CONTRACTING OUT AND ADMINISTRATIVE LAW

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Introduction

Public sector bodies are subject to administrative law challenge. This has become something of a controversial area of the law in connection with government contracting. To what extent is it possible to challenge government contracting decisions by using administrative law? The answer is that administrative law remedies have been patchy and, broadly, appear to be on the retreat. The courts, governments themselves and bodies such as the Administrative Review Council[1] have tended to say that government contracts are essentially "private" and should attract the same remedies as ordinary private sector contracts.

I have argued[2] that this is not a sound position to adopt because public contracts are not the same as private contracts. Not the least reason for saying this is that they involve the expenditure of public (the tax payers' or rate payers') money and that the profit motive is usually not part and parcel of the relationship from the government side.

I have also argued[3] that public law values do not sit easily with private law values and that it is not surprising that disquiet is shown from time to time at the idea that running government is just like running a business. Therefore, the extra scrutiny of public law remedies should be brought to bear on government contracting activity. However, this is a typical example of the divide between the academics and some other commentators, on the one hand, and those in power who find such carping an irritant at most, on the other hand.

Two "Frontiers" of Administrative Law

The difficulty of using public law remedies in connection with government contracting is not surprising when it is considered that using such remedies may push to the very edges of administrative law. There are two developments in administrative law that have excited attention: one is challenging the exercise of executive power (as opposed to power exercised under an enactment); the other is the use of administrative law against private organisations. As to challenge of executive power, this is of importance in the area of government contracting because most contracts are made under the executive power. As to the use of administrative law against private bodies, this is of importance the more that the government contracts out important functions previously the preserve of public bodies. Running gaols and providing case management services for job seekers are two examples where it might be appropriate to make use of public law remedies.

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1 Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law* Report No 38 (1995), AGPS.

2 N Seddon, *Government Contracts: Federal, State and Local* (2nd ed 1999) para [8.2].

3 Ibid at para [1.9].

In neither of these "frontier" areas of administrative law has there been much development in relation to government contracting activities.

Decision Under a Contract

It is well-established in Australia that administrative law challenge is not possible in respect of a decision made *under* a contract, such as a decision to terminate for breach.[4] In New Zealand, the position is different in that it may be possible to challenge such a decision made by a public body, though the scope for such a challenge is very limited, being confined to fraud, corruption or bad faith.[5]

An exception to the generally accepted position is the case of *Telstra Corporation Ltd v Kendall*[6] where it was held that a decision to disconnect a subscriber, on the alleged ground that the telephone was being used for the purposes of prostitution, was an invalid decision because Telecom (as it then was) had no power under the (then) *Telecommunications Act* 1991 (Cth) s 47 to cut off the telephone.

Decision to Make a Contract and Other Pre-Contractual Conduct

It is possible, on the other hand, to challenge the *award* of a contract or other preliminary decisions. In what ways can an administrative law challenge be mounted? As I have noted already, the basis for challenge is limited.

Removal from a panel or creation of a "black list"

It may be possible to challenge the way in which government conducts its commercial activities when there is a perceived obligation imposed on the government to provide fair access to government business. So, for example, it may be possible to challenge the removal of a contractor from a panel of approved contractors if there has been a lack of procedural fairness in the decision.[7]

Similarly it may be possible on administrative law grounds to challenge the government's creation of a "black list" of contractors with whom the government will not do business if the black list has been compiled without due process.[8] The *Master Builders'* case is a rare example of public law remedies being used to challenge a decision made under the executive power. The Commonwealth has a black list of contractors who have not, in the opinion of the Commonwealth, complied with the requirements of the *Equal Opportunity for Women in the Workplace Act* 1999. The black list is authorised by the legislation but the policy not to contract with entities on the black list is not and is therefore an exercise of executive power.[9]

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4 *Australian National University v Burns* (1982) 43 ALR 25; *Sellars v Woods* (1982) 45 ALR 113; *Bayley v Osborne* (1984) 4 FCR 141; *Australian Film Commission v Mabey* (1985) 6 FCR 107; *Cash v Australian Postal Commission* (1989) 88 ALR 547; *Federal Airports Corp v Machuka Developments Pty Ltd* (1993) 115 ALR 679.

5 *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385.

6 (1994) 55 FCR 221.

7 *R v London Borough of Enfield* (1989) 46 BLR 5.

8 *State of Victoria v Master Builders' Association of Victoria* (1994) 7 VAR 278.

9 The policy is embodied in the Commonwealth Procurement Guidelines. These are not enactments.

The award of contracts

It may be possible to challenge a government decision to award a contract. This may be done on a limited number of grounds. Before examining these grounds, it is worth noting an important point made by Aronson,[10] namely, that successful administrative law challenge may not deliver very much. Unless an injunction is obtained quickly, it is often too late to have a decision re-made in the context of contracting activity. A similar point is made by Jolly.[11]

Failure to follow statutory procedures

If there is a statutory regime governing the award process (typically a tender) and the statutory provisions have not been followed, then it may be possible to challenge successfully. However, this type of challenge depends on establishing that the statutory procedure is mandatory, not directory, and the courts have been ambivalent about this crucial question in the cases.[12]

Improper motive

Secondly, if the award decision was motivated by an extraneous or improper purpose, a successful challenge may be mounted.[13] Obviously, it is extremely difficult to prove that an improper purpose motivated the decision to award the contract and so this type of challenge is of very limited usefulness.

Legitimate expectations

Thirdly, if the announced procedure has given rise to legitimate expectations that have not been fulfilled, it may be possible to challenge successfully.[14] Again, the scope for this type of challenge appears to be very limited.
This somewhat paltry list indicates that such challenges are difficult.

Statutory corporations and the award of contracts

The Full Federal Court has decided that a statutory corporation which makes a contract, under the usual statutory power to make contracts found in the corporation's establishing Act, is not making a decision "under an enactment",[15] despite earlier decisions to the contrary.[16] The reasoning employed in *General Newspapers* was

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10 M Aronson, "A Public Lawyer's Responses to Privatisation and Outsourcing" in M Taggart (ed), *The Province of Administrative Law* (1997).

11 R Jolly, "Government Owned Corporations: Public Ownership, Accountability and the Courts" (2000) *AIAL Forum No 24* 15 at 23.

12 Successful challenges were mounted in *Australian Capital Equity Pty Ltd v Beale* (1993) 114 ALR 50; *Wade v Gold Coast City Council* (1972) 26 LGRA 349; *Hunter Brothers v Brisbane City Council* [1984] 1 Qd R 328; *Streamline Travel Service Pty Ltd v Sydney City Council* (1981) 46 LGRA 168. But not so in *Maxwell Contracting Pty Ltd v Gold Coast City Council* [1983] 2 Qd R 533; *Capricornia Electricity Board v John M Kelly (Builders) Pty Ltd* [1992] 2 Qd R 240; *Gerah Imports Pty Ltd v Minister for Industry, Technology and Commerce* (1987) 14 ALD 351.

13 *Metropolitan Transit Authority v Waverley Transit Pty Ltd* [1991] 1 VR 181.

14 *Century Metals and Mining NL v Yeomans* (1991) 100 ALR 383. But cf *Cord Holdings Ltd v Burke* (1985) 7 ALN n72; *White Industries Ltd v Electricity Commission of New South Wales* (unreported, May 20 1987, NSW SC, Yeldham J).

15 *General Newspapers Pty Ltd v Telstra Corp* (1993) 117 ALR 629. It is a requirement under the Commonwealth *Administrative Decisions (Judicial Review) Act* that the decision in question was made under an enactment.

16 *Australian Capital Territory Health Authority v Berkeley Cleaning Group Pty Ltd* (1985) 60 ALR 284; *James Richardson Corp Pty Ltd v Federal Airports Corporation* (1992) 117 ALR 277.

that the decision to enter into a contract is an exercise of a common law power to contract rather than a statutory power. The legislation merely provides the *capacity* to contract rather than the power.[17] This is a distinction which is subtle and the reasoning is open to challenge.[18] This is, in effect, a decision to insulate statutory corporations from judicial review in respect of their contracting activities, a stance that is consistent with the recommendation of the Administrative Review Council that government business enterprises should be immune from judicial review.[19] (There was a hint in the reasoning in this case that an improperly conducted tender may be amenable to challenge under the prerogative writs.)[20]

The Ombudsman's Role

Although the traditional administrative law remedies are on the retreat in conformity with the spirit of the new managerialism, the Ombudsman's role is not. The Ombudsman in all jurisdictions has been vigorous in investigating complaints about government contracts.

The Commonwealth Ombudsman has suggested that, if the government is going to contract out important public functions, then it is appropriate for the Ombudsman to be given wider powers so that he or she can investigate the way in which those functions are exercised by private firms,[21] but so far to no avail.

State Ombudsman's powers have on occasion been extended to private sector bodies, thereby pushing one of the previously-mentioned "frontiers" of administrative law. For example, the Victorian Ombudsman has jurisdiction over the conduct of private prisons[22] and the Queensland Parliamentary Commissioner has jurisdiction over contracted out entities.[23] Clearly this is a direction that should be pursued further but it would be futile to do this while at the same time cutting back the resources available to the Ombudsman.

Freedom of Information

A much-documented effect of contracting out is the erosion of the freedom of information regime. This occurs because (i) the legislation does not extend to information in the hands of private bodies; and (ii) information in the hands of government can be very easily screened from FOI scrutiny by making use of the commercial in confidence exemption written into the legislation.
As to the first point, it is possible to extend the reach of the FOI legislation to private bodies that are performing public functions, just as it is possible similarly to extend the Ombudsman's jurisdiction. This has been done in New South Wales and Victoria in relation to private prisons.[24]

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17 (1993) 117 ALR 629 at 636-637 (Davies and Einfeld JJ).

18 See Allars, M, "Private Law but Public Power: Removing Administrative Law Review from Government Business Enterprises" (1995) 6 *Public Law Review* 44 at 62.

19 Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law* Report No 38 (1995), AGPS.

20 (1993) 117 ALR 629 at 637 (Davies and Einfeld JJ).

21 Commonwealth Ombudsman, *1993-94 Annual Report,* AGPS, 3-4.

22 *Corrections Act* 1986 (Vic) s 9G.

23 *Parliamentary Commissioner Act* 1974 (Qld) s 13(7) and (9).

24 *Correctional Centres Act* 1952 (NSW) s 31I; *Corrections Act* 1986 (Vic) s 9F.

As to the second point there is much work to be done to change government attitudes and to push for a policy of *not* misusing commercial in confidence clauses. There has been much criticism of the overuse of these clauses from many different quarters. There are some signs of movement:

- The Victorian government has been urged to adopt a policy of publishing government contracts (with necessary excisions for truly confidential material, such as trade secrets)—see Audit Review of Government Contracts, *Contracting, Privatisation, Probity and Disclosure in Victoria 1992-1999* (May 2000) and Pubic Accounts and Estimates Committee, *Inquiry into Commercial in Confidence Material and the Public Interest* (April 2000).
- The Western Australian government has voluntarily published the full text of the contract to construct and run the private Acacia prison.[25]
- The Senate Finance and Public Administration References Committee is inquiring into the use of commercial in confidence clauses.[26]
- The ACT Legislative Assembly is considering three Bills aimed at publishing details of government contracts.[27]
- There is arguably a move in FOI cases towards disclosure of information about tendering processes and contracts—possibly a more sceptical attitude to claims of commercial in confidence.[28]

Note that most of the points made above are about *voluntary* disclosure by governments rather than forced disclosure under the FOI legislation.

Disclosure of performance information

A final point to make is that disclosing the terms of contracts is not enough. It is just as important, or possibly more so, to reveal the performance of the contractor. After all, in the end the telling question about government outsourcing is: *has it worked?* Has the public received value for money? Has the level and quality of service improved or at least been maintained? This kind of information should be the subject of a systematic reporting rather than sporadic news stories or an auditor-general's report. Victoria has taken a very important first step in this direction. The government has started publishing *Track Record* which provides information on a regular basis about how the operators of the trams and trains are performing. This publication goes into a lot of detail about punctuality and other important performance measures and also indicates whether in the relevant period the operator earned a bonus for good performance or was penalised for bad performance. The amounts of bonuses and penalties are published. *Track Record* represents the best possible disclosure of performance.

Conclusion

The frequent complaints and disquiet expressed about the new contractualism and its deleterious effects on accountability can be met in part by making public law remedies more effective and putting in place polices that reflect public law values of openness and accountability. Governments are reluctant to engage in a process of

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25 http://www.justice.wa.gov.au/offmngt/acacia.pdf.

26 http://www.aph.gov.au/senate/committee/fapa_ctte/contract_accnt/contract.pdf.

27 Financial Management Amendment Bill 2000; Government Contracts Confidentiality Bill 2000; Public Access to Government Contracts Bill 2000.

28 For example, *Byrne and Swan Hill RCC* (2000) VCAT No 1999/048502; *Staff Development & Training Centre and Secretary, Employment, Workplace Relations and Small Business* (2000) AATA 78; *Coburg Brunswick Community Legal and Financial Counselling Centre and Dept of Justice* (1999) VCAT 28.

"opening up" government contracting activities but at least some are beginning to realise that a sceptical public may react in the one way that politicians fear if they are not responsive to publicly-expressed fears. The first phase of privatisation and contracting out was accompanied by a high-handed use of "private" measures to shield public contracts from challenge or scrutiny. The second phase will, one hopes, see a more responsible use of contract as a tool of public administration.