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**SAFEGARDING THE PUBLIC INTEREST IN THE DELIVERY OF PUBLIC SERVICES BY PRIVATE OPERATORS**

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*"Incorruptibility, accountability and fairness...are ...basic values underlying public administration. They are in no way inconsistent with the processes of desirable change or the search for greater efficiency."* Sir William Deane, Governor General of Australia<sup>1</sup>

## **INTRODUCTION**

In recent years, many human services have been contracted out to the private sector. Such services include disability services, health services, legal services, the operation of prisons, provision of housing to the poor, employment services and so on. It is important that the delivery of services in both the public and private sphere are conducted in a manner which is respectful of human rights and dignity, are exposed to public scrutiny and accountability mechanisms and that where people suffer harm as a consequence of a breakdown in the standard of care that they are protected by adequate administrative and legal remedies. The Administrative Review Council (ARC)<sup>2</sup> has stated that the "community is entitled to expect that public administrators will act lawfully, fairly, rationally, openly and efficiently in their dealings with the community."

Even the Hilmer Report states that the accountability for services when they are contracted out must be sustained. The Hilmer Report<sup>3</sup> has stated that while certain tasks can be transferred, the accountability for the results cannot. The ARC has maintained that although the delivery of the service is transferred, the requirement that the service is actually delivered and in a manner which accords with the functioning of government is still the domain of government accountability.<sup>4</sup>

As both Federal and State Constitutions tend to govern relations and powers between State and Commonwealth rather than relations between citizen and State, there are minimal protections afforded under the Constitutions to citizens.<sup>5</sup> While rigorous procedures for amendment are contained in Chapter VIII of the *Constitution* whereas, the Victorian Constitution can be changed by an Act of Parliament.

This paper will examine some of the legal and administrative safeguards which exist to protect of the interests of those persons affected by the contracting out of

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<sup>1</sup> Australian Institute of Public Administration, November 1996

<sup>2</sup> "The Contracting out of Government Services," ARC Issues Paper, AGPS, February 1997, 13

<sup>3</sup> Industry Commission Report No 48, AGPS, Melbourne 1996

<sup>4</sup> ARC Review, 14

<sup>5</sup> Despite much discussion in the early 1990s of the possibility of implied rights in the Constitution, this was largely put to rest in the case of *Kruger v The Commonwealth of Australia* (1997) 71 CLR 991 when Dawson and McHugh JJ forming part of the majority found that the Constitution contained no guarantee to individuals of the due process of law. They noted that whilst there were provisions in the Constitution affording protection against government action that disregarded individual rights, this did not constitute a guarantee that there was a notion of equality before the law, merely that the law should apply equally to all persons. See L Curran, "Justice – A Commodity or Something More Fundamental" Occasional Paper Number 2, April 1998 Catholic Commission for Justice Development and Peace.

government services and those additional safeguards which are necessary to achieve that end. The issue will be examined in the context of responsible government and the role of government in working towards ensuring the public interest.

## **DEFINITIONAL CLARIFICATION**

### **a) "Persons affected"**

This paper has used the terminology "persons affected" as opposed to "standing" because of uncertainty as to how the term "standing" will be applied by the courts in a contracting out scenario. This paper will highlight many areas of uncertainty: in common law, in approaches to statutory interpretation, in the extension of judicial review and remedies and how these will apply where traditional public sector activities are contracted out to the private sector.

The use of the term "persons affected" is intended to encompass service recipients/citizens who are not legal parties to the contract and therefore may be unable to seek remedies due to the rules surrounding privity of contract. The term is intended to resemble the "person aggrieved" concept under the *Commonwealth (Administrative Decisions) Judicial Review Act 1977*, namely, a person who suffers as a result of a decision beyond the suffering of an ordinary member of the public.<sup>6</sup> The rights and remedies of citizens may be affected by the processes by which contracts are entered into, by their operation, by the availability of appropriate and adequate supervisory and monitoring regimes, by the administration of power by the contractors and by access to compliance mechanisms.<sup>7</sup>

### **b) "Standing"**

In order to be able to present a case before a court or tribunal when one is not a direct party to the action it may be necessary to establish that the person or entity has "standing to sue." There are a plethora of matters affecting citizens which may arise in the administration of a public service which may not be envisaged or articulated in the preparation of contracts for service<sup>8</sup> and for which there may have been a clearer remedy or scope for review if they had occurred within the public sphere.

Potential remedies can include areas relating to freedom of information, judicial review, the right to seek statements for reasons for decisions, the right to correct personal information held on file, whether the activity complies with human rights or anti-discriminatory practice, problems with the delivery of and access to services, defects or deficiencies in service delivery not dealt with in legislation, negligence, activities of a sub-contractor and problems in the quality or scope of the service. The

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<sup>6</sup> ADJR Act s 3(4), 5,6,7

<sup>7</sup> It is interesting to note that the Senate Finance and Public Administration References Committee (Senate Committee) used the term 'parties to a contract' to include not only those parties who actually enter into the contract but also those directly affected by it – the users of the service. Second Report, "Contracting Out of Government Services", Senate Printing Unit May 1998,4.

<sup>8</sup> The Administrative Review Council in its Issues Paper, "The Contracting Out of Government Services" February 1997, 1 at 27 notes that it may be that the Government's contract does not cover the recipient's particular problem or the Government's contract may not provide a role for the Government in resolving individual's complaints against the contractor.

issue of standing in court cases may therefore be of relevance when discussing legal safeguards in the contracting out of government services and the legal mechanisms at the disposal of those persons affected by those services.<sup>9</sup>

Aronson and Dyer note that standing as a concept has many unresolved issues at a doctrinal level with differing formulas both in common law and under the main administrative law statutes<sup>10</sup>. They define standing as<sup>11</sup> existing where "the court or tribunal recognises the person's connection with the dispute before it, and regards the connection sufficient to allow that person to institute and maintain proceedings before it."

They note that the concept of "standing" may attach notions of what is in the "public interest", be fashioned out of notions of "good government", may require a ruling which can have a prospective affect upon non-parties or can involve retrospective declarations of parties' rights and obligations. The power to grant standing is still largely discretionary with the public law applicant being a stakeholder in the relevant exercise of the public power.

Aronson and Dyer also point out that in some cases the right to sue may be vested only in the relevant Minister or Attorney General. However, where it is the Minister's department or policy or that of another public authority which is being questioned, the Minister may not be politically challenged to bring an action to seek remedy on behalf of some third party such as the prisoner. Accordingly, the issue of standing may become very pertinent to a third party affected by the operation of a contracted out service.

## **ISSUES OF GOVERNANCE**

### 1. Source of Executive Power for Contracting Out

Under Section 13 and 56 of the Victorian Constitution the Crown is expressly enabled to contract. In addition, the executive enjoys a general power to contract at common law.<sup>12</sup> As the Crown is seen as a natural person, the courts have reasoned it must possess the same powers to contract as a natural person.<sup>13</sup> Sue Arrowsmith notes<sup>14</sup> that the use of contracts has become an increasingly significant tool in the implementation and enforcement of policy. She notes that Parliamentary appropriation is one form by which Parliament can check the executive, however, this

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<sup>9</sup> One matter raised by the Administrative Review Council in 1997 was whether groups, which might represent the interests of particular service recipients, might be able to bring an action on behalf of their constituents to enforce a contract if the privity doctrine were to be extended. It is arguable that prisoners, refugees in detention and juveniles by virtue of their age may be less able to represent their own interests due to their isolation or language difficulties. See ARC, "The Contracting Out of Government Services, Issues Paper, AGPS February 1997m

<sup>10</sup> Mark Aronson and Bruce Dyer, "Judicial Review of Administrative Action" LBC Information services 1996, 660 at 662.

<sup>11</sup> Mark Aronson and Bruce Dyer, "Judicial Review of Administrative Action" LBC Information services 1996, 660

<sup>12</sup> *Banker's Case* (1700) 90 ER 270

<sup>13</sup> Sue Arrowsmith, "Government Contracts and Public Law", (1990) 10 Legal Studies, 231, at 233

<sup>14</sup> Sue Arrowsmith, "Government Contracts and Public Law", (1990) 10 Legal Studies, 231, at 233

is becoming more difficult for Parliament as often a break down in the spending is not required for the line appropriation. Because the process of contracting out does not have the added scrutiny of Parliamentary debate or approval in the same way as delegated legislation, the executive has room to manoeuvre and finds contracting out even more attractive.<sup>15</sup>

The accountability traditions under the Westminster system hold ministers individually responsible to the parliament and, ultimately, the public, in relation to the administration, actions and policies of their department.<sup>16</sup>

It can be argued that two of the essential components of responsible government are its accountability and openness to public scrutiny. In *Egan v Wiles*<sup>17</sup> the High Court restated the critical elements of responsible government, stating it is "the means by which Parliament brings the executive to account" so that "the Executive's primary responsibility in its prosecution of government is owed to Parliament."

One important feature of the Westminster and democratic process is Parliament's role in the passage of legislation and its overseeing of the actions of the executive in conjunction with the courts. In *Lange v Australian Broadcasting Commission*<sup>18</sup> it was held that the Commonwealth Constitution prescribes the system of responsible government as necessarily implying "a limitation on legislative and executive power to deny the electors and their representatives information concerning the conduct of the executive branch of government throughout the life of the Parliament."

As the Senate Finance and Public Administration References Committee<sup>19</sup> has pointed out, the past thirty years have seen an expansion of the Parliamentary Committee system, an active role for the Auditors General and Ombudsman, Administrative Tribunals and the passage of freedom of information legislation.

Although contracting out is clearly within the prerogative of the Executive, its use is widespread and it can be seen as being an avenue for avoiding the detailed scrutiny of executive activity by the parliament. The Senate Committee states that it would be "naïve to claim that the 'traditional' public sector provision of services is, by definition, readily accessible and accountable to the public and the parliament, or that it is more sensitive to the needs of the individual than the market driven private sector."<sup>20</sup>

In the writer's view this comment may be premature as contracting out has been a recent but widespread development. It may be said that the 'jury is still out' because there is little data on a comparison and evaluation of the two spheres. It will be critical

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<sup>15</sup> Arrowsmith notes a comment by Dalkeith in "Legal Analysis of Economic Policy" (1982) 9 Journal of Law and Society 191,216-217 where he cites the 'wage restraint' policy attained through procurement as a measure which would never have been approved by the Parliament. Sue Arrowsmith, "Government Contracts and Public Law", (1990) 10 Legal Studies, at 231, at 234.

<sup>16</sup> See David Solomon *Australia's Government & Parliament*, 7th edition, Nelson, Victoria 1988

<sup>17</sup> [1998] HCA 71 (19 November 1998), 10

<sup>18</sup> (1997) 189 CLR 520 561.

<sup>19</sup> Senate Finance and Public Administration References Committee, Second Report, "Contracting out of Government Services", Senate Printing Unit May 1998, 5

<sup>20</sup> Second Report, "Contracting out of Government Services", Senate Printing Unit May 1998, 5

to any evaluation of these services that the mechanisms of review and scrutiny which lie in the public sphere are also applicable in the private sphere in the delivery of public services. It is also worth noting that in some cases publicly provided services have been poorly provided and inadequately specified.

Contracting out of services overseas has already given rise to a consideration of whom ultimately will be held responsible for failures and deficiencies of the services contracted out. Examples include the collapse of the Cave Creek viewing platform in New Zealand, Child Support Agency and prison escapes in the United Kingdom, and the Kew Cottages Fire in Melbourne (1997-1998 Coronial Inquiry).<sup>21</sup> In Britain a refusal of the Home Secretary to answer questions in the Parliament concerning the escapes from prisons on the basis that he was not responsible backfired.<sup>22</sup>

The Australian National Audit Office has also maintained that any decision to contract out a service will not diminish the expected level of ministerial responsibility.<sup>23</sup> The reality of the public expectations on such matters is also the subject of a submission to the Senate Committee by Professor Mulgan<sup>24</sup> who pointed out that the public will hold elected members accountable for shortcomings or failures of a service. This is underlined by the regular outcry in Victoria over problems encountered in ambulance and hospital services.

## 2. Contracting Out – The Rationale

Contracting out by government is not a new phenomenon. For some time, governments have procured goods and services by contracting out; such services might include catering, transportation and so on. What is new is the widespread embracing of contracting out in order to secure the delivery of many services which, traditionally, have been seen as central to the government's function in areas such as public health, disability services, employment assistance, human services and prison management.

A number of policy directions taken by State and Commonwealth government have been based on the premise that corporatisation, commercialisation, privatisation and contracting out are a more effective way in maintaining 'fiscal discipline', allocating resources to accord with government priorities, promoting the efficient delivery of services<sup>25</sup> and enhancing economic opportunities and growth.<sup>26</sup>

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<sup>21</sup> See *Inquest Findings, Comments and Recommendations into Fire and Nine Deaths at Kew Residential services on 8 April 1996*, State Coroner's Office, Victoria 1996, 274 where it states "Both historically, and practically, the State of Victoria through its various agencies always was the party best equipped to source, scrutinize and disperse acquired learning as to the adequacy..." and on page 282, "The duty of care owed by the State of Victoria to the residents and staff at KRS was non delegable."

<sup>22</sup> Second Report, "Contracting out of Government Services", Senate Printing Unit May 1998, 38 Submissions Volume 2, 250

<sup>23</sup> Second Report, "Contracting out of Government Services", Senate Printing Unit May 1998, 38 Submissions Volume 2, 295

<sup>24</sup> Second Report, "Contracting out of Government Services", Senate Printing Unit May 1998, 38 Submissions Volume 3, 610

<sup>25</sup> Annual Meeting of Senior OECD Budget Officials, May 1998 and part of promotional material of the Department of Treasury and finance, Victoria, May-September 1996.

It is important to know the key motivations of the government in contracting out before analysing the safeguards. Mr Alan Stockdale, the Treasurer of Victoria, in a speech in 1994 foreshadowed the new direction of his government.<sup>27</sup> Mr Stockdale states;

"There is a generally held view that government has for too long retarded economic growth through inefficiencies in the public sector... I want to point out that contracting out is actually far more subtle and effective than is generally realised. It will form part of virtually every reform we undertake...the government is firmly of the view that public sector reform must be applied to the whole public sector, not just those areas which produce tangible, tradeable outputs...Contracting out is not an end in itself, nor is it a substitute for other reform. Rather, it is an extremely powerful and subtle management tool which is compatible with and indeed must be an integral part of all the options highlighted...Historically, the public sector has greatly under performed relative to its private sector counterparts. Contracting out allows quick access to this superior performance...Governments have traditionally been very poor at managing risk and often get it completely wrong...Risk is so significant that, even if contracting out offered no other advantages, I believe risk transfer would be sufficient justification... This is not to deny that, in any individual case, the government will have to pay for the private sector assuming the risk...Contracting out forces the organisation to examine exactly what it should be doing...it is not just enough to contract out and leave matters. To ensure continued discipline there will need to be constant monitoring and performance evaluation."

The last three points made by the Treasurer namely, the transferal and assumption of risk, the knowledge and articulation of what the private sector agency is actually supposed to be doing, and the need for constant monitoring and performance evaluation, will be themes for recurring discussion throughout this paper in its analysis of the safeguards, their effectiveness, and what additional mechanisms could assist in ensuring effective monitoring and performance evaluation of not only the contract but of the public interest.

The comments by the Treasurer on the transferal of risk are interesting in light of an article in the 1980s entitled "The State Tries an Escape."<sup>28</sup> In the article, Amanda George notes that the state sees its role as transformed from one of management to merely that of overseeing, monitoring and enforcement of contracts. Her warning seems to have been borne out in recent media reports relating to the Port Phillip Prison by Minister McGrath<sup>29</sup> and Premier Kennett<sup>30</sup> where, although acknowledging a role in overseeing, distance was maintained in relation to management issues. Chan

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<sup>26</sup> "National Competition Policy" Report by the Independent Committee of Inquiry, August 1993 (known as the 'Hilmer Report') AGPS, Canberra 1996.

<sup>27</sup> Alan Stockdale, "Contracting Out: A Victorian Perspective", Conference Paper to the Conference Contracting Out Reforms in the public Sector, Sydney, March 1994 paper received from the Office of the Treasurer.

<sup>28</sup> A George "The State Tries an Escape" Legal Service Bulletin 14:2 1989 53-57

<sup>29</sup> "The Age" 27 October 1998

<sup>30</sup> "Herald-Sun, 11 June 1998

notes that<sup>31</sup> privatisation offers government release from their immediate problems for if costs can be contained or reduced and performed by private sector then the State can sustain a tough stance on law and order "without facing the peril of court challenges over prison conditions".

### 3. The Contracting Process

In a Second Report of the Senate Finance and Public Administration References Committee<sup>32</sup> (the Senate Report) which is examining the contracting out of government services it was stated;<sup>33</sup>

"The difference between good examples and unsuccessful examples of contracting out will largely come down to the extent to which good practice has been followed from the initial stages of making a decision to contract out a service through all the stages of the process."

Similarly, the Commonwealth Auditor General states:

"There is clear evidence that, if poorly managed, competitive tendering and contracting can result in higher costs, wasted resources, impaired performance and considerable public concern about the waste of tax payers money...the agency must specify the level of service delivery and quantitative and qualitative service standards in the contract. It must ensure that an adequate level of monitoring of the service delivery is undertaken as part of the agency's contract administration."<sup>34</sup>

These are reasons why the process and planning of contracting out and the design and specifications in the contract needs to be carefully designed, have precision in the terminology and needs to draw on the experience of the relevant public sector services so as to ensure that a range of eventualities are contemplated. In addition, the specifications in a contract need to be flexible enough to cater for the unanticipated, cater to the individual needs and vulnerabilities of persons affected by the contract and be capable of measurement, not just in terms of quantifiable outputs, but of quality and nebulous factors such as whether the service or approach to management benefited the recipients of the service in their overall wellbeing. For, in the contracting out of a public service, as opposed to a commodity, there is a public interest in rendering the most appropriate and individually adapted service possible to ensure that the citizen is cared for in a manner which transcends merely profit driven agendas, but which meets the expectations of the community and requisite standards of care.

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<sup>31</sup> Janet B.L. Chan, "The Privatisation of punishment: a review of the key issues" in "Private Prisons and Police" editor Paul Moyle, Pluto Press NSW 1994, 37, 42

<sup>32</sup> The Second Report into the "Contracting out of Government Services", Senate Printing Unit May 1998

<sup>33</sup> The Second Report into the "Contracting out of Government Services", Senate Printing Unit May 1998, 2

<sup>34</sup> Mr Peter Barrett in *Australian Public Eye*, 24 March 1998, Issue 264, at 10.

The Industry Commission stated, "while CTC (Compulsory Competitive Tendering) may provide governments with new options for providing programs and services more cost effectively, greater flexibility to meet individual needs may entail more discretion. This raises questions about who is accountable to whom, and for what."<sup>35</sup>

Questions that can be asked are: how can the balance between the precision required in a contract to hold a contractor accountable and the discretion needed to ensure the requirement for flexibility of the service to meet the needs of diverse groups be attained? How can these be effectively measured by the community thereby holding government accountable if the information critical to making assessments is not publicly available? Where a public service is being provided by the public sector does their duty to the public interest make them more responsive and flexible to client needs by contrast to a private provider who has a profit motivation as a driving force? The Senate Finance and Public Administration References Committee<sup>36</sup> noted that "difficulties arise when agencies for a variety of reasons or in response to other pressures do not give proper weight to factors or seek to take shortcuts in the process." Such problems can be averted through careful planning but also by a responsive review process and appropriate monitoring and accountability mechanism which will protect not only the interests of the contractors but persons affected in the long term.

#### 4. Contractual Terms and Specifications

Carefully crafted contractual terms and specifications can be of great assistance in determining whether a service is meeting the public interest, whether it is addressing the needs of service users (not just in terms of the numbers of services delivered but as to the quality), its effectiveness and outcomes. Such refinement and forethought in how a services are to be delivered is not just relevant in terms of the assessment of a service but can help with proper planning and implementation of the service whilst it is in the process of being delivered.

The formulation of the contractual terms and specifications will never be adequate if they are written in a vacuum of information on current practice and experience informed by people who are actually engaged in service delivery. They should also take into account factors that client's face in accessing services. There has been concern expressed regularly about the lack of genuine consultation with community organisations in relation to the delivery of employment services, the redevelopment of human services, legal aid, child and family services. Information and experience can inform appropriate contractual and specification measures and be critical in tailoring services adequately. Palumbo<sup>37</sup> states:

"Government policies are bound to be general in character and tend to be incomprehensible except by reference to practice. In the world of politics, all policies (even those that involve hard technologies) have multiple objectives:

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<sup>35</sup> "Competitive Tendering and Contracting by Public Sector Agencies" Report No 48, January 1996, 81.

<sup>36</sup> Second Report "Contracting Out of Government Services" Senate Printing Unit May 1998, 5

<sup>37</sup> D. J. Palumbo "Evaluation Policy Implementation: Central Issues in Comparative Analysis" Paper presented to the International Political Science Association Meeting. Paris, France July 1985, 1

Those who implement government policies have values of their own and will give meanings they prefer to that policy; Conflict is an unavoidable part of policy formulation and implementation; Implementation is intrinsically an interactive process based on give – and - take and on trial-and-error."

The added factor in the contracting process is that bargains may be struck on clauses to reduce exposure to liability or to minimise costs. "Hard bargaining" may do little to promote the interests of persons affected but may suit the political and corporate parties to a contract. When appropriations in relation to public services are in fact paid for through the raising of public revenue, the reduction of the obligations of a contract on commercial or political grounds may not align with the expectations of the public in relation to the manner in which public revenue is allocated as a consequence of such bargaining.

Margaret Allars states that "If government does not honour its promises, which induce expectations in members of the public, harm will be done to the ultimate value of reciprocity between government and the governed."<sup>38</sup>

Einfeld J in *New South Wales Bar Association v Forbes Macfie Hansen Pty Ltd*<sup>39</sup> observed that immunity of the Crown from meeting obligations to individuals holding contracts should not be extended to social and humanitarian spheres but should be confined to commercial areas, as such a restriction would derogate from the freedom of the State and put it beyond the reach of Statutes.

Whilst the comments of Mr Stockdale, referred to earlier, noting the attractiveness for government of risk transferal may provide insight on the motivations of government in contracting out services which were traditionally in the public domain, the ARC has noted that though the risks associated with the performance of the contract can be transferred to the contractor, such matters as the ultimate legal liability for damage or loss and accountability for performance of the contract remain with the government.<sup>40</sup>

## **ADMINISTRATIVE LAW SAFEGUARDS-CURRENT AND POTENTIAL**

### **1. The position of the Crown**

The former Commonwealth Ombudsman in her submission to the ARC cited examples of buckpassing of responsibility between government agencies and contractors. Although risk transferal has been indicated by the Victorian Treasurer as one of the attractions of contracting out it can and has caused inconvenience to

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<sup>38</sup> Margaret Allars " Administrative Law, Government Contracts and the Level Playing Field" (1989\_12 UNSW, 114, 118

<sup>39</sup> (1988) 82 ALR 431, 437

<sup>40</sup> ARC Review, 15 and see "Guidelines for Managing Risk in the Australian Public Service", October 1996; "Guide to Commercialisation in the Commonwealth Public Sector", Department of Finance, July 1996; and "Purchasing Australia", Department of Administrative Services, Management, Risk and Procurement – A Handbook, AGPS Canberra, 1996, also see the Coroner's Court decision *Kew Cottages Inquest* findings. See note 34. In the decision the Coroner noted that it was difficult to unravel which contractor was responsible for what, as there were so many and their roles were unclear. In the end the court still held the government accountable as the complexity of arrangements was indicative of a breakdown in communication, responsibility and lack of clarity in the chain of accountability which reflected on the government's failure to adequately monitor and supervise its services.

persons affected and exposure to possible breaches of care by the government or contractor. It is often the person affected who will suffer unnecessary delay<sup>41</sup>. The Ombudsman went on to show that often the rules associated with contracting out are unclear and contradictory. Such lack of clarity, about who is responsible for the relevant service for persons affected has caused difficulties in recent times surrounding the transferal of prisoners from rural lock-ups to metropolitan prisons in Victoria and in the process of unraveling the relevant service providers responsibility in the Coronial Inquiry into the fire at Kew Cottages in 1996.

## 2. Freedom of Information

As noted earlier, both *Lange's case*<sup>42</sup> and *Egan v Willis* saw the availability of information as a critical element for responsible government. Freedom of Information in Victoria in 1982 was devised in order to further the concept of open and accountable government. Section 34 of the Victorian *Freedom of Information Act* (FOI) 1982 operates to exempt information from disclosure including matters of commercial sensitivity. The Industry Commission has noted that there is a "tension between making information on contracting decisions public and procuring commercial confidentiality."<sup>43</sup>

On 20 May 1999, the Victorian Civil and Administrative Tribunal (VCAT) held that access to the details of contracts with private prison operators ought to be released on the grounds that "there is little that is more obviously in the public interest than the issue of liberty of persons."<sup>44</sup> This decision may allow scope to overcome commercial confidentiality objections concerning the delivery of other key public services however, this is yet to be determined and at the time of writing the Victorian government has the option to appeal the VCAT decision in the Supreme Court.

Paul Moyle<sup>45</sup> points out that "The State needs to control the privatisation process and not be controlled by it."

The ARC has noted that the absence of an information access regime whereby service recipients and others are entitled to obtain information about contracted out services is a factor to be taken into account when considering the adequacy of current remedies or rights.<sup>46</sup> One of the important tools in ascertaining whether one has an exercisable right is information about what one is entitled to and how that service is expected to be delivered and whether it has in fact been delivered.

The ARC Review stated that it should not be possible for government to avoid the accountability and openness provided by the FOI by contracting with the private sector for the provision of services.<sup>47</sup> The FOI Act, under sections 51 and 159 of the VCAT Act operates where there is inconsistency with the VCAT.

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<sup>41</sup> Submission by the Commonwealth Ombudsman to the ARC para 1.29

<sup>42</sup> (*Lange*, (1997) 189CLR520 & *Egan* (1998) HCA 71 (19 November 1998))

<sup>43</sup> Industry Commission Report No 48, *Competitive Tendering and Contracting by Public Sector Agencies*, AGPS, Melbourne 1996, 6

<sup>44</sup> *The Australian*, 21 May 1999

<sup>45</sup> Paul Moyle, "Private Contract Management of Corrections in Victoria" in "Private Prisons and Police" edited Paul Moyle, Pluto Press, NSW 1994, 35

<sup>46</sup> ARC Review, 48

<sup>47</sup> ARC Review, 5

One of the unfortunate side effects of the contracting out of public services for persons affected has been the operation of the commercial in confidence provisions which operate where a private contractor provides the service. Details surrounding the specifications and outcomes required in service delivery together with aspects of staffing levels and details of available programs are out of reach to the general public due to exercise of the commercial in confidence exemption. It is interesting to note that some of the private contractors have expressed doubt about the rationale for the withholding of information surrounding specifications, standards and outcomes on the basis of commercial in confidence.<sup>48</sup> It has been stated to the writer that so long as the conditions and the mode of setting the price remains confidential the private sector sees no reason for the aforementioned matters to be secret. It is remarked that it is the government rather than the private provider who suggests such matters be covered under commercial in confidence. One private contractor indicated that in his view such matters should be revealed in the public interest.

The Senate Committee has stated:

"It is of no public benefit if the information generated by the contractual process is not made public on the grounds of 'commercial in confidence' or indeed that the criteria within a contract against which performance is assessed are not published for the same reason...It is also important that the relevant, publicly funded parts of a private contractor's activities be subject to public scrutiny, particularly by the Auditor- General."<sup>49</sup>

It is interesting that much of the rationale for the contracting out of public services has been derived from the Hilmer Report and yet, the Industry Commission's Recommendation 1B.1 would not seem to support the extension of commercial in confidence exemption to the extent that has been claimed by the Victorian government in relation to outputs and contract specifications.

The Industry Commission Recommendation states:

"Recognising the balance between commercial confidentiality and accountability, governments should make as public as much information as possible (available) to assist to enable interested people to assess contracting decisions made by agencies. Of particular importance is information on the specifications of the service, the criteria for tender evaluation, the criteria for measurement of performance and how well the service provider has performed against those criteria."<sup>50</sup>

In addition, the New South Wales Auditor-General has expressed the view that once a contract is complete there is unlikely to be any material damage caused by the release of such information. Therefore, there should be a presumption in the Freedom of

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<sup>48</sup> Confidential discussions between the writer and private contractors who requested their comments be private in light of the possibility of further contracts with the government in future.

<sup>49</sup> Second Report "Contracting Out of Government Services" Senate Printing Unit May 1998, 8

<sup>50</sup> "Competitive Tendering and Contracting by Public Sector Agencies" Industry Commission, Report no. 48 24 January 1996

Information Act that such information in relation to public service delivery should be released in the public interest.

The ARC listed a number of possible reforms to the Freedom of Information laws in its discussion paper. These included:

1. extending the act to contractors
2. deeming specific documents in the possession of the contractor to be in the possession of the government agency
3. establishing a separate information access regime
4. and perhaps most realistically deeming specific documents in the possession of the contractor, relating to the contractor's performance of his contractual obligations, to be in the possession of the government agency.<sup>51</sup>

The Senate Committee viewed the latter recommendation as the most desirable after noting that it was already contained in the *New Zealand Official Information Act*<sup>52</sup>

### 3. Statutory Administrative Review

The *Victorian Civil and Administrative Tribunal Act* 1998 (the VCAT) came into operation on 1 July 1998. It amalgamated many tribunals including the Administrative Appeals Tribunal. The Administrative Appeals Tribunals Act and the Administrative Appeals Act have been repealed. The VCAT has original jurisdiction and review jurisdiction. The administrative division of the VCAT conducts merit reviews of government decisions previously exercised by the AAT. It has jurisdiction only when an "enabling enactment" confers specific jurisdiction upon it. For example, in FOI cases internal review must first be sought. The capacity to review government action is central to ensuring government accountability and examining whether proper process has been followed. It is critical as it enables consideration to be given to the impact of government action on persons who may be aggrieved by such action or inappropriate exercise of power.

The review jurisdiction can only be invoked by a person applying for review of a decision under an enabling enactment if the person's interests are affected by the decision. The definition of "interests" is broad and is not limited to proprietary, economic or economic interests. The interest affected can be indirect or direct. A person can request reasons. The powers of the VCAT include the power to extend time, dismiss, strike out, summons, inform itself of any matter, grant injunctions (s.123), make declarations (s.124) and affirm or vary, set aside a decision, make its own decision or remit the matter back to the decision-maker.

The *Administrative Law Act* 1978 is very narrow and problematical for people who may wish to seek relief. The test of 'standing' applies to persons affected but the definition of 'persons affected' is much narrower than that given in this paper. The Act allows for an overriding effect of ouster clauses (s. 12) and the court can grant any remedy it considers appropriate (s.7) The Act is procedurally flexible but its scope is limited to 'decisions of tribunals' which are narrowly defined. Often a person affected

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<sup>51</sup> ARC, "The Contracting Out of Government Services: access to information", December 1997

<sup>52</sup> Senate Second Report "Contracting Out of Government Services" Senate Printing Unit May 1998, 49

will complain under the Act and under common law. It also must relate to a decision operating in law to determine a question of rights affecting any person.<sup>53</sup>

There are a number of limitations on the capacity for persons to seek relief. Case law has restricted the Act's coverage to bodies exercising public power.<sup>54</sup> A right must be actually determined rather than just affected.<sup>55</sup> In many cases this acts as a deterrent as there is limited coverage for intermediate formal rulings.<sup>56</sup> It does not extend to "reviewable conduct" as in the Commonwealth ADJR. Furthermore, the Act does not apply to a decision maker who is statutorily obliged to act fairly but is relieved of a duty to accord natural justice.<sup>57</sup>

The Victorian Supreme Court has jurisdiction to conduct judicial review. In Victoria, this jurisdiction cannot be withdrawn unless Parliament's intention is expressly articulated<sup>58</sup> and unless it is passed by absolute majority of each chamber.<sup>59</sup> Currently, in Victoria the government holds a majority in both houses. Consequently, with the operation of party discipline very little legislation ousting Supreme Court jurisdiction has seen much resistance.

#### 4. Ombudsman

Under the *Ombudsman Act 1973 (Vic)* the Ombudsman has the jurisdiction to inquire into or investigate any administrative action taken in any government department or public statutory body to which the Act applies or by any staff member of a municipal council. Section 13(7) of the Act provides that the Ombudsman may investigate the actions of bodies outside the Ombudsman's jurisdiction where they "are acting under any powers or functions conferred on or instructions given by any public authority.

The role of the Ombudsman is critical in ensuring that consumer complaints are addressed and publicly reported upon. However, this is not a sufficient avenue for consumers to pursue a wide range of remedies where loss is occasioned. Nor is there necessarily an onus on the government to adapt practices to accord with the Ombudsman's concerns.

#### 5. Auditor -General

The Office of the Auditor-General is primarily regulatory. It provides assurance to Parliament that instruments of government are operating and accounting for their performance. It reports to Parliament as to the results arising from audits now conducting by Audit Victoria or those privately contracted. The recent Auditor General's Report to Parliament "Victoria's Prison System: Community Protection and Community Welfare," released on 27 May 1999, highlights the difficulties the

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<sup>53</sup> For a comprehensive and up to date discussion see Emilios Kyrou, "Victorian Administrative Law", Volume 1 Law Book Company (Looseleaf)

<sup>54</sup> *Monash University v Berg* (1984) VR 383, *Domik v Eutrope* (1984) VR 636 where trustees of a private super fund were not covered.

<sup>55</sup> *Herald and Weekly Times Ltd v Attorney General* (1991) 1 VR 95, 99

<sup>56</sup> *Alam v City of Northcote* (1994) 7 VAR

<sup>57</sup> See Mark Aronson and Bruce dyer, "Judicial Review of Administrative Action," LBC NSW, 1996, 26-29

<sup>58</sup> Section 85(1) Supreme Court Act 1986

<sup>59</sup> Section 18 (2A)

Auditor faces in auditing in the public interest due to the commercial confidentiality of matters that would enable him to assess benchmarking and government expenditure of public monies.<sup>60</sup>

6. The Minister (See earlier for a discussion of Ministerial responsibility and sources of the power to contract out).

### 7. Estoppel

Estoppel is a complex doctrine but put most simply it enables relief where a person has relied upon a representation that has been made and suffered some detriment due to such reliance. In *Waltons' Stores (Interstate) Ltd v Maher*<sup>61</sup> the High Court showed a willingness to permit estoppel to be raised in the context of administrative law in relation to discretionary powers exercised by administrators rather than duties. In *Waverley Transit Pty Ltd v Metropolitan Transit Authority*<sup>62</sup> in following *Walton's* case, the Supreme Court of Western Australia rejected a submission by the transit authority that its decision to tender for a contract was not amenable to judicial review. Mr Justice O'Bryan held that because the Authorities' approval was a statutory precondition to the grant of a vehicle license, it was capable of judicial review in line with *FAI Insurances Ltd v Winneke*.<sup>63</sup> He held that the Authority had denied procedural fairness and was estopped from denying its representations to a disappointed tenderer. In light of these cases it is remotely possible that if a government department contracts out a public service and there is reliance on the fact that the department will meet its obligations to perform the contract a court may extend a remedy to persons affected using the doctrine of estoppel.

### 8. Procedural Fairness

Traditional administrative notions of natural justice, appropriateness, reasonableness, ultra vires, and other grounds apply. The High Court's decision in *Teoh's case*<sup>64</sup> indicated that those exercising public power were required to provide natural justice to those people who have specific rights, interests or legitimate expectations concerning the exercise of that power. With the removal of traditional public services into the private sphere, scope for the application of *Teoh's case* and other similar administrative decisions on legitimate expectation may be more limited as private bodies are in control of many of the decisions. At a federal level, there have been moves to limit *Teoh's* application through the *Administrative Decisions (Effect of International Instruments) Bill 1997*. This lapsed at the October federal election but is due to be re-introduced into Federal Parliament in 1999.

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<sup>60</sup> Special Report No 60, May 1999. In Part 4 of this Report government benchmarking is listed in tables 4E, 4F and 4G as \$XX XXX. This can provide little basis for the auditor to draw informed conclusions.

<sup>61</sup> (1988) 164 CLR 387

<sup>62</sup> (1988) 16 ALD 253 See also Margaret Allars (1989) 12 UNSW Law Journal, 114, 134

<sup>63</sup> (1982) 151 CLR 342

<sup>64</sup> (1990) 170 CLR 1

## 9. Judicial Review of Government Contracts

As early as 1778 it was held that the Postmaster General was under no contractual obligation to a member of the public to deliver mail.<sup>65</sup> Aronson and Dyer point out that the law has always been reticent to enforce government promises or representations in public or private law<sup>66</sup>. They also note that the law has struck down some arrangements between public authorities and members of the public even if both parties intended them to have contractual force. This is perhaps to ensure the necessary flexibility of government in relation to its future activities and policies and to avert unnecessary intrusions by the judiciary into the executive's prerogative. Such a view has been underlined by Gummow J in *Kurtovic*<sup>67</sup> who noted that the common law's refusal to recognise estoppel at administrative law was to avoid the future fettering of statutory discretion. P.S Atiyah also notes that rules governing relations within the public sector are usually denied contractual force.<sup>68</sup>

Brennan CJ in his decisions has tended to examine the source of the government's relationship with the service provider. This may provide some scope for person's affected by the contracting out of services to gain judicial review in limited circumstances. In the event that the source is statute rather than contract Brennan indicated he would allow judicial review.<sup>69</sup> This would apply to the *Administrative Decisions Judicial Review Act* (ADJR) and the VCAT in that it enables the Federal Court to review a decision of an administrative character "under an enactment".

In *R v Panel on Takeovers and Mergers, Ex Parte Datafin Pty (Datafin)*,<sup>70</sup> it was held that judicial review could be open, even where the exercise of a public power is made by a non-government agency. The government in this case sought to argue that the Panel reviewing government takeovers was not subject to judicial review as it was a voluntary scheme of industry self regulation. The court in *Datafin* held that, the reviewability of an exercise of a public power turned, not on the nature of the body exercising it but upon whether the 'power is public'. As the panel was an integral part of government's industry regulation it was seen to be exercising public power. The case did not define "public".

*Datafin* may challenge the use of contracting out as a means of immunising government from judicial review. In future courts may engage in a process of distinguishing the government's public from its private role.<sup>71</sup>

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<sup>65</sup> *Whitfield v Le Despencer* (Lord) 2 Cowp 754 at 764

<sup>66</sup> Mark Aronson and Bruce Dyer, "Judicial Review of Administrative Action" LBC Information Services 1996, 174

<sup>67</sup> *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 92 ALR 93 at 11

<sup>68</sup> "The Rise and Fall of Freedom of Contract" (1995) 4 AIAI Forum 45 at 49

<sup>69</sup> (1992) 175 CLR 564 at 583-586

<sup>70</sup> (1987) 1 QB 815

<sup>71</sup> In Victoria, *State Owned Enterprises Act* 1992 expresses that the activities to be done are for the public benefit, making a contribution to the economy and the State, see sections 18 & 69. This might open scope for judicial review if a cause of action were to arise. In *Mercury Energy Ltd v Electricity Corp of New Zealand Ltd* (1994) 1 WLR, 521. A local electricity provider which was a state owned enterprise was subject to judicial review because it was established by statute, the minister held shares and was responsible to the Parliament.

Aronson and Dyer point out that where there was an enactment governing the procedure and criteria for a government contract it would be interesting to see how the courts would approach the issue.<sup>72</sup> They conclude that whether under common law or under the ADJR, the courts have been cautious in supervising government contracting with their "armoury of judicial review principles and remedies." They observe that at common law judicial review only lies to "supervise public power", and that whilst government contracting might involve great inequality of power, it is not different from economic power. Aronson and Dyer note that because contracts, irrespective of the inequality of the parties, occur and emerge through a consensual regime of rules they are akin to a private statute.<sup>73</sup> The question the writer wishes to pose is whether, when those contracts have an effect in the public realm and impact upon third parties for whom the contracts are supposedly administered, the courts will be prepared to consider a different approach?

Some recent English cases do provide an emerging broadening of the approach in the development of principles involving public contracting with the possibility for special procedural and substantive protection. Aronson and Dyer warn a cautionary approach to these cases.<sup>74</sup> In Australia there is still tension surrounding the reviewability of government contracting processes. At a Commonwealth level, the ADJR notes that a decision must be made "under an enactment". This is problematical for scrutinising contractual arrangements, as, the situation in many cases is that government contracting has not been made under an enactment, but under general executive prerogative to enter into the contract.

The problem, as Allars points out<sup>75</sup>, is that unlike an action for breach of contract where damages are available as a remedy, where judicial review is concerned it only offers that in a successful action a decision may be set aside, or a direction can be made that an administrator comply, or a declaration against a government can be made rather than a coercive order, (especially orders directing expenditure of public funds). These remedies may be totally inadequate for persons affected by the contracting out of government services who suffer as a consequence of a failure on the part of the private operator or the government.

In February 1997 the Administrative Review Council (ARC Review) undertook an analysis of the contracting out of government services.<sup>76</sup> In the Issues Paper many criteria were suggested for the improvement of the processes of contacting out and for the improvement of mechanisms designed to protect and promote the public interest. Although the paper was specifically targeted at the Commonwealth many of the reforms suggested are applicable also in the provision of State services which are contracted out.

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<sup>72</sup> Mark Aronson and Bruce Dyer, "Judicial Review of Administrative Action" LBC Information services 1996, 177

<sup>73</sup> *Aga Khan v Jockey Club Disciplinary Committee*; *Ex Parte Khan* (1993) 1 WLR 909. See Mark Aronson & Bruce Dyer, "Judicial Review of Administrative Action", LBC Information services, NSW 1996, 176-177

<sup>74</sup> (*Roy v Kensington and Chelsea and Westminster Family Practitioners Committee* (1992) 1 AC 624 and *Mercury Communications Ltd v Director General of Telecommunications* (unreported February 1995)

<sup>75</sup> Margaret Allars (1989) 12 UNSW Law Journal, 114, 148

<sup>76</sup> "The Contracting out of Government Services, Administrative Review Council (ARC) Issues Paper, AGPS, February 1997

One of the difficulties highlighted by the ARC is that a person affected may be seeking to complain about the quality of a service provided rather than loss or damage.<sup>77</sup> When services have been contracted out avenues for a remedy become less clear. Avenues for complaint may lie to the Ombudsman or the Regulator if one exists. For persons affected the operation of commercial-in-confidence the uncertainty surrounding the actual conditions and specifications in the contracts will make it difficult for them to determine whether there is in fact a breach, what services they are entitled to, and whether the anticipated outcomes have been delivered.

One of the difficulties which surrounds the concept of the contracting out of public services is that often the recipient of the service has no choice as to where they go to find the service they need. This is especially relevant in some employment services in rural areas and disability services in local areas. One of the premises behind the theory of National Competition policy contained in the Hilmer Report<sup>78</sup> and raised in the Industry Commissions Report into "Competitive Tendering and Contracting by Public Sector Agencies"<sup>79</sup> is that service recipients have an element of choice and that where a service provider fails to deliver, the consumer can exercise the option to go elsewhere. The assumption is that where the service provider fails to deliver, it will reappraise and adapt to demand otherwise it will fail to attract custom. This choice of consumer is seen as a regulative force by the Hilmer Report but is often absent in many of the public sector services to the disadvantaged.

## **COMMON LAW SAFEGUARDS**

### **1. Contract**

#### **a. Privity of Contract – the limitations for third parties**

At common law under the doctrine of privity only an original party to a contract may sue or be sued upon it. This means only an original party may enforce or be bound by the terms of the contract. The doctrine denies rights to third parties (such as service recipients) and also prevents a third party from being liable under a contract to which he or she is not a party. If a third party has not provided consideration for a contract then that third party cannot demand that the contract be performed. This will operate irrespective as to whether the contract is entered into on behalf of a third party and even in such a case they cannot sue<sup>80</sup> to obtain the benefit of the contract.<sup>81</sup>

A Department might seek specific performance of a contract where it is breached or it may seek damages. However, the scenario might arise where the promisee (the Department) may have suffered minimal damage and it may be the service recipient who incurs the damage. Even if the Department was successful in recovering damages

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<sup>77</sup> ARC Review, 32-33

<sup>78</sup> "National Competition Policy" Report by the Independent Committee of Inquiry, August 1993 AGPS, Canberra 1996

<sup>79</sup> Report Number 48, AGPS, 24 January 1996

<sup>80</sup> In *Tweddle v Atkinson* (1861) 1 B&S 393; 121 ER 762 at 763 –764 Wightman J states, "It is now established that no stranger to the consideration can take advantage of a contract although it be made for his benefit."

<sup>81</sup> Stephen Graw, "An Introduction to the Law of Contract" Third Edition Brookers North Ryde NSW, 1998 (\*check citation and publisher) 138

these will not necessarily be bestowed on the third party who may have suffered the harm. In addition, the Department is under no obligation to sue on behalf of the third party.

b. Emerging questions about the doctrine of privity of contract

The doctrine of privity has increasingly been questioned in view of its neglect of third parties who may be affected by non compliance with contractual obligations. This is an area where there may be scope for law reform to assist persons affected.

In 1969 Windeyer J spoke of

"...the rigidity of the obstacles of the common law doctrine of privity of contract places in the way of justice to third parties."<sup>82</sup>

In 1988 the doctrine of privity did receive some limited re-examination in the High Court in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, but a warning of caution was given by Gummow J who indicated that this might turn on the facts of the case and the case at hand only related to the consideration of insurance contracts. Mason CJ and Wilson J were prepared to acknowledge that the doctrine of privity might deserve some reconsideration. They state, "there is much substance in the criticisms directed at the common law rules (of privity)..."<sup>83</sup> Toohey J stated that the doctrine was "based on shaky foundations and, in its widest form, lacks the support of both logic or jurisprudence."<sup>84</sup> Gaudron J alluded to a similar view but decided the case on different grounds whilst Brennan, Dawson and Deane JJ were unprepared to disregard the doctrine.

In addition to some scepticism about the doctrine of privity expressed by the High Court there has also been a similar concern by the House of Lords in the United Kingdom in a number of cases.

In 1995 Steyn LJ in *Darlington Borough Council v Wiltshire Northern Ltd*<sup>85</sup> (a Court of Appeal case) stated:

"Moreover, often the parties, and particularly third parties, organise their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract."

On further occasions where similar reservations were expressed, the position in relation to third parties was found to be unsatisfactory.<sup>86</sup> In *Beswick v Beswick* (1968)

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<sup>82</sup> *Olsson v Dyson* (1969) 120 CLR 365, 392 and for further discussion about the concerns over the rigidity of the doctrine see the discussion in the Law Reform Commission Report Number 242 "Privity of Contract: Contracts for the Benefit of Third Parties" HMSO, London, July 1996 1, 7- 37

<sup>83</sup> (1988) 165 CLR 107, 118

<sup>84</sup> (1988) 165 CLR 107, 123

<sup>85</sup> (1995) 1 WLR 68

<sup>86</sup> In *Woodar Investment Development Ltd v Wimpey Construction UK Lmt* (1980) 1 WLR 277 Lord Salmon, dissenting, regarded the law regarding damages for third parties as unsatisfactory. Other cases arise where a third party through the non-performance of a contract suffers economic loss. In *Ross v Caunters* (1980) Ch 297 a remedy in tort was found to enforce a contract where a third party would otherwise have been deprived of their benefits under a will. In *White v Jones* fifteen years later, the

AC 58, 72 Lord Reid stated that when a contract purported to bestow a direct benefit on a third party, it should be enforceable by the third party in their own name. He intimated that if the Parliament continued to be slow in legislating the issue might have to be dealt with by the courts.

The United Kingdom Law Commission in its discussion paper and recommendations presented to the Parliament in July 1996<sup>87</sup> calls for changes to the doctrine of privity to allow action by third parties where the contract is for their benefit. The Commission notes that the doctrine of precedent has been criticised for some time in both judicial and in academic circles. It argued that the motivation for reform is not to override the allocation of liabilities but rather rest on the underlying policy of effecting the contracting party's intention.

The English Commission argues that the doctrine of privity currently prevents effect being given to the intention of the parties to the contract where third parties are intending to benefit and they are disadvantaged or do not receive the intended benefit or service under the contract. It argues that injustice to the third party where a third party has an expectation of having a right and has relied on this expectation to regulate their affairs, should be sufficient to found an action. This is akin to an estoppel argument. They note that an anomaly arises under the current laws whereby the person who has suffered loss cannot sue while the person who has suffered no loss can sue. They note that where there can be no specific performance the result is "both perverse and unjust."<sup>88</sup> The Law Commission did not have within its contemplation issues relating to the contracting out of public sector agencies but the conclusions and observations made therein have relevance to the discussion under consideration in this paper.

Sue Arrowsmith is critical of the "weak private law doctrine of freedom of contract." She states that this hardly justifies the exclusion of public law remedies, stating there is so often a public interest involved.<sup>89</sup>

The New Zealand Contracts and Commercial Law Reform Committee<sup>90</sup> recommended that a third party should have rights to enforce a contract where a promise had been contained in a deed or contract conferring or purporting to confer a benefit on a third party. This has occurred in a limited degree in New Zealand's *Contracts (Privity) Act 1982* where in section 4 it provides:

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House of lords confirmed this decision when negligent solicitors were held negligent and held liable to pay the third party who had lost out on their intended legacy. In both cases, the law of tort was effectively used as a back door method to prevent third parties suffering loss under a contract.

<sup>87</sup> The United Kingdom Law Commission Report Number 242, "Privity of Contract: Contracts for the Benefit of Third Parties" Item 1 of the Sixth Programme of Law Reform, The Law of Contract, HMSO, London, July 1996

<sup>88</sup> The United Kingdom Law Commission Report Number 242, "Privity of Contract: Contracts for the Benefit of Third Parties" Item 1 of the Sixth Programme of Law Reform, The Law of Contract, HMSO, London, July 1996 1, 40

<sup>89</sup> Sue Arrowsmith, "Government Contracts and Public Law", Vol 10 No.3 (1990) Legal Studies,231, 242

<sup>90</sup> "Privity of Contract" (1981), paras 6.2-6.3

"Where a promise contained in a deed or contract confers, or purports to confer, a benefit on a person, designated by name, description, or reference to a class, who is not a party to the deed or contract... the promisor shall be under an obligation, enforceable at the suit of that person, to perform the promise."

In addition, section 55 of the *Queensland Property Law Act* enables a third party to personally enforce a promise in property disputes.

A legislative mode of providing avenues for a remedy in contract by persons affected by contracting out (such as prisoners), where the aim of the contract is for their benefit or governs their management, but where they are not a party, should be considered. The difficulty politically in such a legislative amendment, is that contractors may find that such a provision exposes them to too much risk and governments may be reticent for fear of not attracting suitable tenderers. On the other hand, it is a mechanism governments could use to ensure private operators were more accountable and more careful in their day to day manner of operation.

### c. Principal and Agency Relationships

Another area of relevance in the consideration of the legal safeguards and contractual avenues open to persons affected under contracting out is in relation to the relationship of principal and agent. The maxim "qui facit per alium facit per se" (he who acts through another acts through himself) means that where a principal acts through an agent then the principal becomes personally liable for the acts of that agent<sup>91</sup>. Agency arrangements can be viewed as an exception to the privity doctrine. Arguably, operators are engaging on behalf of the government, in a function which has for many decades been a core function of government because of a view that contracting out is an effective method for executing the governments work.

In the 1996 Commonwealth Ombudsman Annual Report the then Commonwealth Ombudsman Phillipa Smith indicated that in some circumstances where the government had contracted out a traditional public service she would be prepared to construct a principal and agent relationship. This would ensure that the third party who suffered detriment by virtue of a government decision to vary the mode by which it delivered services to the public was still liable as the principal. It will be interesting to see if the courts might adopt a similar view as more public services are contracted out to private providers and what the Victorian Ombudsman's approach will be.

## 2. Torts

The elements necessary for negligence to be established require the existence of a duty of care, unreasonable behaviour towards the plaintiff in a situation where the duty arises and damage to the plaintiff by reason of the breach of the duty. The existence of the duty and the level of the standard of care required are matters of the

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<sup>91</sup> Stephen Graw, "An Introduction to the law of Contract" Third Edition Brookers North Ryde NSW, 1998, 146

Stephen Graw, "An Introduction to the law of Contract" Third Edition Brookers North Ryde NSW, 1998

judge, whereas the issue of the breach remains a question of fact. The courts are ready to imply a duty to take reasonable care towards others by positive conduct but they are hesitant to imply a duty to take positive steps to protect others unless a special relationship exists between the parties and positive steps may be imposed by the courts. For instance, in a case involving prison treatment *L v Commonwealth*<sup>92</sup>, it was held that a duty existed with prison authorities being required to keep remand prisoners separate from convicted prisoners. The judges decided that prison operators owed a duty of care to a prisoner to take reasonable care for his safety. They held that reasonable precautions needed to be taken to prevent one prisoner from doing damage to another. They also noted that this standard of care should not be set too high.

In its consideration of cases involving negligence the courts have been happy to consider issues pertaining to public policy. This includes a consideration of the public interest factor, whether the legislature is better placed to implement change and what could be termed ethical or moral factors of whether affirmative action should have been taken by the defendant.

The law of tort for negligence is therefore a constructive remedy for persons affected where the duty is breached. The reality however is that persons affected will often not be in a position financially to fund such an action.

There are certain circumstances where assault and battery will qualify as a tort or even a crime where they exceed what is done with lawful authority.<sup>93</sup>

The ARC has highlighted the point that in a contracting out situation, where the service provider is not carrying out the terms of the contract, the only party who can take decisive action is the government. Where persons affected suffer loss or damage they may only be able to sue as a result of the actions of the contractor in tort for negligence. They note that contracting out arrangements will often attempt to ensure that governments cannot be held vicariously liable for the negligence of contractors.<sup>94</sup> This illustrates another of the difficulties a person affected may have when dealing with contractors and sub-contractors.

## CONSTITUTIONAL SAFEGUARDS

Currently, in Australia there is much discussion about the move towards a republic. Such an opportunity would also enable time to consider what additional protections are needed to be constitutionally entrenched to protect citizens against intrusions upon their human rights. Australia has made commitments internationally to adhere to covenants and conventions on civil and political rights including social, cultural and economic rights, the rights of the disabled, refugees and the rights of children. Many persons affected come from these groups. It has been slow to incorporate these standards into domestic law leaving itself open to international condemnation when it fails to comply with those standards and leaving limited enforceable rights for many of Australia's most vulnerable citizens. It has been noted by Justice Jim Spiegelman,

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<sup>92</sup> (1976) 10 ALR 269

<sup>93</sup> David Gardiner and Frances McGlone, "Outline of Torts" Second Edition, Butterworths, Sydney 1998

<sup>94</sup> ARC Review, 28-29

the Chief Justice of the New South Wales Supreme Court<sup>95</sup> that since the enactment of the United Kingdom's new Human Rights legislation at the end of 1998, Australia is one of the only western countries without a Charter or Bill of Rights for the protection of its citizens. The absence of a right to sue private operators for breaches of contract which impact on person's human rights makes it difficult to maintain accountability.

The difficulties created arising from the limited remedies available for wrongdoing under administrative law and the doctrine of privity of contract may leave persons affected with very few meaningful remedies when they are wronged. Additionally, what is needed is access to such remedies in a manner which is not cost prohibitive or cumbersome, for it is often society's most vulnerable whose rights are most likely to be infringed because of their disadvantage and for whom access to justice may seem an insurmountable problem.

## CONCLUSION

The government's contracting out activity, if not carefully planned, reviewed and scrutinised through proper democratic, parliamentary and publicly available channels could well see the diminution of important public interest unless further safeguards are enforced where the private domain chooses to undertake public activity and service delivery. This could well impact negatively upon society and erode the fundamental underpinnings of responsible government. It may also gradually see a perception of government as irrelevant and impotent in advancing matters of public interest. To avert such consequences, measures must be put in place to audit, steer, manage, monitor and promptly penalise where there are failures to comply with standards of care. In addition persons affected must be given protection and rights in addition to those which currently exist.

A useful list of other safeguards for accountability and the protection of persons affected is provided by Harding<sup>96</sup> who suggests that the applicability of standard accountability mechanisms in the public system should apply equally in the private sector when they are delivering public services. In line with developments in other western countries including Canada, New Zealand and the United Kingdom it may be time for Australia to contemplate an overarching document which offers protection to individuals where their rights are infringed.

Harding also suggests specific monitoring to ensure that the actual services contracted for be actually provided. Presumably, this would not just rely on the guarantees given by a private provider but would involve some audit. Currently it is difficult for the public to evaluate the execution of the actual services due to commercial in confidence exemptions under the Freedom of Information Act and the Corrections Act.

Harding observes that monitoring should be provided for by statute rather than contractually or administratively. Often Victoria tends to deal with the issue as if it

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<sup>95</sup> Human Rights and Equal opportunity Conference to mark the 50<sup>th</sup> Anniversary of the Declaration of Human Rights, Sydney, 8 December-10 December 1998

<sup>96</sup> Richard Harding, "Models of Accountability for the Contract Management of Prisons" in "Private Prisons and Police: Recent Australian Trends" ed. Paul Moyle 63, 80 and 84

were a contractual/administrative matter. A model which is "contractor focused" may be remote and abstract from the public interest.

The extent of contracting out of public services has raised many issues. Contracting out of public services clearly involves careful consideration of not just rendering the most cost effective and efficient service. It involves notions of the public interest, transparency and accountability, the fundamental role and obligations of government and the protection of persons affected because they are often powerless and have minimal choice about the services that they use.

## **SUMMARY OF POSSIBLE FURTHER SAFEGUARDS**

### **The Contracting Process**

1. Good practice should be followed from the initial stages of making a decision to contract out a service through all stages of the process. (2<sup>nd</sup> Report of the Senate Finance and Public Administration References Committee)
2. Adequate levels of monitoring of the service delivery should be undertaken as part of the agency's contract administration but with adequate resources provided for the agency to undertake this task.
3. The process and planning of contracting out and the design and specifications in the contract needs to be carefully designed, have precision in the terminology and needs to draw on the relevant experience of the relevant public sector services so as to ensure that a range of eventualities are contemplated.
4. Specifications in a contract need to be flexible enough to cater for the unanticipated, cater to the individual needs and vulnerabilities of persons affected by the contract and be capable of measurement, not just in terms of quantifiable outputs, but of quality and nebulous factors such as whether the service or approach to management benefited the recipients of the service in their overall well being.
5. Agencies and departments should not take shortcuts in the process and ensure that adequate weight is given to adequacy of funding, resources, staffing, complexity of relationships and insurance coverage.

### **Contractual Terms and Specifications**

6. Carefully crafted contractual terms and specifications can be of great assistance in determining whether the public interest is being met. Such refinement and forethought in how a service is to be delivered is not just relevant in terms of the assessment of a service but can help with proper planning and implementation of the service whilst it is in the process of being delivered.
7. Information and experience can inform appropriate contractual and specification measures and be critical in tailoring services adequately.

### **Administrative Safeguards**

8. A clear chain of accountability and responsibility of government agencies and the contracted services should be accessible by service users.
9. One of the important tools in ascertaining whether one has an exercisable right is information about what one is entitled to and how that service is expected to be delivered and whether it has in fact been delivered. This information must be publicly available.

10. Details surrounding the specifications, public expenditure and outcomes required in service delivery together with aspects of staffing levels and details of available programs should be accessible by the general public.
11. It is of no public benefit if the information generated by the contractual process is not made public on the grounds of commercial in confidence or indeed that the criteria within a contract against which performance is assessed is not published. (2nd Report, senate Committee)
12. Once a contract is complete there can be no material damage caused by the release of the above information (NSW Auditor General)
13. The Freedom of Information laws could be extended to contractors (ARC)
14. Specific documents in the possession of the contractor could be deemed to be in the possession of a government agency (ARC)
15. A separate information regime could be established (ARC)
16. Specific documents in the possession of the contractor relating to the contractor's performance of his contractual obligations could be deemed in the possession of a government agency. (ARC)
17. The limitations on the law of standing in the Victorian jurisdiction could be widened to enable greater scope for a person affected and harmed by the failure of the contractor or for a group acting in the interests of that person scope to apply to the court.
18. The role of the Ombudsman should be extended to cover traditional public sector human services now exercised by the private sector.
19. The Auditor General should be able to access information to assess the benchmarking and government expenditures as are necessary to enable him to audit in the public interest.
20. There should be a recognition by policy makers that often the recipient of a human service has no choice as to where they go to find the service that they need. This should be recognised as a reason why competition policy factors may not apply given restrictions on choice and flow on impact on demand and supply.
21. The State and Commonwealth Ombudsman should be prepared to construct a principal/ agency relationship where the government has contracted out a traditional public service. This will ensure that a third party who has suffered detriment by virtue of a government decision to vary the mode by which it delivers services to the public is still liable as principal.

### **Judicial Review**

22. If a government department contracts out a service and there is reliance on the fact that the department will meet its obligations to perform the contract and it fails to do so then the court should be able to give consideration to extending a remedy to persons affected using the doctrine of estoppel.
23. Decisions of the courts should consider examining the source of the government's relationship with the service provider. This could give scope for person's affected by the contracting out of services to gain judicial review in limited circumstances. (Brennan CJ (1992)175 CLR at 583-586). Given that judicial review lies only to "supervise public power" this term should be given scope to incorporate cases where the government delivers its services to members of the public through a private contractor as part of its governing function. This will ensure that a third party who has suffered detriment by virtue of a government decision to vary the mode by which it delivers services to the public as not unduly prejudiced.

**Common law safeguards**

24. Where a contract purports to bestow a direct benefit on a third party, it should be enforceable by the third party in their own name. Therefore the doctrine of privity should be modified to reflect this. (UK Law Commission)
25. In its consideration of cases involving negligence the courts should continue to consider issues pertaining to public policy including the need for safeguarding the interests of citizens where the government changes its mode of service delivery.
26. The law of negligence remains a constructive remedy for persons affected where a breach of the duty of care owed by government through the contracted agency occurs.
27. There are certain circumstances where assault and battery will qualify as a tort or even a crime where they exceed what is done with lawful authority. This provides another avenue for relief for person's affected if the preconditions are met.

\* This paper was written for the Melbourne Catholic Commission for Justice, Development and Peace by Liz Curran who is its Executive Officer. Much of the material used is extracted from research undertaken as part of a Masters in Laws at the University of Melbourne.

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