NORTHERN TERRITORY OF AUSTRALIA v SKYWEST AIRLINES PTY LTD

Court of Appeal of the Northern Territory of Australia

O'Leary CJ, Kearney & Asche JJ.

9, 10, 11 March and 30 June 1987 at Darwin

Contract - Government contract - Power of the Territory to contract - Mode and means of entering into a contract - Authority to contract - Contracts Act 1978 (NT) ss. 5, 7; Financial Administration & Audit Act 1978 (NT) ss. 35 and 78.

Contract - Authority to contract - Tender Board - Treasurer's Directions - Whether Directions ultra vires - Power of the Treasurer - Treasury Regulations - Regulation 10; Financial Administration & Audit Act s.35.

Contract - Offer and acceptance - Acceptance of offer - Notification - Authority to notify - Whether acceptance validly communicated.

Contract - Specific performance - Government contract - Breach - Availability of remedy.

Crown - Government contract - Crown in the right of the Territory - Power to contract - Executive power - Northern Territory (Self-Government) Act 1978 (Cth) ss. 31 and 32.

Statute - Interpretation - Whether provisions facultative or restrictive - Power of the Territory to contract - Mode and means of contracting - Contracts Act 1978 (NT) ss. 5 and 7.

Cases applied:

New South Wales v Bardolph (1934) 52 C.L.R. 455

Cases referred to:

Australian Broadcasting Tribunal v Saatchi (1985) 60 ALR 756
Commonwealth v Rhind (1966) 119 C.L.R. 584
Coogee Esplanade Surf Motel Pty. Ltd. v Commonwealth of Australia 50 ALR 363
Keboki Business Group (Inc) v The Independent State of Papua New Guinea (1984) P.N.G.L.R. 281; (1985) P.N.G.L.R. 369
Lockwood v Commonwealth (1954) 90 C.L.R. 177
McGuire v Simpson 139 C.L.R. 362
Minister for Aboriginal Affairs & Anor. v Peko-Wallsend Ltd. & Ors. 66 ALR 299

Rock Island, A. & L.R. Co. v United States (1920) 254 U.S. 141
R. v Mayor of City of Wellington (1896) N.Z.L.R. 72

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IN THE COURT OF APPEAL
IN THE NORTHERN TERRITORY
OF AUSTRALIA

No. AP 1 of 1987

ON APPEAL FROM THE SUPREME
COURT OF THE NORTHERN TERRITORY
NO. 919 of 1986

BETWEEN:

THE NORTHERN TERRITORY
OF AUSTRALIA

Appellant

AND:

SKYWEST AIRLINES PTY LTD

Respondent

CORAM: O'Leary CJ, Kearney and Asche JJ.

REASONS FOR JUDGMENT
(Delivered 30 June 1987)

O'LEARY C.J.: This appeal raises for consideration a number of questions arising out of a decision of the General Tender Board of the Government of the Northern Territory awarding a Government contract to the respondent. The contract in question is a contract for the supply of aerial medical flight services to the Darwin and East Arnhem regions of the Territory. They are services that are required by the Government as incidental to the administration of the Department of Health.

The provisions regulating the procurement of supplies and services for the Government of the Northern Territory are to be found in Regulations called Treasury

Regulations made under the Financial Administration and Audit Act 1978 (NT), and in Treasurer's Directions issued under that Act. Before proceeding to consider the facts of the case, it is necessary to set out what those provisions are.

Treasury Regulations are made pursuant to s.78 of the Act which empowers the Administrator to make regulations not inconsistent with the Act for the carrying out of its provisions, and in particular for and in relation to a number of specific matters, including "(e) the execution of works and the supply of services for or on behalf of the Territory". Part III of the Regulations is entitled "Contracts", and deals with the procurement of "supplies" for the Territory, "supplies" being defined for the purposes of the Regulations as "supplies that are to be executed, furnished or performed for or by the Territory, and includes works, stores and services that are so executed, furnished or performed". In general terms, the Regulations in Part III (Regs. 8-14) are concerned with laying down procedures for the requisitioning of supplies for the Territory, for the obtaining of quotations, and, in certain cases, for the invitation of public tenders for the provision of supplies. The relevant Regulation for present purposes is that which requires the calling of public tenders. It is Regulation 10, and is in these terms:

"10. (1) Subject to this Part, where the amount to be expended in an order for supplies is in excess of $10,000 the subject of the order shall be submitted to a tender board for the invitation of public tenders.

(2) A tender board referred to in sub-regulation (1) shall be established by the Treasurer and shall consist of at least 3 people.

(3) A tender board established under this regulation shall carry out its functions independently but tenders shall be processed in accordance with the Treasurer's Directions."

The expression "Treasurer's Directions" there used is defined in the Regulations (Reg.2) as meaning "Directions given by the Treasurer under the Act". The section of the Act which provides for the issue of Treasurer's Directions is s.35 which is as follows:

"35. TREASURER'S DIRECTIONS

(1) The Treasurer may, from time to time, prepare and issue directions to accountable officers with respect to the principles, practices and procedures to be observed in the administration of the financial affairs of the Territory and may at any time amend, vary or cancel a direction so issued.

(2) Every accountable officer, every accounting officer and every employee shall, subject to this Act, comply with the Treasurer's Directions."

An "accountable officer" is a person appointed as such by or under s.25 of the Act. That section provides

(inter alia) that "each departmental head shall be responsible for the financial administration of his department and shall be the accountable officer for that department."

The Directions given by the Treasurer for the purposes of Reg. 10(3) (supra) are contained in Section 20 of the Treasurer's Directions issued pursuant to S. 35 of the Act. That Section is entitled "PURCHASING PROCEDURE", and the object of the procedures set out in that section is explained in Direction 20.1 as follows:

> "PURCHASE OF SUPPLIES
>
> 20.1 The procedure for obtaining supplies is directed to their purchase at the lowest price consistent with satisfactory quality and in a manner that is above public criticism. It is a fundamental principle of government purchasing that public tenders will be invited for supplies. This rule does not apply:
>
> (a) if the estimated cost does not exceed $10,000 (when at least three representatives shall, whenever possible, be obtained);
>
> (b) where for certain classes of supplies, the Treasurer or his delegate certifies that the inviting of tenders is impracticable or inexpedient.
>
> 20.2 The Accounting and Property Manual issued by an Accountable Officer shall ensure that employees are made aware of the need to pay due regard at all times to economy in purchasing. The Manual should make provision for the use of existing contracts (see Direction 20/3),

> and also for the invitation of public tenders wherever it is reasonable to expect that this will result in more economical purchasing - notwithstanding that the amount of the purchase is below $10,000."

Direction 20.14 deals with tenders and quotations and explains the intention of the Regulations relating to these thus:

> "20.14 The underlying intention of Regulations 8 to 14 is that the procurement procedures of the Territory Government should be, and be seen to be, beyond reproach: i.e. that all who wish to participate in Territory Government business are given the opportunity to do so, that the Territory maintains a reputation for fair dealing and that Territory moneys are spent effectively and economically. This intention is best achieved by the public invitation of tenders by press or Gazette advertisements and the subsequent publication in the Gazette of details of contracts arranged (Regulation 14). It is not, however, always appropriate to call tenders or publish details of contracts and the Regulations provide for alternative procedures."

The arrangement of Territory Government contracts is then dealt with by Direction 20.17 which provides:

"ARRANGEMENT OF TERRITORY GOVERNMENT CONTRACTS

20.17 Territory Government contracts shall be arranged except where:

(a) the estimated cost of the required supplies/service does not exceed $10,000;

(b) there is an existing contract arranged by the Territory Government - Regulation 11(1) and Direction 20/19;

(c) an existing Commonwealth, State or another Territory's contract is to be used - Regulation 11(2) and Direction 20/20;

(d) there is a general exemption from the need for tender action relating to the class of supplies/service - Regulation 12 and Directions 20/22;

(e) a certificate of inexpediency has been given in respect of the particular supplies/service - Regulation 12 and Directions 20/22 and 20/23.

Adequate specifications must be submitted to the appropriate tender board, which will invite public tenders under Regulation 10 and <u>enter into a contract on behalf of the Territory Government</u>." (Emphasis mine)

Direction 20.18 provides:

"20.18 The specifications should contain a detailed description of the supplies/service, compiled in such a manner that their nature will be apparent to all potential tenderers, e.g., measurement, capacity, similarity with an article manufactured by a particular firm, etc. Adequate instructions regarding required delivery date, packing, marking, etc should be given in all specifications."

As required by Regulation 10(2), the Treasurer established (amongst others) a General Tender Board, and appointed people to it. At the time relevant to these proceedings those people were:

Member and Chairman	Chief Executive Officer of the Treasury Department or his delegate.
Member and Deputy Chairman	Chairman, Northern Territory Development Corporation or his delegate
Member	Secretary, Department of Transport and Works, or his delegate
Member	Secretary, Department of Health, or his delegate
Member	Secretary, Department of Education, or his delegate.

In accordance with these procedures then, on or about 9 July 1986 the General Tender Board of the Government of the Northern Territory called tenders for the aerial medical flight services to which I have referred. That was done in a document entitled "Request for Tender". The Request for Tender comprised a number of documents which were collectively referred to as the Schedule. They were:

Preamble

Part "A" Specifications (these were specifications referred to in Treasurer's Direction 20.17 and 20.18)

Part "B" Special Conditions

Part "C" General Conditions of Tender and Contract for the Performance of Services

Part "D" Information/Data to be supplied by Tenderer

Part "E" Declaration by Tenderer

Part "F" Certificate of Flight (Sample)
Attachment 1 - Map of Region
Attachment 2 - List of Airstrips within Regions.

The Preamble contained the following (amongst other) terms:

"ACCEPTANCE

The lowest or any tender will not necessarily be accepted and no tender shall be deemed to have been accepted unless and until the fact of such acceptance has been notified to the tenderer in writing by or on behalf of the General Tender Board.

DOCUMENTS FORMING THE CONTRACT

The Schedule, any subsequent written amendment and the Letter of Acceptance from the General Tender Board shall comprise the contract.

GENERAL CONDITIONS OF TENDER AND CONTRACT

This tender shall be deemed to have been submitted subject to the Northern Territory of Australia, General Conditions of Tender and Contract for the Performance of Services. (Part "C")."

In response to that Request, offers were received from four tenderers. One was from the respondent Skywest

Pty Ltd ("Skywest") which, in fact, submitted three options, A, B and C; another was from a company Air North Pty Ltd ("Air North") the then current contractor; the other two are not relevant to these proceedings. It appears that, on receipt of the tenders and before considering them itself, the General Tender Board referred them to the Department of Health for its assessment and recommendations. The Department's assessment of the offers, and its recommendation were conveyed to the General Tender Board by the Secretary for Health, Dr Ella Stack, by letter dated 15 October 1986. In her letter she had this to say:

> "Only one company (Skywest) complied fully with all of the specifications. Of major importance was the requirement to provide a reasonable service in terms of aircraft availability to meet the demands of the Department. Only Skywest complied with the specifications in this area.
>
> Skywest's offer provided a high standard of safety and maintenance at what is considered a reasonable cost. Direct questioning of the Executive Director and his senior staff showed that Skywest had approached the tender in a serious manner and had a good understanding of the work involved."

Accordingly, Dr Stack's recommendation to the Tender Board was that the contract should be awarded to Skywest.

Attached to Dr Stack's letter was the documentation which detailed the basis of the Department's

recommendations. Of the four offers received, that document said:

> "Two offers were considered to be unsatisfactory ... (one) for non-compliance with the specification, no previous experience and insufficient information to adequately assess the offer. Air North, the current contractor, has been rejected for non-compliance with specification and current unsatisfactory standard of service. Reasons for non-compliance with specification are detailed in attached documentation."

In her evidence in the court below Dr Stack said that not long before she wrote that letter she had a meeting with the then Minister for Health, Mr Harris, at which Dr Quinn, the Deputy Secretary, and Dr Kirk, Assistant Secretary of the Department were also present. She said that one of the matters discussed at the meeting was the tenders for the aerial medical service contract, and she submitted to the Minister a memo informing him of the deliberations by officers of her Department and of the decision they had made. She said that, having read the memo, the Minister returned it to her suggesting that the sooner it went to the Tender Board the better, since there had already been a two months delay in dealing with the tenders. From this, I think the inference can be drawn that the Department's recommendation had at least the Minister's tacit approval.

The tenders were considered by the General Tender Board at its meeting on 23 October 1986. They came before the meeting in the form of a Business Paper prepared the previous day, 22 October 1986, which summarised the background to the invitation for tenders, the reasons for passing over the three lowest tenders, and the reasons for supporting a recommendation that Skywest be awarded the contract. Attached to the Business Paper was the Department of Health's recommendation. The recommendation proposed in the Business Paper was that "the General Tender Board grant approval to arrange a contract with Skywest Airlines ... for the ... service". The concluding paragraph of the Business Paper read:

> "8. Time to commence from notification - 30 days."

The decision of the Board is indicated on the Business Paper by the stamp "APPROVED" followed by the signatures of the five members of the Board.

For a better understanding of what then followed, it is now necessary to say something about the General Tender Board and the way in which it operated. The Board itself has no legal identity of its own; it is merely a group of people appointed to perform a particular function. It has no premises of its own; it has no administrative or clerical staff of its own; it operates from within the

Treasury; it meets in the Treasury, and is serviced by officers of the Treasury. Its Chairman (as appointed by the Treasurer) is the Chief Executive Officer of the Treasury (the Under-Treasurer) or his delegate. At the time of the events with which we are here concerned, the Chairman of the Board was Mr Ken Harkin, the Under-Treasurer's delegate. He was a senior officer of the Treasury, being the Director of Corporate Services. In that role he headed the Purchasing Branch of the Treasury, which was the operative arm of the Tender Board. On 23 October 1986 Mr Harkin was in fact the second most senior person in the Treasury in Darwin. Assisting Mr Harkin in the operation of the Tender Board was another employee of the Treasury, Mrs Janelle O'Grady, who was Special Projects Officer (Purchasing). Also assisting in the work of the Tender Board was a Mrs Sandy Gemmell, a Treasurer Officer with the local designation of Purchasing Manager. Her role was to manage the day to day administrative functions of the Board, as well as to take on some specific purchasing projects. She also acted as unofficial secretary of the Board; in fact, she attended the meeting of the Board on 23 October, and took the minutes of that meeting.

I should also say something here as to the methods adopted, at the time, of notifying tenderers of decisions of the Tender Board. The usual method was by letter, though on occasions, particularly where there was an element of

urgency in getting a contract under way (as was the case here) it was done by sending telexes. Furthermore, the one who regularly signed those letters, or authorised the telexes, was Mrs. O'Grady, who did so in her own name "For Under-Treasurer". That was in accordance with a direction of the Under-Treasurer that all correspondence emanating from the Treasury should be signed in that way.

I return now to events following the meeting of the Board on 23 October. Some time after the meeting Mrs Gemmell prepared letters to be sent to the unsuccessful tenderers, advising them of that fact, and a telex to the successful tenderer advising it accordingly. The letter to the unsuccessful tenderers (which, of course, included Air North) was as follows:

> "23 October 1986
>
> Dear Sir
>
> TB:1738/85EX - SUPPLY OF AERIAL MEDICAL FLIGHT SERVICES TO THE DARWIN AND EAST ARNHEM REGIONS OF NORTHERN TERRITORY DATE OF ACCEPTANCE TO 30 SEPTEMBER 1991
>
> Your offer for the above has been considered but on this occasion was unsuccessful.
>
> The name of the successful tenderer was Skywest Airlines Pty Ltd.
>
> Estimated Expenditure: $1.7 million per annum.

Your interest in tendering is appreciated.

Yours sincerely

J O'GRADY for Under Treasurer"

The telex to the successful tenderer, Skywest, was in these terms:

"23 OCT 86 11.54

ATTENTION: L MEEKE, MANAGING DIRECTOR

REF: TB 1738/85EX - SUPPLY OF AERIAL MEDICAL FLIGHT SERVICES TO THE DARWIN AND E ARNHEM REGIONS OF NORTHERN TERRITORY

YOUR OFFER AS PER OPTION 'A' DATED 1 AUGUST 1986 FOR THE ABOVEMENTIONED SERVICE IS HEREBY ACCEPTED.

COMMENCEMENT DATE IS 30 DAYS FROM 23 OCTOBER 1986. YOU WILL BE ADVISED WHEN FORMAL DOCUMENTS ARE READY FOR SIGNING. OPERATIONAL CONTACT IS DEPARTMENT OF HEALTH SISTER-IN-CHARGE AERIAL MEDICAL SERVICE, BARB STOTT, PHONE (089) 203251. WRITTEN CONFIRMATION WILL FOLLOW.

J O'GRADY FOR UNDER TREASURER."

Having prepared that telex, Mrs Gemmell took it to Mrs O'Grady for her approval before sending it out. She explained that there was an urgency about sending it, that she had checked with the Department of Health and that they had requested that it be sent out urgently; as far as they

were aware, there was nothing to stop the telex being sent. At that, Mrs O'Grady approved it, and it was sent out in her name "for Under-Treasurer".

Whether it was before or after the telex was sent is not clear, but it appears that some time later that day Mr. Harkin spoke about the aerial medical services tenders with Mr. David Stone, the Director of the Capital Resources Division of the Treasury. In the absence that day of the Under-Treasurer, who was abroad, and the Acting Under-Treasurer, who was in Alice Springs, Mr Stone was the senior Treasury officer in Darwin. What exactly was said in that conversation is also not clear (as the learned trial judge commented, Mr Harkin's evidence was vague in some respects), but it seems that Mr Stone had come to Mr Harkin's office and asked what recent action had been taken in relation to the aerial medical services tenders, whereupon Mr Harkin told him that they had been considered by the General Tender Board that morning, and that the recommendation to award the contract to Skywest had been approved. Mr Harkins said in his evidence that following his discussion with Mr Stone, he then spoke with Mrs Gemmell and Mrs O'Grady "to ascertain what precisely had happened since the General Tender Board meeting". He did not say what, in fact, he ascertained, but the significance of this evidence, as I see it, is that both Mr. Harkin and Mr. Stone must be taken to have known that the Board's decision would

be notified to the tenderers in the way it was regularly done at the time.

On receipt of the telex from Mrs. O'Grady, the respondent, by its Managing Director Mr Chris Ring, replied on the same day in these terms:

> "23 OCT 86
>
> TO: MR J. O'GRADY
> FOR UNDER TREASURER
>
> TB 1738/85EX - SUPPLY OF AERIAL MEDICAL FLIGHT SERVICES TO THE DARWIN AND EAST ARNHEM REGIONS OF THE NORTHERN TERRITORY
>
> WE ARE PLEASED TO ACKNOWLEDGE RECEIPT OF YOUR TELEX OF 23 OCTOBER 1986 AND CONFIRM THAT SKYWEST IS LOOKING FORWARD TO COMMENCING OPERATIONS ON SATURDAY 22 NOVEMBER.
>
> WE ALSO LOOK FORWARD TO YOUR LETTER OF CONFIRMATION IN DUE COURSE.
>
> OUR GENERAL MANAGER GOVERNMENT CONTRACTS, HUGH DAVIN, WILL MAKE CONTACT WITH THE DEPARTMENT OF HEALTH SISTER-IN-CHARGE AERIAL MEDICAL SERVICE, BARB STOTT, AND ALSO WITH THE MANAGEMENT OF AIR NORTH, TO ARRANGE AN ORDERLY HAND-OVER OF OPERATIONS.
>
> HUGH DAVIN AND I WILL BE IN DARWIN ON MONDAY 27 OCTOBER AND WILL BE PLEASED TO MEET WITH YOU THEN SHOULD YOU FEEL IT APPROPRIATE.
>
> REGARDS CHRIS RING MANAGING DIRECTOR SKYWEST AIRLINES."

Also, on the same day, 23 October, the respondent sent a telex to the then Minister for Health. It read as follows:

"23 OCT 86

TO: THE HON T. HARRIS, MLA
MINISTER FOR HEALTH
NORTHERN TERRITORY

DEAR MINISTER

THE MANAGEMENT AND STAFF OF SKYWEST AIRLINES ARE VERY PLEASED TO BE AWARDED THE CONTRACT FOR THE SUPPLY OF AERIAL MEDICAL FLIGHT SERVICES TO THE DARWIN AND EAST ARNHEM REGIONS OF THE NORTHERN TERRITORY, AND ARE LOOKING FORWARD ENTHUSIASTICALLY TO THE COMMENCEMENT OF OPERATIONS.

I AM VERY CONFIDENT THAT THE CHOICE OF SKYWEST TO OPERATE THIS VERY IMPORTANT SERVICE WILL BE JUSTIFIED BY THE PROVISION OF A PROFESSIONAL SERVICE OF HIGH STANDARD WHICH WILL PROVE TO BE MORE THAN ACCEPTABLE TO ALL CONCERNED.

YOURS SINCERELY CHRIS RING MANAGING DIRECTOR"

To this point, there is nothing to indicate that anything untoward had taken place in the calling of tenders for the contract, in the assessment of them by the Department of Health, in the General Tender Board's consideration of them, or in the notification to the tenderers of the Board's decision. The Board had acted entirely in accordance with Treasury Regulation 10(3); it had carried out its functions independently; the tenders had been processed in accordance with the Treasurer's Directions; and in accordance with Direction 20.17 it had entered into a contract on behalf of the Territory by

accepting the respondent's offer and communicating that acceptance to the respondent in accordance with a method adopted by the Board at the time for communicating acceptances of offers.

On the following day, however, 24 October 1986, a new development began when Mr. John Hardy, the Managing Director of Air North, sent a telex to the Treasurer, Mr. Coulter. It read:

> "REFERENCE: TB 1738/85EX - SUPPLY OF AERIAL MEDICAL FLIGHT SERVICES TO THE DARWIN AND EAST ARNHEM REGIONS OF NORTHERN TERRITORY
>
> WE HAVE RECEIVED ADVICE FROM THE GENERAL TENDER BOARD THAT THEY ARE ABOUT TO AWARD TENDER TB:1738/85EX TO SKYWEST AIRLINES PTY LTD AT AN ESTIMATED EXPENDITURE OF $1.7 MILLION.
>
> WE WOULD OBJECT MOST STRONGLY TO THIS ACTION AND DRAW TO YOUR ATTENTION THE FOLLOWING MATTERS:
>
> 1. SKYWEST'S TENDER IS SOME 25% IN EXCESS OF OUR TENDER PRICE - THEY ARE OBVIOUSLY NOT THE LOWEST TENDER.
>
> 2. SPECIFIC CARE WAS TAKEN IN THE PREPARATION OF OUR TENDER TO ENSURE THAT THIS TENDER CONFORMED WITH THE SPECIFIED REQUIREMENTS.
>
> 3. WE HAVE NEVER BEEN GIVEN THE OPPORTUNITY TO DISCUSS OUR TENDER WITH THE GENERAL TENDER BOARD.
>
> IT HAS ALWAYS BEEN AGREED BETWEEN THE M.B.A. AND OTHER CONTRACTORS' ORGANISATIONS AND THE VARIOUS TENDER BOARDS THAT A REPUTABLE CONTRACTOR WHOSE BID CONSTITUTED THE LOWEST TENDER WOULD NOT BE PASSED OVER UNLESS THEY HAD BEEN GIVEN THE OPPORTUNITY TO STATE THEIR CASE.

THIS UNILATERAL DECISION BY THE GENERAL TENDER BOARD REFLECTS ON THE COMPETENCE OF THIS COMPANY, A MAJOR NORTHERN TERRITORY COMPANY AND IS COMPLETELY CONTRARY TO YOUR GOVERNMENT'S POLICY TO SUPPORT N.T. COMPANIES.

WE ACCEPT THE RESERVATION CONTAINED WITHIN THE CONDITIONS OF TENDERING THAT THE TENDER BOARD IS UNDER NO OBLIGATION TO AWARD THE TENDER TO THE LOWEST TENDERER OR IN FACT TO ANY TENDERER.

HOWEVER WE WOULD REQUEST THE COURTESY OF AN EXPLANATION OF WHY THE GENERAL TENDER BOARD CONSIDERS THAT THIS COMPANY IS NOT CAPABLE OF FULFILLING THE SPECIFIED REQUIREMENTS AND WOULD REQUEST A REVIEW OF THE TENDER SUBMISSIONS FOR THIS SPECIFICATION.

JOHN HARDY
MANAGING
DIRECTOR AIR
NORTH PTY LTD".

Some time later that day, Mr. Harkin rang Mr. Davin, the General Manager, Government Division, of Skywest in Perth. According to Mr Davin, Mr Harkin introduced himself as the Director of Corporate Services of the Treasury and advised him that no action was to be taken following the telex of advice of acceptance of Skywest's offer, that contract documents were being compiled, that no action was to be taken until they were signed and that the commencement date had been rescinded to a date to be advised.

That telephone call was followed by a telex from Mr. Harkin to Mr. Davin. It was not sent "for Under-

Treasurer", nor was it sent by him as Chairman of the Tender Board. He sent it as Director, Corporate Services, Northern Territory Treasury. It read:

> "I REFER TO YOUR TELEX OF 23 OCTOBER. YOU WILL APPRECIATE THAT THE TELEX OF 23 OCTOBER 1986 SIGNED BY J. O'GRADY DOES NOT CONSTITUTE ACCEPTANCE OF YOUR OFFER. ACCEPTANCE OF TENDERS IS GOVERNED BY THE TERMS OF REQUEST FOR TENDER DOCUMENT TB:1738/85 EX, A COPY OF WHICH WAS DELIVERED TO YOU. UNDER THE TERMS OF THE R.F.T. THERE CAN BE NO ACCEPTANCE UNTIL A LETTER OF ACCEPTANCE, SIGNED BY A PROPERLY AUTHORISED PERSON, IS DELIVERED OR POSTED TO YOU.
>
> THIS IS TO CONFIRM THE POSITION AND TO CAUTION YOU AGAINST ACTING IN ANY WAY TO YOUR PREJUDICE ON THE ASSUMPTION THAT A CONTRACT IS IN EXISTENCE."

To that telex Mr. Davin replied as follows:

> "WE ARE SOMEWHAT PUZZLED BY YOUR UNDERSTANDING OF OUR APPRECIATION OF J. O'GRADY'S TELEXED ADVICE. TO THE CONTRARY, OUR ADVICE IS THAT A BINDING LEGAL CONTRACT IS IN EXISTENCE.
>
> THE ACCEPTANCE OF THIS COMPANY'S TENDER WAS CLEARLY COMMUNICATED BY THE TELEX OF 23 OCTOBER 1986 AND HAS BEEN WIDELY CONFIRMED IN DISCUSSION WITH VARIOUS DEPARTMENTAL OFFICERS.
>
> IN FACT ARRANGEMENTS HAVE BEEN PUT IN PLACE FOR A MEETING BETWEEN SKYWEST AND THE REGIONAL DIRECTOR AT HIS REQUEST FOR 1300 HOURS ON MONDAY 27 OCTOBER TO FURTHER DISCUSS IMPLEMENTATION PLANS.
>
> HUGH DAVIN
> GENERAL MANAGER
> GOVERNMENT CONTRACTS"

On 28 October 1986 the Managing Director of Skywest, Mr. Ring, sent a telex to the Secretary of Cabinet, with a copy to each of the members of Cabinet. It read:

> "TB1738/85EX - SUPPLY OF AERIAL MEDICAL FLIGHT SERVICES TO THE DARWIN AND EAST ARNHEM REGION OF THE NORTHERN TERRITORY
>
> I AM BOUND TO REGISTER WITH YOU MY GRAVE CONCERN AT SUGGESTIONS WHICH HAVE REACHED US FROM VARIOUS SOURCES AND IN PARTICULAR THE CLAIM BY AIR NORTH PERSONNEL THAT THE DECISION TAKEN BY THE NORTHERN TERRITORY TENDER BOARD TO AWARD THE AERIAL MEDICAL CONTRACT TO SKYWEST IS TO BE OVERTURNED IN CABINET TODAY AND THAT THE CONTRACT WITH SKYWEST IS TO BE SOMEHOW REPUDIATED AND RE-AWARDED TO AIR NORTH.
>
> THIS CONCERN HAS BEEN REINFORCED BY:-
>
> 1. THE TELEX RECEIVED FROM KEN HARKIN DIRECTOR OF CORPORATE SERVICES ON 24 OCTOBER 1986 PURPORTING TO DENY THE EXISTENCE OF A CONTRACT.
>
> 2. THE FACT THAT WE HAVE BEEN UNABLE TO SPEAK WITH EITHER OF THE MINISTERS DIRECTLY ASSOCIATED WITH THE AWARDING OF THIS CONTRACT, NAMELY, THE MINISTER FOR HEALTH, THE HON. TOM HARRIS, AND THE TREASURER, THE HON. BARRY COULTER.
>
> 3. OUR UNDERSTANDING THAT STAFF OF THE NORTHERN TERRITORY TENDER BOARD AND THE NORTHERN TERRITORY DEPARTMENT OF HEALTH HAVE BEEN INSTRUCTED NOT TO DISCUSS ANY OF THE MATTERS RELATING TO THIS CONTRACT WITH SKYWEST. WE HAVE BEEN ATTEMPTING TO ARRANGE A MEETING WITH THE OPERATIONAL STAFF OF THE NORTHERN TERRITORY DEPARTMENT OF HEALTH BUT HAVE HAD NO RESPONSE WHATSOEVER TO OUR REQUEST FOR A MEETING TO DISCUSS THE IMPLEMENTATION OF THE SKYWEST OPERATIONS.
>
> IF OUR CONCERN SHOULD PROVE TO BE SUBSTANTIATED WE WILL OF COURSE HAVE NO ALTERNATIVE BUT TO IMMEDIATELY PURSUE

ALL LEGAL RIGHTS AND REMEDIES AVAILABLE TO US IN RESPECT OF THE BINDING CONTRACT PROPERLY AWARDED TO US.

CHRIS RING
MANAGING DIRECTOR"

There was no reply by or on behalf of the Secretary of Cabinet, or of any of the members of Cabinet, to that telex, though, having regard to the serious allegations contained in it, particularly the allegation that the contract to Skywest was to be overturned in Cabinet, to be somehow repudiated and re-awarded to Air North, one would think it certainly called for some reply.

On 30 October, Mr Meeke rang the Minister for Health, Mr Harris, and, according to Mr Meeke, this is the conversation that took place:

> Mr Meeke said, "Minister, I am ringing to discuss with you your phone call to Hugh Davin (Mr Harris had rung Mr Davin earlier that day). I have become aware that there are some rumblings regarding the awarding of this contract. We didn't entirely expect it to be without rumblings. The purpose of my call really is to determine what the situation is."
>
> Mr Harris said to Mr Meeke "I don't really know what all the fuss is about. We've made a decision. We made that decision in the full light of the circumstances and the repercussions of that decision, and what I would ask of you is that you don't contribute to the innuendo, rumour and gossip that is abounding in Darwin at this stage."

On the following day, in an interview broadcast on the A.B.C. radio programme "After Eight", one Patrick Cusack asked the Chief Minister, Mr Hatton, "Does Skywest have the legal right to the tender", to which the Chief Minister replied: "That appears to be the position, yes." On the same day in statements made to representatives of the media and reported in that day's edition of the Northern Territory News in an article entitled "Chief Blasts Officials over Air Contract" the Chief Minister said:

> "The Health Department has been severely reprimanded for allowing the contract to be let without first consulting the Treasurer, Mr Barry Coulter regarding possible Cabinet consideration."

In response to the interviewer's question "Do you believe Skywest was legally entitled to claim it had won the $1.7 million tender after receiving the controversial telex from the Government", the Chief Minister replied "On the facts available to me, yes".

The Chief Minister did not explain why he thought the letting out of the contract should be a matter for "possible Cabinet consideration". Nor is it clear to me why he should think there was occasion for reprimanding the Department of Health. It seems to me that the Department of Health was quite entitled to proceed on the basis that the letting out of the contract was solely a matter for the

Tender Board carrying out its functions independently under Treasury Regulation 10(3). They could not be expected to think it was a matter for "possible Cabinet consideration".

On that same day, 31 October, Air North made an application to the Court (later numbered 818 of 1986) seeking orders nisi for writs of certiorari, prohibition and mandamus against the members of the Tender Board, and for a writ of prohibition against the Minister for Health and the Northern Territory Government prohibiting them from further dealing with the contract with Skywest for the supply of the aerial medical services. The application was heard late that day, as a matter of urgency, by Nader J., and orders nisi were made returnable at 9am on Friday 7 November 1986.

Thereafter, on 3 November 1986, Air North commenced proceedings in the Court (817 of 1986), this time by way of Writ of Summons, against the General Tender Board (First Defendant), the Minister for Health (Second Defendant), and the Northern Territory (Third Defendant). Stated shortly, the Statement of Claim (as subsequently amended) alleged that the General Tender Board which considered the tenders was not a properly constituted Board, and that, in any event, the Board had misinterpreted the specification of the services tendered for, and had not dealt fairly with Air North's tender. Consequentially, it claimed a number of declarations, including a declaration that any purported

acceptance of Skywest's tender and any agreement entered into pursuant to that acceptance, was invalid and/or ultra vires, and orders that the decisions of the Board and the Minister for Health accepting Skywest's tender be quashed, that the Tender Board deal with the tenders according to law, and an injunction restraining the defendants from entering into or further acting upon any contract in relation to the aerial services pursuant to an acceptance of a purported tender by Skywest.

Subsequently, on 7 November, the respondent Skywest applied to be, and was, joined as a defendant (Fourth Defendant) in those proceedings.

Meanwhile, at some time between 3 and 5 November, Mr Harris, the Minister, telephoned Mr Meeke and had a further conversation with him. According to Mr Meeke, Mr Harris said,

> "I hope the contents of this telephone call don't come back to me. I really also hope that you won't enter into the debate and the fuelling of rumours and speculation that is occurring in the Territory at the moment in Darwin surrounding the aerial medical contract. I don't know what all the fuss is about. It seems as though we are just going to have to ride it out. <u>Our position is that we have a contract with Skywest.</u> There are obviously complaints being rendered from other quarters. It looks as though that will now result in litigation and in that regard we are just going to have to see that process through." (Emphasis mine)

Mr Meeke said he asked again what the Government's view was; he said he had been informed by his counsel that the Government would be adopting a defence that there was a legal and binding contract, and was that the case? To that Mr Harris said "yes". Mr Meeke said he then asked whether or not the Crown Law Department had been given instructions to defend the litigation vigorously, and Mr Harris' reply was "Yes".

Mr Meeke also said that he had two subsequent telephone conversations with Mr Harris, one about 12 November and the other on 21 November. In the course of this latter conversation, Mr Meeke said that Mr Harris said:

> "As you know, the Government's position is that we have a legal and binding contract with Skywest." (Emphasis mine)

These statements made by the Minister for Health, as well as the statements made by the Chief Minister to which I have referred above, and which are not disputed, were, in fact, reflected in the Defences of the Tender Board, the Minister for Health and the Northern Territory to the Statement of Claim filed in the proceedings. Paragraph 18 of the plaintiff's Statement of Claim read:

> "On or about 23rd October 1986, the first defendant (the General Tender Board) rejected the plaintiff's tender and purported to accept Skywest's tender".

Paragraph 11 of the First, Second and Third Defendants' Defence read:

> "As to the facts alleged in paragraph 18 they admit that on or about 23 October, 1986, the plaintiff's tender was rejected and the Skywest tender was accepted."

Furthermore, paragraph 24 of the Statement of Claim alleged:

> "24. The First, Second and Third Defendants are threatening to enter into or have entered a contract with the Fourth Defendant Skywest, for the supply of aerial medical services, which contract includes services not called for in the request for tender, which contract is or will be entered into in breach of the aforesaid Treasury Regulations, Treasury Directions and in breach of the Plaintiff's rights."

To this, the First, Second and Third Defendants pleaded in paragraph 14 of their Defence:

> "14. That the facts in paragraph 24 are denied except that the Third and Fourth Defendants have entered into an agreement."

On 4 December, the Fourth Defendant, Skywest, filed Notice in the proceedings requiring certain questions and

issues to be determined both as between the plaintiff and the First, Second and Third Defendants, and as between itself and the First, Second and Third Defendants. Those questions and issues were stated in the Notice as these -

> "1. Is there a binding agreement between the Fourth and Third Defendants as alleged in paragraph 6 of the Fourth Defendants Defence herein.
>
> 2. Does the Third Defendant have the power to avoid or rescind such an agreement.
>
> 3. Has the Third Defendant validly exercised any such power to avoid or rescind the said agreement with the Fourth Defendant.
>
> 4. Has the Third Defendant committed a breach of such agreement with the Fourth Defendant.
>
> 5. Is the Fourth Defendant entitled to an order for specific performance of such agreement against the Third Defendant, or in the alternative damages for breach of such agreement."

Consequentially, it claimed the following relief:

> "1. A declaration that there is a valid and binding agreement between the Fourth and Third Defendants as alleged in paragraph 6 of the Fourth Defendant's Defence herein.
>
> 2. A declaration that the Third Defendant has not validly avoided or rescinded such agreement.
>
> 3. An order for specific performance of such agreement, or in the alternative, damages to be assessed."

On 5 December, a further development took place. On that day both actions came before Nader J. on an application by counsel for the plaintiff Air North to discontinue the actions against all defendants. The basis of the application was, as expressed by the plaintiff's counsel, that "... the first, second and third defendants have now conceded that there is, in fact, no contract between the Government and Skywest.... they had previously asserted that there was a contract, they assert that there was not a contract." The Solicitor-General who appeared for those defendants consented to the application, and explained what had happened in these words:

> "... in the course of working up for trial, additional information was found which disclosed, and was disclosed to both plaintiff and to Skywest. The plaintiff, Air North, then amended its statement of claim, or otherwise by reason of the pleadings, to raise an issue going to things which were not raised in the first instance. That was the authority of persons constituting the Tender Board, and their capacity to act as a Tender Board, and as to the authority - lawful authority of a person who signed a telex message to Skywest, which it was alleged - is alleged by Skywest, concluded the contract in which in the light of what has been found since, the Territory says on advice, did not amount to a concluded contract. ... Taking into account those new issues as opposed to the procedures prior to that time ... the Government took advice and as a consequence instructed me that <u>on its pleadings between itself and Air North, will admit that there was no binding contract as between itself and Skywest.</u>" (Emphasis mine)

He went on to say:

> '... The Territory proposes calling for retenders of the contract for the provision of aerial medical services, which are the centre of this dispute, and that is what the Government proposes to do ... The Government, having made that decision, then any finding contrary to the advice received by Government that there is a contract, will not, on my instructions, disturb what the Government proposes to do. It will take its risk of the remedy available to Skywest, should there be found to be a contract, of damages."

Counsel for the fourth defendant, Skywest, opposed the application, indicating that his client wished to pursue its claim that a binding contract had been concluded between itself and the Territory, and that his client would be seeking specific performance of that contract. In the end, the trial judge gave the plaintiff leave to discontinue both actions on the terms set out in the correspondence below.

In fact, the arrangement between Air North and the Government had been reached some days before that date. It was confirmed in an exchange of letters between the Crown Solicitor and the solicitor for Air North which I think I should set out in full.

On 2 December 1986 the solicitor for Air North wrote to the Crown Solicitor in these terms:

"I refer to discussions between Ms Harrison and the writer on Monday 1st December 1986.

I confirm the following arrangements between us:

1. You will write to Air North Pty Ltd and Skywest Airlines Pty Ltd today advising them that there is no concluded contract between the Northern Territory and Skywest Airlines Pty Ltd and that the Northern Territory will call new tenders for the provision of aerial medical flight services to the Department of Health for the Darwin and East Arnhem regions of the Northern Territory.

2. Air North Pty Ltd will discontinue actions 817 and 818 of 1986. The first, second and third defendants in action 817 of 1986 will consent to the discontinuance of that action. The parties represented by the Crown in action 818 of 1986 will consent to the discontinuance of that action.

3. In consideration of the actions of Air North Pty Ltd set out in 2. above;

   (i) The Northern Territory of Australia, the Honourable Minister for Health and General Tender Board of the Northern Territory of Australia will undertake not to enter into or further act upon any contract in relation to the provision of aerial medical services called for by Request for Tender TB:1738/85EX.

   (ii) The Northern Territory of Australia, together with all the parties represented by the Crown in both actions will release Air North Pty Ltd generally as to damages

and costs of the parties represented by the Crown in both actions;

(iii) The Northern Territory of Australia and the Minister for Health will indemnify Air North Pty Ltd in respect of any claim for damages or costs made at any time by Skywest Airlines Pty Ltd against Air North Pty Ltd in actions 817 and 818 of 1986 or arising out of or in any way related to the matters the subject of those actions or any orders made therein and whether made in those actions or in any other way whatsoever.

(iv) The Northern Territory of Australia will pay the plaintiff's party and party costs to be taxed or agreed;

Yours faithfully,

James Noonan".

On 3 December 1986, the Crown Solicitor wrote to the solicitor for the plaintiff Air North as follows:

"I refer to my letter of 2 December 1986, our subsequent discussions and to your letter of the same date.

I confirm that by letter dated 2 December 1986 to Messrs Mildren Silvester & Partners, their solicitors, I advised Skywest Airlines Pty Ltd (Skywest) that the Northern Territory of

Australia does not consider that there is a contract in existence between Skywest and itself and that accordingly the Territory proposes calling for retenders for the contract for the provision of aerial medical services in the Territory.

I further confirm that in the light of the advice that there is no contract between the Territory and Skywest the first, second and third defendants consented to Notices of Discontinuance being filed by Air North Pty Ltd in Supreme Court Action Nos. 817 and 818 of 1986 on the basis that:-

1. The Northern Territory of Australia will pay the plaintiffs' costs to be taxed or agreed;

2. The Northern Territory of Australia will release Air North Pty Ltd generally as to damages or costs arising out of the actions;

3. The Northern Territory of Australia will indemnify Air North Pty Ltd in respect of any claim for damages or costs by Skywest Airlines Pty Ltd against Air North Pty Ltd arising out of Supreme Court Actions No. 817 and 818 and matters the subject of those actions;

4. The Northern Territory of Australia will undertake not to enter into or further act upon any contract in relation to the provision of aerial medical services called for by Request for Tender TB:173885EX.

Yours faithfully,

Meredith Harrison".

Meanwhile, on 2 December, the Crown Solicitor had written to the solicitor for Air North as follows:

> "I wish to advise that having considered the evidence which has been produced in the course of discovery in action 817 of 1986 and taken legal advice, the first, second and third defendants have come to the view that there is no contract in existence between the Northern Territory of Australia and Skywest Airlines Pty Ltd.
>
> Accordingly I give you notice that the first, second and third defendants will be making application for leave to amend their defence so as to deny the existence of a contract.
>
> I am instructed to advise you that the Territory will be calling for retenders for the contract for the provision of aerial medical services in the Territory.
>
> Yours faithfully,
>
> Meredith Harrison
> for Crown Solicitor."

The first aspect of this arrangement between Air North and the Government parties to be noted is that it provided for the discontinuance of the proceedings not only as against the Government parties (the first, second and third defendants), but also as against Skywest (the fourth defendant). It therefore sought to remove from the jurisdiction of the court not only the determination of the issues raised between the plaintiff Air North and the

Government parties, but also the determination of the issues between the plaintiff Air North and the defendant Skywest. The issues between the plaintiff and the Government parties were the same as the issues between the plaintiff and Skywest. They were: whether the Tender Board was properly constituted, and whether the Tender Board fairly, and properly, considered the tenders submitted to it. In agreeing with Air North that it would call fresh tenders, the Government conceded both those issues in Air North's favour, and adversely to Skywest. In fact, it gave to Air North the relief sought by it in paragraph 8 of its prayer for relief, namely, that the decision of the Tender Board be quashed, and it took away from Skywest the opportunity to litigate those issues in the proceedings, and to have the court's decision on them.

But the arrangement between the Government parties and Air North that it would call fresh tenders had wider implications than merely quashing or setting aside the decision of the Tender Board. Let me set out what those implications are, as I see them.

The basis of the arrangement between the Government parties and Air North, as explained to the court by the Solicitor-General, was that whereas they had formerly admitted that there was a concluded contract between the Government and Skywest, they now said, on advice, that there

was no such contract. The reason for that was said to be that additional information had been found that touched on issues that had been raised or were to be raised by Air North as to the constitution of the Tender Board, and as to the authority of Mrs. O'Grady to send the telex to Skywest notifying it of the Board's acceptance of its offer.

It was doubtless in accordance with that advice that the Crown Solicitor wrote to the solicitor for Air North on 2 December (supra, p.34) advising him that the Government parties would make an application to the court to amend their defence so as to deny the existence of a contract, i.e. to withdraw their admission that there was a contract. As it turned out, no such application was made, nor did any occasion arise for making such an application. That, of course, was for the reason that Air North and the Government parties determined between themselves the issue of whether or not there was a contract by the Government with Skywest, and, again, they determined that issue in favour of Air North, and adversely to Skywest. Furthermore, by discontinuing the proceedings, they denied Skywest any opportunity of having the court's decision on that question in those proceedings, and, indeed on the question whether the Government parties should be permitted to withdraw their admission that there was a contract.

The result, then, of the arrangement between Air North and the Government parties was that if Skywest wished to persist that it had a contract with the Government, it would have to pursue that claim in separate proceedings. They would be proceedings in which it would not have the benefit of any formal admission on the pleadings that there was a contract, and proceedings which the Government would resist, and which, indeed, it has resisted, with much vigour.

Furthermore, if Skywest succeeded in those proceedings it would still not have the benefit of being awarded the contract in accordance with the Tender Board's decision. It would have damages only, whether or not that be an adequate remedy. The Government would call fresh tenders notwithstanding that the court may find that it did have a concluded agreement with Skywest.

Following the discontinuance of the former proceedings, then, Skywest commenced proceedings in the court by Writ of Summons issued on 10 December 1986 claiming relief as follows:

> "(a) A declaration that there is a valid and binding agreement between the plaintiff and the second defendant (the Northern Territory of Australia) in respect of the provisions of Aerial Medical Flight Services to the Darwin and East Arnhem regions of the Northern Territory of Australia and that the

second defendant has not validly avoided or rescinded the said agreement;

(b) an order for specific performance of the said agreement or in the alternative;

(c) damages for breach of contract or equitable compensation;

(d) in the alternative, as against the first (the General Tender Board) third (the members of the Tender Board) and fourth (Mrs. O'Grady) defendants, damages for breach of warranty of authority."

That action came on for hearing before Nader J. on 15 December 1986. It was defended by the appellant, the main grounds of defence being:

"4. The defendant will rely upon the provisions of the Financial Administration and Audit Act and the Regulations thereto, the Tender Specifications and the Contracts Act and delegations made thereunder to show that there was no valid and lawful acceptance of the plaintiff's tender.

5. The defendant says that the plaintiff is guilty of laches acquiescence and delay and in any event the court should not, in the exercise of its discretion, make an order for specific performance in the event that it finds that there is a contract (which is denied)."

His Honour reserved his decision, delivering it on 13 January 1987. In the result, he made a declaration in the terms sought by the plaintiff, namely, that there was a

valid and binding contract between the plaintiff and the defendant, and he ordered the defendant to pay damages for breach of contract, those damages to be assessed. Although he found "that the loss of the Aerial Medical Contract (to the plaintiff) represents more than a readily measurable monitory loss to the plaintiff," and "that the legal remedy would not be as perfect a remedy as specific performance", he went on to say that he did not believe the obligations under the contract were apt to be enforced by a decree of specific performance. He therefore declined to make any such order.

The appellant now appeals against those orders, the principal ground of appeal being that the learned trial judge erred in law and in fact in finding that there is in existence a valid and binding contract between the appellant and respondent for the provision of the Aerial Medical Flight Services the subject of the Request for Tender. No issue was raised either in the court below, or on appeal, as to the composition of the Tender Board, nor as to the Tender Specification.

In support of this ground of appeal, the appellant relies, in the first place, on the provisions of the Contracts Act 1978 (N.T.). Its argument is, in short, that a contract on behalf of the Territory may only be validly made in accordance with the provisions of that Act, and not

otherwise. A contract made otherwise than in accordance with that Act is not binding on the Territory. The alleged contract in the present case was such a contract.

The first question to consider, therefore, is what construction is to be given to the provisions of the Contracts Act. Before coming to deal with that question, however, I think it will be instructive to consider the general power or capacity of the Territory to enter into a contract, and the sources of that power.

In the first place, I do not think there can be any doubt as to the power or capacity of the Territory to enter into contracts, nor do I think there can be any doubt as to the main sources of that power. The first source of power is, I think, to be found in the Northern Territory (Self Government) Act 1978 (C'th) itself. That Act created the Northern Territory of Australia as a body politic under the Crown, and established it as a distinct and largely self governing political and juristic entity. The concept of an indivisible Crown operating in right of different self-governing communities was extended to the Territory. Section 32(2) of the Act charges the Administrator with the administration of the Government of the Territory, and s.32(3) requires him to "exercise and perform all powers and functions that belong to his office, or that are conferred on him by or under a law in force in the Territory, in

accordance with the tenor of his Commission ...". Section 33 creates an Executive Council (consisting of persons for the time being holding Ministerial Office) "to advise the Administrator in the Government of the Territory", and section 36 empowers the Administrator to appoint persons (members of the Legislative Assembly) to the office of Minister of the Territory. Executive authority is conferred on the Administrator, the Executive Council and the Ministers of the Territory by s.31 in these terms:

> "31. The duties, powers, functions and authorities of the Administrator, the Executive Council and the Ministers of the Territory imposed or conferred by or under this Part extend to the execution and maintenance of this Act and the laws of the Territory and to the exercise of the prerogatives of the Crown so far as they relate to those duties, powers, functions and authorities."

The making of a contract by or on behalf of the Territory is an exercise of executive power, and, in my opinion, the power conferred by s.31 is wide enough in its content to confer power on the Territory to enter into the contract here in question, i.e., a contract necessary or incidental to the execution and maintenance of a law of the Territory in respect of public health: see Northern Territory (Self-Government) Regulations, Regulation 4(1).

Another source of power in the Territory to enter into contracts is to be found in the capacity of the Crown in right of the Territory to enter into contractual relations with a subject: see New South Wales v Bardolph (1934) 52 C.L.R. 455. Even if this power be limited, as was said in that case, to the making of a contract "... in the ordinary course of administering a recognised part of the Government", it is clearly a source of power for making the contract here in question.

If they be the main sources of power in the Territory to enter into contracts, the question then arises, how and by whom may that power be exercised. To answer that question, it is necessary, for present purposes, to consider both the Contracts Act, 1978, (above referred to) and the Financial Administration & Audit Act, 1978. Those Acts came into force on the same day as the Northern Territory (Self-Government) Act. The appeal raises questions in respect of each of them, and I will consider them in turn.

The Contracts Act is described in its long title as an Act "relating to the making and execution of contracts affecting the Northern Territory". The relevant sections of the Act for present purposes are sections 5 and 7 which are as follows:

"5. CONTRACTS BY THE TERRITORY

(1) The Territory may enter into a contract.

(2) A minister may on behalf of the Territory enter into a contract if that contract relates to a matter which concerns or is incidental to the administration of a department or of a law in force in the Territory.

(3) A contract which, if it were made between natural persons would be required to be in writing to be enforceable by either party shall, if the Territory is a party to such a contract, be in writing and may be executed by a minister.

(4) A contract which, if it were made between natural persons would be required to be under seal to be enforceable by either party shall, if the Territory is a party to such a contract, be executed by a minister and attested by another person who is not a party or signatory (except by way of attestation) to the contract;

(5) A minister may do all things and execute all documents necessary or desirable to give effect to any contract entered into by the Territory.

(6) Where a contrary intention appears in another law of the Territory, this section yields to the appearance of the contrary intention.

. . . . . .

(7) DELEGATION

(i) A minister may, by instrument in writing, delegate to a person his powers and functions under section 5 -

(a) in relation to a contract or class of contracts;

(b) in relation to a specified district or part of the Territory; or

(c) in relation to a contract or class of contracts to be made under or for the purposes of an Act or a provision of an Act,

so that the delegated powers may be exercised by the delegate with respect to the contract or class of contracts specified in the instrument of delegation.

(2) A delegation given under sub-section (1) -

(a) is revokable by the minister at will;

(b) does not prevent the exercise of a power, function or authority by the minister; and

(c) is subject to such limitations and conditions as are specified in the instrument of delegation."

It was submitted to us on behalf of the appellant that that Act governs exclusively the mode and means of exercising the power of the Territory to make contracts. In other words, contracts on behalf of the Territory may only be validly made in the ways set out in the Act, namely by ministers and those to whom they delegate their power in accordance with the Act. The provisions of the Act, so it was argued, are mandatory and restrictive, that is, contracts made by or on behalf of the Territory may only be

validly made in accordance with the provisions of that Act and not otherwise; a contract made otherwise than in accordance with the Act is not binding on the Territory.

I see no reason for giving such a construction to the Act. Its provisions are expressed in purely permissive or facultative terms, and nothing in the subject matter of the Act or in any of its provisions gives any reason for concluding that the legislature intended that all contracts by or on behalf of the Territory must be made only by a minister, or by a person to whom he has delegated, by instrument in writing, his powers and functions under the Act. Such a construction would, for example, deny to the Administrator as the person charged with the duty of administering the Government of the Territory, the right to enter into a contract on behalf of the Territory. It would also deny the authority of the Crown in right of the Territory to make contracts founded on common law principles governing Crown contracts. I cannot think that the legislature intended such a result. In my opinion, the Act must be construed as being purely facultative or permissive, and in no may restrictive so as to cut down the powers of the Territory to contract aliunde. In my opinion, the Contracts Act did no more than confer general power on the Territory to contract, and appoint ministers and their delegates authorised agents of the Territory for the purpose of entering into contracts on behalf of the Territory

relating to matters which concern or are incidental to the administration of a department or of a law in force in the Territory: See generally the Commonwealth v Rhind (1966) 119 C.L.R. 584, per Barwick C.J. at 597, and per Owen J. at 611; Coogee Esplanade Surf Motel Pty. Ltd. v Commonwealth of Australia 50 ALR 363 at 364, 376, 377.

The other relevant Act for present purposes is the Financial Administration & Audit Act, together with the Treasury Regulations, and Treasurer's Directions made under it. As has been seen, that Act, among other things empowers the Administrator to make Regulations for "the execution of works and the supply of services for or on behalf of the Territory" (s.78). That, of course, necessarily involves entering into contracts for those works and services.

The appellant's submissions in relation to that Act may be summarised thus. Even if the Act be regarded as a source of power in the Territory to enter into contracts, the mode and method of entering into those contracts is governed exclusively by the Contracts Act, and that Act applies to the making of any contracts provided for in the Financial Administration & Audit Act. Therefore, it was submitted, it is not open to the Treasurer, in the Treasurer's Directions, to authorise the Tender Board to enter into a contract on behalf of the Territory (Treasurer's Regulations 20.17), the members of that Board

not having had the power to enter into such contracts delegated to them in accordance with s.7 of the Contracts Act.

As I have already held, the Contracts Act does not regulate exclusively the method of entering into contracts on behalf of the Territory. In my opinion, therefore, the contracts provided for by the Financial Administration & Audit Act may be made either in ways provided for in the Contracts Act, or in that Act or in the Regulations, or, if there is no such provision, or, if there is some such provision and it is permissive only, then in accordance with the general law relating to contracts and agency.

Neither the Financial Administration & Audit Act nor the Treasury Regulations makes any provision for the way in which contracts therein provided for are to be made. The Act does no more than provide for the making of Regulations "for or in relation to ... the execution of works and the supply of services for or on behalf of the Territory" (s.78). Furthermore, so far as relevant for present purposes, the Treasury Regulations merely provide for the establishment by the Treasurer of a Tender Board which "shall carry out its functions independently", and that "tenders shall be processed in accordance with the Treasurer's Directions": Regulation 10. The procedures, therefore, for entering into contracts on behalf of the

Territory for the execution of works and the supply of services are left to be provided for by Treasurer's Directions issued under s.35 of the Act. The relevant Direction for present purposes is 20.17 which provides that "... adequate specifications must be submitted to the appropriate Tender Board which will invite public tenders under Regulation 10 and enter into a contract on behalf of the Territory Government".

It was submitted on behalf of the appellant that that Direction, at least insofar as it purports to authorise the Tender Board to enter into a contract on behalf of the Territory, is ultra vires the Financial Administration & Audit Act and the Treasury Regulations. The submission, in short, was that the power conferred on the Treasurer by s.35 of the Financial Administration & Audit Act extends no further than authorising him to issue directions to accountable officers with respect to the principles, practices and procedures to be observed in the administration of the financial affairs of the Territory. A direction under that section purporting to authorise the Tender Board to enter into a contract on behalf of the Territory Government is beyond the power conferred by that section.

In my opinion, that Direction does fall fairly within the power to issue directions conferred on the

Treasurer by s.35 of the Act. I think it may be fairly construed as a direction to accountable officers as to the persons who are authorised to enter into contracts on behalf of the Territory in cases where public tenders are called. Besides, it is a direction which falls squarely within the terms of Treasury Regulation 10 which itself seems to contemplate that Treasury Directions under s.35 are appropriate for directing the procedures to be followed by the Tender Board. In any event, I think s.35 of the Act itself must be construed as being permissive only, and not as in any way cutting down or fettering the independent power of the Treasurer, as a Minister of the Territory, to authorise the members of the Tender Board to enter into contracts on behalf of the Territory. In this regard, it is to be borne in mind that the Directions here are not issued, as is the case of Treasury Directions issued under the Audit Act 1901 (C'th) by the permanent head of the Treasury (the Secretary to the Treasury), but by the Treasurer himself. I do not think that any of the provisions of the Financial Administration & Audit Act (or of the Contracts Act) restricts his power as Treasurer to give such directions as he may see fit, and to authorise such person as he sees fit to enter into contracts on behalf of the Territory. The Treasury Regulations clearly cast the principal responsibility for the procedures to be followed in the procurement of goods and services on the Treasurer, though leaving the details of the procedures to be followed

to the issue of Treasurer's Directions. Having in mind the requirement of Regulation 10 of the Treasury Regulations that the Tender Board should carry out its functions independently, there is every good reason, in my view, why the Treasurer should direct accountable officers that it is the Tender Board who enters into contracts for the supply of certain goods and services, and why he should then incidentally confer power on the Board to enter into those contracts, thus removing that activity from the political arena, and avoiding any suggestion of ministerial influence or involvement. In my opinion, then, Direction 20.17 of the Treasurer's Directions is a valid exercise of the Treasurer's power as the Minister of the Territory with special executive responsibility for the procurement of goods and services for the Territory. In consequence, the Tender Board was the duly authorised agent of the Treasurer to enter into a contract on behalf of the Territory in the case of tenders submitted to the Board.

It was then argued on behalf of the appellant that the decision of the Tender Board in approving the recommendation contained in the Business Paper that it arrange a contract with Skywest for the aerial medical services did not amount to an acceptance of Skywest's offer contained in its tender. In my opinion, it clearly did. The stamping of the word "APPROVED" on the Business Paper followed by the signatures of all five members of the Board

can only be regarded as a final and unqualified expression of assent by the Board to the terms of the offer contained in Option A of Skywest's tender.

Finally, it was submitted on behalf of the appellant that in authorising the telex to Skywest notifying it of the Board's acceptance of its offer, Mrs. O'Grady was acting without authority, and, therefore, even it the Tender Board had accepted the offer, there was no valid communication of that acceptance to Skywest. In my opinion, there is no substance in this submission. Although the telex was worded as an acceptance of Skywest's offer ("your offer as per Option A ... is hereby accepted"), in truth it amounted to no more than a notification to Skywest that the Tender Board had accepted its offer. I do not see any basis for saying that Mrs. O'Grady did not have authority to do that. It was a function she had regularly carried out, and one can only think that she did so with the knowledge and approval of the Tender Board. She was the one through whose agency the Board regularly notified tenderers of its decision: cf Minister for Aboriginal Affairs & Anor. v Peko Wallsend Ltd. & Ors. 66 ALR 299, per Mason J. at 307.

In the result then, in my opinion, the Tender Board validly accepted Skywest's offer, and that acceptance was validly communicated to Skywest. There is therefore a valid and binding contract between the Territory and Skywest for

the provision of the aerial medical flight services, the terms of the contract being as provided for in the Request for Tender. Accordingly, I would affirm the declaration made by the learned trial judge.

It is now necessary to consider what other relief, if any, the respondent is entitled to. As I have said, the learned trial judge declined to make an order for specific performance, but ordered the appellant to pay damages to be assessed. He did that, no doubt, as a result of being told by the Solicitor-General for the appellant that, notwithstanding his declaration, the appellant did not intend to perform the contract but would pay damages to the respondent. In its cross-appeal, the respondent submitted that the trial judge was in error in not ordering specific performance of the contract, and that this court should make such an order. Alternatively, the respondent argued that if the court should affirm the declaratory order made by the trial judge, it should set aside his order that the appellant pay damages to be assessed and substitute for it merely an order giving the parties liberty to apply. The appellant opposes the making of an order for specific performance, chiefly on the ground that courts do not make coercive orders against Governments. As well, of course, it opposes the granting of the alternative remedies sought by the respondent.

It is true that courts do not, at least as a general rule, make coercive orders against Governments, either because that would be incompatible with the dignity of the Crown: see Maguire v Simpson 139 C.L.R. 362, at 393, or because it is inconceivable that a Government would not comply with an order of the court. In the present case, however, I do not think there is any occasion, at this time, to consider whether or not an order for specific performance should be made against the Government. Treasury Regulation 10(3) creates the Tender Board as the procurement agency of the Territory for supplies, such as here in question, for which public tenders must be called. Nothing put before us gives any reason whatever for impugning the decision of the Board awarding the contract to the respondent, nor has any good reason been shown for depriving the respondent of the benefit of that contract. That being so, I think the court should, at this stage, act on the assumption that, on reconsidering its position in the light of these Reasons, and in spite of its earlier expressed intention to call fresh tenders, the Government will honour the Board's decision, and not take any steps that would render it nugatory. Should the Government decide not to do so, I think the parties should have liberty to apply on the question as to the appropriate remedy to which the respondent is entitled.

I would therefore affirm the declaration made by Nader J. I would set aside the order that the appellant pay damages to be assessed for breach of contract. Subject to that variation, I would dismiss the appeal with costs, and I would give both parties liberty to apply as indicated above.

KEARNEY J: I respectfully agree with the Chief Justice's comments on the sorry history of events leading to this litigation, his assessment of the arrangements made between the Government and Air North at the beginning of December 1986, his analysis of the issues on this appeal, and his conclusions and reasons. I would add 7 observations.

First, the second reading speech of the Majority Leader when introducing the Bill which became the Contracts Act makes it clear that it was intended to be purely an enabling measure. It was to give the new government, following self-government on 1 July 1978, a capacity to enter into contracts; see Hansard 3 May 1978, p.764. It was assumed that the Act was necessary to attain that end. In fact, it appears to have been unnecessary to pass such legislation; as the Chief Justice has pointed out at pp.41-43, after 1 July 1978 a capacity to contract flowed from the Self-Government Act and the common law. However the provisions of the Act must be read in the light of the Legislative Assembly's intention that it be an enabling

measure; it was not passed to limit the power to contract, or to regulate how and by whom that power is to be exercised. This intention of the legislation militates against giving ss.5 and 7 a construction that contracts may be made only in the ways set out in the Act.

Second, even if contracts by the Territory may be made only in the manner provided for by the Contracts Act, I consider that the requirements of that Act were met in this case. The Treasurer is responsible to the Legislative Assembly for the administration of the financial affairs of the Territory; see s.44(2) of the Northern Territory (Self-Government) Act 1978 (C'wlth), and, generally, the Financial Administration and Audit Act. It follows that the Treasurer and his senior Treasury officials would be expected to have a central role in deciding whether the Territory should enter into a contract involving a sizeable expenditure of public monies by any minister of the Government. That central role is recognized and spelled out in Part III of the Treasury Regulations, in particular Regulation 10, and exemplified by the delegation by the Minister for Health to Treasury officials, Exhibit A. I consider that the Treasurer, in issuing Treasury Direction 20.17 pursuant to s.35(1) of the Financial Administration and Audit Act, effectively and intentionally delegated to the persons comprising the General Tenders Board, pursuant to s.7(1)(a) of the Contracts Act, his own powers and

functions as a minister under s.5 of that Act to enter into contracts of the type for which the Treasury Regulations require public tenders to be called. The fact that the aerial medical contract related to a functional responsibility of the Minister for Health is of no consequence in this connexion; there is nothing in s.5(2) of the Contracts Act to limit the power of the Treasurer (or any other minister) to enter into contracts of the type there mentioned. The careful distinction between "minister" and "Minister" in s.18 of the Interpretation Act as applied to the Contracts Act (where the word is "minister") supports this view, as do s.38(3) and s.41(2). It is of no consequence, I think, that this delegation by the Treasurer, a member of the executive government, was not drawn up in an appropriate form such as Exhibit A and made no reference to the Contracts Act; it falls within the "settled principle that an act purporting to be done under one statutory power may be supported under another statutory power" as Fullagar J. described it in Lockwood v The Commonwealth of Australia (1954) 90 CLR 177 at 184. See also the discussion in Australian Broadcasting Tribunal v Saatchi (1985) 60 ALR 756 at 764-5 (Bowen CJ) and 778-9 (Wilcox J, dissenting), distinguishing between the executive and a statutory authority in relation to the application of the principle.

Third, the system of government procurement long followed in the Territory is a system well-known to all

Australian governments; see the general description at pp.184-6 of Aronson and Whitmore's "Public Torts and Contracts" (1982). It involves procurement by competition among suppliers through a public tendering system, so as to ensure that the services required by the Government are supplied at the lowest price consistent with satisfactory quality of performance, and that those services are procured in a manner above public criticism. Competitive public tendering is a basic feature of the system. Individual ministers of the Government, whose portfolio responsibilities give rise to the need to procure such services, must (and do) comply with the Treasury Regulations which regulate the system. It is clear in my opinion that the aerial medical contract was properly entered into by the Tenders Board, with the full prior approval of the Minister for Health, and that it did so in accordance with the detailed legal procedures and practice of the government procurement system in force since 1978 and designed to promote economy, efficiency and the prevention of corruption. The Financial Administration and Audit Act, under which that system was created, came into force on 1 July 1978, the same day as the Contracts Act. It has never hitherto been suggested that the Contracts Act has the exclusive effect for which the Territory now contends; I see no reason to construe it in that way, while the practice of procurement since 1978 supports the view that the manifest intention of the Legislative Assembly was that it should not be so construed.

Fourth, there is no suggestion that Skywest is unable or unwilling to perform its obligations under the contract. In general, and for good reasons, a government rightly regards itself as bound to carry out a contract it has lawfully and properly entered into, when the other party is not in breach. The reasons are rooted in commonsense and good government - in general, in a proper concern to protect the public revenue against unnecessary and unwarranted loss, to preserve the government's reputation for integrity and to retain its credibility, particularly with the business community. Because of its responsibilities to the people a government may nevertheless sometimes have to break its contract because of some overriding public interest, such as the exigencies of war; there is however no suggestion that any public interest requires that the Government break this contract. Nevertheless, Counsel has informed the Court that that is what the Government proposes to do.

Counsel for the Territory submits that there was nothing wrong with this, that the law does not require the Territory to perform its contractual obligations. It is clear that the common law does not require ordinary persons to adhere to their contracts. In general, it requires each party to choose between performing its contractual obligations and compensating the other party for injury resulting from its non-performance; as Holmes put it -

> "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it - and nothing else."

("The Path of the Law", (1897) 10 Harvard Law Review 497). But a government is not only a party to a contract; through its control of parliament it is a law-maker. In that capacity it has an interest in ensuring that the people respect and observe the laws, and to do so it must display by its actions some minimum respect for its own rules. Further, it is in the public interest that when a government contracts with an ordinary person, it deals fairly with that person, and is seen to do so. Accordingly it would be a serious matter for the rule of law if a government were perceived as refusing without proper cause to perform a contract for services to the public entered into in accordance with all the legal safeguards designed to protect the public interest. The rule enunciated by Holmes does not necessarily apply, in these circumstances.

No substantial explanation has been advanced as to why the Government intends to take this extraordinary action, and to pay to the successful tenderer Skywest out of the public purse any damages to which as a result that company may be entitled; the Court is simply told that for reasons referred to later the Government proposes to adhere to the arrangements it entered into with Air North at the beginning of December 1986. Those arrangements prejudged,

and incorrectly prejudged as it turns out, the outcome of this litigation. It is not suggested that those arrangements must be adhered to on grounds such as executive necessity. No submissions have been put to this Court on the question whether in the circumstances those arrangements give rise to any binding and enforceable legal obligations by the Territory to Air North, and I express no opinion on the point. As I say, the basic assumption upon which those arrangements appear to have been instituted - that there was no binding contract at the time between the Territory and Skywest - is now seen to be wrong. In making these remarks I should emphasize that while propriety, commonsense, commercial morality and the interests of good government might in the light of the Court's decision today be said to demand a re-examination by the Territory of any decision deliberately to break its contract with Skywest - a successful tenderer completely without fault - that question is not within the province of this court, though the consequences of the answer may be.

Fifth, the minister whose portfolio responsibilities gave rise to the need for an aerial medical contract, the Minister for Health, had repeatedly affirmed to Skywest between 30 October and 21 November (following the letting of the contract by the Tenders Board on 23 October and both before and after the injunction was granted on 31 October), that the Government's position was that it had

a contract with Skywest. The company's officers no doubt accepted, as would anyone, that the Minister spoke with the authority of his office and on behalf of the Government; they clearly gave no thought at the time to the old warning "Put not your trust in Princes" (Psalms 146:3). I respectfully agree with the learned trial Judge's observation that -

> "Statements such as those made by the Minister for Health, made by such a person in the circumstances in which they were made, must put beyond all doubt the question whether a valid contract had been [already] made."

Sixth, as time has proved, the Minister was in any event perfectly correct: Skywest had a contract with the Territory. Even in the more uncertain light of the situation as it may have been perceived at the times he spoke to Skywest, what the Minister then said reflects the usual approach taken by governments in such situations. A government usually values its reputation for fair dealing and its commercial credibility too highly to take technical points going to the formation of a contract the existence of which has been affirmed by one of its ministers. That accounts for the notable lack of case law in this area. The Territory's case in this litigation was, in essence, as follows:

(1) Its own long-established and well-known government procurement system and practice was and always had been invalid in so far as the Tenders Board entered into contracts, because the Contracts Act exclusively provides for the manner by which the Territory contracts. This is clearly an important question.

(2) The Tender Board's decision approving Skywest's tender following its consideration of the various competing tenders did not amount to an acceptance by that Board of Skywest's tender but constituted an approval that a contract be arranged with Skywest by a minister (or his delegate) under the Contracts Act. The Territory case appeared to be that the Tenders Board, having approved that a contract be arranged with a particular tenderer, should have sent that approval to the Under-Treasurer, who held an unrestricted delegation (Exhibit A) under the Contracts Act from the Minister for Health, or to the Minister himself; the Under-Treasurer or the Minister would then decide whether or not a contract would be entered into with that tenderer; any decision that it would be entered into would then be communicated to the Board, and the Board would then arrange for the successful tenderer to be notified that its

tender was accepted, in accordance with the 'Acceptance' provision in the Request for Tender.

It is a question, ultimately, of what the Board's words and actions mean, in the context of its perceived powers, particularly under Direction 20.17, and its practice; there can be no doubt, I think, that what it did, and intended to do, was to accept the tender itself.

(3) Mrs O'Grady was not authorized to notify Skywest that its tender had been accepted, though the evidence was that it had been the practice for her to do so, at least in urgent cases.

On this aspect, it is instructive to consider Keboki Business Group (Inc) v The Independent State of Papua New Guinea (1984) P.N.G.L.R. 281. That case involved legislation broadly similar to that in the Territory, though there was nothing corresponding to Treasurer's Direction 20.17 empowering a Board to enter into contracts, while s.2 of a Governments Contract Act preserved the effect of any other laws relating to power to enter into contracts. A minister had power to enter into contracts, under a Governments Contracts Act; he had delegated that power to the Chairman of the Central Tenders Board, and power to execute letters of acceptance to the Secretary of the Board.

That Board under its Chairman decided in a proper manner which company should win a tender; it approved that a contract be entered into, and a public servant wrote for the Chairman to a Provincial Tenders Board advising the decision and requesting that a letter of acceptance issue. The Chairman of the Provincial Board then notified the successful tenderer by a letter of acceptance that it had been awarded a contract. Services were then performed by the company under the contract. It sued when its claims for payment were refused. The State argued that the company had no binding contract with the State, since the Provincial Board's letter of acceptance had not been executed by one of the Minister's delegates under the Government Contracts Act. Further, the Chairman of the Central Board had not signed the letter to the Provincial Board, and there was no evidence that he had authorized the public servant to sign it for him. This argument succeeded before the National Court. However, the Supreme Court upheld an appeal by the tenderer - see (1985) P.N.G.L.R. 369 - holding that it was not necessary that the contract be personally signed by the Chairman of the Central Tenders Board, that he had sufficiently directed the Provincial Board to sign on his behalf, and that a binding contract existed. As Pratt J. put it:-

> "The discretion to enter into the contract has been exercised and the decision made. It remains only for the mechanics to be set in motion for the purpose of advising the offeror of the acceptance."

That was broadly the situation here. What Mrs O'Grady did was within the scope of her usual authority. I have nothing to add to the Chief Justice's comments on p.51.

Seventh, the question whether the remedy of specific performance is available to Skywest, and should be granted in the circumstances of the case has been agitated to some degree. The continued use of a system of contracts by a government in order that it may provide services to the public, as here, would appear to be viable only if the government contracting system is seen to be effective in arranging firm contracts. Companies which respond to a government's public invitation to tender do so to secure a contract, not an immediate lawsuit.

It is trite that our society is founded upon the rule of law. One incident of the rule of law, as Professor Wade put it, is that "the government should not enjoy unnecessary privileges or exemptions from the ordinary law" (Administrative Law, 5th ed., 1982, p.24). Governments are not above the law. In principle, the ordinary remedies of the law should be available against a government in relation to its contracts, in the same way and to the same extent as they are available as between ordinary persons; but the common law in fact immunized governments against specific performance, and whether they are liable to it depends upon whether a statute so provides.

In any event a government is of course not an ordinary person; it was in recognition of its sovereign aspects that Mr Justice Holmes said "Men must turn square corners when they deal with the Government"; see Rock Island, A. & L.R. Co. v United States (1920) 254 U.S. 141 at 143. Particular problems arise in relation to doctrines of apparent authority and estoppel when considering the acts of those who purport to be authorized to act for a government. It is clear that specific performance is not available so as to prevent a government from acting in the public interest.

The question whether specific performance is available against the Territory involves an examination of the Claims by and against the Government Act. Section 7 of that Act is expressed in quite general terms; it does not, unlike the corresponding legislation in New South Wales and Queensland, expressly provide that the remedy is available. On the other hand, it does not, like s.21(1)(a) of the Crown Proceedings Act 1947 (UK), specifically exclude the remedy. The better view, I think, is that the remedy of specific performance is available against the Territory, in appropriate circumstances; see R v Mayor of City of Wellington (1896) 15 NZLR 72.

Whether specific performance should be granted may perhaps require an examination in depth of the Territory's motives or purpose, for what it did. It is, however,

unnecessary to pursue at this stage the question whether specific performance should be granted to Skywest in the particular circumstances of this case. The legal position is that Skywest has an aerial medical contract with the Territory. It won that contract fairly and squarely, as a result of an open competitive tender. The Court is informed that the Territory proposes to break the contract. The reason is, it is said, that faced with competing claims by Air North and Skywest after Skywest had won the tender, the Territory "had no option but to accede to one" of those claims, and it "chose the course which left both contenders in the field", in the sense that the Territory proposes to call for fresh tenders. It is said that "justice and fairness" support that decision, made apparently about 1 December 1986. The fact is that it can now be seen that Air North was not "in the field" in December 1986. It had been excluded on 23 October by the proper operation of the competitive tendering system. This may not have been so clear at the time. The step which the Territory took in December 1986 is now seen to have had the effect of purporting to let Air North back "into the field". By doing so, the Territory can now be seen to have put at risk the integrity of its own system of competitive tendering and the credibility of a minister. I should emphasize that the Minister for Health in fact appears to have behaved with complete propriety throughout. I suggest with respect that the vital and immediate question now before the Territory,

as a result of the Court's decision today, is as to the action it should now take to ensure public confidence in the integrity of its tendering system.

I concur in the orders proposed by the Chief Justice.

ASCHE J: I agree with the judgment of the Chief Justice.

O'LEARY C.J. The orders of the court will, therefore, be -

1. that the declaration made by Nader J. that there is a valid and binding contract between the appellant and the respondent in respect of the provision of Aerial Medical Flight Services to the Darwin and East Arnhem regions of the Northern Territory be affirmed.

2. that the order made by Nader J. that the appellant pay to the respondent damages for breach of contract to be assessed be set aside.

3. that, subject to that variation, the appeal be dismissed with costs.

4. that the parties have liberty to apply on the question as to the appropriate remedy to which the respondent is entitled in the event that the appellant does not honour the Tender Board's decision.