WHEN THE BUSINESS OF BUSINESS IS GOVERNMENT: THE ROLE OF THE COMMONWEALTH OMBUDSMAN AND ADMINISTRATIVE LAW IN A CORPORATISED AND PRIVATISED ENVIRONMENT

*Phil McAloon**

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Introduction

It has been suggested that investigation of administrative action by the Ombudsman can improve the efficiency of government agencies, so complementing moves to a more managerialist approach to public administration.[1] Conversely, the constraints imposed by administrative law (through freedom of information legislation, judicial, tribunal and Ombudsman review) are often seen as fetters on the efficiency and effectiveness of administrative bodies; this is said to be especially true of government-owned corporations that have to compete with the private sector.[2]

As much of the work of government is increasingly corporatised, privatised or is contracted out into private hands, it is becoming important to ask what relevance administrative law has in the current administrative order. In short, should public power always be regulated by public law, or are there times when it should not be?[3]

The need for consideration of this question has acquired greater urgency with recent changes to the way the Commonwealth Government provides services to the public. The changes relevant to this paper have taken place in two main areas: a range of welfare services previously provided by government agencies are now provided through a pseudo-corporate agency, Centrelink; and employment services are now provided through a contested market, Job Network, in which a government-owned corporation, Employment National, competes with private service providers to place people in jobs.

As we will see, especially in the case of Job Network, the issue of how service providers are to be made accountable is far from settled. It is the argument of this paper that where the provision of services to disadvantaged and vulnerable members of our community has in the past been subject to accountability through the mechanisms of administrative law, this accountability should not be lightly removed.[4]

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* *Phil McAloon is currently studying Law at the University of Sydney. He spent 1998 on placement with the Commonwealth Ombudsman's office and has since worked for the Ombudsman. He previously worked as a script-writer for "Heartbreak High."*

1 Dennis Pearce, "The Ombudsman: neglected aid to better management," (1989) 48(4) *AJPA* 360.

2 *National Competition Policy* (1993) AGPS, Canberra (*The Hilmer Report*) Chs.6 and 13.

3 A question posed in Margaret Allars, "Private Law but Public Power: Removing Administrative Law Review from Government Business Enterprises," (1995) 4 *PLR* 44.

4 An argument also put forward by the *Senate Finance and Public Administration References Committee Report on the Contracting out of Government Services (Senate Contracting Out Report)* (1998) http://www.aph.gov.au/senate/ committee/fapa-ctte/contracting/contents/htm. See especially Ch.1.

In the specific case of the Ombudsman, it will become apparent that the availability of external review and investigation of decision-making has been, and continues to be, a valuable means of legitimising decisions. And, despite the rhetoric of managerialism, it will also become apparent that such review is an aid to the efficient provision of services.

1. The administrative context of Centrelink and Job Network: a brief history of administrative law and managerialism.

In the 1970s, there was a growing realisation that the traditional methods of keeping the government's bureaucracy accountable were no longer sufficient. As the government administered an increasingly extensive and complex range of services, it became apparent that the common law and ministerial accountability were no longer adequate tools to safeguard the interests of citizens in their dealings with government.[5] A number of committees[6] recommended that consumers of government services should receive greater protection: the administrative law package began to take shape.

In Australia, at the Commonwealth level, a number of statutory safeguards and review bodies were established to provide this protection. The key elements of this package include freedom of information legislation,[7] tribunals to review administrative actions,[8] a statutory process for judicial review of administrative decisions,[9] and the Ombudsman.[10] The function of the Ombudsman, which will be the focus of this paper, is to investigate complaints about administrative action and determine if maladministration has occurred or if mistakes have been made during the administrative process. The Ombudsman may investigate such matters and make recommendations to the affected administrator in the hope that any problems can be avoided in the future. The Ombudsman need not always act on a complaint, and may launch own-motion investigations if necessary.[11]

Besides protecting citizens' rights,[12] the primary objectives of the processes and bodies comprising the administrative law package were to promote openness, rationality, fairness and participation by the citizenry in the actions of government.[13] These objectives were predicated on a conviction that different standards of fairness should apply to those who wield public power from the standards applicable to those who wield private power.[14] In other words, the Department of Social Security should be held to a different standard from that applied to a major private company.

The administrative law package was aimed at regulating government behaviour, but there were some dissenting voices who felt that administrative law should extend its ambit further. Most notably, Murphy J questioned the orthodoxy of excluding private bodies from the application of public law.[15]

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5 See Margaret Allars, "Managerialism and Administrative Law," (1991) 66 *CanbBullPubAdmin* 50.

6 Such as the Bland, Ellicott and Kerr Committees, see Allars, Op cit at 50-51.

7 *Freedom of Information Act 1982* (Cth.)

8 For example, the *Administrative Appeals Tribunal* formed in 1977.

9 *Administrative Decisions (Judicial Review) Act 1977* (Cth.)

10 *Ombudsman Act 1976* (Cth.)

11 The general function of the Ombudsman is discussed in Pearce, "The Ombudsman: neglected aid to better management?" Op cit.

12 See A.W.Bradley, "The role of the Ombudsman in relation to the Protection of Citizen's Rights," (1980) 39(2) *CambLJ* 304.

13 Allars, "Private Law but Public Power," Op cit at 45.

14 Ibid.

15 See *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242 at 274-5.

For instance, when considering if a private trotting club should be allowed to "warn off" a citizen (in this case, a professional punter) from its premises without according him procedural fairness (ie. a hearing), Murphy J felt it appropriate to emphasise the public effect of exercises of private power. A trotting club's rules could affect the livelihood of members of the public, such as trainers, drivers and bookmakers. Although it was exercising its rights as a private property holder, the trotting club was in reality exercising public power. As such, Murphy J felt the club should be subject to public law, just as government departments exercising public power are held accountable.

Murphy J's post-liberal views on the nature of power were not, however, embraced by the majority of the High Court. Administrative law, they made clear, is public law which should only be applied to exercises of public power by public bodies.

This support for maintaining the classic liberal distinction between public and private power was re-enforced and broadened in subsequent cases. For instance, when a statutory body exercised rights given to it by a contract, its actions were held by the Federal Court not to be subject to judicial review under administrative law.[16]

In *ANU v Burns*, an academic (Burns) was dismissed by a statutory body (the ANU) exercising dismissal powers conferred on it by the employment contract it had made with Burns. It was held that the source of the dismissal was the private contract, not the Act constituting the university. Accordingly, the decision was not reviewable under the Administrative Decisions (Judicial Review) Act (AD(JR) Act). It was a private decision and, as such, should be regulated by private law; if Burns wanted a judicial hearing on the decision, he should sue in contract, not administrative law.

The rise of managerialism

The above limitations notwithstanding, there has been widespread recognition of the positive effect of the administrative law package.[17] Citizens could be assured that bureaucratic power was responsibly used, that departments were forced to adhere to proper procedures when making decisions, and that the inevitable inequities created by the exercise of broad public power were at least minimised.

But the administrative law package came at a cost. In complying with reporting requirements and, for instance, responding to freedom of information (FOI) requests, large amounts of government resources were tied up in ensuring fairness in administration was both done and seen to be done.[18]

As economic conditions worsened in the 1980s, new priorities began to supplant the values of the administrative law package in the debate over government accountability. It was argued that many departments had been hamstrung by the new administrative law. The emphasis on fairness and due process had led to an administrative culture in which, it was argued, adherence to correct procedures had replaced getting the job done as a priority.[19] Commentators compared this approach to decision-making unfavourably with the more

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16 *Australian National University v Burns* (1982) 43 ALR 25.

17 See Pearce, "The Ombudsman: neglected aid to better management?" Op cit and Allars, "Managerialism and Administrative Law," at 56-58 Op cit.

18 On a senior public servant's frustrations with FOI red-tape in the Defence Department, see R.W.Cole, "The Public Sector: the conflict between Accountability and Efficiency," (1988) 47(3) AJPA 223 at 227-228.

19 See Cole, "The Public Sector" Op cit; Allars, "Managerialism and Administrative Law," at 57 Op cit; and Peter Bayne, "Administrative Law and the new Managerialism in Public Administration," (1988) 62 ALJ 1040 at 1042.

result-driven decision-making that was said to be characteristic of private sector corporations.[20]

The corporate model, it is argued, is a more efficient way to achieve outcomes. Once the board of directors of a corporation agrees with its owners about what goals the corporation is to pursue, the managers are then free to decide how those goals are achieved, and are duly rewarded if they attain them.[21] If the managers do not reach the goals set, they are accountable to the shareholders and can be voted out of management. Success for such corporations is usually measured in profit made and market share gained.[22]

On the face of it, the corporate model would, then, seem more likely to produce efficient outcomes. It is a model which implicitly accords the managers of a corporation a great deal of autonomy: once corporate goals are set, managers should be allowed to decide how the goals are met.

With the widespread acceptance of the notion that adopting a corporatised governance structure for the provision of government services will result in more efficient decision-making, the late 1980s and 1990s have seen a rapid corporatisation of many services previously provided through government departments: for example, postal, transport, telecommunications and water supply are areas that have been corporatised.[23] The usual model for the government corporation is incorporation under the Corporations Law or a constituting statute, and the installing of a board of directors answerable to the relevant minister.

Corporatisation of government services is usually also accompanied by calls for a reduction in the applicability of the administrative law package to such corporations.[24] This is especially so where the government-owned corporations find themselves in competition with private service providers on the open market. The Administrative Review Council, for instance, recommends that when they face real competition, government-owned corporations should be free from review under the administrative law package.[25]

The concept of "competitive neutrality" for government-owned corporations competing with the private sector was described in *The Hilmer Report* in 1993.[26] Hilmer argued that competition in the open market is the surest way to ensure the efficient provision of services.[27] For competition to achieve this efficiency, government business enterprises had to compete on the same terms as their private sector counterparts: with neither the advantages nor the disadvantages stemming from their status as government organisations applying to their actions. In other words, for competition to work, government-owned corporations and privately-held companies had to compete on a level playing field.

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20 See Cole, "The Public Sector," Op cit at 224, in which he encourages public servants to adopt the same risk-taking decision-making adopted by Westpac Bank in its lending section in the 1980s.

21 John Farrar and Bernard McCabe, "Corporatisation, Corporate Governance and the De-Regulation of the Public Sector Economy," (1995) 6(1) PLR 24 at 30-33.

22 Ibid at 33. See also Michael Taggart, "Corporatisation, Privatisation and Public Law," (1991) 2 *PLR* 77.

23 Allars, "Private Law but Public Power," Op cit at 46.

24 Allars, "Private Law but Public Power," Op cit at 46-7.

25 ARC, *Administrative Review of Government Business Enterprises - Discussion Paper* (1993) AGPS, Canberra.

26 *The Hilmer Report*, Ch.13.

27 *The Hilmer Report*, "Executive overview," at xv-xxxix. (see note 2)

In short, managerialists argue that the private sector corporation provides a model for an efficient decision-making organisation. And competition with the private sector in the market, where possible, is the most effective way of keeping government corporations efficient.

It has been suggested that the social responsibility of a corporation begins and ends with its obligation to make profits.[28] In that it is profit-driven, the market is unlikely to force corporations (be they government-owned or privately-owned) to adhere to the values of rationality, openness and fairness imposed by the administrative law package. In fact, the need to maintain a "competitive edge"[29] in the marketplace may compel corporations to value secrecy over openness: revealing how you deliver your services could compromise your competitiveness.[30] In such an environment, fairness may only be accorded to the extent that it enhances a corporation's competitiveness. Accountability in such a context is largely measured by economic performance, not in terms of how properly and fairly decisions are made.

It would be wrong however, to over-simplify the various ways in which different government-owned corporations and corporations providing services to the government are made accountable. There is no single model for the corporatisation and opening up to competition of government services. The process may be undertaken in a number of ways, each of which has different implications for accountability: some versions of corporatisation and privatisation result in Hilmer's level playing field, and others result in a different outcome.

The process may be achieved by the government forming a corporation in which it (represented by the minister) is the only shareholder. More radically, the government may first incorporate a government body and then privatise it: selling it off on the share market.[31] After being sold, the privatised corporation competes in the market like any other privately-held company. Or, the government may contract out its service responsibilities to private service providers who assume the role of providing government services to the public.[32]

Accountability varies depending on which of the above options is pursued. When the government privatises or corporatises a government service, for instance, it may force the service provider to adhere to a Community Service Obligation.[33] Such obligations should prevent mere economic efficiency from being the sole priority of the corporation. In practice, however, these obligations tend to be broadly worded, and reserve a wide discretion for the corporation's managers to decide how best to achieve corporate priorities. As such, these obligations may be difficult for customers to enforce.[34]

When the government operates its own corporation, by Hilmer's logic, that corporation should be accountable to the market. However, the peculiar nature of the government-owned corporation may blunt some of the market's more salutary effects. Unlike a privately-held company, the government-owned corporation does not face the discipline of the stock market: the government holds the shares, they are not traded and would accordingly be difficult to ascribe a market value to. Similarly, the valuable input of dissenting shareholders at Annual and Extraordinary General Meetings is notably missing from a corporation where

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28 Milton Friedman, quoted in Taggart, "Corporatisation, Privatisation and Public Law," Op cit at 87.

29 A term used by Centrelink CEO Sue Vardon to describe the agency's approach to service provision, in an interview, *Australian Financial Review* 9-10 May 1998 at 61.

30 Taggart, "Corporatisation, Privatisation and Public Law," Op cit at 100.

31 As partially undertaken in the case of Telstra.

32 As with Job Network.

33 Such as that imposed on Telstra by the *Telecommunications Act*, see Yarmirr *v Australian Telecommunications Corporation* (1990) 96 ALR 739.

34 Ibid.

there is only one shareholder with only one perspective on how the company should be run. Finally, and perhaps most importantly, the government-owned corporation is most unlikely to face the ultimate sanction of the market: insolvency.[35]

When the government contracts out service provision to private providers, the relevant minister may retain some control over the behaviour of those service providers. The contract made between the department and the providers may, for instance, contain conditions to be complied with, or may impose a Code of Conduct on providers.[36]

However, these contractual arrangements may provide only an illusory safeguard for members of the public in their dealings with private service providers. Privity of contract may preclude them from suing for breach of terms of the contract. Also, as a commercially sensitive document, the contract may be secret: the citizen may not be able to find out its terms in order to ascertain if they have been breached.[37]

As we will see in the specific cases of Centrelink and more especially Job Network, recourse to the administrative law package to enforce agreements like those discussed above may be problematic at best.

In an environment where different government corporations are competing - or are preparing to compete - with the private sector, how are the values of rationality, openness and fairness to be preserved? Would the application of the administrative law package in such an environment impair efficiency?

In the case of Centrelink, we will be looking at a pseudo-corporation, established by the government with a view to eventually entering a contested market for the provision of services. In the case of Job Network, a government-owned corporation is already in competition with the private sector.

2. Managerialism in practice: the creation of Centrelink and Job Network

In the 1996 Federal Budget, the coalition government announced a major overhaul of the provision of Commonwealth welfare and employment services.[38] The existing system, it was argued, had resulted in an inefficient duplication of services. Moreover, after two decades of the administrative law package, a culture had become entrenched in the Commonwealth Public Service which valued process over results. It was time to apply managerial theory to these areas, and to introduce the efficiency-creating discipline of contested markets for the provision of these services.

Centrelink

Coming into existence on July 1, 1997, Centrelink is a statutory authority which provides a range of income-support and welfare programs previously supplied by a number of separate departments: among others, Department of Social Security (DSS), Department of Employment, Education, Training and Youth Affairs (DEETYA), Department of Health and Family Services (DHFS) and the Department of Primary Industry and Energy. As its name

35 See Taggart, “Corporatisation, Privatisation and Public Law,” Op cit at 80.

36 In the case of Job Network, all providers have to subscribe to the *Employment Services Industry Code of Conduct*.

37 Discussed by the *Senate Contracting out Report* at Ch.1.

38 *Budget Statement 1996-7* (August 1996) AGPS, Canberra.

implies, under Centrelink all of these previously disparate services are now supplied through one centralised service operating 401 offices throughout Australia.[39]

This "one stop shop" approach to service provision would appear to be more efficient than the spread of services it replaced. This aspect of Centrelink has been widely praised for cutting down service duplication. It has even been suggested that the process could be extended, incorporating the Ombudsman into some key Centrelink offices.[40]

The structure of Centrelink is embodied in the Community Services Delivery Agency Act (CSDA Act).[41] Like a corporation, operation of the agency is managed by a board of directors and a chief executive officer.[42] It is a statutory requirement that at least two of the members of the Board must not be principal officers of Commonwealth Authorities.[43] The board is answerable to, and must take direction from, a minister.[44] In effect, the minister seems to be expected to perform the role of the shareholders; though, of course, Centrelink does not have any shares and is not incorporated under the Corporations Law. Under the CSDA Act the board is to ensure Centrelink's functions are properly, efficiently and effectively performed.[45]

When the CSDA Bill was put before the House of Representatives, it was stressed that, as Centrelink was responsible for spending large amounts of public money, the usual administrative law accountability measures would apply to it, and it would be accountable under the Audit Act.[46]

However, there is a contradiction at the heart of Centrelink. Although it is a statutory authority and subject to review, it is also a pseudo-corporation pursuing efficiency as one of its key goals. Centrelink CEO, Sue Vardon, has said that it is hoped Centrelink will be competing with private service providers in a contested market for the provision of government services within 3-5 years.[47] Whether review under the administrative law package will be appropriate or adapted to such an environment remains a vexed and uncertain question.

Some hint as to how administrative law will fit within such future arrangements may be provided by an area in which a government-owned corporation is already competing with private service providers: Job Network.

Job Network

On May 1, 1998, the old Commonwealth Employment Service was replaced by Job Network. Placing people in employment was no longer to be the task of government. Competitive tenders were called for private service providers to supply DEETYA with employment services. Successful tenderers contracted with DEETYA to put people into jobs. This scheme is now administered by the Department of Employment, Work Place Relations and Small Business (DEWRSB). The government was to become a purchaser, rather than a

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39 For more information, visit the Centrelink homepage at http://www.centrelink.gov.au.

40 Robin Creyke, "Sunset for the Administrative Law industry? Reflections on developments under a Coalition Government," in John McMillan (ed.) *Administrative Law under the Coalition Government* (1997) Canberra.

41 1997 (Cth.)

42 CSDA Act Pt.3.

43 CSDA Act s.16(2).

44 CSDA Act s 13.

45 CSDA Act s 12(2).

46 See Explanatory Memorandum to the CSDA Bill, and *House of Representatives Hansard* (4 December, 1996) for the second reading speech on the Bill.

47 *Australian Financial Review* (9-10 May, 1998) at 61.

provider, of employment services.[48] Government monitoring and evaluation of provider performance is facilitated through management of the providers' contracts by the relevant minister.[49]

Thirty five percent of the initial contracts went to Employment National. Employment National was incorporated under the Corporations Law in 1997, and its sole shareholder is the Commonwealth government.[50] The corporate structure of Employment National, however, distances its provision of services from the government. Employment National has sub-contracted its service provision responsibilities to Employment National (Administration), a separate company.[51] So the actual provision of services seems to be conducted by a provider acting under contract to another provider which has a contract with DEETYA or DEWRSB.

3. How accountable are Centrelink and the members of Job Network?

Because of the newness of Job Network, the exact applicability of the administrative law package to its provider members is not yet completely clear and awaits an authoritative judicial decision. Centrelink is, however, clearly subject to the full range of accountability measures under the package. Most likely, Job Network members are less easily held to account.

The accountability of Centrelink

It was stated in the second reading speech for the CSDA Bill that Centrelink is at the moment subject to the full range of review options available under the administrative law package.[52]

Judicial review is available under the AD(JR) Act for decisions of an administrative character made under an enactment.[53] In that it makes decisions under the CSDA Act and a range of other Acts, Centrelink is then, apparently, amenable to AD(JR) Act jurisdiction. That Centrelink's decisions must be of an administrative character to be so reviewable probably represents no great obstacle to review. This term has in the past been broadly construed to apply to a wide range of decisions.[54]

Investigation by the Commonwealth Ombudsman is available for reviewing an action that relates to a matter of administration by a government department or prescribed authority.[55] Once again, an "action relating to a matter of administration" has in the past been construed broadly, even allowing for review of a commercial decision.[56] In that Centrelink was

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48 For details of the scheme, see the DEETYA homepage (now the DETYA homepage) at http://www.deetya.gov.au.

49 Till very recently the Minister responsible for DEETYA. Now probably the Minister responsible for DETYA.

50 For a discussion of the contracting process and nature of Employment National, see Moore J's judgment in the - as yet - unreported decision of *Peter Schanka, Erica Aldridge, Robert Ashfield and Richard Walden and Community and Public Sector Union v Employment National (Administration) Pty Ltd.* (Unreported Judgment of the Federal Court, 9/9/98.)

51 Ibid.

52 See second reading speech CSDA Bill.

53 AD(JR) Act s.5.

54 *Evans v Frieman* (1981) 35 ALR 428 at 435.

55 *Ombudsman Act 1976* (Cth) s 5(1).

56 *Re British Columbia Development Corp and Friedmann* (1984) 14 DLR (4th) 129.

established for a "public purpose...by an enactment"[57] it would seem to fit the definition of a prescribed authority for the purposes of the Ombudsman Act.

The *Freedom of Information Act 1982* (Cth) would also apply to Centrelink's current decisions. This Act gives anyone a legal right to access documents of agencies, prescribed authorities and ministers (section 11). A prescribed authority includes a body corporate or unincorporated body "established for a public purpose by or in accordance with the provisions of an enactment" (subsection 4(1)).

In the future contested market, where Centrelink may enter contracts for service provision, the above reviewability may be less clear. People seeking to challenge Centrelink decisions in such circumstances will probably have to establish that the contracts entered into by the agency were required by the CSDA Act and were not made under a general power to contract.[58]

Accountability by way of tribunal review is not directly accorded by the CSDA Act, but given that it mostly makes decisions under other Acts (for instance, it may assess benefit eligibility under the Social Security Act) availability of review for a Centrelink decision by a tribunal is conferred by these Acts.

The operations of Centrelink are also subject to the *Financial Management and Accountability Act* 1997 (Cth).[59]

The accountability of Job Network providers

In determining the applicability of accountability mechanisms to Job Network members, it is necessary to distinguish between Employment National and the privately-owned service providers it competes with. As we will see, Employment National may be easier to hold accountable.

Given that the actions of the service providers (both privately and government-owned) are carried out under contracts with DEWRSB, they are probably not subject to judicial review under the AD(JR) Act. The proximate source of the providers' decision-making power is the contract, not an Act. As courts have stressed in the past, such private arrangements are not intended to be subject to the administrative law package.[60]

The Ombudsman probably would be able to investigate the actions of Employment National, in that it is a Commonwealth controlled company, and so comes within the Ombudsman's jurisdiction.[61] However, the private contractual arrangements between Employment National and its subsidiary company Employment National (Administration) for the provision of services may remove the actual decisions regarding the provision of services from the Ombudsman's jurisdiction: Employment National (Administration) is arguably not a Commonwealth controlled company.[62]

The privately-owned service providers are even less likely to be subject to the Ombudsman's jurisdiction. They are plainly not Commonwealth controlled companies. Arguably they may

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57 *Ombudsman Act* s.3(1).

58 See, for instance, the reviewability of Telecom's (as it was called at the time of the decision) contractual decisions in *General Newspapers Pty Ltd v Telstra* (1993) 117 ALR 629.

59 CSDA Act s 39.

60 See *General Newspapers v Telstra* (see note 58) and *ANU v Burns* (see note 16).

61 Ombudsman Act s.3AB.

62 On the nature of the somewhat confused relationship between Employment National and Employment National (Administration) see *Schanka v Employment National (Administration)*. (see note 50)

be brought into jurisdiction if they could be shown to be acting under the authority of DEWRSB - ie. their acts are deemed to be those of the department that authorised them.[63]

Privately-owned service providers are then, most likely not subject to the Ombudsman's jurisdiction. Employment National *may* be in jurisdiction for the reasons discussed above.

In that the decision-making power of both Employment National and the privately-owned service providers is conferred on them by their contracts with DEWRSB (and not under an Act) and neither is a prescribed authority, it is unlikely that the *Freedom of Information Act* applies to them. Both Employment National and the privately-owned service providers are incorporated under the Corporations Law. Such corporations are not prescribed authorities.[64]

It should be remembered that for both the Freedom of Information Act and the Ombudsman Act, it is possible for the Parliament to turn Employment National and the privately-owned service providers into prescribed authorities by listing them as such in the regulations of both Acts. So far this has not been done.

Arrangements for tribunal review of the decisions of employment service providers have not yet been implemented.

Accountability under the Job Network contracts

A complaints process has been established by the contracts finalised between each service provider and DEWRSB. Under these contracts, service providers undertake to conform to the Employment Service Industry Code of Conduct. Like the statutory Community Service Obligations that have been found so hard to enforce in the past,[65] the Code of Conduct is broadly worded and gives providers wide discretion in how to provide their services. However, all providers must afford access to an internal complaints procedure for aggrieved "customers". Customers must also be given access to their own records on request.[66]

If customers are unhappy with how the agency handles their complaint, they may take the complaint to DEWRSB. DEWRSB's handling of these complaints is, obviously subject to the full range of review measures applicable to the decisions of departments. However, it is unclear how far this review could "reach down" into the decision-making process. Although DEWRSB's handling of the complaint is reviewable, is it possible for the Ombudsman (for instance) to investigate the circumstances of the original decision being complained about? The answer to this has yet to be found.

In summary, then, it would seem that "government by contract" - especially when the contracts are with privately-owned corporations - effectively removes the exercise of public power from scrutiny under the range of public law remedies provided by the administrative law package.

As a managerialist would no doubt point out, service providers are also accountable to the market. If they do not perform efficiently and for the price they tendered for, they go broke. This particular form of accountability has recently been very much in evidence. In late 1998, a Sydney privately-owned service provider that joined Job Network after operating for 15 years as a private employment agent closed its doors, owing $260,000. The provider claimed DEETYA (the Department then administering the scheme) had not delivered on its

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63 This type of jurisdiction would be available, if at all, under Ombudsman Act s 3(4).

64 Freedom of Information Act s 4(1).

65 See *Yarmirr v Australian Telecommunications Corporation* (1990) 96 ALR 739.

66 See *Employment Services Industry Code of Conduct* (1998) AGPS, Canberra.

contractual promise to have a large number of job-seekers referred to the service through Centrelink.[67] It is unclear whether the terms of the contract included this promise as it is a private document between the provider and DEETYA.

As we have seen, if the service provider wishes to challenge the actions of DEETYA in this matter, it will most probably have to do so by suing under the private law of contract. The logic of the public/private distinction in law would dictate that such contractual matters are beyond the ambit of public law.

So the current arrangements in employment services seem to propel both service providers and service recipients to private law if they wish to challenge the exercise of public power by private means.

4. Should private providers of public services be subject to public law?

It seems odd that, in theory at least, a job-seeker who is unhappy with the service given him/her by Employment National has direct recourse to the Ombudsman, while a job-seeker complaining about the same service given by a privately-owned provider does not. If competition is to ensure efficient service-provision, it must do so in an environment where all the competitors are competing equally: subject to the same advantages and disadvantages.[68] A competition in which the competitors do not start on an equal footing is no competition.

The question that must be answered when setting up such a public market is: should all providers be subject to public law accountability mechanisms or should none be subject to them?

The report of the Senate References Committee on Finance and Public Administration on Contracting Out has suggested that, at least, providers in a contested market for services previously supplied by the government ought to be subjected to Ombudsman review and freedom of information requirements. It was felt that the presence of the Ombudsman would provide a useful source of legitimacy for decisions: unlike an internal complaints process, the Ombudsman provides a review that is independent in both appearance and substance. Freedom of information would allow clients to get enough information about a provider's contract with the government to assess whether that contract had been breached. In other words, it would help them to decide if it is worth suing or not. Providers would also be more careful in reaching decisions if they knew their decision-making process could be subject to such scrutiny.

My practical experience has been in observing the role the Ombudsman plays in the complaint process. It is my opinion that this element of public law, at least, should be available to clients of privately-owned providers of public services. For reasons that will become clear, this form of review is especially necessary in a contested market for the provision of services to vulnerable members of the community. As Centrelink moves towards a contested market for such services, it is imperative that this issue be addressed now.

Managerialists frequently object that external review of service provision is a source of inefficiency.[69] This strikes me as a particularly inappropriate argument when it is applied to

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67 *Australian Financial Review*, (30/10/1998) at 34, *Australian Financial Review* (27/10/1998) at 5, *The Australian* (27/10/1998) at 5.

68 See *Hilmer Report* Chs. 6 and 13; Op cit.

69 See, for instance, *the Hilmer Report* (see note 2), and Cole, *The conflict between Accountability and*

the provision of welfare services. If efficiency is measured in terms of providing a public service to those people eligible to receive it, then I would argue that the Ombudsman is an aid to efficiency, not a source of inefficiency.

The above argument assumes, of course, that efficiency means the same thing in all contexts. Experience suggests that this may not be so. Figures released through DEETYA when it was administering the scheme stressed the success of Job Network in placing people in employment.[70] It was assumed that this measure of performance is an unproblematic indication as to how efficiently Job Network is functioning. As the Treasurer pointed out when first launching the program,[71] the emphasis in the new employment market is in getting people into work. The objectives of the previous system of case management, which measured its efficiency not only in terms of getting people into work, but also by placing them in appropriate training programs, were obviously different.[72]

Measuring efficiency in the welfare sector - for instance, in the payment of income support - is even more difficult than measuring efficiency in employment services. During the latest federal election campaign, the coalition government made much of the performance of Centrelink in eliminating welfare fraud: saving taxpayers $46 million dollars a week in payments that had been found to be unjustified.[73]
Such savings are, of course, important for the efficient functioning of government welfare programs. And it is easy to imagine competitors in a contested market being able to enforce such efficiencies. In the United States, for instance, such savings have been made in contested markets: when they lost their defence contracts to build the Stealth Bomber, Lockheed Martin turned their attention to providing all of Florida's state welfare services. The result has been a leaner provision of services with lower overheads, so ensuring a profit for the provider and a quality service for the customer. Or so Lockheed claims.[74]

What may not be so easily achieved by the market is ensuring that income-support services, for instance, go to those who are eligible to receive them. It would perhaps affront a managerialist to hear that the most efficient service provider in a welfare system was the one most effective at paying out the most benefits. It is hard to conceive of a contested market alone ensuring such efficiency.

Besides being an independent review body, the Ombudsman provides a way for service providers to find out if their services are reaching those eligible to receive them. For instance, the recent managerialist push for risk-management in welfare provision has seen an increased onus on welfare recipients to work out what benefits they are eligible for: it is their responsibility, not the agency's. As the Ombudsman recently observed,[75] this risk management approach coupled with increasingly complicated eligibility requirements means a vulnerable section of the community may not be receiving the support they need and are eligible for.

Efficiency Op cit.

70 Such figures are regularly updated on the DEETYA web page, at http//www.deetya.gov.au.

71 See the Budget Speech, 1996.

72 On this qualitative difference between the priorities of the two systems, see Mitchell Dean, "Lecture 9A: Unemployment after the Welfare State," which is a lecture recently delivered to students at Macquarie University. Available on the internet at: http://www.macq.edu.au.

73 Figures discussed on ABC Radio National, "Background Briefing", 11/10/98.

74 Ibid.

75 Balancing the Risks - Own Motion Investigation into the role of agencies in providing adequate information to customers in a complex income support system." Report under s 35A Ombudsman Act; due for release, August, 1999.

To redress this inefficiency in service provision, the Ombudsman frequently assists individual clients to work out what benefits they are entitled to. The Ombudsman's annual reports are sadly always full of stories of non-English speaking, illiterate and developmentally disabled clients who have "fallen through the cracks" of the welfare system and are not receiving the benefits they are entitled to. The Ombudsman is one readily available means of ensuring such people receive adequate service.

There is a typical pattern to such cases. The eligible person either does not know he or she is entitled to benefits at all, or is unable to understand how and what to apply for. He or she may for instance, be illiterate, or unable to understand the Centrelink literature explaining eligibility for a benefit. If he or she complains to the Ombudsman about the difficulties, it is possible for the office to explain the eligibility criteria. The Ombudsman, through annual reports and daily discussions with service providers, can frequently alert the service providers to gaps and problems in their services.[76]

The Ombudsman's reporting of systemic problems like the one above may provide a salutary warning to service providers that their services should be better advertised or simplified. For instance, the New Zealand Ombudsman alerted that country's corporatised Telecom to the unfair and overly-complicated way in which it worded its standard customer service contracts. Acting on this advice, Telecom re-wrote the contracts.[77]

In New South Wales, where many state-provided community welfare services have been contracted out, it is a frequent observation that the "hard cases" are often not dealt with by privately-owned service providers.[78] People with severe mental, financial, and /or language problems are unlikely to be sought out as clients in a system predicated on payment for results, competition and economic efficiency.[79]

Arguments for a contested market for the provision of welfare services assume that such a market can be achieved in the first place. As Schoombe points out,[80] "real competition" may be something of a fiction in an environment where customers have little real choice - they usually do not choose to enter the market, and may be ill-equipped to act as rational consumers once they do.

Advocates of contested service provision also suggest that consumers in such markets have the ultimate means of holding providers of inadequate and maladministered services to account: they can "vote with their feet," and go to another service provider.[81] But does this self-help solution really solve anything? Unlike administrative review, which may fix the problem and ensure it does not recur, if a customer just leaves a service provider, the problem remains unaddressed: a land mine for the next hapless job-seeker. Problems in such a system, and the reasons for them, are unlikely to be rigorously examined.

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76 Ibid, p 13.

77 Taggart, "Corporatisation, Privatisation and Public Law," at 91. (see note 22)

78 Anita Tang, "Contracting out in Community Services," in Linda Pearson (ed) *Administrative Law: Setting the Pace or Being Left Behind?* Sydney (1997) at 334.

79 Ibid at 340.

80 Hannes Schoombe, "Privatisation and Contracting Out - Where are we going?" in John McMillan (ed) *Administrative Law under the Coalition Government* (1997) Canberra.

81 Something job-seekers are encouraged to do in the foreword to the *Employment Industry Code of Conduct*.

Conclusion: Does administrative law have a place in a managerialist system?

As we have seen, external review need not be antithetical to efficiency. In some areas of service provision, it may in fact be a positive aid to the efficiency and effectiveness of a service. Unlike internal complaint handling mechanisms, external review has the advantage of being independent and impartial in both appearance and reality. It can legitimise decision-making in a way internal review never can. Through independent review, I would argue, service providers and their customers are at least to some extent assured that decisions are made rationally, openly and fairly.

Allars has suggested[82] that review processes themselves should be as efficient as possible. In economically hard times, it must be ensured that review processes do not become overly legalistic, formal and time-wasting exercises. Reporting and auditing the effectiveness (not just the economic efficiency) of review procedures is perhaps an area where managerialist techniques can be used to make review processes more efficient.

It is ultimately a matter for the elected parliament to decide how resources are distributed in our society. The argument of this paper has been that an efficiency-minded government should not lightly dismiss external review, for the review process is not necessarily antithetical to economic efficiency.

It is perhaps also time for the illogical separation between the public and private spheres in law and government to be questioned, if not set aside. In Australia, there has been a marked reluctance to apply public law to private decision makers. Such an approach is no longer justified when private bodies have taken on many of the functions of government.

Instead of looking at the source of power to decide if decision-makers should be accountable under public law or not, attention should be paid to the effect of their decision-making. If a privately owned service provider's actions affect citizens in the same way as the decisions of a government agency, there seems to be no sound reason for that decision to be immune from the same accountability measures. In other words, public law should apply to private service providers when they are providing a public service.

82 In *Managerialism and Administrative Law* Op cit.