MINISTERIAL CONTROL AFTER CONTRACTING OUT - PIE IN THE SKY?

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These notes formed the basis of an address to an AIAL seminar, "Ministerial Control After Contracting Out", Canberra, 10 March 1997

Introduction

We are to consider how a government department may exercise control over a contractor when a task, formerly performed by the government, is now performed by that contractor. We must necessarily be concerned with only a certain type of contracting out. There is probably no cause for discussion if a function formerly performed by the government for itself - such as servicing of computers - is now contracted out to a private sector company. There is nothing inherently governmental in such a function. There is unlikely to be a need for any form of control, other than the ordinary terms and conditions found in commercial contracts, to ensure that the task is carried out properly.

So we are concerned with the contracting out of those tasks or functions which have traditionally been part of government such as provision of certain types of services to the public, running gaols, running the births, deaths and marriages register, running the land titles office. How can the Minister, through his or her public servants whose job it is to administer the contract, exercise control?

I assume in this seminar that the contractor is truly a contractor, that is, a separate legal entity from the government, either a specially created body which may be a statutory corporation or else a private sector body or person. In other words, I am talking about a contractor other than an in-house team or body.

Can the Minister exercise control after the contract is made?

The contract lawyer always has a very simple answer to every question about what can be done under a contract: it depends what the contract says. This somewhat unhelpful response is a reflection of some very basic principles of contract law. It is inherent in most contracts, so long as they are not controlled by legislation (as many consumer contracts are), that the parties can agree to whatever they like, so long as it is not actually illegal. This idea is fundamental and is very much part of the idea of freedom of contract. It is therefore entirely up to the parties to decide what form of governance and control should apply during the contractual relationship.

It is a corollary of this principle that, generally speaking, what is *not* in the contract cannot be enforced and any attempt, after the contract is made, by one party to attempt to impose an obligation or insist on some requirement which is not mentioned in the contract will be met by a robust reply. This principle is, however, subject to the possibility that the contract may have hidden terms in it, that is, implied terms. But it is extremely difficult to argue for an implied term which is other than some very basic and obvious standard of quality or behaviour. Such

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things as a duty to co-operate in a contract or to perform in a proper manner may be readily read into the contract but as soon as you try to read in an ad hoc term to fix a problem that had not been catered for in the original agreement, it is very difficult.

There are, of course, complications which make this simple principle not so simple. It may be that the terms that have been agreed to are not very clear and there is argument about how they apply or what they mean in a particular context.

Enforceability

In addition there is the problem of enforceability. It seems to be generally assumed by policy makers and those who think that contracting out is the answer to everything, that, once you have got it in a contract, then that is the end of the matter. Very few people who think that things can be done by contract stop to think about how enforceable the contract is. This is a particular problem with some types of government contracts. The law of contract was developed for commercial people and there it does a tolerably good job (though even in ordinary commercial contracts there can be problems of enforcement). The only general remedies are damages and termination. (I leave aside the other remedies of specific performance and injunction which would be very rarely invoked in government contracts.) Termination is useless except in the most dire of circumstances. Damages as a remedy can be almost as useless because of the impossibility of assessment. What has the government lost if a contractor has failed to deliver services to the public or has performed them very badly? What can the government do if a contractor fails to adhere to the contractual requirement that privacy obligations must be observed by the contractor and its staff? It can sack the contractor and start again, but apart from that, there is little that can be done unless the contract has dealt specifically with the problem - to which I now turn.

It is worth noting, whilst on this theme, that of course the affected citizen cannot do anything about poor contractual performance. The citizen has no relationship with the contractor and yet may be met with the unhelpful reply, when a complaint is lodged with the department, that this is the contractor's responsibility. This is, of course, a theme which has been very successfully publicised by the Commonwealth Ombudsman. This problem stems from the strict privity rule. Even in the United States where the rules about privity are not so strict it has been held that the citizen has no right of redress if a company fails to perform: *Martinez v Socoma Companies Inc* 521 P 2d 841 (1974) (contract to provide employment opportunities to disadvantaged people). The privity rule is often misunderstood.

There are of course things that can be done about the problem of enforceability because of the very principle I just mentioned, namely, that you can agree to what you like in a contract. Therefore, if the parties are sufficiently prescient, they may provide for the difficulty of enforcement by building into the contract some extra measures to enhance enforceability. One example of this type of measure is a liquidated damages clause but it is not always suitable. In my experience there is very little by way of clearly thought-through measures for enhanced enforceability in government contracts.

So the answer to the question of how the Minister can control the contractor is: it depends what the contract says. In principle you can simply write it into the contract: "The Minister may give directions to the contractor from time to time as to the following matters ...". But here lies another problem. As a matter of commercial sense, the contractor is going to be concerned about any provision in

the contract which is open-ended and which could have the effect of changing the nature of the task. A sensible contractor either will not agree to open-ended commitments or will jack up the price in an attempt to cater for the risk or will insist on a clause in the contract which specifies that an increase in the scope of work means an increase in the amount of money. Of course, lots of contractors are not sensible and they will agree to almost anything in order to get government work. But even so, it is not to the Commonwealth's advantage to have a contractor which finds that it simply cannot perform the task. So although the contractor may *agree* to be bound by ministerial directions, there may be practical constraints on what the Minister can actually direct.

The possibility of contract becoming a constraint on a Minister's freedom to exercise discretions and direct policy is not beyond the bounds of possibility. Despite the existence of the doctrine of executive necessity which allows the government to break a contract without paying compensation if it must do so for policy reasons, a Minister might be constrained not to take advantage of this privilege if it would thwart the whole purpose of contracting out in the first place or would possibly even result in the contractor having to be compensated. To explain the last point, it is not in fact part of the law of executive necessity that the government must pay compensation (despite a suggestion to the contrary by Mason J in *Ansett Transport Industries (Operations) Pty Ltd v the Commonwealth* ((1977) 139 CLR 54 at 76, 77) but it may be that either the contract provides for compensation (as for example in the termination for convenience clause commonly used by the Commonwealth) or possibly legislation could so provide. For example, in the UK under the *Deregulation and Contracting Out Act 1994* subsection 73(2), if the Minister decides to revoke the contracting out arrangement, the contract is repudiated by the Minister rather than frustrated. This means of course that the government would have to pay damages. Such a liability may act as a disincentive to ending the contracting out arrangement.