

five years.

The April 1989 Information Paper proposed and listed certain countries and concessions. Regulations listing designated comparable tax countries and the associated designated concessions are still being finalized.

In relation to non-resident discretionary trusts, income will be attributed to an Australian resident generally where (at any time) an Australian resident has transferred value to the trust and where the trust is resident in an unlisted country or derives concessionally taxed income. Accordingly, income of discretionary trusts will be attributed regardless of when the transfer occurred. In the case of non-discretionary trusts, attribution will occur only if the transfer took place after 12 April 1989. Distributions made by non-resident trusts out of attributed income generally will be exempt from tax.

It should be noted that an incentive is provided by the legislation in relation to non-resident discretionary trusts. In respect of such trusts which were in existence on 12 April 1989, a 10% final tax liability on the taxable amount of a trust distribution will be imposed where the trust is wound up. This particular incentive is not without its own technical difficulties however and should not be taken as affording complete protection in the case of winding-up of such trusts. Further advice should be sought by clients who are contemplating the use of this incentive.

The draft legislation is of considerable complexity. This paper has given a "broad brush" only of its provisions. The draft legislation has been released to enable scrutiny and comment. It should also be noted that a passive investment fund regime has been deferred until the 1991-1992 year of income. Draft legislation for this is to be released in 1990.

- Reprinted with permission from Henderson Trout's HT Update.

FAIRNESS IN TENDERING PROCEDURES

- Philip Davenport

In [1989] 9 Australian Construction Law Newsletter at p.22, there is a report by Frank Cahill on the N.S.W. Supreme Court decision in *White Industries v. The Electricity Commission of N.S.W.* where the duty of a construction authority to observe the rules of natural justice is considered. Two recent decisions from England illustrate aspects of the responsibility of a construction authority to observe procedural fairness in tendering procedures. Although both cases involve local government councils and the interpretation of provisions of the Local Government Act in England, the principles have relevance for all construction authorities.

The first case is *R v. The London Borough of Islington* [1989] 45BLR 50 and involved an application by The Building Employers' Confederation for judicial review of certain special contract conditions adopted by the Council. The special conditions required the contractor to comply with the requirements of the Sex Discrimination Act and a list of other Acts relating to safety as well as the Council's own safety codes. The Confederation argued that these provisions infringed s.17 of the Local Government Act which provided that it was the duty of a public authority to exercise contractual functions without reference to matters which are non-commercial.

In finding that there was an infringement Parker LJ said:

... I should stress that I do not, by what I have said, intend to hold that a local authority is not to include in its contracts provisions requiring the contractor to comply with the general law. It is only to the extent that there are specific obligations so included which cover such matters as pay, hours of work, what a particular employee is or is not to be permitted to do and so on that there would be an infringement.

Increasingly, public authorities in Australia are using tendering procedures and contract conditions as a vehicle to promote Government policy, e.g. with respect to the deregistration of the BLF, compliance with a Code of Conduct, apprenticeship, preference to industries, alternative dispute resolution, etc. The sanction for failure to comply with Government policy is usually the removal from tendering invitation lists or the barring of opportunities to tender. Where a contractor has derived a large part of the contractor's income from contracting for a particular public authority, the consequences for the contractor can be very damaging. This was just the situation faced by the contractor in *R v. The London Borough of Enfield* [1989] 46BLR 5.

The contractor derived about 95% of its turnover from work for the Council and had for a considerable time been on the Council's list of approved contractors. The Council's building surveyor approached the contractor to

construct extensions to his house. The contractor agreed to do so and when the Council became aware of this, the Council removed the Contractor from the list of approved contractors. The reason given by the Council was that there were enquiries into the conduct of Council staff. The police were notified. The contractor applied to the court for orders that the Council give reasons for the decision to suspend the contractor from the Council's list and that the Council reinstate the contractor to the list. The Council argued that there were serious allegations of offences or irregularities in the relationship between the contractor and the Council officer and that, while investigations were being made by the police, the Council could not provide further details to the contractor.

In ordering the Council to reinstate the contractor, Glidewell LJ said:

I accept that a local authority which receives apparently credible evidence that a firm which undertakes work for the authority appears to be guilty of fraud or other criminal offences arising out of its contracts with the authority is in a dilemma. An employer who receives similar information about an employee can resolve the problem by suspending the employee on full pay. A local authority cannot take this course in relation to a contractor ... I am prepared to accept also that if the information which the local authority receives is detailed and credible, and if it discloses that the contractor appears to have been guilty of conduct of so serious a nature that no responsible authority should continue in a contractual relationship with that contractor and, in particular, if the continuance of the relationship is likely to cause substantial loss to the authority and thus to its ratepayers, the authority may be justified in suspending the contract without giving more by way of reasons than an explanation in some such terms as I have here set out. Even in such a situation, the authority is in my view under a duty to do all it can to ensure that the investigation proceeds as rapidly as possible, and that the contractor is given reasons for the suspension and an opportunity to respond as soon as possible, so that if the accusation is unfounded the damage to the contractor will be limited. I do not think the authority is entitled simply to leave it to the police to determine the speed of the investigation.

The extent to which the decision was based on the common law as distinct from the provisions of the Local Government Act was not made clear. However, the result was that the Council was not entitled to make the decision to remove the contractor from its list until the contractor had been told of the accusations against the contractor and given the opportunity to answer them. Glidewell LJ also said:

... it seems at least doubtful whether [the Council] considered at all the considerable damage which the decision would do to [the contractor's] business. If they did not, that also would be a ground

on which the decision could properly be quashed.

The Council was left with the choice of maintaining its stance that until completion of the police investigation, it was unable to give the contractor adequate reasons and an opportunity to make representations, or of abandoning that stance and giving the contractor adequate reasons and an opportunity to make representations. In either event, until the Council did give the contractor adequate reasons and an opportunity to make representations, the Council could not make a valid decision to remove the contractor from its list. What the Council finally decided to do is not recorded.