AUSTRALIAN GOVERNMENT SOLICITOR

Commercial Notes

Number 5 30 August 2002

Legal and Probity Issues in Tendering

Cubic Transportation Systems v New South Wales
26 July 2002, [2002] NSWSC 656

Background

This case is a timely reminder of the complex legal and probity issues that can arise in relation to tender processes and the need to take legal/probity advice both in drafting the conditions of tender and in dealing with process issues as they arise.

The case involved a tender dispute under a 'Call for Revised Offers' document which was issued to 2 pre-selected proponents. The tender process related to the proposed acquisition of an Integrated Ticketing System (ITS) for Sydney's public transport system. The proposed arrangements for delivery of the ITS involved the preferred proponent contracting with 'the Principal', proposed to be a special purpose company having as its shareholders the participating operators and the relevant NSW Department.

Call for Revised Offers

The key provisions of the Call were:

- clause 3.1.1: 'Each Proponent agrees and acknowledges that notwithstanding anything contained in this Call (except in relation to the irrevocable offer described in Clause 3.1.17), no contractual relationship exists between the Principal, and Operator or its employees, agents, representatives or advisers, on the one hand and any Proponent, its agents, employees, representatives or advisers on the other hand in relation to the evaluation of revised Proposals, or otherwise in dealing with a Proponent in relation to the ITS.'
- clause 3.1.17: 'Each Proposal submitted in response to this Call will comprise an irrevocable offer by the Proponent to perform the undertakings and observe the representations and warranties set out in the Proposal. The irrevocable offer shall be given in consideration for the Principal agreeing to consider the Proposal (but it shall not be a term that the Principal must do so) in accordance with this Call. …'

The decision

The unsuccessful tenderer alleged that the selection process did not follow the procedures set out in the Call, was not a fair process and did not afford an equal opportunity to both tenderers. The concerns related to the evaluation of particular technical issues as well as allegations of bias or the perception of bias in the decision making process, including as a result of various conflicts of interest of some of the advisers. The Court dealt with each of the allegations in turn and found that in each case the decision making process was fair, there was no actual bias and no conflicts of interest existed.

Process contracts

After reviewing case law on process contracts (including *Hughes Aircraft Systems International v Air Services Australia* (1997) 76 FCR 151, and *Transit New Zealand v Pratt Contractors* [2002]

This issue

2 NZLR 313, but interestingly not *MBA Land Holdings v Gungahlin Development Authority* [2000] ACTSC 89), the Court found 'not without misgivings', that 'a contract of some kind was intended' based on the language of contract in clauses 3.1.1 and 3.1.17 of the Call. However, given the language of clause 3.1.1, the basis of the contractual obligations were as follows:

- There was no contractual relationship in relation to the *evaluation* of Proposals.
- The exception in the parentheses in clause 3.1.1 'relates entirely to a contractual obligation on the Principal to comply with the Call and, in particular, to consider the bids in light of the assessment of the Evaluation Committee, which it is to assist in the ways specified in section 3.2, appoint a Probity Auditor and consider any advice given by the Auditor as to probity concerns.'
- The words in clause 3.1.17 'do not require the *Principal* to assess or evaluate the bids in any particular way, except...in light of the assessment of the Evaluation Committee.'
- '...[T]he nature of the contractual obligations of the parties in the context of this tender, requires the implication of a term of reasonableness and good faith, especially because (so far as the Principal is concerned) of the broad powers the Call reserves to it to vary the Call and the processes under it.' This term was implied as a matter of law.
- The term meant that the specific reservations and unqualified powers in the Call, although not being read down, could not be exercised unreasonably or capriciously or dishonestly.
- The content of the implied term was that the Principal and the Government were obliged to act honestly, reasonably and fairly. However, this does not mean that the Principal is not entitled to have regard only to its own legitimate interests but it must not do so for a purpose extraneous to the contract.
- The process contract was between each of the members of the consortium and the Principal or the Department or both (the court considered that it did not need to finally determine this issue).

The Court also held that the provisions of the tender evaluation plans, being confidential internal documents, did not comprise a term of the process contract and accordingly the Proponents could not rely on any processes or requirements set out in the evaluation plans.

Procedural fairness

In addition to arguing that a process contract applied in relation to the tender process, the unsuccessful tenderer also argued that documentation governing the tender process gave rise to a legitimate expectation about the process to be followed in dealing with Proponents' bids.

The Court found that the particular imputations raised by the unsuccessful tenderer, which depended on alleged *perceptions* of bias, did not attract the judicial rule relating to natural justice and procedural fairness. However, the Court assumed that the rules of procedural fairness did circumscribe the procedures of Government, although their content must be related to the nature of the exercise being undertaken, which in the present case, was primarily a commercial one.

The allegations of unfairness

The re-evaluation issue

A key aspect of the tender evaluation involved consideration of the merit of the tenderers' technical systems. The system proposed by one of the tenderers (MASS/ITSL) was considered to be significantly more mature than the other (called Smartpost – effectively the unsuccessful tenderer). ITSL was recommended by the Evaluation Committee as the preferred tenderer largely because of this technical advantage.

However, before a decision was made, information came to light which suggested that the ITSL system

may not have been as mature as previously thought. Accordingly, a decision was made to review the technical findings. Additional information was considered at this point. That review resulted in some adjustment to the technical score for the ITSL system but the ultimate recommendation to select ITSL as the preferred tenderer was not changed.

After considering the factual background to the technical evaluation, including the circumstances surrounding the provision of the additional information which did not correspond fully with the Call, the Court found that the process was nevertheless fair and reasonable and equal opportunity was afforded to both proponents.

Bias and the evaluation team members

Two of the participants on the Technical Sub-Committee of the Evaluation Committee had had previous involvements with various participants in the unsuccessful tenderer's consortium which had ended in circumstances that might have suggested that they held ill-feeling towards the unsuccessful tenderer. The probity auditor examined the situation of each of these persons. Following *Hughes*, the Court held that the crucial question was whether there was any *actual* unfairness or *actual* bias, rather than an apprehension of bias or the possibility of the reasonable apprehension of bias. There was not a duty to ensure that a reasonable person would not apprehend the possibility of bias. The Court found that there was no actual bias.

Conflict of interest

Both the legal adviser (who was also a member of one of the Evaluation Sub-Committees) and the probity auditor were alleged to have had conflicts of interest in that other partners in their firms had instructions to act for ITSL related parties in relation to various matters unconnected with the tender process. In particular, the Melbourne office of the legal adviser was handling some litigation for One Link which was related to ITSL, while the probity auditor provided tax advice for another company associated with ITSL. The Court made the following comments:

- The probity auditor examined the arrangements put in place by the legal adviser to establish Chinese walls and considered that they were acceptable. The Court considered that there was in fact as well as in law no conflict of interest.
- The only issue was whether there was a real risk of breach of confidence – the Court noted that the legal adviser had no fiduciary obligation of confidence to the unsuccessful tenderer or any duty, breach of which could provide a basis for it to prevent the Government from entering into a contract with ITSL.
- Similarly, the probity auditor was found not to have a conflict of interest as it was not required to make any financial assessment of the ITSL bid and there was no suggestion that the individuals acting as probity auditors in relation to the ITSL tender had any knowledge of information on the tax matters in any case.

Role of the probity auditor

The Court found that as far as the government was concerned, having appointed the probity auditor, it was entitled to rely on that person's resolution of probity issues, whatever the deficiencies in the investigation process adopted by the probity auditor may have been, unless the Government had failed to provide necessary information to the probity auditor.

Comments about the Call document

While the Court ultimately found in favour of the Government, it made a number of comments about the Call document that are worthy of consideration:

- The Court severely criticised the drafting of the Call document, noting 'the obscurities and confusion of even the most important provisions' and the fact that the document appeared to be a patchwork.
- The Court noted that the threat of litigation may distort and encumber the process which highlights the need for ensuring the document is clear about actual undertakings and legal obligations – '[a]spirational statements may provide a warm inner glow but they are no substitute for unambiguous language targeted at actual risks with clearly stated consequences.'

- The Call included a clause requiring that Proponents pay their own costs and in particular excluding liability for any losses and expenses in developing or pursuing a proposal. This case related to injunctive relief to prevent a contract being signed. The Court noted that this clause did not protect the Principal from an action directed to the failure to make a valid recommendation owing to flaws in the process.

Improper conduct of the unsuccessful tenderer

It is important to note that the Court found that the unsuccessful tenderer had not come to the matter 'with clean hands' and that it had shown 'lack of good faith and positive dishonesty'. The Court held that, had it been necessary for it to do so, it would have given judgment to the defendants on this ground alone. The matters in question included the receipt by the unsuccessful tenderer of confidential information about the tender evaluation process and a plan by the unsuccessful tenderer to effectively stop the tender process if they were not to be the preferred tenderer. Accordingly, it seems that the conduct of an aggrieved tenderer could ultimately lead a Court to refuse a remedy even where the tenderer could show that a particular tender process was flawed.

Contacts for further information:

Harry Dunstall
Senior Executive Lawyer

Tel: (02) 6253 7066
Fax: (02) 6253 7333
E-Mail: harry.dunstall@ags.gov.au

Cathy Reid
Senior Executive Lawyer

Tel: (03) 9242 1203
Fax: (03) 9242 1481
E-Mail: cathy.reid@ags.gov.au

Employee or Contractor?

Difficulties often arise in determining whether a person performing duties for a government entity is an employee or an independent contractor. The worker's status can have important implications for the entity – for example, it can affect whether the entity will be vicariously liable for the worker's actions, or whether the worker can seek a remedy for unfair dismissal if their services are terminated.

When considering whether an employment relationship exists between two parties, a court will initially examine the terms of any contract between the worker and the purported employer. However, in order to avoid an employment relationship being found, it may not be enough to simply state in the contract that the worker is not an employee. The court will not accept the label put on the relationship by the parties if this label contradicts the effect of the agreement as a whole, or if subsequent conduct by the parties has varied the terms of this agreement.

It may be that the contract is unclear as to the nature of the relationship; or there may be no contract between the two parties at all. For example, where a worker has been supplied to a government entity by a labour hire firm, the entity may well have a contract with the labour hire firm, but not with the worker directly. There is usually no legal relationship between the Commonwealth and the worker in these circumstances. However, where there is a legal relationship, the court will look at a variety of matters to determine whether this is an employment relationship, using the multi-factor test outlined by the High Court in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16. The factors to be taken into account include whether the purported employer has the right to exercise control over the worker ('the control test'); the mode of remuneration – such as whether the worker is paid wages, or a set fee per hour; whether the worker or the employer provides the required equipment for the work; the hours of work and provision for holidays; the deduction of income tax; and whether the worker

must perform the work personally, or may delegate or sub-contract it to others.

The High Court case of *Hollis v Vabu Pty Ltd* [2001] HCA 44 reinforced the importance of the control test in determining whether a worker is an employee or an independent contractor. However the High Court also confirmed that it is the totality of the relationship between the parties which must be considered. In *Hollis v Vabu*, the High Court had to consider whether bicycle couriers were employees of the courier company for whom they delivered goods, or independent contractors. In finding that the couriers were employees, the High Court took into account such factors as:

- the couriers were not providing skilled labour or labour which required special qualifications
- the couriers had little control over the manner of performing their work – they were assigned work rosters, could not refuse work, and were to deliver goods as directed by the courier company
- the couriers were presented to the public as representatives of the courier company – for example, by having to wear uniforms
- the courier company superintended the couriers' finances – for example, there was no scope for the couriers to bargain for their remuneration rate.

Significantly, the High Court's finding that an employment relationship existed allowed the Court to go on to find that the courier company, as an employer, was vicariously liable for the actions of one of its couriers, who had injured a pedestrian. This outcome highlights the importance for government entities of having a clear understanding of whether their workers are employees or independent contractors.

Contact for further information:

Kate Brophy
Lawyer

Tel: (02) 6253 7192
Fax: (02) 6253 7306
E-Mail: kate.brophy@ags.gov.au

New Commonwealth National Lease

AGS has recently produced a new version of the Commonwealth National Lease. The earliest version of the Commonwealth National Lease commenced its life at the National Tenant's Lease in the early 1990s and through its various versions has been the benchmark for the acquisition by lease of commercial office accommodation for Commonwealth agencies.

The lease reflects a balanced allocation of risk between the landlord and the tenant as opposed to the more common forms of commercial lease which tend to place most risk with the tenant.

The lease is appropriate for use in any method of acquisition (including inviting expressions of interest, calling tenders or simply negotiation by private treaty) and is compatible with all forms of project delivery ranging from design, construction and lease to the lease of existing commercial office accommodation.

General features

An emphasis on plain-English drafting makes the lease easier to read and understand. The revised form and structure, together with headings which summarise paragraph content, make for a more 'user-friendly' document.

Amendments have resulted from testing the lease provisions against current market and tenancy issues. For example:

- provisions which deal with performance standards for the operation and maintenance of building services adopt Australian Standards as a benchmark
- fixed time frames have been adopted for dispute resolution, and
- if the tenant removes its fittings it must effect that removal prior to the expiry or termination of the Lease.

Changes in law and practice have been addressed. For example:

- the GST provision has been simplified and covers supplies made by each party, and
- requirements which attach to the consent of a party are common for each consent.

Special features

Treatment of rent

The Lease adopts a gross rent (exclusive of GST) which includes all outgoings except for tenancy cleaning, electricity, water and gas. We believe a gross rent benefits both parties and is preferable to a net rent (tenant pays a base rent plus outgoings) for the following reasons:

- an acceptable definition which exhaustively defines the nature and extent of outgoings is elusive
- the costs incurred by each party in the management and administration of outgoings for the term of the lease is high, and
- disputes concerning whether an item of expenditure falls within the definition of outgoings or whether the quantum of expenditure is both reasonable and necessary are avoided.

If rent is not fixed for the duration of the Lease, the term is divided into rent periods commencing on the Commencement Date of the Lease and on each review date for rent. Rent for the first rent period is specified. Provided a rent review notice is given by one party to the other, rent for each subsequent rent period is fixed by agreement or failing agreement is equivalent to the open market rental value of the premises determined by a valuer acting as an expert. The provision provides certainty, since if both parties fail to give a review notice, rent remains unchanged.

Maintenance and repair

The tenant must keep and maintain the premises, including its fittings and alterations, in good repair and condition subject to fair wear and tear and risks which are specified. In return, the landlord must keep and maintain the premises and the building subject to the obligations of the tenant. The tenant has no responsibility for the maintenance and repair of the building services or the building structure except where that damage is caused by its act or omission.

The landlord has important obligations to operate and maintain the building services which must satisfy:

- standards specified in the Lease, and
- Australian Standards and Industry Standards effective at the commencement of the Lease.

The landlord must effect maintenance contracts with respect to the building services in accordance with the relevant Australian Standards and provide the tenant with certain information and certificates of compliance at regular intervals.

The tenant has the following remedies for the malfunction of a building service which is not rectified within two working days after notice to the landlord:

- abatement of rent
- termination, if in the written opinion of an expert the malfunction is unlikely to be rectified within three months from the date of that opinion, or
- the tenant may rectify the failure at the landlord's cost if the malfunction remains uncorrected for a period of five further working days.

The tenant is permitted to make alterations subject to a number of conditions. Property in the tenant's fittings and its obligations vest in the tenant who must maintain and repair those items.

The tenant has the right, but not the obligation, to remove its fittings and alterations on or before the expiry or termination of the Lease. Subject to the tenant making good damage caused by the removal of its fittings and alterations, the tenant is not obliged

to make good or otherwise restore the premises on the expiry or termination of the Lease.

Landlord's warranties

The landlord warrants that premises and the building are:

- free of materials containing asbestos or any other hazardous substance
- fit for use in accordance with the permitted use, and
- comply with the specified performance standards, the relevant Australian Standards and the industry standards effective at the Commencement Date.

Subject to the provisions of the Lease which deal with damage and destruction, the landlord's warranty is expressed to apply at all times during the term of the Lease.

The landlord provides warranties in relation to its insurance and in particular, that the Lease does not affect its rights to be indemnified under those insurances.

Obligations to comply with laws

The tenant must comply with all laws relating to the use of the premises, except those requiring structural alterations or additions. The landlord must comply with all laws which are not the responsibility of the tenant.

Tenant's right to assign and sub-lease

The tenant may assign and sub-lease with the consent of the landlord. The Lease identifies the information which must be provided by the tenant and the conditions which the tenant must satisfy to secure the consent. For example, the landlord's consent to an assignment is conditional on a Deed or Agreement in which the assignee agrees to perform, in favour of the landlord, the obligations of the tenant under the lease and the provision by the assignee of a security reasonably required by the landlord.

Landlord's insurance obligations

The landlord must effect joint (composite) insurance or alternatively, ensure that the tenant's interests are noted in each of the insurances. In the case of joint insurances, the tenant may elect to have its fittings and alterations included in the policy for the building for full reinstatement or replacement value given that the tenant must keep and maintain its fittings and alterations. If the tenant makes the election, it must reimburse the landlord for all additional premiums as a result of the inclusion. The election permits an integrated reinstatement of the building and the tenant's fitout, without additional cost to the tenant.

In the event of damage or destruction, the landlord must reinstate the premises if the tenant requires and apply the proceeds of the insurance to that reinstatement.

Insurance is important to the tenant as it is required to perform an obligation under the Lease only to the extent that the landlord is not entitled to receive indemnity under a policy of insurance required by the Lease.

Premises unfit for occupation and use

If the premises or the building become wholly or partially unfit or are otherwise inaccessible, the rent or a proportion of the rent having regard to the nature of the damage or inaccessibility, is suspended until reinstatement has been completed. The tenant has limited rights to terminate the Lease if the premises or the building are rendered unfit for occupation and use or are inaccessible.

The landlord must restore the premises and the building in the event of partial unfitness and subject to the tenant's limited right to require reinstatement, the landlord may terminate the Lease if the premises or the building are rendered wholly unfit for occupation and use.

Default and termination

The Lease defines default by each party and specifies the remedies. The tenant's default includes

rent being unpaid for not less than thirty days after it becomes due or a failure to commence repairs within thirty days after the landlord's notice and to proceed diligently to complete those repairs. Default by the landlord includes a failure to commence repairs or maintenance within thirty days after the tenant's notice and to proceed diligently to complete those repairs.

Resolution of disputes

Each party is permitted to refer a dispute for determination by an expert if the dispute is not resolved within a fixed time after giving notice of that dispute to the other party. Each party may make submissions to the expert within a fixed time. If the expert fails to make a determination within a fixed time, either party may require the appointment of a further expert to determine the dispute. The expert must provide a written statement of reasons for the determination which is expressed to be conclusive and binding on the parties.

How to use the lease

The extent to which the terms of the Lease are applied will depend on the early development of a lease acquisition strategy which allows the tenant to examine and test the market prior to the commencement of the term. This will involve:

- the preparation of a tenancy brief which identifies all user and technical requirements, and
- choosing the method of project delivery and the manner in which the requirement will be put to the market.

The preparation of the tenancy brief and the matters which must be considered in selecting the method of project delivery justify the procurement of project management, property, valuation and legal advice. AGS is able to provide advice in relation to:

- the structure and inter-relationship of the consultancies
- the alternative forms of project delivery
- the documentation for use in conjunction with the Lease to facilitate the chosen form of project delivery
- evaluation of proposals and the negotiation of an agreement and lease, and
- the management of the agreement and lease.

Contact for further information:

Robert Claybourn
Senior Executive Lawyer

Tel: (07) 3360 5767
Fax: (07) 3360 5798
E-Mail: robert.claybourn@ags.gov.au

Commonwealth Privacy Legislation: Implications for Commonwealth Agencies

Extension of privacy regulation to the private sector

On 21 December 2001, the *Privacy Amendment (Private Sector) Act 2000* (the Private Sector Act) came into effect. The Private Sector Act amends the Privacy Act 1988 (Cth) (the Act) by extending the regulation of privacy to private sector organisations.[1] Specifically, the Private Sector Act establishes a co-regulatory regime which obliges organisations when dealing with 'personal information'[2] to comply with the National Privacy Principles (NPPs) or an Approved Privacy Code (APC).[3]

Application of the Private Sector Act to agencies – section 95B

The Private Sector Act imposes certain requirements upon Commonwealth agencies[4] in dealing with private sector organisations. Section 95B requires an agency entering into a Commonwealth contract[5] to take contractual measures to ensure that a 'contracted service provider'[6] for the contract does

not do an act, or engage in a practice, that would breach an Information Privacy Principle (IPP) if that act were done or the practice engaged in by the agency. The agency must also ensure that the Commonwealth contract contains provisions to ensure that such an act or practice is not authorised by a subcontract [7] relating to the provision of the services.

Commencement of obligations under section 95B

The obligation upon agencies to take contractual measures to comply with section 95B of the Act is prospective and therefore applies to all Commonwealth contracts entered into on or after 21 December 2001. However, even before the commencement of section 95B, it was arguable that IPP4(b) required agencies to include provisions in their contracts preventing the unauthorised use or disclosure of personal information contained in a record.

Application of the NPPs or an APC

By virtue of section 6D(4)(e) of the Act, a contracted service provider for a Commonwealth contract is not a 'small business operator'. Accordingly, at least for the purposes of its activities under a Commonwealth contract, a contracted service provider (regardless of size) is deemed to be an 'organisation' under the Act and therefore subject to the NPPs or an APC in relation to those activities. However, a contracted service provider may be defined as a small business operator (and therefore not an 'organisation') in relation to its activities *outside* the Commonwealth contract and in that capacity, would not be subject to the NPPs or an APC.

Significantly, if a contracted service provider does an act or engages in a practice for the purposes of meeting (directly or indirectly) an obligation under the Commonwealth contract (whether entered into before or after 21 December 2001) and the act or practice is authorised by a provision of the contract that is inconsistent with the NPPs or an APC respectively, then that act or practice will not contravene the NPPs or the APC. [8]

Comparison of the NPPs and the IPPs

As a contracted service provider will be obliged to comply with the IPPs under provisions in a Commonwealth contract, the effect of that obligation is that the IPPs will prevail to the extent that they are inconsistent with the NPPs (or an APC). In general terms, compliance with the IPPs by a contracted service provider will in any event satisfy the requirements of all but four of the NPPs for which there are no equivalent IPPs. These four are NPPs 7 (Identifiers), 8 (Anonymity), 9 (Transborder data flows) and 10 (Sensitive Information).

In view of the above, it is probably good practice to refer in a Commonwealth contract to a contracted service provider's obligations to comply with NPPs 7–10 in order to assist the contracted service provider to identify its obligations under the Privacy Act. [9] This is particularly the case as the Privacy Commissioner has the discretion to substitute an agency for a contracted service provider as respondent to a complaint under section 50A. In this context, the inclusion of an obligation in a Commonwealth contract that the contracted service provider must comply with the NPPs could arguably support an agency's submissions that it should not be substituted as respondent to the complaint.

Direct marketing – section 16F

Agencies should also be aware that section 16F of the Act provides that a contracted service provider must not use or disclose personal information for direct marketing unless the use or disclosure is necessary to meet (directly or indirectly) an obligation under the contract. Again, in order to assist a contracted service provider to become aware of its obligations under the Act, it will if relevant, be necessary to include provisions in a Commonwealth contract which expressly state the extent to which disclosure of personal information is required to meet an obligation under that contract for the purposes of the section.

Interference with privacy

Under section 13A of the Privacy Act, an act or practice of an organisation constitutes an 'interference with privacy' of an individual if:

- the act or practice breaches an NPP or an APC to which the organisation is bound; or
- the act or practice breaches a provision of a Commonwealth contract relating to privacy of the individual; or
- the organisation is in breach of section 16F.

It should be emphasised that the definition of 'contracted service provider' in the Act has the effect of extending any privacy obligations imposed on a contracted service provider in relation to a Commonwealth contract beyond the duration of the Commonwealth contract.

For a similar reason, a breach of any privacy obligations imposed under a Commonwealth contract entered into prior to 21 December 2001 will also constitute an interference with privacy for the purposes of section 13A of the Privacy Act.

Privacy clause

The following model clause was drafted by AGS in consultation with the Attorney-General's Department and the Office of Federal Privacy Commissioner. It takes account of the principles outlined in this note. We emphasise that this is the initial version of the AGS model clause which AGS may if necessary modify in the light of experience with its use. In addition, agencies using this model clause will need to consider whether it should be amended to suit their own particular circumstances.

Model Clause: Protection of Personal Information [1]

The following model clause is provided to assist Commonwealth agencies in discharging their responsibilities under section 95B of the Privacy Act. Agencies are reminded that changes to these clauses may be necessary to reflect particular situations. If any difficulties are expressed with implementation of the clause please contact AGS.

X.1 This clause applies only where the Consultant deals with personal information when, and for the purpose of, providing [services] under this Contract.

X.2 The Consultant acknowledges that it is a 'contracted service provider' within the meaning of section 6 of the *Privacy Act 1988* (the Privacy Act), and agrees in respect of the provision of [services] under this Contract:

(a) to use personal information obtained during the course of providing [services] under this Contract, only for the purposes of this Contact;

(b) not to do any act or engage in any practice that would breach an Information Privacy Principle (IPP) contained in section 14 of the Privacy Act, which if done or engaged in by an agency, would be a breach of that IPP;

(c) to carry out and discharge the obligations contained in the IPPs as if it were an agency under that Act;

(d) to notify individuals whose personal information the Consultant holds, that complaints about acts or practices of the Consultant may be investigated by the Privacy Commissioner who has power to award compensation against the Consultant in appropriate circumstances;

(e) not to use or disclose personal information or engage in an act or practice that would breach section 16F (direct marketing), an NPP (particularly

NPPs 7 to10) or an APC, where that section, NPP or APC is applicable to the Consultant, unless:

(i) in the case of section 16F – the use or disclosure is necessary, directly or indirectly, to discharge an obligation under [clause ?] of this Contract; or

(ii) in the case of an NPP or an APC – where the activity or practice is engaged in for the purpose of discharging, directly or indirectly, an obligation under [clause ?] of this Contract, and the activity or practice which is authorised by [clause ?]of this Contract is inconsistent with the NPP or APC; [2]

(f) to disclose in writing to any person who asks, the content of the provisions of this Contract (if any) that are inconsistent with an NPP or an APC binding a party to this Contract; [3]

(g) to immediately notify the agency if the Consultant becomes aware of a breach or possible breach of any of the obligations contained in, or referred to in, this clause X, whether by the Consultant or any subcontractor;

(h) to comply with any directions, guidelines, determinations or recommendations referred to in, or relating to the matters, set out in Schedule X, [4] to the extent that they are not inconsistent with the requirements of this clause; and

(i) to ensure that any employee of the Consultant who is required to deal with personal information for the purposes of this Contract is made aware of the obligations of the Consultant set out in this clause X.

X.3 The Consultant agrees to ensure that any subcontract entered into for the purpose of fulfilling its obligations under this Contract contains provisions to ensure that the subcontractor has the same awareness and obligations as the Consultant has under this clause, including the requirement in relation to subcontracts.

X.4 The Consultant agrees to indemnify the Commonwealth in respect of any loss, liability or expense suffered or incurred by the Commonwealth which arises directly or indirectly from a breach of any of the obligations of the Consultant under this clause X, or a subcontractor under the subcontract provisions referred to in subclause X.3.

X.5 In this clause X, the terms ‘agency’, ‘approved privacy code’ (APC), ‘Information Privacy Principles’ (IPPs), and ‘National Privacy Principles’ (NPPs) have the same meaning as they have in section 6 of the Privacy Act, and ‘personal information’, which also has the meaning it has in section 6 of the Privacy Act, means:

> ‘information or an opinion (including information or an opinion forming part of a database), whether true or not and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion’.

X.6 The IPPs and the NPPs are set out in Attachment A and B, respectively. [optional]

X.7 The provisions of this clause X survive termination or expiration of this Contract.

Notes to Model Clause

1 See ‘Guidelines for Commonwealth Contracts’ Information Sheet No. 14 issued by the Federal Privacy Commissioner and available at www.privacy.gov.au.

2 Note that section 6A requires that the Consultant be ‘obliged’ to carry out the activity. Where possible the relevant clause numbers should be noted here.

3 Section 95C Privacy Act.

4 This Schedule should include any specific matters, for example, agency and Privacy Commissioner’s guidelines which the agency wishes the CSP to comply with.

Notes

1 'Organisation' is defined in the Private Sector Act to mean an individual, body corporate, partnership or any other unincorporated association or trust that is not a small business operator, registered political party, agency, State or Territory authority or prescribed instrumentality of a State or Territory.

'Small business operator' does not include an individual, body corporate, partnership, unincorporated association or trusts if he, she or it: (i) carries on a business having an annual turnover of more than $3 million for financial year; (ii) provides a health service to another individual and holds any health information except in an employee record; (iii) discloses personal information about another individual to anyone else for a benefit, service or advantage; (iv) provides a benefit, service or advantage to collect personal information about another individual from anyone else; or (v) is a contracted service provider for a Commonwealth contract (whether or not a party to the contract).

2 'Personal Information' means information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can be reasonably ascertained from the information or opinion.

3 An APC is a privacy code developed by the relevant industry and approved by the Privacy Commissioner which contains privacy requirements of an equivalent standard to the NPPs.

4 'Agency' includes Commonwealth Departments and statutory authorities.

5 'Commonwealth contract' means a contract to which the Commonwealth or a Commonwealth Agency is or was a party, under which services are to be or were to be provided by a Commonwealth agency. Section 6(9) clarifies that services provided to an agency include the provision of services to other persons in connection with the performance of the functions of the agency.

6 'Contracted service provider' means: (i) an organisation that is or was a party to the government contract and that is or was responsible for the provision of services to an agency or a State or Territory authority under the government contract; or (ii) a subcontractor for a government contract.

7 'Subcontract' includes all subcontracts beyond the initial subcontract.

8 See sections 6A(2) and 6B(2) of the Act.

9 See 'Privacy Obligations for Commonwealth Contracts', Office of the Federal Privacy Commissioner, Information Sheet 14 – 2001.

Contacts for further information:

Rachel Chua
Senior Lawyer

Tel: (02) 6253 7086
Fax: (02) 6253 7306
E-Mail: rachel.chua@ags.gov.au

Madeline Campbell
Senior Executive Lawyer

Tel: (02) 6253 7408
Fax: (02) 6253 7381
E-Mail: madeline.campbell@ags.gov.au

For further information on commercial law matters and services please contact:

National	
John Scala	(03) 9242 1321
Canberra	
Harry Dunstall	(02) 6253 7066
Anne Caine	(02) 6253 7145
Anne Kelly	(02) 6253 7004
New South Wales	
Simon Konecny	(02) 9581 7585
John Berg	(02) 9581 7624
Victoria	
Paul Lang	(03) 9242 1322
Josephine Ziino	(03) 9242 1312
Queensland	
Robert Claybourn	(07) 3360 5767
Western Australia	
Lee-Sai Choo	(08) 9268 1137
South Australia	
David Williams	(08) 8205 4283
Northern Territory	
Ashley Heath	(08) 8943 1444
Tasmania	
Peter Bowen	(03) 6220 5474

For assistance with supply of copies, change of address details etc please Tel: (02) 6253 7052, Fax: (02) 6253 7313, E-mail: ags@ags.gov.au Text will be available via the AGS Internet site: see 'For Clients' on 'http://ags.gov.au'.

ISSN 1443-9549