# Government By Contract – Who Is Accountable?

**Carla Michler***

*By the turn of the century the boundaries of government will have become so blurred that we will have trouble knowing whether we are really being served by a public servant or a private employee.*

-Sturgess in *Theophile.*[1]

Public service change began more than a decade ago and the move to contracting has proved significant. We are now in a society where governments are increasingly moving to contract out core government services and functions which were previously the responsibility of the public sector. Greater emphasis on contracting out reflects the view that services may be delivered more cheaply and efficiently by private contractors. This change in approach will profoundly affect the ways in which the government carries out its functions. Such an increased interest is occurring in the context of fundamental reassessments of the roles of governments.

The contracting out of government activities has altered the relationship between the public to whom the service is delivered[2] and the government. It has also affected the relationship between the public sector and others who may be affected by, or interested in, service delivery. When the government contracts out an activity or a service it continues to retain political and financial accountability however individuals may discover that they do not have access to public or private law mechanisms and remedies. It will become apparent, during the course of this paper, that public or private law remedies will not automatically apply to the provision of services by the private sector. This leaves the service recipient in a compromising and unsatisfactory position.

This paper will endeavour to concentrate on the legal position of members of the public where service delivery is contracted out. It will do so by initially focusing on the availability of mechanisms by which the public can call to account the delivery of contracted out services.

The crucial concerns with the move to contracting out are based on issues of accountability to the public in general, access to public and private law remedies and

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* Final year Bachelor of Arts/Bachelor of Laws (Hons) student, University of Technology, Sydney.

1 F Theophile 'Direct Service Provision Contracts' 81 *Canberra Bulletin of Public Administration* at 15.

2 Herein referred to as the "service providers".

redress for the individual. These tensions shall be contextualised within the paper through an exploration of the 'public' and 'private' law divide.

The purpose of this paper is to determine how proper levels of accountability can be maintained and appropriate remedies can be made available to service recipients. This poses a challenge to the legal system to respond to the changes in government administration so as to provide practical and pragmatic solutions to current concerns.

## An Accountable Government is of Prime Importance

"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".[3]

As government services of many kinds are increasingly being provided by the private sector, the challenge for the public sector is to translate the above quoted basic values to the new service providers.

The contracting out of public services extends government functions outside those bodies generally thought of as 'governmental'. In many cases this places their decisions and actions outside of the scope of administrative and other public sector accountability mechanisms.[4]

In its report into *Competitive Tendering and Contracting by Public Sector Agencies*[5] the Industry Commission recognised that accountability was fundamental to good governance. It set out three conditions which enable a principle to achieve the necessary control;

1. Clear demarcation of who is responsible for what;
2. The availability of sufficient information to ensure that there is transparency in assessing performance of the various principal agent relationships;
3. Opportunity for redress where there is poor performance and a means for problems to be fixed or sanctions imposed.[6]

It is submitted that the government must look to these conditions to uphold traditional accountability values.

The Administrative Review Council[7] has documented many examples of when accountability mechanisms have failed in contracting out. To conceptualise the discussion, this paper shall refer briefly to the main problems.

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3 Sir William Deane, Governor General, Address on the Opening of the National Conference of the Institute of Public Administration Australia, Melbourne, 20 November 1996.

4 A Tang 'The Changing Role of Government in Community Services: Issues of Access and Equity to Administrative Review' *Australian Journal of Public Administration* 56(2), June 1997 at 95.

5 Industry Commission Report No 48 *Competitive Tendering and Contracting Out by Public Sector Agencies* (AGPS, Melbourne, 1996).

6 *Ibid* at 82.

7 See Administrative Review Council Discussion Paper *The Contracting Out of Government Services* (AGPS, February 1997).

Contracting out gives rise to a triangular relationship between firstly, the government entity which conducts the outsourcing and acts as a "purchaser" of the services, secondly the party contracting with the government,[8] and thirdly the members of the public to whom the service is delivered.[9]

A dissatisfied recipient who deals with a service provider will tend to find himself or herself in a situation where public law remedies are not available against either the government agency or the service providers. Furthermore, these recipients may have a limited private law redress option against the government or a private contractor. One reason being that there may not be a contractual nexus between the service provider and the recipient. Conversely if a contract exists between the service provider and service recipient it may be very difficult to establish. In situations where some contractual relationship could be established (for example where the recipient makes a payment for the service) the relationship may be skeletal and its contents ill defined. There may be nothing explicit about when service may be terminated or whether a duty to act fairly applies to such termination.[10]

In some statutory contexts such as the *Employment Services Act*, the service providers[11] are compelled to enter into agreements[12] however the enforceability of such agreements in private law may not be straightforward. Even where the recipient may have contractual rights against the service provider, the enforcement of an appropriate contractual remedy in court would tend to be difficult and expensive. It may well not be worthwhile to pursue a private action because of the minimum financial loss involved and by reason of the fact that a recipient may often lack the financial capacity required to pursue such an action.[13]

Where a failure in service delivery occurs under a contractual framework, recourse against a Government Agency by an affected recipient also faces formidable obstacles. There is not a contractual nexus between the government and the service recipients, nor can the recipients compel the government by mandamus to enforce the head contract (which it has with the service provider) to enable the recipient to get the flow on benefit.[14] There may also simply be a lack of knowledge about the head contract[15], and the relevant documents (for example tender documents) may well be beyond the reach of Freedom of Information legislation because of exemptions relating to business affairs and confidentiality.[16] Even if the failure to deliver proper services under the contractual regime breaches a statutory obligation on the government to deliver the services (either by itself or through a contractor) the obligation may be judged to create a so-called duty of imperfect obligation, not enforceable by mandamus.[17]

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8 Referred to herein as the service provider.
9 Referred to herein as the recipients.
10 *Supra* n 7 at 26.
11 Termed "styled contracted case managers".
12 Termed "case management activity agreements".
13 H Schoombee 'Privatisation and Contracting Out – Where are we Going?' *Canberra Bulletin of Public Administration* No 87 February 1998 at 90.
14 *Supra* n 7 at 19.
15 See H Schoombee 'Judicial Review of Contractual Powers' in L Pearson (ed) *Administrative Law; Setting the Pace or Being Left Behind?* (AIAL 1997) 433 at 451.
16 *Supra* n 7 at 2.
17 See JT Schoombee in LBC *Laws of Australia* "Administrative Law", subtitle 2.6 at para 135.

Additionally, consumer protection legislation does not offer problem free remedies. For example, the *Trade Practices Act* 1974 (Cth) does not apply to State crown instrumentality and under the *Bradken*[18] doctrine will often not apply to their contractors.[19] Those entities may, however, presently be sued under the state *Fair Trading Act*. However, a contractor's failure to make good its publicly made promises will not per se amount to misleading or deceptive conduct under the legislation. By itself it is not misleading and deceptive conduct to say at one point that you will do something and then later fail to do so. The area of unconscionable conduct in trade and commerce is also largely untested in relation to the termination of contracts, the failure to honour promises and the failure to deliver services.[20] Competition policy is one innovation which will assume increasing importance in achieving accountability and efficiency in government services. The National Competition Policy Reform Package launched competition as a crucial factor in encouraging business performance and an improvement of choice for consumers.

The shift from public law to private law, brought about by contracting out, also marks a change of ethos. Dissatisfied recipients can no longer rely on the values we expect (at least in theory) from public administration, such as accountability, rationality and openness. In fact the values obtained from contracting out often derive from part of a privatisation ideology. This ideology puts values such as faith in market mechanisms and closed commercial decisions above values such as collective political choice, openness and accountability.[21]

In exploring the new ways of delivering government services and entitlements it is crucial to ensure that effective accountability mechanisms are retained and implemented.

**Remedies in Existence – Both Public and Private**

The following shall contrast the existing public law remedies available to persons affected by the activities of government with the private law remedies available to persons affected by the activities of individuals or companies in the private sector. It shall focus on the position of service recipients of services and shall also examine the broader issue being the accountability of the government to the community as a whole.

For example a service recipient who has been refused service or who has a grievance with the quality of service may want an avenue of redress. Similarly, a person who is adversely affected by the activities of government or a government contractor may want a remedy because they have suffered loss or damage as a result of the service they have received.[22]

The rights and remedies that are currently available to individuals are classified by the Administrative Review Council into three distinct groups. These comprise:

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18 *Bradken Consolidated Ltd. v Broken Hill Pty Co Ltd.* (1979) 145 CLR 107.
19 For example *Woodlands v Permanent Trustee Company Ltd* (1996) 139 ALR 127
20 *Supra* n 15.
21 G Hodge *Contracting Out Government Services: a Review of International Evidence* (1996) at 55.
22 *Supra* n 7.

1. Administrative law mechanisms, which include rights and remedies available against the government;
2. Private law remedies, which are actions that one person can take against another person under contract or tort law or because of legislation; and
3. Other consumer remedies, which include options such as industry complaints schemes that may be provided in response to consumer demand.[23]

## Administrative Law

Administrative law is concerned with all aspects of decisions made by the executive branch of government. Administrative law has developed as a set of rules which govern the procedures to oversee the making of government decisions, natural justice being one of the more commonly known.[24]

The Administrative Law 'package', comprising the Ombudsman, the Administrative Appeals Tribunal (AAT), and the *Administrative Decisions Judicial Review Act* (ADJR), was put in place between 1975 and 1977. The package aimed to transform the working methods of the administration and the relationship between members of the public and officials in the performance of their administrative duties. This package was extended by the *Freedom of Information Act* 1982 (Cth) and the *Privacy Act* 1988 (Cth).[25] Together these reforms aspire to enshrine the principles of openness, accountability and fairness in government administration.

It is important to note that the purpose of the Administrative Law 'package' was to recognise the special circumstances that apply to the dealings between the public and its government and to establish unique rights of review and remedies for aggrieved persons.[26] To this extent it differs significantly from (as an example) consumer protection law which, in essence, seeks to prohibit unfair practices, establish some basis of greater equality of bargaining power between the consumer and the supplier and provide means of redress through a judicial or quasi-judicial process.[27] A person who has a concern or a complaint about a government-delivered service has access to a number of administrative remedies. These are the rights and remedies which, for example, enable a member of the public to complain about defects in the way the service was delivered or not delivered, to seek information about the service, to maintain the privacy of personal information and to find out about and correct information about them that is incorrect or misleading. Contracting out may also involve giving private sector service providers a right to make decisions about entitlements. This may raise concerns for those who, if the government was making the decisions, would have a range of rights which enable them to seek re-consideration of those decisions.[28]

However, in some circumstances where a contractor provides the service, service recipients and others affected by the activities of the contractor may not have access to

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[23] *Ibid* at 19.
[24] S Bourke 'Australian Administrative Law and Quality Service Standards' (1993) 74 *Canberra Bulletin of Public Administration* at 6.
[25] See S Bromley 'The Contracting Out of Government Services' (1997) *Administrative Review*.
[26] *Ibid.*
[27] See Commonwealth Ombudsman *21st Annual Report, 1996-1997* (AGPS, Canberra, 1997).
[28] *Ibid.*

administrative law mechanisms. Without a specific statutory regime extending administrative law remedies to contracted out services, those remedies would be available only to a restricted extent.[29] The Administrative Review Council's *Issues Paper* provides an indication as to what happens to administrative remedies when services are contracted out.[30]

Both the Administrative Review Council (ARC) and the Management Advisory Board (MAB), through its Management Improvement Advisory Committee (MIAC), have addressed the question of whether elements of the administrative law 'package' should continue to apply to government agencies which are in essence corporatist.[31] In addition, the Administrative Review Council has, in a report addressed to the Minister for Justice[32], addressed the issue of Administrative Review and Funding Programs, focusing on the delivery of unaided community service programs (in the Health, Housing and Community Services portfolio). The latter report discovered that the effect on the final consumer will often be the same whether the Commonwealth is the service provider or funds other parties to deliver services on its behalf. The report held that if consumers have legitimate concerns about decisions which affect them, then they should have the opportunity to have those concerns addressed. In an attempt to adequately address those concerns, the Administrative Review Council recommended an enhanced role and jurisdiction for the Ombudsman.[33] This recommendation is further discussed in the subsequent part of this paper under the heading "Examining Options and Making Submissions".

**Limited Scope for Administrative Remedies**

While persons receiving government-delivered services have access to administrative law remedies, these remedies clearly have a number of limitations. For example, obtaining information under the *Freedom of Information Act* can be a costly and lengthy process.[34] Access to administrative remedies is further limited as people seeking judicial review of a decision will usually need to obtain professional legal advice. Even applicants for merit review of decisions by a tribunal may need to seek legal advice or representation, notwithstanding the steps being taken by tribunals to make their procedures more informal and user friendly.[35] Service recipients may still feel that these administrative law remedies are inherently adversarial.[36]

Furthermore, some administrative law remedies may be of little use to a service recipient whose complaint is about the way in which a service was delivered. For example, where the contractor is not a part of the government, complaints cannot be

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29 Administrative Review Council Issues Paper *The Contracting Out of Government Services* (AGPS, February 1997).

30 Refer to Appendix A.

31 See Management Advisory Board and Management Improvement Advisory Committee Report No 8 *Contracting for the Provision of Services in Commonwealth Agencies* (AGPS, Canberra, December 1992).

32 Administrative Review Council Report No 37 *Administrative Review and Funding Programs* (AGPS, Canberra, 1994).

33 *Ibid.*

34 For further discussion see Attorney General's Department Discussion Paper *Privacy Protection in the Private Sector* (AGPS, Canberra, September 1996).

35 For further discussion see Administrative Review Council Report No 40 *Open Government: a review of the Federal Freedom of Information Act 1982-1995* at para 2.12.

36 *Supra* n 29 at 22.

made to the Ombudsman about service delivery. Complaints to the Ombudsman can only be made in relation to a "matter of administration",[37] this means that the Ombudsman may be able to investigate the manner in which the relevant agency has dealt with the contractor, but this may not allow the Ombudsman to address the complaint directly. Additionally, members of the public, including service recipients, cannot seek information held by the contractor unless legislation provides for this access. The law relating to standing further limits the scope of administrative review, through restricting the range of persons who can seek remedies in respect of a particular government action or decision, and the sorts of government actions subject to review.[38] 'Standing' requirements determine the eligibility of a person or organisation to be a party to an application for merits review before the Administrative Appeals Tribunal or an application for judicial review before a court. A person or organisation that is not sufficiently connected with the subject matter of the application is ineligible to apply for such review or to be a party to such an application. Such a person or organisation is said to 'lack standing'. Generally speaking, a person seeking review must be affected by the action or decision in some way over and above the way in which members of the public at large are affected. Further, the law relating to justiciability recognises that a court cannot appropriately review some disputes.[39]

Therefore, through an examination of the above it is evident that the administrative mechanism is clearly limited in application.

In addition to the available public or administrative law remedies briefed above, there are a number of private law remedies available to service recipients. This paper shall summarise the private law remedies which may be available to people who experience service delivery problems or are adversely affected by the activities of government contractors.

## Private Law - Contract

Contractual remedies may be available to service recipients of government funded services. Those remedies will generally be irrelevant to other persons who are affected by the activities of the contractors. A contract will exist between the service provider and a service recipient where the service recipient is charged some fee by the service provider. Such a contract may not exist where the provider is only collecting such fees on behalf of the government.[40] Additionally, no contract will exist where a service is provided free of charge to recipients. The only contractual relationship in such a case will be between the government and the service provider. If there is any contract between the service provider and the service recipient it is unlikely to be in writing and if it is, it is likely to be a brief document.[41] Whether or not the contract is in writing, the *Trade Practices Act* and other consumer protection legislation will include a number of terms in the contract. For example, the *Trade Practices Act* provides that in every contract for the supply of goods by a corporation, there is an implied term that the goods are of a merchantable quality.[42] If a contract is established, the service recipient will

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37 See *Ombudsman Act* 1976, s 5(1).
38 *Supra* n 25 at 22.
39 *Ibid.*
40 *Supra* n 29 at 25.
41 *Ibid* at 27.
42 See *Trade Practices Act* s 81.

have enforceable rights under their contract with the contractor. A service recipient may be able to take action under their contract to seek damages for breach of contract or (in a limited range of situations) force performance of the contract.[43]

However, in most cases it would be rare for the service recipient to commence proceedings in a court until the contractor has refused or failed to respond to a request to rectify the problem or to a claim for compensation. Therefore, the service recipient may prefer to wait to see if the government agency can resolve the problem by enforcing its contract with the provider. However, it may be that the government contract does not cover the recipient's particular problem or the government contract may not provide a role for the government in resolving individual complaints against the contractor. In this situation, the only option for a complaining service recipient is to take action under his or her own contract. If the service recipient has a contract with the service provider, the recipient can take action to enforce the proper performance of the contract, however, others affected by the contractor's activities will not be able to enforce the contract.[44]

**Limits of Contractual Redress**

There are many limitations which exist in the contract-based remedy available to the service recipient. The following will attempt to outline the main restrictions in enforcing a remedy through contract. Contract, for example, is a court-based remedy which may be inappropriate or lengthy for certain types of problems.[45] In many cases a service recipient may not have a contract with a service provider, for example when the service is provided free of charge. If a service recipient has a contract with the contractor (because they pay the contractor for some cost of the service) the recipient can take action to enforce that contract but in most cases there is not likely to be a written contract.[46] Even if the contract is in writing it may not stipulate the manner in which the service is to be delivered. Further, in situations where a contract does exist, the service recipient's complaint may go to the quality of the service provided without constituting a breach of the terms of the contact.[47] For example, the recipient's concern may be that the service was delivered at a time or in a manner that was impractical given their particular situation. In the unlikely case where a contract exists, the service recipient may not be able to afford the cost of enforcing the contract in the courts. In addition, an enforcement action may be inappropriate in certain circumstances where the problem might not be significant enough to justify the proceedings.[48]

These examples highlight but a portion of the difficulties faced by prospective service recipients in enforcing their contractual remedies.

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[43] However it is important to note that the remedy of specific performance is discretionary and may not be appropriate in the case of contracts for the provision of services. In these cases the remedy of damages may be more appropriate.

[44] *Supra* n 29 at 25.

[45] *Supra* n 29.

[46] *Ibid* at 27.

[47] *Ibid.*

[48] *Ibid* at 30.

## Tort

If contractual remedies do not suffice one may look towards a remedy in tort law. A person who suffers loss or injury as a result of an act by the contractor may be able to sue for damages under the law of torts.

The word 'tort' (meaning wrong) refers to a spectrum of legal actions that can be brought to seek compensation where one person is considered to have committed an act that results in some form of loss or damage to another person or a person's property.[49] The government can be sued in tort in substantially the same manner as a private person.[50] Where claimants suffer loss or damage as a result of the actions of a contractor, they may be able to sue the contractor in tort for negligence. To plead a successful negligence case, a claimant must prove that the contractor owed him/her a duty of care; that the contractor failed to take reasonable care in the delivery of the service; that the claimant suffered damage as a result of that failure; and that the damage suffered was reasonably foreseeable (that it is not too remote).[51]

If these circumstances apply it is irrelevant as to whether the harm was caused by the government or a government contractor (whoever caused the harm may be liable). Nor will it make any difference whether the claimant is a service recipient or someone unconnected with the delivery of the services.

In situations where a contractor is providing services, the injured person may have a right of action against both the contractor and the government. This may be because both the contractor and the government have been negligent or because the government is vicariously liable[52] for the contractor's negligence.

As with most private law remedies in contracting out situations, there are limitations on the remedial value of redress through tort law.

## Limits of Tort

Tort law is limited in its application to contracting out situations and in various cases will not offer a remedy. If a service recipient is seeking a remedy their complaint may go to the quality of the service provided rather than to any loss or damage. In these circumstances, tort law cannot offer a remedy.[53]

Some limitations on service recipients bringing court actions were mentioned earlier in the discussion of practical difficulties in enforcing contracts.[54] Many of these limitations also apply to bringing court actions under the law of tort.

In most cases the decision whether to bring an action at common law will be governed by questions of cost and the injured parties' enthusiasm in commencing court

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49 See H Luntz & D Hambly *Torts: Cases and Commentary* (4th edn, Butterworths, Australia, 1995).
50 *Judiciary Act* 1903, s 64.
51 For a further discussion of the 'duty of care' doctrine see *Donoghue v Stevenson* (1932) AC 562 at 580/
52 *Supra* n 29 at 41.
53 *Ibid* at 29.
54 Refer to heading "Private Law – Contract".

proceedings. Where the government is the defendant, there are alternative remedies that are cost efficient, easier and are likely to be preferred initially. The Administrative Review Council in its *Issue Paper* has indicated that the injured party might lodge a complaint with the Ombudsman or might raise the matter with a Member of Parliament to lobby for a settlement.[55] None of these facilities are available in the private sector, although, as will be evident herein, a number of industry complaint handling equivalents to the Commonwealth Ombudsman exist.[56]

Therefore, while the common law provides some rights to seek legal remedies in contracting out situations, the cost of obtaining access to justice is high and usually beyond the means of most individual consumers.

**Legislation**

Legislative remedies will only be available to service recipients provided there is a contract between the recipient and contractor.

Legislation offers a variety of consumer law remedies, however the availability and context of these remedies varies between jurisdictions. These remedies generally enable a recipient to take action in a small claims court or tribunal if the service is provided improperly or not provided. These rights further extend to take action under the *Trade Practices Act* 1974 (Cth) or equivalent state or territory legislation.[57] However these legislative provisions may not relate to government bodies, because of the doctrine of 'crown immunity'. Further, in some circumstances, persons acting for Government may be able to rely on 'crown immunity'. The Federal Court decision in *Woodlands v Permanent Trustee Company Ltd and Ors*[58] addressed the issue of whether the *Trade Practices Act* applied to the states or persons acting on the states' behalf. It was held that New South Wales was not bound by the *Trade Practices Act* and the judgment suggested that a body or person that is acting as an agent to a government agency, such as a contractor, may not be bound by the *Trade Practices Act* in certain circumstances. The contractor may be immune in circumstances where the legislation, if applied to the provider, would prejudice the government agency, for example, by restricting the activities of the agency.

Under Part V of the *Trade Practices Act*, a contractor, that is a corporation, is prohibited (in the course of its business) from engaging in conduct that is misleading or deceptive.[59] If a contractor engages in such conduct, a person who suffers loss or damage as a result would be able to recover damages under the *Trade Practices Act*.[60] The *Trade Practices Act* further suggests that damages may be recoverable where a corporate contractor in the course of business engages in such conduct that is liable to mislead the public as to the nature, suitability or quality of any service.[61] Or where a contractor accepts payment for services that he/she does not intend to supply.[62]

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55 *Supra* n 29 at 31.
56 See discussion under heading "Examining Options and Making Submissions".
57 *Supra* n 29 at 29.
58 139 ALR 127.
59 See *Trade Practices Act* 1974 (Cth) s 52.
60 See in discussion under *Trade Practices Act* 1974 (Cth) s 82.
61 See *Trade Practices Act* s 55A.
62 See *Trade Practices Act* s 58.

Other remedies may be more widely available,[63] and in certain circumstances complaints may be made to a regulatory body such as the Australian Competition and Consumer Commission.[64]

## Legislation Has its Limits

Prosecutions under consumer protection legislation[65] are more commonly brought by Government agencies rather than private individuals. Unlike matters that can be brought in small claims courts, legal representation is considered a necessity by most litigants in trade practices matters. Alternatively, State small claims courts and tribunals may be an option but again there are limitations to the amount of compensation available and a tribunal may require the existence of a contractual relationship between the contractor and service recipient. A contract between the service provider and service recipient is unlikely to be in writing. Even if the contract is in writing it may not define in detail the manner in which the service is to be delivered.

## Rethinking Available Remedies

The Commonwealth Ombudsman, in her latest Annual Report, lists a range of issues raised by complaints about contracted out services.[66] Although acknowledging that contracting out can be healthy if it results in an improved standard of service for consumers, the Ombudsman notes that

> Often the rules associated with contracting out can be muddy, contradictory or not yet written. When things don't work out problems can arise for the consumer and the service deliverer because many service delivery mechanisms are currently outside the Ombudsman's jurisdiction and no other accountability mechanisms are readily available.[67]

In a response to a range of complaints relating to contracting out situations, the Commonwealth Ombudsman outlined a range of strategies to improve responsibility and accountability, some of which included extending the *Ombudsman Act* and the *Freedom of Information Act* to cover contracting scenarios.[68] The viability of extending these administrative mechanisms (or inherently public mechanisms) will be discussed further in the context of the public/private distinction. Whether the current administrative mechanisms should be extended to contracting out situations should not detract from the fact that steps can be taken to ensure that government contracts with service providers are drafted to minimise the instance of poor service delivery.

The government has the ability to make provisions in the contract to provide remedies for problems with service delivery, and to provide rights of access to information, to the

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63 For example s 74 of the *Trade Practices Act* provides that where there is a contract for the supply of services by a corporation, there is an implied warranty that the service will be rendered with due care and skill. Under s 82 of that Act, a person who has suffered loss or damage because of false or misleading representations by a service provider (regardless of whether there is a contract between them) will be able to recover the amount of that loss or damage.

64 *Supra* n 29. See Appendix D.

65 For example under Part V of the *Trade Practices Act*.

66 *Supra* n 29 at 62.

67 *Ibid* at 59.

68 Refer to n 96.

extent that these features are considered desirable.[69] A range of matters need to be taken into account when drawing up and renewing contracts. The following aspects must be addressed: Who is responsible when things go wrong; What obligations they have to find the problem; What information the service recipient and/or other members of the public are entitled to; and How they are to be given access to that information. There must also be a clearer definition of the service and standards of service.[70] Some of these steps are already being taken by the government.[71]

Nonetheless, even where a contract between the government and a service provider makes provision for the abovementioned aspects there may be practical difficulties in seeking to enforce the contract. When drafting the contract, for example, it may be difficult to anticipate and cover the individual circumstances of service recipients. Further, it may not be possible to determine whether a particular defect in the service constitutes a breach of the contract.[72]

Prior to establishing whether additional remedies need to be provided to service recipients, this paper will highlight the limits of redress available by virtue of the traditional divide between the "public" and "private".

## The Great Public/Private Divide

It is routine to think of administrative law as having enjoyed a strong and dynamic development in the period which followed the decision in *Ridge v Baldwin*[73] – that is in the last 30 years. One could feel that there has been a productive response to a number of the major issues raised by the huge expansion of the powers and responsibilities of the government during the Second World War and in the post war period.[74] Nevertheless, recent developments indicate that our system of administrative law may be experiencing difficulty in coping with the curbing of state activity. It may, however, be the case that the administrative law tradition itself has contributed to difficulties in this area. As a result of what has been described as a "decision based, tactical level approach",[75] administrative law has, it must be said, failed to develop a sophisticated tactical analysis of the dynamics of government by contract. It is clear that, by contrast, civilian systems of public law such as the *French droit administratif* have developed a detailed analysis of all the different stages of government contracting. Such an analysis is foreign to our system. The French civilian system provides further attention to the pre-contractual stages at which the terms or basis of contracting are formulated.[76] It is of some importance that the courts, when called upon to review contracting out exercises, should have an amply sophisticated model of the strategic considerations involved to ensure that they do not overlook, either these particular interests, or the wider public interests which are at stake.

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69 *Supra* n 29 at 41.

70 *Ibid* at 42.

71 There are a number of Departments examining ways in which government contracts can be improved. In August 1994 the Privacy Commissioner issued a document called *Outsourcing and Privacy: Advice for Commonwealth Agencies Considering Contracting Out: (Outsourcing) Information Technology and Other Functions.*

72 Refer to n 100.

73 [1964] AC 40.

74 M Freedland 'Government by Contract and Public Law' (Spring 1994) *Public Law* at 93.

75 *Ibid* at 98.

76 Brown & Bell *French Administrative Law* (4th edn, 1993) Ch 8 S 8 Administrative Contracts.

The capacity of administrative law to deal with government by contract is further threatened through its failure to give effect to public interests at large. This threat arises in relation to the question of 'locus standi' in administrative law. Somewhat apart from the issue of Government by contract, there are major debates about whether locus standi in administrative law is sufficiently defined to enable applicants for judicial review to adequately represent group and community interests in a pluralist democracy.[77] The majority of the High Court in *Batemans Bay Local Aboriginal Land Council & Anor v The Aboriginal Community Benefit Fund Pty Limited & Anor*[78] examined the criterion for standing where a plaintiff sought injunctive relief to prevent apprehended economic loss as a consequence of ultra vires activities by a statutory body enjoying recourse to public monies. In obiter, the Court adopted an expanded interpretation of judicial standing, to encompass parties with a "special interest", a kind which the relevant legislation had envisaged to protect. There is an imminent risk that government by contract might be inclined to adopt a narrower re-interpretation of the concept, by introducing some of the basic patterns of contractual thinking, such as the idea of privity of contract. The complexity of ideas associated with privity of contract, that is the notion that claims arising from contracts are confined to the parties to the contract, has a profound significance in relation to government by contract. The notion of privity of contract is very definite in that economic relations are conceived as dual relationships rather than as multi-partite ones.[79] Government by contract may involve a comparable network of contracts so that there can be an interlocking of service procurement contracts on the one hand and consumer contracts with the service provider on the other.[80] In such arrangements the doctrine of privity of contract ensures that the consumer has no direct contractual relationship with the service procurer. Therefore, by extension of that reasoning there are many situations in which the citizen (as a consumer) has no sufficient interest to seek judicial review of the actions of the governmental department which had procured the service in question.[81]

In another sense, the implication of privity of contract may go deeper still. By insisting on the exclusiveness of the bi-partite contract, the doctrine of privity of contract singles out the interest of the individual as a consumer from the larger group interest of which it forms part as well as from the general public interest. Therefore, through discussing the possible impact of privity of contract upon locus standi for judicial review, this paper has highlighted the difficulty in how government by contract can prove to be justiciable at public law. This brings the paper to the most significant of all the difficulties which public law faces in addressing the issues of government by contract, namely the restriction of judicial review to matters or decisions with a public law element in them.[82]

The traditional demarcation between government and industry (and between the applicability and inapplicability of administrative law) has been the public/private distinction.[83] In general, the prerogative writs and public law wrongs only go to public

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77 Issue currently being discussed in relation to concept of "sufficient interest", see also *R v Inland Revenue Commissioners, ex.p. National Federation of Self-Employed and Small Businesses Ltd* (1982) AC 617.

78 (1998) 155 ALR 684; (1998) 194 CLR 247 per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

79 *Supra* n 74 at 99.

80 Issue was canvassed under heading "An accountable Government is of prince importance".

81 *Supra* n 74.

82 *Ibid.*

83 J Barnes 'Is Administrative Law the Corporate Future?' (1993) 21 *Australian Business Law Review* 66.

law bodies. The distinction between public and private administration has been questioned by scholars who point out the similarity in function and set up between public and private bureaucracies.[84] It is well established that public law does not regulate the decisions of bodies with which the applicant has voluntarily entered into a consensual relationship. As Lord Parker CJ explained in 1967 "private or domestic tribunals have always been outside the scope of certiorari since their authority is derived solely from contract, that is, from the agreement of the parties concerned.[85] Some of the recent cases have tried to make sense of this principle. In the first jockey club case, *Ex Parte Massingberd-Mundy*[86] Neill LJ concluded that although many aspects of the work of the jockey club were in the public domain and many of its functions were "at least in part punlicor quasi public functions", still it was held not to be subject to judicial review because the authorities established that a consensual submission to jurisdiction was inconsistent with judicial review.[87] Since this decision, the courts have not shifted from the traditional public/private distinction, but have widened the concept of public to take in bodies which have a public character, notwithstanding numerous private features. In *Datafin*[88] the court held that a body's source of power was not the sole test of whether the body was subject to judicial review. Also relevant was the nature of the function being performed. On the facts the court held that the panel was performing a public duty.

However, as a result of the decision-based approach to judicial review, government activity of a contractual nature has been placed in the private sphere and hence beyond the scope of judicial review. The onus in effect shifts to the applicant for judicial review to show that there is some public law element.[89] This will be true even where the body against whom the application is made is a body some of whose activities are subject to judicial review within the doctrine of the *Datafin* case.[90] This means that a public body can, by identifying some of its functions as purely commercial ones – by contracting out those functions – place them beyond the reach of public law. So the argument about the scope of its public law becomes a circular one, whose outcomes depends upon the way the government has chosen to constitute the activity in question. By using the combination of corporatision and contractualisation which typifies government by contract, governments can thus expect to contract out their activities in a judicial as well as in an administrative sense.

This paper argues that the underlying assumption that decisions of non-government organisations are in the realm of private law is inappropriate in those situations where government has delegated functions which are clearly public in nature to the private sector. It is submitted that in such cases the non-government body should be considered an extension or substitute of government for the purposes of accountability and redress. Where government decides to fund a non-government agency to perform a function which would otherwise be performed within the public sector, that organisation becomes part of an indirect public administration.[91] The service providers are in effect exercising a public power – to the extent that the government has made a conscious

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84 *Ibid.*
85 *R v Criminal Injuries Compensation Board, ex parte Lain* (1967) 2 QBp 882B-C.
86 *R v Jockey Club, ex parte Masssingberd-Mundy* (1990) 2 Admin LR 609.
87 *Ibid* at 626B.
88 *R v Panel on Takeovers and Mergers, ex parte Datafin plc* (1987) QB 815.
89 S Freedman 'The Costs of Exclusivity: Public and Private Re-examined' (1994) *Public Law* 69.
90 Refer to n 112 at 817.
91 *Supra* n 4 at 100.

decision to delegate power and in this way the outcome can be perceived as public. Further, it can be argued that the performance of functions, such as cleaning services under contract, still involves the use of public money and assets and is done within a framework which furthers government policy.[92] In cases where non government organisations are exercising powers and performing functions which would normally be exercised by government, then both the decision to contract out and the actions of the contracted body should be recognised as public functions. This is consistent with using a functional approach to determine whether a body is considered to be public or private for the purposes of accountability requirements. This approach takes into account the nature, purpose, duties and functions of an organisation rather than its legal structure or origins, to determine the application of public law.[93] Such an approach recognises that where an otherwise private organisation conducts public functions, its status can no longer be considered fully private. The argument that such bodies should be considered for coverage by administrative review mechanisms should not be considered to be an unreasonable claim. The decision of the Federal Court in *Hughes Aircraft Systems International v Airservices Australia("Hughes Aircraft")*[94] indicates the first willingness of the courts to allow grounds of judicial review to be utilised where executive government decision making in a contractual framework is challenged. In *Hughes Aircraft* Finn J made it clear that where the contracting party is a government agency it can be expected to act fairly with those whom it contracts and that such bodies must act as "moral exemplars".[95] A distinction should be drawn in considering which functions of an organisation involve the exercise of public powers which require the option of administrative review and which do not. The principles and recommendations of the Administrative Review Council provide some guidance as to the appropriate scope of administrative review. The principle that there should be a right of appeal for those decisions where the interests of a person will be or are likely to be affected is highly pertinent in the area of contracted services.[96] Service providers regularly make decisions which have direct impact on the interests of consumers, such as whether or not to provide a service where a person should live, and how many hours of assistance they will receive. The right to appeal should be based on the nature of the decision rather than the nature of the provider, as the impact on the consumer is the same.

The direction of these arguments recognises the need for accountability to the public and access to avenues of individual redress to ensure a fair and open government.

## Examining Options and Making Submissions

The above discussion gives rise to the main question which is to be raised in this paper. This paper has discussed the range of remedies currently available to recipients of contracted government services affected by the activities of contractors. It has also reviewed the public and private distinction which underlies the traditional scope of administrative review and recognised its effect on addressing accountability within Government contracts. In light of these issues it is necessary to question whether existing remedies provide adequate redress against deficient service delivery and means

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92 N Lewis 'Regulating Non-Governmental Bodies: Privatisation, Accountability and the Public-Private Divide' in J Jowell and D Oliver (eds) *The Changing Constitution* (Clarendon Press, Oxford, 1989).

93 *Supra* n 74 at 101.

94 (1997) 146 ALR 1.

95 *Ibid* at 41.

96 *Ibid* at 102.

of ensuring accountability. If different or additional remedies are required, this paper shall address the various options that could be introduced.

A new frontier of delivery of government services has emerged through contracting out. Recent complaints from both the consumers and suppliers of these services indicate the need to determine clear lines of responsibility at the time the contract is being developed. Consumers currently face buck-passing between agencies and suppliers as to whom should be responsible when things go wrong.[97] Suppliers have also alleged unfair contractual arrangements where they have faced unclear specification of services and the unfair termination of contracts.[98]

The Administrative Review Council, in its *Issues Paper*, has identified four possible options which could be relied upon to provide additional remedies and redress for people affected by the actions of service providers.[99] Firstly, service recipients might be given the opportunity to sue on the contract between the government and the provider to the extent that the contract relates to the service to be provided to the particular recipient.[100] Secondly, new remedies could be established that would be accessible to people affected by the action of contractors. For example, service recipients might be given a direct right of action against the Commonwealth to recover compensation for minor loss or damage suffered as a result of the action of a contractor. The onus would then be on the government to arrange with the contractor how it would recover that compensation. This simple type of compensation scheme might overcome the problem of buck-passing which may arise when both the contractors and the government department, which has purchased the contractors' services, argue that they are not liable.[101] The government might also establish a complaint handling body for recipients of contracted government services. Such a body might, for example, deal with activities about the operations of all contractors delivering government services. Alternatively, the complaint handling body may solely address complaints about contractors in a sector where there is no Industry Ombudsman available.[102] Thirdly, contractors might be required to establish their own complaint handling mechanisms and to provide access to information about the service.[103] Such an obligation could be imposed on contractors by legislation or be included in contracts between the government and service providers. Fourthly, existing administrative law mechanisms such as the Ombudsman and the *Freedom of Information Act* regime might be extended so that they are utilised to handle complaints by service recipients about services provided by private contractors.

There is clearly a lot of support for extending the scope of administrative law to cover the contracting out of government services. In the Ombudsman's 1996/1997 report she stated:

> In my opinion the underlying values and reasons behind the introduction of administrative law still hold today in providing one of the best measures of

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97 Commonwealth Ombudsman Background Paper prepared for Industry Commission *Complaints and Issues Related to Government Services which are delivered by Contract* (AGPS, April 1995) at 10.
98 *Ibid.*
99 *Supra* n 29.
100 *Ibid* at 80.
101 *Ibid* at 53.
102 *Ibid.*
103 *Supra* n 29.

> protection for citizens in their transactions with Government and ensuring responsibility and fairness by the agency concerned.[104]

As an extension of the Ombudsman's submissions Smith argues that where government services are provided indirectly it is critical that the thread of accountability reverts back to the principal agency. She contends that agencies should not be able to contract out responsibility at the client's expense. Smith further supports the belief that the Ombudsman and other administrative review procedures have an important role to play in ensuring accountability and service standards in contracting situations. However, she acknowledges that the jurisdiction of the Ombudsman needs to be revised to take account of the changes in the ways government agencies now deliver their services.[105] One example of how the Ombudsman's jurisdiction has been extended was evident in a white paper which provided for private employment contractors to take over parts of the CES arrangements. An important precedent was set in that the new private contractors do in fact come under the Ombudsman and other administrative review arrangements. Smith contends:

> It is clear that the clients are dealing with Government agencies, such as the Departments of Social Security and Employment Education and Training, and now dealing with private contractors. In those situations it is necessary to be able to follow the thread of accountability.[106]

In following the "thread of accountability", perhaps the first question should be: Should the remedies be directed against the government or the contractor? This paper would suggest that they should be directed at the contractor in an effort to uphold the key purpose of contracting out. It is possible for a contractor who enters into a contract with the government to factor the cost of complaint handling into its tender price. Moreover, the more competent and fair the contractor, the less complaints the service provider should have to contend with and the more profit it should, in practice, show. It is not feasible to impose some form of vicarious liability upon the government. This would only result in "buck-passing" of responsibility – a complaint that the Ombudsman's office continues to face.[107] The lines of accountability and responsibility need to be clearly defined to ensure clarity in government contracts. As to the type of remedies that may be available, these should be of a public, private, or hybrid nature. It is important to note, however, that a remedy could not operate effectively unless there is specifically, in relation to the obligations of the contractors, public disclosure of those obligations.[108]

Public law remedies may be applied to private contractors by providing, in the relevant legislation, that they are deemed to be statutory authorities for particular purposes – an example is the Victorian *Correction Act* 1986 as it applies to the operators of private prisons. This option may be suitable where a significant element of governance is involved in the service delivery as in the case of private prisons.[109] This however is not

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[104] *Supra* n 27 at 74.
[105] P Smith 'Form v Substance' (February 1996) 79 *Canberra Bulletin of Public Administration* at 169.
[106] *Ibid* at 171.
[107] See Commonwealth Ombudsman Background Paper prepared for Industry Commission *Complaints and Issues Related to Government Services which are delivered by Contract* (AGPS, April 1995).
[108] *Supra* n 13 at 89.
[109] *Ibid.*

an option or model that can be widely applied to service delivery by contractors. Another option in the remedy continuum is to provide the recipient with a contractual right against the service provider which deems the contractor's obligations actionable. In an earlier part of this paper[110], reference was made to the practical disadvantages of relying on contractual remedies. To provide a recipient with a contractual remedy may be feigned in that it may exclude an affected person who does not fit in under even an expanded notion of privity of contract. This paper proposes that the most productive option would comprise a hybrid remedy, that is, a mixture of both public and private law remedies. Here it is instructive to refer to the regime of performance standards that is being introduced in the Telecommunications Industry by the *Telecommunications Act* 1996 (Cth) and the Telstra (Dilution of Public Ownership) Bill 1996 (Cth).[111] This legislative scheme provides the Australian Communications Authority with a power by subordinate legislation to specify performance standards for carriage service providers. The service providers are not government contractors, however this paper would argue that this distinction is not material. In a privatised industry, service providers operate under a government-licensing regime, so they deliver services to the public subject to measures of government control. This position is not so different from a situation in which a service provider has contracted with the government to deliver and to charge for a telecommunications service. Under the performance standards scheme, the standards may apply in a specific or general context.[112] They outline matters such as customer complaint procedures and the service standard required of a service provider.

The standards specify a monetary penalty for non-compliance – a fine which is payable by the provider to the customer. The maximum penalty that can be set under the Act is $3000.00.[113] The legislation also provides for a Telecommunications Industry Ombudsman who can investigate a complaint, then issue a certificate if the complaint is established. If the carrier, notwithstanding the certificate, refuses to pay the customer, the customer is able to sue in a court of law with the certificate being prima facie evidence of a breach of standard and of the recoverability of the fine.[114]

Therefore, it is evident that this regime has both public and private elements. There is a strong public law aspect in the enforcement of statutory standards by a consumer without reliance on a contractual nexus. By contrast, there are private law elements in providing that redress for a customer is in the form of monetary payments and that the courts of law are responsible for enforcement by way of civil action. This type of scheme has much to offer a contracting out scenario and could be developed into a general model for the recipients of services that have been contracted out. An area of the model that could be improved may be to enhance the public law element. For example, standing to enforce the standards should be extended to persons affected and not be limited by notion of privity of contract. The public law element may also be strengthened by expanding the remedies beyond mere monetary payments to include orders for corrective action to be undertaken by a provider.[115] The paper is now in a position to discuss the final question it shall address: Should the remedies be granted to recipients on an impromptu basis by specific legislation or should there be what the

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[110] Refer to heading "Private Law – Contract".
[111] *Supra* n 105 at 170.
[112] *Ibid.*
[113] Refer to *Telecommunications Act* 1996 (Cth).
[114] *Ibid.*
[115] *Supra* n 49 at 169.

Administrative Review Council has termed a "Contracting Out Act"?[116] The stronger preference of this paper is for a general legislation that can operate as an adaptable template. In relation to such a template there is a further choice between the *Administrative Decisions* and *Judicial Review* type legislation that applies generally or the Administrative Appeals Tribunal type legislation that is only enlivened by a specific reference in that or another Act. In relation to contracting out, the Administrative Appeals Tribunal model may be more suitable. Adoption of a general Act would encourage detailed consideration of how recipient's rights should be structured. Once in place, the Act would exert a powerful legal and political gravitational force and would promote coherence and consistency in the field of contracting out. While guidelines on contracting out and on government service charters have a role to play, matters should not be, as they are today, left at the non-enforceable level.[117]

## Concluding Remarks

The concluding part of the paper is necessarily brief and alludes to further work remaining to be done in the analysis of the implications for public and private law of Government by contract.

The new patterns of public sector management which have been considered in this article, in particular the pattern of contracting out, clearly have strong implications, not only for relations between institutions or enterprises carrying out public services, but also for relations outside those institutions. There are, however, real concerns about the implications of this project of exploiting individual competitiveness and individual enterprise to the achievement of public goals and the pursuit of public interests. By attempting to import the values of initiative and market enterprise into public sector employment relationships, the government may have forgone the traditional accountability values of openness, fairness and good governance.[118] With the progressiveness of entrepreneurial government we are in a situation where we do not have a legal framework which is capable of regulating the process of contracting out or the new kind of relationships which it creates. This paper has argued that there must be concern that the absence of such a framework leaves the government open to behave arbitrarily or to neglect the public interest. In the words of Schoombee; "we have to doubt whether the rule of law is fully implemented as long as our system of law fails in any fundamental sense to register and respond to a new regime of public administration."[119] This paper has recognised that the rule of law has failed to provide adequate redress to aggrieved recipients in contracting out situations. It has sought to outline the legal position of members of the public where service delivery is contracted out. Within the scope of this paper it has been seen that the legal position of members of the public is compromised by issues of accountability and inadequacy of remedial redress.[120] The difficulties associated with enforcing remedial action against any party to a government contract has been exemplified through a discussion of the traditional public and private law divide. In search of a solution to the current situation, this paper has canvassed the options proposed as additional remedies for service recipients.[121] In

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[116] *Supra* n 29 at 78.
[117] *Supra* n 105.
[118] *Supra* n 1.
[119] *Supra* n 105 at 170.
[120] Refer to heading "An Accountable Government is of Prime Importance".
[121] Refer to heading "Rethinking Available Remedies".

concluding, it is asserted that in reaching a suitable remedial option, one must seek a hybrid mix between redress offered by both public and private law. As more and more administrative choices are being relegated to the private sphere it becomes more important than ever that the fundamental principles of public law and accountability should provide strong notions of how administrators should approach those choices. Such a framework of principles will be increasingly necessary to remind those engaged in the policy making that they are so engaged as administrators and public servants rather than as business people or as entrepreneurs.