations.

Finally, it is integral to ensure that an experienced and independent probity auditor is involved from an early stage of a tender process. Ideally, the auditor will be engaged prior to the EOI/RFT/RFP being made available to the public, so that any probity issues in that document can be dealt with, and also so feedback can be given on how to better embody probity concepts. Regrettably, this is contrary to the authors' experience in the bulk of processes. The auditor's independence should be respected at all times, and while the final say in relation to all issues remains with the government, there should not be pressure on the auditor to sign off on decisions to which he or she objects. It should be clear to tenderers that they are at liberty to raise concerns with the auditor, and there should be a clear protocol for doing so in a manner which does not cause the tenderer to apprehend that their interests may be prejudiced by doing so.

If the tender process ultimately ends in litigation, communications with the probity auditor, as well as the auditor's recommendations and the action taken in relation to those recommendations, may be of central importance. Further, where a proper protocol for complaints to the auditor exists and was not taken advantage of by an aggrieved tenderer, the legitimacy of the tenderer's grievance might well be questioned at trial. Tenderers should be firmly encouraged to raise and resolve issues as soon as possible, not to store grievances as a basis for a court action if ultimately unsuccessful in the process.

It should be clear from a perusal of the cases discussed in this paper that successful challenges to tender processes are relatively rare. However, in a number of cases, the plaintiff tenderers had legitimate grievances, but failed for technical reasons to make out the particular cause of action relied upon. Governments must expect tenderers' legal advisors to be more sophisticated in their approach as a result of these cases already decided. Furthermore, governments ought to strive to avoid such grievances arising whatsoever, as even if they do not amount to actionable wrongs, they are still evidence of a sub-optimal process, and even an unsuccessful legal challenge requires the expenditure of further public money to defend. The law of process contracts ought not to be viewed as a problem for government procurement officers, but as a mechanism for defining and managing tender processes.