Local Government, Contracts and Judicial Review

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1. Introduction

Local authorities often engage in contracting and tendering for the carrying out of construction work, or for the supply of goods or services. Contracts involving more than a specific monetary amount (presently $100 000) are subject to tendering requirements imposed by legislation. For the Brisbane City Council ("the BCC"), the relevant provisions are found in ss.42-46 of the *City of Brisbane Act* 1924 (Qld) and for other local authorities, ss.395-406 of the *Local Government Act* 1993 (Qld) must be referred to. In addition, many local authorities have developed policies and guidelines, such as Request for Tender documents, to assist them in conducting the tendering process.

The purpose of this article is to examine briefly the role of judicial review in contracting and tendering decisions of local authorities. While there may be a possibility of seeking private law remedies based on estoppel where there has been detrimental reliance,[1] negligent misrepresentation,[2] or under s.38 of the *Fair Trading Act* 1989 (Qld),[3] there are a number of limitations on bringing such actions, particularly when dealing with government bodies.[4] In addition, it is unlikely that

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1 *Commonwealth v. Verwayen* (1990) 170 CLR 394; *Metropolitan Transit Authority v. Waverley Transit Pty Ltd* [1991] 1 VR 181; *Minister for Immigration, Local Government and Ethnic Affairs v. Kurtovic* (1990) 92 ALR 93. See the analysis of this area by N Seddon *Government Contracts* Federation Press Sydney 1995 at 254-251.

2 N Seddon *supra,* n.1 at 253-256; *Commonwealth v. Citra Construction Ltd* (1986) 2 BCL 235.

3 Provided the tenderer bringing the action falls within the definition of "consumer" in s. 6. A "consumer" is a natural person who buys goods or services otherwise than in the course of, or for the purposes of, a business carried on by that person; or a person who buys goods or services where the price does not exceed $40000.

4 For example, estoppel cannot be used against a government body so as to cause the body to act beyond power or to make a contract which fetters a statutory discretion.

Australian courts will find that a pre-award contract exists during the tendering process, so as to found an action in damages for breach of contract.[5] Thus, a consideration of public law remedies as an alternative is appropriate, given that local authorities are government bodies operating under statutory powers and are, therefore, potentially amenable to judicial review.

It is necessary to examine the possible difficulties that confront an applicant seeking judicial review of local authorities' contracting and tendering decisions. Recent pronouncements of the Federal Court indicate strongly that most contractual decisions made by federal statutory bodies are not amenable to judicial review and are to be considered by reference to the law of contract. The implications for local authorities, whose constituting enactments also empower them to enter into contracts, will be discussed in light of certain provisions in the *Judicial Review Act* 1991 (Qld).

2. What is Judicial Review?

Judicial review is where the courts consider whether the process of decision making surrounding the tendering process or entering into contracts is lawful. An unlawful decision in the context of this discussion can arise if the local authority has gone outside its statutorily conferred powers or has failed to comply with mandatory statutory procedures. It can also arise if the authority, while possessing power to make the relevant decision, has improperly exercised its discretion. Examples of such improper exercise are where the local authority has breached the rules of procedural fairness; or has made the decision for an improper purpose; or has considered extraneous matters in making the decision; or has failed to take into account relevant considerations. Other possible grounds of review do exist but it must be recognised that judicial review is not a review on the merits of the case. The courts therefore cannot examine the basic fairness or wisdom of the relevant decision. Judicial review is concerned with the decision making *process* only.

The scope of remedies available may not be as satisfactory to an applicant as private law remedies such as damages or restitution. The most that the courts can afford a successful applicant in a judicial review action is to quash the decision and order that a fresh, and lawful, decision be made in its place. Injunctions and declarations may also be provided. There is no entitlement to damages out of the judicial review action itself.[6]

It is a vexed question whether the overturning of a decision regarding the selection of a successful tenderer or awarding of a contract will have the consequence of the contract itself being nullified. If the decision to enter into the contract is

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5 See the comprehensive discussion by Seddon *supra*, n.1 at 212-244.

6 Order 81 r 6 RSC enables an applicant to join a related damages claim with an application for judicial review where the matters are related. However, this would only appear to allow a joinder of action where there would otherwise exist a separate and distinct action in damages under the general law such as in contract or in tort.

beyond power, it is likely that the contract will be void.[7] However, this may not always be the result in situations where the decision is vitiated through non-compliance with a statutory procedure, particularly if it is not mandatory.[8]

3. Examples of Judicial Review of Local Authorities

The following cases indicate the scope of judicial review and the grounds upon which decisions might be able to be overturned. They have been chosen because they involve local governments. Many of the cases involve the system of judicial review that existed prior to the procedural reforms made by the *Judicial Review Act* but there is little difference in the substance of the review and grounds of challenge. A number also involve the provisions of the previous *Local Government Act* 1936 (Q), which have been replaced, with some modifications, by ss.395-406 of the *Local Government Act* 1993 (Q).

A case where the BCC acted beyond power in accepting a tender is illustrated by *Hunter Brothers v. Brisbane City Council.*[9] The contract which the BCC entered into was not authorised by the provisions of the *City of Brisbane Ordinances*. The provisions set out in considerable detail the conduct of the tendering process, including rules about the closing of the tendering and for preventing contact between tenderers and the BCC after the closing of tenders, except in defined circumstances. The BCC invited tenders for contracts for refuse collection in the city on a variety of bases. At the close of tendering there were five tenderers. At the time when the BCC Stores Board was about to recommend to the BCC that it should accept a tender submitted by Waste Management, a Council committee decided that there should be a new term in any new refuse collection contracts. Waste Management was invited to submit a new tender based on the changed terms. It did so and its tender was then accepted. It was held that the BCC had not complied with the *Ordinance* because it had accepted a tender that had been made after the close of the tenders. It was not even a question of whether the requirements of legislative provisions were mandatory or directory because they had been disobeyed. Thus, the resolution of the BCC for acceptance of the tender was declared to be void and there was no contract created. The contract was void for illegality. The BCC's powers in relation to contracts and tendering are now contained in ss.40-44B of the *City of Brisbane Act* 1924.[10]

However, in *Re RP Data Pty Ltd and Brisbane City Council,*[11] the BCC was found not to have gone beyond its "enterprise powers" contained in ss.410-415 of

7 *Hunter Brothers v. Brisbane City Council* [1984] 1 Qd R 328; *Reade v. Mayor of St Kilda* (1888) 14 VLR 829.

8 See *Re RP Data Pty Ltd and Brisbane City Council* (1995) 2 QAR 213 at 217 per McPherson JA; *Australian Broadcasting Corporation v. Redmore Pty Ltd* (1989 166 CLR 454.

9 [1984] 1 Qd R 328.

10 These provisions were inserted by the *Local Government Legislation Amendment Act* 1992 (Qld) s.6.

11 (1995) 2 QAR 213.

the *Local Government Act* 1993 when it decided to enter into an exclusive contract with a company, Infopac, to sell or supply it with information concerning properties within its local government area. Pursuant to s.410 of the Act, a local authority may engage in activities that might not otherwise be within power, provided that the local authority is of the opinion that the subject which the activity concerns is directed at benefiting and could reasonably be expected to benefit the local area. The appellants, a rival firm of Infopac, sought judicial review alleging that the BCC was in breach of its powers because it had not enabled the appellants to compete for the acquisition of the information and competition would have provided greater benefit to the BCC than the arrangement it had actually entered into. The appeal was dismissed on the basis that there was no evidence that the BCC had failed to comply with its "enterprise powers". There was no evidence before the Court that there could have been greater benefit to the BCC if it had allowed the appellants to compete or that it had failed to take advice in accordance with the requirements of s.412 of the Act before it exercised its powers.

In *obiter dicta* McPherson J stated that it would not automatically follow that if a decision preceding the contract was vitiated, the contract would be nullified. Such depended upon the character and effect of the factor said to vitiate the decision; its relevance for or impact on the contractual capacity, authority or power of the decision maker; and maybe the extent to which the other party is aware of the defect or irregularity in the process.[12] His Honour referred to *Hunter Brothers* as an example of where non-compliance with a mandatory provision nullified the contract. However, the "enterprise powers" did not appear to have that effect.[13]

Further, pursuant to s.41 of the *City of Brisbane Act* a delegate of the BCC can only make a contract on behalf of or in the name of the BCC if there has been money set aside in the Council's budget for it, or there is an approval by the BCC in the case of an emergency. It would appear that if a delegate entered into a contract in any other circumstances, the decision would be invalid. Although it may appear to follow that the contract would also be unauthorised, whether the contract is void may depend on whether the breach is regarded as arising from lack of capacity to contract or from failure to follow a procedure.[14]

The ground of judicial review raised in *Maxwell Contracting Pty Ltd v. Gold Coast City Council*[15] was that the Council had failed to comply with a mandatory statutory procedure regarding the advertising for tenders because it varied the terms of the conditions of the tender after tenders had been received without further advertising. Pursuant to s.19(4) of the previous *Local Government Act* 1936 (Qld), before a local authority entered into a contract for the carrying out of work or the supply of goods over an amount of $10 000 (subject to other exceptions), the local

12 Ibid, at 217.

13 Ibid, at 218.

14 See also s.397 of the *Local Government Act*. This area is beyond the scope of this article and is examined by Seddon, *supra*, n.1 at 83-89 and 291-305.

15 [1983] 2 Qd R 533.

authority was required to, at least three weeks before entering into the contract, invite tenders by public advertisement. A local authority was given the power to accept any tender which, in view of all the circumstances, appeared to it to be the most advantageous or it could decline to accept any tender.[16]

The original tenders in this case had been called for on the basis of a lump sum payment on completion. The plaintiff and another company were the only tenderers whose tenders were considered by the Council and the plaintiff's tender price was the lowest. The Council then asked both tenderers to submit new tenders on the basis that they would receive progress payments rather than a lump sum. Again, the plaintiff's price was the lowest. However, the Council resolved to let the contract to the other company on the basis of progress payments. Apparently, consultants advising the Council had found that the plaintiff's tender did not conform with the relevant plans and specifications. The plaintiff sought declarations that first, the Council had not conducted a valid tendering procedure in accordance with the statutory provisions by accepting a variation of a serious component of the tender without further advertising; second, that there was no valid agreement between the Council and the other company; and third, that the resolution recommending acceptance of the tender was unlawful. It also sought an injunction.

It was held that s.19(4) was drafted in such vague terms that it was impossible to believe that compliance should be regarded as absolute because of the grossly disturbing effect such result would have to any contract and the uncertainty that would arise. Thus, it was not mandatory in nature, and, even if directory, there had been at least substantial compliance with the requirements of the section. The Council should not be required to re-advertise its call for tenders upon any variation it might make to the original conditions, no matter how trivial on the basis that if the original conditions had been the varied form, more tenders would have been received. There was no evidence to suggest that the varied progress payment arrangement would have attracted additional tenders. Thus, there was no contravention of s.19(4) of the Act. Justice Derrington did, however, indicate that the situation might have been different had there been a variation to the original terms that was so significant as to constitute a new contract that it would be unfair to those who did not tender, and detrimental to the public funds of the local authority in that more favourable tenders may very well be received on re-advertising.[17]

However, in *Wade v. Gold Coast City Council*,[18] s.19(4) of the *Local Government Act* was held to be mandatory in its requirement that contracts involving an amount over the requisite limit[19] had to be put to a tender process Here, a contract had been renewed without tenders being called and was found to be invalid. The apparent

16 Similar but not identical requirements in relation to carrying out work and the supply of goods and services are now contained in ss.398-400 and s.404 of the *Local Government Act* 1993.

17 *Supra*, n.15 at 539. See also *Streamline Travel Services Pty Ltd. v. Sydney City Council & Anor* (1981) 46 LGRA 168.

18 (1972) 26 LGRA 349.

19 Which was then $10 000.

contradiction with *Maxwell Contracting* as to the effect of s.19(4) could be resolved on the basis that some parts of a provision might be mandatory but not others. While the requirement that a contract involving an amount over a certain limit be subject to tender was expressly stated in s.19(4), the terms and the conditions of the conduct of the tender were not. In *Maxwell Contracting*, Derrington J thought that the criterion of conduct laid down in s.19(4) was vague so as not to entail precision of performance. On the other hand, the specification that contracts above a requisite monetary amount be put to tender was not vague and imprecise and would appear to require precise compliance.

Under the new *Local Government Act* 1993, provision is made in s.402 for local governments to change the tender specifications allowing them to invite all persons who have submitted a tender to change the tender to take account of the change. The section only applies if the original invitation to tender states that the local authority might later invite all tenderers to change the tender.[20] It may be that this provision would necessarily preclude the council from changing the terms of the tender and inviting resubmissions from the tenderers without the local authority having first specified in its invitation to tender that it might do so. In other words, local authority would not be able to change the terms of the tender other than in accordance with s.402. The implications of this provision have not been judicially considered.

Another situation which can raise a ground of review is not where the local authority acts beyond its statutory powers or ignores a mandatory statutory procedure in conducting the tendering process or in entering into a contract. The local authority may have the power to make a decision but, in doing so, it might use its power in an improper way. For example, a local authority has a discretion not to accept any tender available to it and this power appears to be unfettered.[21] However, the discretion is limited by the need that it be exercised according to law and not arbitrarily or capriciously.

For example, if a local authority rejected a tender for a waste collection contract, the local authority would exercise its powers improperly if it took into account the fact that the unsuccessful tenderer only employed non-union labour or that other rival tenderers were prepared to employ the niece of one of the councillors. These matters would be likely to be irrelevant considerations such as to vitiate the decision. The considerations might also give rise to a ground of improper purpose in that the powers conferred on the local authority do not contemplate the local authority's involvement with industrial relations matters or favouritism towards relatives. It should be noted, however, that it has been stated that a local authority will not be acting for an improper purpose if it acts in a commercial way to benefit itself financially, provided that in doing so it is not motivated solely or substantially by a concern to protect its own profits or enterprise, and it is not

20 Section 402(1)(b).

21 See s.45 *City of Brisbane Act*; s.404 *Local Government Act*.

seeking to stifle competition that can be seen to be in the public interest.[22]

Further, it is expected that local authorities will act fairly in a procedural sense in conducting a tendering process so as to avoid contact with some tenderers but not others and to avoid bias through pecuniary interest or otherwise, such as an officer of the local authority publicly announcing a suspicion about one of the tenderers.[23]

The *Local Government Act* states that when a local authority is entering into contracts or deciding to accept a tender that is most advantageous to it, it "must have regard to" a number of principles set out in s.395 of the Act.[24] There is no similar requirement pertaining to the BCC under the *City of Brisbane Act*. The principles are: open and effective competition; value for money; enhancement of the capabilities of local business and industry; environmental protection; and ethical behaviour and fair dealing. If any of these matters are not considered, the decision to accept a tender could be overturned on the ground of failure to take into account relevant considerations which the local authority is bound, by the legislative provision, to consider.[25] Failure to consider the matters may also amount to non-compliance with a statutory procedure, a procedure which might be considered to be mandatory by its use of the words "must have regard to". On the other hand, if the local authority has had regard to these principles, the decision cannot be vitiated unless it can be shown that the principles were given very little weight and the tender was awarded on the basis of an extraneous consideration.[26] It is not clear that the principles in s.395 are the only relevant matters or whether the local authority can also have regard to other matters which might be relevant in the context of a particular tender. It may be that the principles in s.395 are the only ones that local authorities "must have regard to" and that other considerations will be seen as irrelevant. This is a matter of construction of the Act to determine whether Parliament considered the list in s.395 to be exhaustive.[27]

22 *Richards and Sons Pty Ltd v. Ipswich City Council* (unreported, Queensland Supreme Court, Thomas J, 3 April 1995) at pp. 8, 13. See also *Boral Resources (Qld) Pty Ltd v. Johnstone Shire Council* [1990] 1 Qd R 18; *Randalls v. Council of Northcote* (1910) 11 CLR 100 at 107; *R v. Council of Charleville; ex parte Corones* [1928] SRQ 155 at 158.

23 See, for example, *Century Metals and Mining N/L v. Yeomans* (1985) 85 ALR 29. See also *Metropolitan Transit Authority v. Waverley Transit Pty Ltd* [1991] 1 VR 181 where there was evidence of bias on the part of one of the officers of the Authority.

24 See ss.395 and 404 *Local Government Act*.

25 *Minister for Aboriginal Affairs v. Peko-Wallsend Pty Ltd* (1985) 162 CLR 24 at 39.

26 Ibid, at 40.

27 Ibid, at 39-40. See also *Coulson v. Shoalhaven City Council* (1974) 29 LGRA 166 where it was held that the list of factors preceded by the words "shall take into consideration" was exhaustive and no other factors could be considered.

4. Issues Arising from Contract and Tendering Decisions of Local Authorities

It is necessary to now consider the difficulties that may confront applicants who decide to pursue a judicial review action against a contract or tendering decision of a local authority.

(a) Judicial Review in Queensland

In Queensland, applications for judicial review are made under the *Judicial Review Act* either by way of an application for a statutory order of review under Part 3 or an application for review under Part 5. There is no difference in the grounds upon which judicial review is sought, whichever avenue is chosen, nor substantially in the type of remedies available. The main distinction is that the obligation on a decision maker to provide reasons for decision will arise only if an application is made under Part 3.[28]

Part 5 of the *Judicial Review Act* essentially codifies the common law process of judicial review, with a number of procedural simplifications. The Supreme Court is empowered by s.47 to provide orders in the nature of the traditional prerogative writs or injunctions or declarations. There may be some technicalities still associated with the availability of some of these prerogative orders, which apart from the ability to obtain reasons, may add to the attraction of seeking a review under Part 3.

(b) Reasons for Decision

Reasons for decision are quite essential to appraising a potential applicant of the possible ground upon which the decision could be challenged, be it want of power, failure to follow procedures or improper exercise of a discretionary power. Without a statement of reasons, there is very little evidence to mount an action and it will be necessary to obtain discovery once proceedings have commenced.

An unsuccessful tenderer may be able to obtain reasons as a matter of course from a local authority, although there does not appear to be any legislative requirement that reasons be given. In addition, under Schedule 2 Clause 13 of the *Judicial Review Act*, it is provided that reasons need not be given for decisions relating to -

(a) the selection of a tenderer following the conduct of a competitive tendering process; and
(b) the awarding of contracts.

Thus, the ability to compel local authorities to provide reasons in respect of the selection process or the award of contracts seems slight. However, in *Re RP Data*

28 See s.32 of the *Judicial Review Act.*

Pty Ltd and Brisbane City Council[29] the rather surprising comment was made by the Court of Appeal that, as the unsuccessful tenderer had not sought reasons for decision under s.32 of the *Judicial Review Act,* there was no evidence to assist it in establishing its claim that the BCC had acted beyond power.[30] The difficulty is that this comment assumes that the appellants could have obtained reasons whereas Sch 2 Cl 13 would enable the BCC to refuse to provide the appellants with reasons because the decision in issue related to the awarding of a contract to Infopac. It is not clear why the contractual arrangements in that case did not fall within the Sch 2 exception or even that this point was argued before the Court. On the other hand, in *K C Park Safe (Brisbane) Pty Ltd v. Cairns City Council*[31] Thomas J dismissed an application for provision by the Council of a statement of reasons in relation to its resolution to not accept any tenders regarding a particular project on the basis that Sch 2 Cl 13 applied to the tendering and contracting scheme under the *Local Government Act.*

(c) Judicial Review under Part 3 of the Judicial Review Act

It is a prerequisite to an entitlement to reasons to show that Part 3 of the *Judicial Review Act* provides the Supreme Court with jurisdiction over the decision and that the applicant has standing to seek review.[32] The requirements of jurisdiction are found in s.4 of the *Judicial Review Act* and are similar to those found in s.3 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act"), which confers jurisdiction on the Federal Court. Apart from the comments made by the Court of Appeal in *Re RP Data Pty Ltd* that indicate that unsuccessful tenderers are able to seek reasons for decision, it would not appear to make much difference whether application is made under Part 3 rather than Part 5. The only real disadvantage in these circumstances would appear to be the existence of some technicalities governing the availability of some of the prerogative orders. The limits of the Court's statutory jurisdiction under Part 3 will now be examined.

Section 4 provides that the Court can only engage in judicial review under Part 3 if there is:

(a) a decision of an administrative character made...under an enactment; or
(b) a decision of an administrative character made...by an officer or employee of, the State or a State authority or local government authority under a non-statutory scheme or program involving funds that are provided or obtained (in whole

29 *Supra*, n. 11.
30 Ibid, at 216-217 per Davies J. I am grateful for the observations on this issue made by Mr Mark Tranter in a recent paper submitted for assessment as part of the LLM by Coursework degree entitled 'Judicial Review And Queensland Local Government' at p 5.
31 (Unreported, Queensland Supreme Court, Thomas J, 23 July & 1 August 1996) at 14.
32 The issue of standing to challenge tendering and contract decisions of local authorities will be considered later.

or part) –
(i) out of amounts appropriated from Parliament; or
(ii) from a tax, charge, fee or levy ...

This definition appears to be very wide, indicating that there would be few decisions of government that are not caught by s.4 and, therefore to which Part 3 of the *Judicial Review Act* would not apply. The breadth of jurisdiction was designed to overcome the significant gaps in the Federal Court's jurisdiction under s.3 of the ADJR Act, the main one being the requirement for a proximity to an enactment.[33] There have been a number of decisions which have fallen outside of the Federal Court's ADJR jurisdiction for failure to satisfy this requirement. This has sought to be overcome by the extended jurisdiction provided by s.4(b) which does not exist under s.3 of the Commonwealth ADJR Act.

The necessity that the decision be "under an enactment" presents the greatest hurdle in challenging decisions regarding tendering and entry into contracts by statutory bodies such as local authorities. The complication arises in determining whether the decision to reject or accept a tender or to enter into a contract is one which has its "proximate source" in the contract or in the statute which has created the body and provided it with power to enter into contracts.

The point should be made before proceeding further that it is clear that while a decision to accept a tender and reject another is commercial in nature it is still "of an administrative character", provided that it is related to the discharge of a statutory function of the government body.[34]

(i) Contracting and Tendering Decisions — "Under an Enactment" ?

There seems to be little difficulty in accepting that if one must look to the "proximate source"[35] of the power to make a decision, that a decision to terminate a contract is one which has its proximate source in the contract itself rather than the statute which has authorised the making of the contract initially.[36] The rights and obligations of the parties thus arise out of the terms of the contract and the only remedies would be the ordinary contractual remedies.

More troublesome, however, is accepting the current view of the Federal Court that a decision concerning the entry into a contract by a statutory body also derives its authority directly from the contract rather than from the empowering statute creating the body and conferring ability to contract.

In *Australian Capital Territory Health Authority v. Berkeley Cleaning Group Pty*

33 *Evans v. Friemann* (1981) 53 FLR 229 at 238; *Post Office Agents Association Ltd v. Australian Postal Commission* (1986) 84 ALR 563 at 571.
34 *James Richardson Pty Ltd v. Federal Airports Corporation* (1993) 117 ALR 277 at 280.
35 *Post Office Agents Association Ltd v. Australian Postal Commission* (1986) *supra*, n.33.
36 *Australian National University v. Burns* (1982) 64 FLR 166; *Blizzard v. O'Sullivan and Braddy* [1994] 1 Qd R 112; *Australian Film Commission v. Mabey* (1985) 6 FCR 107.

Ltd ("Berkeley Cleaning"),[37] the Full Federal Court had held that a decision to enter into a contract with a successful tenderer was a decision "under an enactment" because the contract could only be regarded as being made under the authority to contract provided by the *Health Services Ordinance* 1985 (ACT), which established the Authority and conferred upon it broad powers, including the power to enter into contracts.[38]

However, this view does not sit well with the current approach to entering into contracts that emerged in the Full Federal Court decision in *General Newspapers Pty Ltd v. Telstra Corporation ("General Newspapers")*.[39] This case concerned Telstra Corp's entering into a contract with existing printers of its Yellow Pages without calling for tenders after indicating to appellants that it would do so and placing the appellant's name on a list of potential tenderers. During the time that this conduct was occurring, Telstra Corp had become incorporated under *Corporations Law*, after having been the statutory corporation Telecom. Telstra Corp had "the legal capacity of a natural person" under *Corporations Law*. Although there were two parts to the application, one being under the ADJR Act and the other under s.52 of the *Trade Practices Act*, it is the former that is relevant here. It was argued that the conduct on the part of Telstra Corp was reviewable conduct under s.6 of the ADJR Act on the basis that it had denied procedural fairness to the appellants in failing to keep it informed of its intentions.

It was held that the ADJR Act was concerned only with decisions which, being authorised or required by an enactment, are given force or effect by the enactment or by a principle of law applicable to the enactment. There was no statute making specific provision giving force or effect to the contracts which Telstra Corp had entered into, only conferring upon it a capacity to contract. Thus, the force and effect of the contract was not provided by any statute but fell to be determined by the ordinary law of contract.[40] The contracts were not relevantly "authorised or required" by any enactment. As Seddon points out, it is difficult to see the distinction between a capacity to contract (where the resulting decision to enter into the contract is not "under an enactment") and where a contract is "authorised" by an enactment (where the decision to enter into it might be "under an enactment").[41] It would be thought that capacity to contract would be no different to having authority to contract.

The Court preferred *ANU v. Burns*[42] to *Berkeley Cleaning*[43] without expressly overruling the latter.

The only exception which the Court made to the finding that entering into a

37 (1985) 60 ALR 284.
38 See also *James Richardson Corporation Pty Ltd v. Federal Airports Corporation supra*, n.34.
39 (1993) 117 ALR 629.
40 Ibid at 636, 637 per Davies and Einfeld JJ.
41 Seddon *supra*, n.1 at 276. See also M Allars 'Private Law but Public Power: Removing Administrative Law Review from Government Business Enterprises' (1995) 6 *Public Law Review* 44 at 62.
42 *Supra*, n.36.
43 *Supra*, n.37.

contract is not "under an enactment" and, hence, not reviewable under the ADJR Act is when the contract is entered into for an improper purpose, such as private gain. In such instances the validity of the entry into the contract is challenged by reference to the statute and can be brought under the ADJR Act.[44] However, it seems that where other grounds of review are in issue, such as denial of procedural fairness, as was alleged in *General Newspapers*, that conduct will not be referable to any statutory provision so as to be "under an enactment".

Justices Davies and Einfeld JJ appeared to consider that the ADJR might be invoked in relation to a tender process where the challenge to the process was referable to the provisions of the statutory scheme under which it was regulated. Their Honours referred to the facts of *Gerah Imports Pty Ltd v. Minister for Industry, Technology and Commerce*[45] where a Ministerial Scheme made under the *Customs Act* 1901 (Cth) included specific and detailed rules about how tenders were to be conducted. However, it was eventually held in that case that the Scheme was not a binding set of rules but a statement of policy only. It may be, however, that the Court in *General Newspapers* was indicating that had the provisions detailing the tender process been contained in a statutory instrument that relief may have been provided under the ADJR Act. Although not referred to by the Court, an instance where a tendering process was found to be beyond power was in *Australian Capital Equity Pty Ltd v. Beale*[46] where the Minister revoked an invitation for tenders before the close of the tender period. The issue of reviewability under the ADJR Act was not raised because the Court was concerned with the preliminary issue of whether the invitation to tender was an "instrument" pursuant to s.33(3) of the *Acts Interpretation Act* 1901 (Cth).

However, the concept of being able to seek judicial review of tendering decisions for non-compliance with statutory procedure or for going beyond power is not a new one.[47] However, it is not entirely clear whether, at the federal level, it would take place under the ADJR Act or under the Federal Court's common law jurisdiction.

Justices Davies and Einfeld indicated that both *Berkeley Cleaning* and *James Richardson Corp Pty Ltd v. FAC*[48] could be explained on the basis that they involved a situation where it was arguable that the circumstance of calling for tenders implied rights as between all the parties that the tenders would be dealt with in accordance with the conditions of the tender and in accordance with procedural fairness. 'Accordingly, the Court may well have had jurisdiction to deal with the dispute though, in our opinion, not under the ADJR Act'.[49] Their Honours probably meant that it might be possible, in these limited instances, to invoke the Federal Court's jurisdiction under s.39B *Judiciary Act* 1903 (Cth) and that the ordinary laws of contract

44 *Supra*, n.39 at 637 per Davies and Einfeld JJ.
45 (1987) 14 ALD 351.
46 (1993) 114 ALR 50.
47 See, for example, *Hunter Bros v. Brisbane City Council* [1984] 1 Qd R 328; *Wade v. Gold Coast City Council* (1972) 26 LGRA 349.
48 *Supra*, n.38.
49 *Supra*, n.39 at 637.

would not need to be resorted to.[50]

It is not entirely clear exactly what those circumstances would be such as to give rise to "implied rights" between parties but it appears that their Honours may have been referring to situations where the way in which tenders are called may give rise to legitimate expectations in those who submit tenders that the tenders will be conducted in accordance with the rules of procedural fairness so as not to unfairly favour one tenderer over another or to show a bias.[51] An example used by some commentators to illustrate this point is the decision of the Full Federal Court in *Century Metals and Mining N/L v. Yeomans*.[52] This case preceded the decision in *General Newspapers* and the requirement that the empowering statute "authorise or require" the contract.

In this case, the Federal Cabinet decided that phosphate mining on Christmas Island should cease. Subsequently, the Commonwealth owned company, PMCI, which had been engaged in the mining, was in the process of being wound up. Yeomans was appointed as a liquidator under the relevant legislation and, in the course of his duties, Yeomans received adverse comments about the activities of a person associated with the local union and so formed a view that the union, a partner of Century Metals, was untrustworthy and unreliable in the performance of agreements. The government decided that there should continue to be some limited mining operations on the Island and asked a number of interested parties to put in a submission about the conduct of such operations. Century Metals was one of a number of interested parties asked to put in a proposal. The Minister asked Yeomans to evaluate the various mining proposals and announced to the press that the inquiry was to be conducted by an "independent" person in an "impartial and thorough manner". The evaluation occurred and Yeomans made recommendations to the Minister that another tenderer, Elders Resources Ltd, be preferred and that negotiations to commence mining be entered into with Elders Resources. Century Metals sought to challenge Yeoman's recommendation and the Minister's decision to accept Elder Resource's tender under the ADJR Act.

It was held that Yeomans had an obligation to provide procedural fairness in circumstances where the Minister had promised an independent and impartial assessment of the merits of the competing proposals. Thus, the public announcement by the Minister was such as to give rise to an expectation of such independence and impartiality. In light of Yeoman's antipathetic views about the union and his scepticism about the likely success of the Century consortium, an impression of bias could be said to have arisen. Thus, there was a failure to afford procedural fairness so as to vitiate the Minister's decision to commence negotiations with Elders and the recommendation upon which it was based. Generally speaking, however, it will be rare that a tenderer will have a legitimate expectation of procedural fairness unless there

50 See Allars *supra*, n.41 at 65.

51 Seddon *supra*, n.1 at 284.

52 (1991) 100 ALR 383. Seddon *supra*, n.1 at 287-289 and Allars *supra*, n.41 at 65-66 discuss this case in that context.

are very special circumstances involved in the tendering process that give rise to such. Such circumstances existed in this case. Usually, the wide power conferred on government bodies to reject tenders is against finding legitimate expectations, even though much expense and time is put into the preparation of a tender and extensive negotiations may have been conducted.[53]

On the justiciability point, it is not entirely clear why the Full Federal Court thought that the ADJR Act applied, appearing to discuss the question of justiciability on the basis that the political or public interest nature of a decision does not necessarily prevent judicial review. At first instance, the primary judge had held that the liquidator was exercising power under the "Winding Up Ordinance 1987"[54] but the Full Court did not appear to deal with the matter in those terms.

Generally speaking, the position at the Federal level is that any decision to enter into or terminate contracts made by statutory authorities or corporations is not reviewable under the ADJR Act. In most instances, the entry into contract derives its source from the contract itself and the ordinary laws of contract apply. However, it appears that there are some limited qualifications that emanate from the judgment in *General Newspapers:*

- Judicial review will apply rather than ordinary contract law where the circumstances of the calling for tenders implies rights between all the parties that the tenders will be dealt with in accordance with the rules of procedural fairness. However, the ADJR cannot be used and the Federal Court's jurisdiction under s.39B of the *Judiciary Act* would need to be invoked.
- Judicial review under the ADJR appears available only where a contract may have been entered into for an ulterior purpose, such as private gain, or perhaps, where a tender is conducted under the provisions of a statutory scheme and the challenge to the tendering process is by reference to the provisions of the statutory scheme. This latter situation may apply where conduct of the tendering process is in breach of a mandatory statutory provision.

The view that the result in *General Newspapers* pertains only to government bodies such as Telstra Corp which are incorporated under *Corporations Law* rather than under a specific empowering enactment has been dispelled by subsequent cases involving statutory bodies, such as the Civil Aviation Authority and statutory corporations, such as the Federal Airports Corporation, both of which are established by legislation.[55] Indeed in *CEA Technologies Pty Ltd v. Civil Aviation Author-*

53 *White Industries Ltd v. The Electricity Commission of New South Wales* (Unreported, New South Wales Supreme Court, Yeldham J, 20 May 1987); *Cord Holdings Ltd v. Burke & Ors* (1985) 7 ALN N 72; *K C Park Safe v. Cairns City Council supra* n.31.

54 *Century Metals and Mining N/L v. Yeomans* (1988) 85 ALR 29.

55 *CEA Technologies Pty Ltd v. Civil Aviation Authority* (1994) 122 ALR 724; *Giorgas v. Federal Airports Corporation* (1995) 37 ALD 623. See also *Chapmans Ltd v. Australian Stock Exchange Ltd* (1994) 51 FCR 501.

ity, Neaves J appeared to regard the fact of Telstra Corp's incorporation as irrelevant to the decision in *General Newspapers* stating that even the statutory body, Telecom's, statutory source of capacity to contract did not require or authorise the making of the contract.[56]

(ii) Application of General Newspapers to Queensland Local Authorities

Queensland local authorities are set up by statute and are statutory corporations.[57] Similarly to the federal statutory corporations considered above, the parent statutes confer broad powers "of an individual" on local authorities. Examples are provided of the activities that they can engage in, one being to "enter into contracts".[58]

In considering whether a challenge to a decision by a local authority involving a contract or tender can be brought under Part 3 of the *Judicial Review Act*, the Supreme Court has not, apart from one instance considered below, considered whether to follow *General Newspapers* in preference to the *Berkeley Cleaning* line of authorities. Adherence to the former view would necessitate the finding that a contractual decision is not "under an enactment" unless the statute requires or authorises the making of the relevant decision, as opposed to merely providing a general capacity to contract. It does appear fairly certain, however, that the Court would find that a decision made under the contract itself, such as to terminate the agreement would not be "under an enactment" but under the contract.[59]

The decision dealt with by the Court in *Concord Data Solutions Pty Ltd v. Director-General of Education*[60] was one taken by a government department exercising prerogative power to decide in favour of one tenderer in preference to the other. The matter was not one involving a statutory corporation or local authority. Thus, the Court had no difficulty in determining that the Federal Court cases holding that exercises of prerogative power were not "under an enactment" applied.[61] Justice Thomas contrasted the position of local authorities, stating that it was well established that decisions concerning entering into contracts made by local authorities are administratively reviewable. Their powers are limited to those conferred by statute and s.19(4) of the (previous) *Local Government Act*[62] expressly lays down the requirements that must be observed in the tendering process. His Honour then cited *Hunter Brothers Pty Ltd v. Brisbane City Council* and *Maxwell Contracting Pty Ltd v. Gold Coast City Council* as examples. However, Thomas J then went on to cite *Berkeley Cleaning* and *Century Metals and Mining N/L v. Yeomans*[63] as demonstrating

56 Ibid, at 731.

57 See s.6 of the *City of Brisbane Act*; s.35 of the *Local Government Act*.

58 See s.6A of the *City of Brisbane Act*; s.36 of the *Local Government Act*.

59 See *Blizzard v. O'Sullivan & Braddy supra*, n.36 following *ANU v. Burns supra*, n.36 in a case involving a decision to terminate an employment contract.

60 [1994] 1 Qd R 343.

61 For example, *Hawker Pacific Pty Ltd v. Freeland* (1983) 79 FLR 183.

62 Now replaced by ss.395-406 of the *Local Government Act* 1993.

63 *Supra*, n.52.

a similar proposition for statutory bodies in general. The judgment in *Concord Data* appears to have been delivered at almost the same time as that in *General Newspapers* so His Honour would not, at the time of writing his judgment, have been aware of the inconsistent views expressed there.

It may be, however, that a distinction can be made between at least some of the statutory powers of local authorities and the position of the statutory corporations discussed earlier. First, it would appear that the very general powers of the BCC and other local authorities, which include entering into contracts,[64] would not relevantly "authorise or require" a contract or give it force or effect but would merely confer a capacity to contract. Administrative law would not apply, only the normal laws of contract. The only exception might be, as hinted at by Davies and Einfeld JJ in *General Newspapers*,[65] where there are circumstances giving rise to procedural fairness in the conduct of the tendering process. Because the jurisdictional requirements of Part 3 of the *Judicial Review Act* and those of the ADJR Act are similar,[66] it is possible that Part 3 will not apply and the Court's power to review the matter will come from Part 5. Part 5 is relevant where a decision falls outside the s.4 definition and, hence, outside the Court's jurisdiction under Part 3. The fact that reasons need not be given for tendering decisions does, however, make it rather academic as to which avenue of review under the *Judicial Review Act* is preferable.

The position may be different where the specific contract and tendering provisions of the empowering statutes of the local authorities apply. Sections 42-46 of the *City of Brisbane Act* and ss.398-406 of the *Local Government Act* apply where the contract proposed to be made for carrying out of work or the supply of goods or services involves more than a specified monetary amount. These provisions require the calling of tenders and set out quite specific requirements for the conduct of the tendering process and for the consideration of the competing tenders. It is arguable that these provisions do more than merely confer capacity to contract but actually "authorise or require" it so as to give it force and effect. This is because of the detail and specificity of the provisions and the "challenge to the tender process can be made by reference to the provisions of the statutory scheme".[67] It would then follow that the decision to enter into a contract to which these provisions apply would be "under an enactment" within s.4(a) of the *Judicial Review Act* so as to enable review under Part 3. This appears to have been the approach of Thomas J in *KC Park Safe v. Cairns City Council*[68] in a claim for interlocutory relief by a tenderer in the course of an application for judicial review under the *Judicial Review Act* of a decision by the Council to "not accept any tender". His Honour distinguished the facts in *General Newspapers* from those in case before him on the basis that ss.398 and 404 of the *Local Government Act* 1993 governed the tendering process and

64 See s.6A(3)(a) of the *City of Brisbane Act* and s.36(2)(a) of the *Local Government Act*.
65 *Supra*, n.39 at 637.
66 However, consideration of s.4(b) will be made later.
67 *General Newspapers supra*, n.39 at 637.
68 *Supra*, n.31 at 5-9.

s.404(3), in particular, conferred an express power to make a decision to reject any tender. The relevant provisions, therefore, did more than confer a generally capacity to contract, as was the case in *General Newspapers*. The operative source of the power to make the decision was the statute.[69]

In any event, it seems clear that the tendering process conducted under earlier similar provisions, particularly s.19(4) of the previous *Local Government Act* 1936, has always been regarded as susceptible to review, as mentioned by Thomas J in the *Concord Data* case. The point could be made that it is often quite difficult to separate decisions relating to the conduct of the tendering process from decisions to enter into a contract as a result of the process. The cases involving the tendering process, such as *Hunter Brothers* and *Maxwell Contracting* preceded the enactment of the *Judicial Review Act* and relief was provided by Supreme Court's general powers of judicial review that existed at common law. These are now enshrined, with procedural modifications in Part 5 of the *Judicial Review Act.* Although it is clear that Part 5 could certainly be used to bring an application for review to challenge tendering decisions, it is arguable that the specificity of the tendering provisions are such as to make the conduct of the tendering process and consequent decision to select one tenderer over another is "under an enactment" so as to enable Part 3 to apply.

At the time of drafting the *Judicial Review Act*, it was envisaged that contract and tendering decisions were potentially reviewable under Part 3, although the grounds of review would generally be limited to non-compliance with mandatory procedures, as considered by the Court in *Hunter Brothers*, or where there has been fraud, bad faith, personal interest, bias, and in some situations, denial of procedural fairness.[70]

It was not proposed to give contract and tendering decisions any special exemption from judicial review, but it was decided that local authorities should be exempted from having to provide reasons in respect of such decisions.[71] It should be noted that the Electoral and Administrative Review Commission ("EARC"), in its Report, indicated that decisions taken by statutory authorities in the exercise of a power to contract expressly conferred by an Act...would be subject to the obligation to provide reasons. This obligation would potentially apply to all local authorities, whose power to enter into contracts was (at that time) expressly conferred by s.19 of the *Local Government Act* 1936 and extensively regulated by the provisions of Part VIII of that Act.[72] On balance, it was thought that while such decisions might be reviewable, there were a number of reasons, such as resource implications and threats to confidentiality, that meant that local authorities should not have to provide reasons for its contract and tendering decisions. The consequent exemption is

69 Ibid at 8.

70 Electoral and Administrative Review Commission *Report on Judicial Review of Administrative Decisions and Actions* Brisbane December 1990 at paras. 7.24-7.33.

71 Ibid, paras. 12.24-12.28.

72 *Supra*, n.70 at para. 12.24.

now enshrined in Sch 2 Cl 13.

Therefore, it was envisaged by both EARC, and by the legislature when it inserted the exemption provision into the *Judicial Review Act* relieving local authorities from its reasons obligation in respect of contract and tendering decisions, that such decisions were potentially reviewable under Part 3 of the *Judicial Review Act*. It must be remembered, however, that the EARC Report and the drafting of the *Judicial Review Act* occurred at a time when the *Berkeley Cleaning* line of authorities held that contract and tendering decisions were "under an enactment". However, the exemption has not been amended or repealed as a consequence of the decision in *General Newspapers*.

Surprisingly, in some recent cases where it would have been supposed that this very issue would have been important, the problem was not even alluded to. *Re RP Data Pty Ltd and Brisbane City Council* did not concern the very specific tendering and contracting provisions of the *City of Brisbane Act* but the broad "enterprise powers" of the *Local Government Act* 1993 which apply to the BCC. These powers are, arguably, of the conferral of capacity type, although there are some restrictions upon them. However, the Court of Appeal was dealing with a decision to enter into a contract and it appeared to be assumed that Part 3 of the *Judicial Review Act* applied without any indication as to why this was the case. Could it have been that the restrictions within the "enterprise powers", such as the need for a resolution and the need to seek appropriate advice,[73] were such as make the entering into a contract in exercise of the "enterprise powers" a decision which is relevantly "under" those provisions? It is a pity that the Court did not make the position clear.

In *Richards and Sons Pty Ltd v. Ipswich City Council*[74] the matter was not one which actually involved the Council entering into a contract with the applicants but, rather, the Council refusing to grant approval to the applicants to remove and dispose of waste pursuant to the *Health Act* 1937 (Qld). The applicants had not complied with the prescribed form such that there was no valid application made and the purported refusal could not have a "decision" for the purposes of Part 3 of the *Judicial Review Act*. The Court did not have to deal with the issue of entry into contract.

Another interesting point in cases such as *Concord Data* (although not dealing with local authorities) and *Re RP Data* was that in neither case did the Court consider the other limb of the definition in s.4(b) of the *Judicial Review Act*. Section 4(b) enables the Court to review a decision under Part 3 in situations where the decision has no proximity to any enactment" but is made....by a local authority "under a non-statutory scheme or program" which involves some public funding. The phrase "non-statutory scheme or program" has been defined quite widely to cover a whole range of matters from a single project or enterprise (a scheme) to a repetition of events (a program).[75]

73 Section 412 of the *Local Government Act*. Other restrictions appear in ss.413-415.

74 (Unreported, Queensland Supreme Court, Thomas J, 3 April 1995).

75 *Re South-East Brisbane Progress Association and Minister for Transport* (1993) 1 QAR 196.

The question is whether a decision by a government body to terminate a contract could be "under a non-statutory scheme or program". The answer would depend upon whether a contract could be relevantly regarded as a scheme or program within the definition provided. It may be stretching the meaning of the phrase to attempt to make a contract equate with a "scheme" or a "program" although if the contract formed part of an enterprise or project or a particular on-going program between a government body and others, there may be some scope for arguing that a decision to terminate the contract is one taken under the "scheme" or "program" within s.4(b). In *Blizzard v. O'Sullivan & Braddy*[76] the Court, after deciding that the termination of the contract was referable only to the contract and not the empowering statute, found that Part 3 did not apply without considering the possibility that s.4(b) might be relevant.

Another problem is with the requirement of a "non-statutory" scheme or program, which would entail a source not in statute but from the prerogative. Even on the view of the Court in *General Newspapers* that the empowering Act only confers capacity rather than requires or authorises the contract, it might be difficult to argue that entering into a contract is therefore under a non-statutory scheme or program. The significance of s.4(b) was not considered by the Court of Appeal in *Re RP Data* or by Thomas J in *Concord Data Solutions* either. Maybe the point was not raised in argument or the Court in both cases thought that decisions relating to entry into contracts were not under non-statutory schemes or programs. It is unfortunate that elaboration on this matter was not made, even if to deny that s.4(b) applied to contractual decisions, whether by local authorities or other government bodies.

(d) Standing

A short note should be made about standing to challenge tendering decisions by local authorities under the *Judicial Review Act*. To have standing to challenge a decision, whether under Part 3 or Part 5 of the *Judicial Review Act*, the applicant must be a "person whose interests are adversely affected by the decision"[77] The Federal Court, under the equivalent ADJR Act provision, has given the term a liberal but not unlimited meaning so as to require that a person show an interest which they have which is greater than that as a member of the general public.[78] Generally, being a business rival to other tenderers will not be sufficient. However, where there has been a tendering process pursuant to an invitation to tender, a tenderer will then be a "person aggrieved" for the purpose of challenging an adverse decision.[79]

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76 *Supra*, n.36.

77 Sections 7 and 44.

78 See *Right to Life Association (NSW) Inc v. Department of Human Services and Health* (1995) 128 ALR 238; *Tooheys Limited v. Minister for Business and Consumer Affairs* (1981) 36 ALR 64 at 79; *United States Tobacco Co v. Minister for Consumer Affairs* (1988) 83 ALR 79 at 86.

79 *Hawker Pacific Pty Ltd v. Freeland* ibid, at 190. See also *Hunter Brothers v. Brisbane City Council* [1984] 1 Qd R 328 at 336.

5. Summary

It appears that the following points can be made in respect of contract and tendering decisions made by Queensland local authorities:

1. Decisions to terminate a contract made by a local authority will generally be under the contract and not "under an enactment" for judicial review to take place under Part 3 of the *Judicial Review Act*. It is not even clear that Part 5 applies given the Federal Court's view in *ANU v. Burns* that the normal rules of contract law apply rather than principles of judicial review;
2. Decisions made by a local authority to enter into contracts generally under its broad powers[80] may, if the Supreme Court chooses to follow the view of the Full Federal Court in *General Newspapers*, be regarded as gaining their force and effect from the contract rather than from any constituting enactments.[81] This is because the general powers conferred on the local authorities by those enactments will be regarded as only providing a general capacity to contract not as requiring or authorising the contract. The matter appears to be governed entirely by the ordinary laws of contract.[82] However:
   (a) if the contract has been entered into for an ulterior purpose, such as private gain, Part 3 may apply because the challenge to validity is made by reference to the statute under which the contract was entered into.[83] However, there is no obligation on the local authority to provide reasons.[84]
   (b) if the "circumstance of the calling for the tenders implied rights...that the tenders would be dealt with in accordance with the conditions of tender and fairly, at least in a procedural sense", this might allow the Court to review the decision but not under Part 3.[85] Part 5 will be the relevant avenue to pursue.
3. Decisions made by a local authority to enter into contracts under specific contract and tendering provisions of their empowering statutes may be regarded as having been 'required or authorised' by those statutes. In such cases Part 3 would appear to apply.[86] However, it seems that the Supreme Court has always reviewed decisions to enter into contracts in situations where the conduct of the tendering process has gone beyond power or there is non-compliance with a mandatory statutory procedure. The cases of *Hunter Brothers* and *Maxwell Contracting* are clear illustrations.[87] Again, reasons may not be available to the applicant.

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80 See s.6A of the *City of Brisbane Act*; s.36 of the *Local Government Act*.
81 Such as the *City of Brisbane Act* or the *Local Government Act*.
82 *General Newspapers supra*, n.39 at 637.
83 *Ibid.*
84 See Sch 2 Cl 13. See also, *K C Park Safe v. Cairns City Council supra*, n.31 at 14.
85 *K C Park Safe v Cairns City Council supra*, n.31 at 7.
86 *General Newspapers supra*, n.39 at 637. See *K C Park Safe v. Cairns City Council supra*, n.31.
87 *K C Park Safe v Cairns City Council supra*, n.31 at 7.

It will be interesting to see whether the Court will continue adopt the approach of Thomas J in *K C Park Safe v. Cairns City Council* in reviewing a contracting or tendering decision made by local authorities so that recourse to judicial review remedies can be had in situations where private law remedies may be of little assistance.