

**HUGHES AIRCRAFT SYSTEMS INTERNATIONAL v AIR SERVICES AUSTRALIA
(1997) 146 ALR 1
Federal Court of Australia – 30 June 1997**

FACTS

Hughes Aircraft Systems International (“Hughes”), a Californian company, was the unsuccessful tenderer in a two party bid for the award of The Australian Advanced Air Traffic System (“TAAATS”) released by Air Services Australia (“Air”), a statutory corporation of the Commonwealth. The successful tender was Thompson Radar Australia Corporation (“Thompson”).

Air, Hughes and Thompson entered into a contract as to the process of the tender. Air initially recommended Hughes as the preferred contractor, but after several revisions of the tender process and a price reduction by Thompson, recommended Thompson as the preferred contractor.

Hughes’ claimed that Air by contract obliged itself to conduct the tender process leading to the award of the TAAATS contract fairly and ensure equal opportunity to Hughes and Thompson.

ISSUE

Whether there was an implied term of good faith and fair dealing.

FINDING

The Court confirmed that for a term to be implied it must be reasonable and equitable; necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; so obvious that it goes without saying; capable of clear expression; and must not contradict any express term of the contract.

The Court held that the community expects standards of fairness in contracts which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance.

The Court found that CAA acted in breach of its implied duty to act in good faith and fair dealing by failing to evaluate the tenders in accordance with the request for tender.

QUOTE

Finn J at 37 commented:

Fair dealing is a major (if not openly articulated) organising idea in Australian law... the implied duty is, as is well known, an accepted idea in the contract law of the United States... Its status in civil law is well recognised...[and a] more open recognition in our own contract law is now warranted.

Finn J continued at 37:

...I consider a virtue of the implied duty to be that it expresses in a generalisation of universal application, the standard of conduct to which all contracting parties are to be expected to adhere throughout the lives of their contracts. It may well be that, on analysis, that standard would be found to advance little the standard that presently may be exacted from contracting parties by other means... But setting the appropriate standard of fair dealing is, in my view, another matter altogether from acceptance of the duty itself.

IMPACT

As the Courts expect a standard of fairness in contracts, a duty upon the parties of good faith and fair dealing in the performance of contracts may be implied and compliance with agreed tender process is covered by the duty.

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NSW

Jim Doyle
P: 02 9283 5388

E: jdoyle@doylesconstructionlawyers.com

QLD

Frank Nardone
P: 07 3221 2970

E: fnardone@doylesconstructionlawyers.com

VIC

Vinodhini Krisnan
P: 03 9620 0322

E: vkrisnan@doylesconstructionlawyers.com