THE SOCIAL CONTRACT RENEGOTIATED: PROTECTING PUBLIC LAW VALUES IN THE AGE OF CONTRACTING

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Introduction : Religion and the Public Square

> Thus the conflict between religion and those natural economic ambitions which the thought of an earlier age regarded with suspicion, is suspended by a truce which divides the life of mankind between them. The former takes as its province the individual soul, the latter the intercourse between man and his fellows in the activities of business, and the affairs of society. Provided that each keeps to his own territory, peace is assured. They cannot collide, for they can never meet.
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> RH Tawney, Religion and the Rise of Capitalism[1]

Recent public policy developments in Australia and elsewhere have highlighted the fact that the conditions of Tawney's truce between religion and "the affairs of society" are increasingly hard to sustain. In the United States, where the strict separation of church and state has been a sacred constitutional dogma, the Bush administration has established the Office of Faith-based and Community Initiatives, looking to extend the involvement of religious organisations in the delivery of government-funded social welfare programmes. In the United Kingdom, a Christian socialist Prime Minister has actively promoted "social enterprise" partnerships between government, the private sector and the non-profit sector, especially churches, as "the third way" to improve social outcomes. In Australia, churches have been awarded Job Network contracts following the dismantling of the Commonwealth Employment Service.

But as the private sphere of religion and the public sphere of the secular state have engaged one another in new ways, the tensions in the relationship are evident. Last year there was open antagonism between the Human Rights and Equal Opportunity Commission (HREOC) and the Minister for Employment Services over the right of church-based Job Network Contractors to exercise religious discrimination in employment. New Commonwealth school funding legislation has reinvigorated the state aid debate and caused constitutional issues about the establishment of religion to be revisited. And the Commonwealth Government's Inquiry into the Definition of Charitable and Related Organisations has asked how much government support can a charity receive before it loses its charitable status, in other words, before it becomes a *de facto* public body?

These tensions are part of a re-negotiation of the social contract between the state, the market, civil society and the individual citizen. They are taking place against, and to an extent are explained by, a wider change in the political climate: the citizenry of developed Western capitalist democracies appear to be reacting against the economic libertarianism and glorification of the market that has delivered greater inequality and social *anomie*. There are increasing calls for a new appreciation of the values of community and the institutions of civil society that provide a framework for meaningful and purposeful living beyond mere acquisitiveness.[2]

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1 RH Tawney, *Religion and the Rise of Capitalism*, New York: Harcourt, Brace and World, 1926, Mentor Books edition, 1947, p.229.

2 Simon Longstaff, "The Young and the Damned", *The Australian*, 1 March 2001.

The Australian government has responded to this disengagement by evoking notions of "mutual obligation" and using the power of the state to compel re-engagement with the market economy, exemplifying the situation where "the individual today is often suffocated between the two poles represented by the state and the marketplace. At times it seems that he exists only as a producer and consumer of goods or as an object of state administration".[3]

The renegotiation of the social contract must transcend this dichotomy between commercialisation and politicisation, the market and the state:

> There is a growing recognition that human beings do not flourish if the conditions under which we work and raise our families are entirely subject either to the play of market forces or to the will of distant bureaucrats. The search is on for practical alternatives to hardhearted laissez-faire on the one hand and ham-fisted top-down regulation on the other.[4]

Avery Dulles has suggested that the first step in this search "is to acknowledge that in addition to the political and the economic orders there is a third, more fundamental than either. The moral-cultural system is…the presupposition of both the political and the economic systems."[5]

The legal system, as the regulator of both the private power of the marketplace through contract law and the public power of the state through administrative law, is a particular expression of the moral-cultural order. However, as public policy increasingly experiments with mechanisms of social service delivery that cross the boundary between private and public activity, the legal system is struggling to evolve new frameworks that satisfactorily address the need to respect both public and private purposes and values.

This essay, therefore, presents an argument that the law needs to be reshaped according to the contours of the new terrain being mapped out by the interpenetration of "the private" and "the public". The traditional distinction between public administrative law and private contract law needs to evolve, to be transformed in order to be a more effective regulator of the range of new social partnerships between the state, the market and civil society. In this reshaping, the moral-cultural notion of citizenship requires attention.

The argument is developed in four stages.

The starting point is the response of administrative law to managerialism's extensive use of outsourcing and privatisation to bring about reform in the public sector over the last decade. Administrative law has been increasingly marginalised as a tool for ensuring transparency and accountability in government. Attempts to recover relevance for public law have to date focussed on expanding the definition of what is "public", then detecting these "public" aspects in activities that have now been transferred to the private or community sector, and arguing for an extension of public law jurisdiction to cover those activities. Recent Federal Court cases on the industrial relations implications of contracting out "the business of government" highlight the dilemmas of this approach.

From there the paper canvasses some theoretical arguments that have been proposed as a way through the traditional bi-polar division between public and private law. Concepts such as "the third way" and "the third sector" have emerged as a way of describing the new

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3 John Paul II, Encyclical Letter, *Centesimus Annus* (May 15, 1991), no 49.

4 Mary Ann Glendon, "Beyond the simple market-state dichotomy", *Origins* 26 (9 May 1996) 797.

5 "*Centesimus Annus* and the Renewal of Culture", (1999) 2 *Markets and Morality: the journal of scholarship for a humane economy*.

paradigm of public administration that involves partnerships between government and both private and community sector organisations.
The paper's third section explores the relationship between notions of citizenship (a key concept in the moral-cultural system) and the legal framework for regulating new social partnerships. While public law advocates tend to focus on citizenship rights and market reformers focus on consumer power as the underlying principles that should guide public policy, a third model of citizenship, that focuses neither on rights nor power but on social engagement and connectedness, provides a way of understanding the evolving political economy and suggests directions in which the legal system might evolve.

From this point the paper moves to its conclusion, which is to suggest that if administrative law is to retain a role as the guardian of the public interest in the era of outsourcing, a new jurisprudential framework that takes account of the softening boundary between the bi-polar notions of "private" and "public" law, and creates a space for "social law", whose purpose is the promotion of the common good rather than private rights or strict adherence to public sector rules, may need to emerge. A modest proposal for initiating that evolution is suggested. The term "social contract" can take on a new meaning, one used to describe the nature of public-private partnerships to deliver social goods.

1 The ethic of contract

> There is a generally held view that government has for too long retarded economic growth through inefficiencies in the public sector…I want to point out that contracting out is actually far more subtle and effective than is generally realised. It will form part of virtually every reform we undertake…the government is firmly of the view that public sector reform must be applied to the whole public sector, not just those areas which produce tangible, tradeable outputs…Contracting out is not an end in itself, nor is it a substitute for other reform. Rather it is an extremely powerful and subtle management tool …[6]
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> Alan Stockdale, Victorian Treasurer 1992-1999.

The Victorian Government under the leadership of Jeff Kennett and Alan Stockdale elevated to the status of dogma the belief that government does best when it does least. They were Australia's most effective missionaries of the revolutionary gospel which urged public administrators to render unto the purchaser what belonged to the purchaser and to the provider what belonged to the provider. The realms of policy-design and service-delivery should be kept separate, and service-delivery subjected to competitive forces of the market, enabling the government to work wonders. They healed paralysed government departments and haemorrhaging state finances, and fed the multitudes with a couple of major asset sales and "major events". They won many converts in other governments.

Contracting out, as the quote above foreshadowed, has now become the normal rather than an exceptional practice underpinning public administration in Australia. The state that steers rather than rows is a powerfully persuasive metaphor that inhabits and inhibits the imagination of policy-makers at all levels of government. Not only have those functions that "produce tangible and tradeable outputs" such as electricity and garbage collection been contracted out or privatised completely, but so have those social services that have traditionally been seen as the responsibility of government in its role as guarantor of social rights: health services, disability services, housing for the poor, public transport and employment assistance, to name just a few.

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6 "Contracting Out: A Victorian Perspective", conference paper delivered to the conference "Contracting Out Reforms in the Public Sector", Sydney, March 1994. Cited in *Protecting the Public Interest in the Contracting of Public Services to Private Providers,* Catholic Commission for Justice, Development and Peace (Melbourne) Issues Paper No 6, June 1999.

Dr Bob Officer, one of the chief architects of Victoria's contracting out framework, was appointed by the Federal Coalition Government to chair the National Commission of Audit in 1996. Unsurprisingly, the National Commission of Audit recommended the widespread use of marketisation, competition and various forms of privatisation to generate increased efficiency. Creyke sees this report and others produced by the Productivity Commission that call for increased use of outsourcing as signalling the "sunset for the administrative law industry", because privatisation removes a wide range of government decisions and public functions from the scope of administrative review, and in many cases, from the scrutiny of Parliament.[7]

Administrative Law in Retreat

> The delivery of government services by contractors, and the consequent 'privatising' of the relationship between service providers and members of the public, has the potential to result in a loss of the benefits which the administrative law system provides for individuals. In turn, this may affect the efficiency and quality of government administration. Further, since a contractor's connection with government will be governed by contract, the accountability mechanisms traditionally provided by ministerial responsibility and Parliamentary oversight may no longer be as effective.[8]

In an address to Free Speech Victoria on 25 August 1999, the former Auditor-General of Victoria, Ches Baragwanath reiterated the concerns of the Administrative Review Council about the negative consequences of contracting out:

- The growth in the use of commercial confidentiality to restrict access to government information;
- The diminution of public law accountability – that is, the exclusion of the jurisdiction of the Ombudsman and public law remedies such as administrative review legislation;
- Changes in the concepts of accountability, which become determined less by the public interest than by consideration of financial efficiency and cost-related numerical targets;
- Changing notions of "public interest", in that contracts limit the number of interested parties, whereas "public interest" recognises a wider range of constituencies;
- Increased, or changed, opportunities for corruption in the contracting process;
- A diminution in the challengability of contracts, brought about by the doctrine of privity of contract.[9]

As Seddon points out,

> What appears to be happening is that administrative law is being pushed out of the public sphere by re-labelling public activities. This relabelling is done by the expedient of using the mechanism of contract to fulfil public purposes. The rhetoric of contract, in particular "freedom of contract", is then employed to insulate the government from scrutiny."[10]

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7 Robin Creyke, "Sunset for the Administrative Law Industry: Reflections on Developments under a Coalition Government", *Administrative Law under the Coalition Government*, ed John McMillan, 1997, Australian Institute of Administrative Law, p 20.

8 Administrative Review Council Report No. 42, *The Contracting Out of Government Services*, 1998, p vi.

9 "Say Ches" *Eureka Street*, Vol 9 No 8 October 1999, p 34.

10 Nick Seddon, *Government Contracts*, 2nd Edition, Sydney, The Federation Press, 1999, p 282. See also Sue Arrowsmith, "Government Contracts and Public Law", (1990) 10 *Legal Studies*, 242.

The response of public law theorists to this phenomenon has been to attempt to regain territory for the public sphere, by arguing that where there is a recognisable "public" aspect to the activity that has been contracted out, administrative law should still apply.

> It is by no means a forgone conclusion that a decision taken under a government contract should invariably be free from public law remedies. It depends very much on the type of contract. For example, when the government has decided to carry out, by the use of contract, what were formerly governmental functions, or when the government is distributing public resources through contract, such as the use of a public sports facility or public housing, then, it is submitted, there is a sufficient public element to justify the higher level of scrutiny and accountability that is provided by administrative review.[11]

In other words, it should be possible to define the meaning of "public" in such a way as to allow a re-imposition of administrative review over those activities which outsourcing had delivered into private hands, particularly if the focus is not on *who* is doing the activity, but *what* is the activity that is being done. If a private body is involved in doing something that the "public sector" used to do, or the use of "public power", or the administration of "public resources" or the performance of a "public function", then that, so the argument goes, should allow administrative review greater scope for regaining lost ground.

This approach is not as helpful as it might seem. The problem is that it gets into the same "name" game that Seddon himself criticises: "Merely labelling something 'private' or 'public' tells us nothing about what form or level of regulation is appropriate…Further, the criteria for determining the difference between public and private are elusive."[12]

For example, the argument that if an activity or function is a "public" activity or function, then administrative law should apply, only begs the question: what is a public function?

Public Functions?

The question cannot be resolved simply by saying that a public function is anything that is, or once was, carried out by a public body. For example, is electricity generation and distribution a "public" function just because, once upon a time, only public bodies performed that function? And what about the areas of transport, education and health – are they inherently, essentially "public", to the extent that when their performance passes into private hands they must continue to be regarded as "public" functions and therefore subject to regulation by administrative law? Such services have been provided by private bodies, often religious organisations, since well before the state became involved in their more systematic and universal provision. Writing at the beginning of the post-war period of state expansionism, Hood Phillips could refer to the extension of "public functions":

> In recent times, especially since the industrialisation of most civilised countries, the scope of this [the executive or administrative] function has become extremely wide. It now involves the provision and administration or regulation of a vast system of social services – public health, housing, assistance for the sick and unemployed, welfare of individual workers, education, transport and so on – as well as the supervision of defence, order and justice, and the finance required therefore, which were the original tasks of organised government.[13]

The answer one gives to the question of what is a public function will depend to a large degree on one's political ideology and views about the proper limits on the role of the state. If the sphere of administrative law is co-extensive with the sphere of state activity, which is itself determined by the political culture of the time, then it is clear that value judgments and

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11 Seddon, p 279-80

12 Ibid, p 279.

13 O Hood Phillips, *Constitutional Law of Great Britain and The Commonwealth*, Sweet and Maxwell, 1952, p 12.

politics play a significant role in determining the legitimate scope of administrative law. So whereas social democrats of the baby-boomer generation, growing up in the period of state expansionism and coming of age in the Whitlam era, would associate the state with a wide range of social support type activities, from another perspective, that of the "new right" or the "neo-liberal", the winding back of this welfare state through contracting out represents a return to the proper limits of state activity to its "night-watchman" role. The turning of the tide against the public sphere is apparently mirrored in the policy in all three branches of government: "There is little doubt that the tide of judicial, political and bureaucratic opinion, in line with the wave of new managerialism and corporatisation, is to treat public contracts as closely as possible as 'private' conduct."[14]

Contracting out "the Business of Government"

However, recent decisions of the Federal Court in relation to industrial awards governing employees of former government bodies would appear to swim against this tide somewhat, by finding that outsourcing does not absolve the private sector contractor of the responsibilities of the former public sector employer. McMillan cites this as an example of the legal system being unable to keep pace with changes in public policy and administration, and adhering rigidly to the public/private law divide when what is really occurring is a blurring of that boundary.[15]

In *Employment National Ltd v CPSU*[16] Einfeld J held that when the business of the Commonwealth Employment Service (CES) was taken over by Employment National, the industrial awards that were in place for CES employees were also binding on Employment National.

The court applied the "substantial identity" test established in *Re Australian Industrial Relations Commission; ex parte Australian Transport Officers Federation*[17] ("ATOF") to conclude that since the activities being carried out by Employment National (EN) were substantially the same as those carried out by the CES, the business or part of the business of the CES had been transmitted to EN. Consequently, EN was a successor to the CES business and therefore bound, in accordance with s.149(1)(d) of the *Workplace Relations Act 1996* (Cth), by the award that was in place for CES employees prior to the introduction of the Job Network on 1 May 1998:

> The subsection is clearly intended to protect workers whose employers' business is being transmitted, and to ensure the continuity of awards during that process, provided the employer is succeeding to a business which is substantially identical to the one bound by the original awards. In this case the legislative policy and intent is that workers should continue to be protected (para 111).

If the legislative policy and intent is that the transmission of a business from one owner or employer to another does not unravel industrial agreements and awards, and if this principle applies to public sector businesses that are transmitted to private hands, then this may be a bridge across which the banner of administrative law could be carried from the one side of the public law/private law divide to the other. Does this instance of continuity suggest that something essentially "public" continues to exist in privatised entities such that administrative law is entitled to scrutinise the activities and possibly review the decisions of those entities?

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14 Seddon, p 278.

15 John McMillan, "Law and Administration: Conflicting Values", *Canberra Bulletin of Public Administration*, No 98, December 2000, 34. The ARC demonstrates similar constraints on its own thinking by making "recommendations relating to the contracting out process, and the application of private law and administrative law in situations where services are provided by contractors. The preservation of accountability and avenues of redress can be achieved through a mix of public and private law mechanisms." (ARC Report 42, p vi).

16 (2000) 173 ALR 201.

17 (1990) 171 CLR 216.

On the contrary, it could be argued that this decision is little more than a very strict application of private contract and industrial law, and that the outcome would have been exactly the same if the previous employer had been a private company.

However, the courts have treated the transfer of businesses differently when one or both of the employing bodies involved in the transfer are government entities.

First, in the *EN* case, the court admitted that its decision to find there had been a transfer of the CES business to EN was made easier by the fact that EN was a government-owned company:

> There is in my view no doubt that both EN and ENA [Employment National Administration Pty Ltd] are, as the CPSU put it, "emanations of the Commonwealth"…While they are run as fully competitive enterprises along commercial lines, both in their conception and in their operation they essentially provide services in accordance with departmental policy. The Commonwealth is in complete control of the companies. (para 78)

In other words, the public sector heritage of these bodies makes the argument for continuity of the award harder to resist. But Einfeld J made a tantalisingly cryptic observation about the other private sector operators in the new market created by the Job Network, who also, arguably, were as much successors to the CES as EN was:

> The fact that EN is in competition with over 300 other providers adds nothing of relevance to the question of whether this step [outsourcing the CES] amounts to a transmission, amongst other reasons because what is added by the competition cannot be determined when the other providers are not parties to this litigation. (para 83)

This begs the question: what if the CPSU had taken Drake, Wesley Mission, the Salvation Army, or Centacare to court, arguing that the employment conditions existing at the CES should continue to bind them? The logic of the court's decision would suggest that they too would be bound just as EN is bound.

In *PP Consultants Pty Ltd v Finance Sector Union of Australia*,[18] involving an agency relationship between a pharmacy and a bank, the High Court focused on the meaning of the word "business" in s149(1)(d), and concluded that cases in which government activities were transferred either to another government entity or to a private entity were to be distinguished from cases involving only two private employers:

> The Full Court[19] purported to apply *RE Australian Industrial Relations Commission*; Ex parte Australian Transport Officers Federation, a case concerned with the construction of a union eligibility rule, and *North Western Health Care Network v Health Services Union of Australia*. But those cases were concerned with the transfer of governmental activities from (in *ATOF*) one branch of government to another or (in *North Western Health Care*) from government to the private sector. The courts were not therefore required to identify or analyse the nature and components of a "business" in the orthodox sense of the word and in the context of a conventional business environment. [para 38]

The reason for distinguishing such cases was that:

> While the notions of "profit" and "commercial enterprise" will ordinarily be significant in determining whether the activities of a private individual or corporation constitute a business, they play little, if any, role in identifying whether one government agency is engaged in the business of government previously undertaken by another government agency. [para 13]

Unfortunately, this finding and these cases do not bring us any closer to identifying what kind of activities are inherently public in nature. At best they simply confirm the rather

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18 (2000) 176 ALR 205.

19 *FSU v PP Consultants* (1999) 91 FCR 337.

unsatisfactory formulation that "the business of government" is whatever government does, and provide some solace and a straw to clutch at for those who argue that whenever the government stops doing something itself and hands over responsibility to a private agency, something "public" inheres in that activity and this inherence has legal consequences.[20]

However, there is a postscript to the *EN* case that suggests a more complex situation. The APS award that now covers EN employees has a very peculiar and very "private" feature. Clause 10 of the Australian Public Service Award 1998 deals with anti-discrimination. Sub-clause 10.1 states exactly what one would expect to see in an award governing employment in the public sector:

> 10.1 It is the intention of the respondents to this award to achieve the principal object of the Workplace Relations Act 1996 through respecting and valuing the diversity of the workforce by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

However, sub-clause 10.3.4 states:

> 10.3 Nothing in this clause is taken to affect:
> …
> 10.3.4 the exemptions in s170CK(3) and (4) of the *Workplace Relations Act 1996.*

Those exemptions relate to the requirement of employers not to terminate an employee's employment on the grounds listed in s170CK(2)(f), which are the same grounds as those listed in clause 10.1 of the award. The exemption in s170CK(4), which is unaffected by clause 10.1 of the award, reads as follows:

> (4) Subsection (2) does not prevent a matter referred to in paragraph (2)(f) from being a reason for terminating a person's employment *as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed*, if the employer terminates the employment in good faith to avoid injury to the religious susceptibilities of adherents of that religion or creed. [emphasis added].

Is it not peculiar that the APS award envisages that someone employed under the award could be "a member of staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed"? Under what circumstances would that be the case? Well, one such circumstance would be when an activity being carried out by the public sector, in which people are employed under this award, is outsourced to religious agencies who, as successors to the business, might be obliged to recognise the award, yet who, as religious bodies, are also obliged to conduct their activities in a manner consistent with their religious identity. This curious feature of the award could be construed as recognition of the interpenetration of the public and private sectors in the delivery of social outcomes sponsored by government and of the evolution of a "third sector" between the purely public and purely private sectors.

2 Third Way and Third Sector

The British Government under Tony Blair has articulated a clear philosophy of public policy design and implementation that involves private and community sector agencies in achieving public policy outcomes, not as contracted extensions of the state but as partners. In this view, contracting out need not be seen as a disaster for public accountability. Contracts can

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20 A more recent case, *Stellar Call Centres Pty Ltd v CEPU* [2001] FCA 106 (21 February 2001), casts a shadow over even this tentative conclusion. Stellar successfully argued that it should not be bound by the awards and certified agreements that bound Telstra prior to the transfer of the call centre operations to Stellar.

also be used as a means of democratising public policy development and social service delivery.

"The Third Way" is the title of the Blair Government's manifesto, written by political philosopher and advisor to Blair, Anthony Giddens:

> Reform of the state and government should be a basic orienting principle of third way politics – a process of the deepening and widening of democracy. Government can act in partnership with agencies in civil society to foster community renewal and development. The economic basis of such renewal is what I shall call the new mixed economy.[21]

Giddens contrasts "the new mixed economy" with older versions:

> Two different versions of the old mixed economy existed. One involved a separation between state and private sectors, but with a good deal of industry in public hands. The other was and is the social market. In each of these, markets were kept largely subordinate to government. The new mixed economy looks instead for a synergy between public and private sectors, utilising the dynamism of markets but with the public interest in mind. It involves a balance between regulation and deregulation, on a transnational as well as a national and local level; and a balance between the economic and the non-economic in the life of society. The second is at least as important as the first, but attained in some part through it.[22]

Analysing further the concept of "a synergy between public and private sectors", we can see that the new mixed economy describes the interpenetration of the public and private sectors through contracting out. In other words, there is not just a public sector and a private sector (which includes the community non-profit sector) but a new third sector, a mixed sector that has characteristics of both the public and the private.

Mark Freedland has described this sector, created by the widespread use of contracting out, as the "public-service sector", which exists between the purely public and purely private sectors.

> It is the sector of the economy in which services or activities, recognised as public in the sense that the State is seen as ultimately responsible for the provision of them, are nevertheless not provided by the State itself, but by institutions which are intermediate between the market and the State. These institutions are, on the one hand, too independent of the State to be regarded as part of the State, but are, on the other hand, too closely and distinctively associated with the goals, activities, and responsibilities of the State to be thought of as simply part of the private sector of the political economy.[23]

Furthermore, in this third, public service sector:

> the State is left not just with that ultimate regulatory responsibility which we regard it as having for *all* activity occurring within its political economy, but with a higher level of responsibility which, although reduced from primary to secondary level, nevertheless still ascribes a partly public character to the activity in question.[24]

I would argue, for reasons that will become clear later in this essay, that the sector Freedland calls the public-service sector should be called the social service sector, where "social service" is used in a manner more expansive than is conventionally the case. Social service is a better term because the term "public services" implies that these services are

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21 Anthony Giddens, *The Third Way: the renewal of social democracy*, Polity Press: Cambridge 1998, p 67

22 Ibid, pp 99-100.

23 Mark Freedland, "Law, Public Services, and Citizenship – New Domains, New Regimes?" in Freedland, M and Sciarra, S (eds) *Public Services and Citizenship in European Law: Public and Labour Law Perspectives,* Clarendon Press, Oxford, 1998, p 3.

24 Ibid, p 4.

essentially public in the sense that the public, state sector should provide them. In that way, the term "public service sector" locks one into the very dualistic thinking that Freedland wants to escape. Social service, in my definition, is broader than the usual meaning of that term as "human services", ie labour intensive services such as health, education and welfare. Social service includes human services but extends beyond that category to include what might be termed essential social infrastructure that enables society to function, for example, telecommunications, water and power supply.

Be that as it may, the "third way"/ "third sector" approach to public sector reform has some characteristics in common with the first wave of public sector reform, characterised as New Public Management (NPM), and can be seen as an evolution from it. NPM was essentially a creature of neo-liberal thought, and saw contracting out as a means of exerting greater control over public finances and policy outcomes. In particular, grants of public monies to civil society organisations, and the relationship of such agencies to government, would be transformed under NPM.

New Public Management Grows Up

The separation of purchaser from provider, and policy development from policy implementation, was seen by the more zealous New Public Managers as a mechanism for imposing discipline on providers who up to then had been, so the theory goes, unaccountable for the funds they received from government and unresponsive to the needs of the community.

For example, the former head of the Victorian Department of Health and Community Services claimed that as a result of his reforms,

> Victoria has taken health and welfare reform from a system where government pays providers to do what providers like to one where they are paid to do what governments like. These reforms stop well short of the ultimate aim – a system in which providers compete to do what consumers like. Only then can we be sure that health and welfare resources are being appropriately applied.[25]

Since then, a more enlightened view of the community sector is beginning to emerge through "third way politics", one that does not assume, as the public choice theorists do, that such groups are nothing but self-interested utility-maximisers (unlike the public choice theorists themselves, of course). In this view, it is recognised that in many instances, the aims or purposes of government and the community groups are the same - the promotion of the public interest and the common good - and furthermore, that such groups, insofar as they represent attempts by the community to meet its own needs, are worthy not only of support, but are worth listening to for the experience they have in dealing with social problems. So the slash-and-burn reformers of the early nineties, who shut their ears to the advice of community sector providers lest one be "captured" by their agenda, and who enthusiastically advocated the increased use of legally binding and highly specific contracts to force community sector social service providers into becoming privatised extensions of the state, now find themselves oddly *passé* as the wisdom of a previous era's approach to funding agreements based on trust and goodwill undergoes a renaissance, albeit with a closer eye on outcomes and accountability.

Social Capital and Public Purposes

This more recent approach reflects the understanding of the role such community organisations have in building and sustaining what has been dubbed "social capital", and, consequently, the role that governments can play in supporting those organisations. "Social capital" has been popularised by texts such as Robert Putnam's *Bowling Alone* and Francis

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25 John Paterson, Foreword to the 1994-95 Annual Report of the Victorian Department of Health and Community Services, *Momentum*, 3(11):4.

Fukuyama's *Trust*.[26] Putnam's basic thesis can be summarised as follows: societies which have a strong tradition and culture of social interaction and social support between individuals and families through non-state and non-market networks and organisations such as churches, sporting clubs, choral societies, charities, etc, are better able to inculcate the habits of trust, compassion, honesty, and personal responsibility than those societies that do not have that tradition and culture. The differences show up in social pathologies such as crime, family breakdown, loss of personal responsibility and greater reliance on the state for the provision of social support.

Rather than seeking to undermine diversity, in accordance with a secularising, universalising, public ethic, policy-makers are increasingly recognising the value of partnering with civil society organisations in order to promote social engagement and self-help as a means of achieving the kinds of social outcomes for citizens, especially disadvantaged citizens, that were once conceived as only being able to be met by monopolistic public provision. It is a realisation that the common good is not necessarily about what is common to all, but "is the sum total of social conditions which allow people, either as groups or individuals, to reach their fulfilment more fully and more easily".[27] The "*détente* between universal and particular within liberalism",[28] which underpinned the strict separation of the public and private law in most Western democracies, has been gradually breaking down, allowing new and more dynamic mechanisms to emerge to fulfil the needs of citizens. For example, the funding of non-government schools is not for the purpose of allowing private providers to deliver the kind of education provided in state schools. It is a way of providing parents with a variety of educational philosophies and approaches from which they can choose, but more importantly, it is a way of promoting diversity and facilitating the engagement of individuals in the life of society through participation in the life of their communities. The contracting of church agencies to run Job Network programmes and public hospitals should also be premised on the notion that religious communities can and do contribute to the fulfilment of social purposes and responsibilities.

The legal system needs to adapt to be able to regulate these new social partnerships effectively, so that both the public purposes of the state and the values and role of the non-government organisation are supported. The law needs to develop categories that transcend the public-private dichotomy, that more effectively deal with the increasing incidence of state-market-civil society partnerships, as evidenced in the evolution of hermaphrodite bodies that are both public and private in their structure or in the functions they perform. In the search for new categories, notions of *public* sector and *public* function are less important than notions of *social* sector and *social* function. These notions are intimately related with the moral-cultural idea of citizenship.

3 Citizenship

Constitutional v. Market Citizenship

In his analysis of how the evolution of the public-service sector is stretching the capabilities of the public-private legal paradigm, Freedland identifies two rival notions of citizenship which, he claims, relate to the values and concerns of public law on the one hand and private law on the other and which "share" the terrain of public service sector between them. These rival notions are, respectively, "constitutional citizenship" and "market citizenship".

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26 Robert Putnam, *Bowling Alone: the collapse and revival of American Community*, New York, Simon and Schuster, 2000 ; Francis Fukuyama, *Trust: the social virtues and the creation of prosperity*, London Hamish Hamilton, 1995.

27 Vatican Council II, "*Gaudium et Spes*" (7 December 1965) no 26.

28 See Wendy Brown, "Wounded Attachments" (1993) 21 *Political Theory* 390.

Constitutional citizenship "implies a claim to participate in the processes of democracy; more generally, it implies a set of links between the State and the individual which it is the very business of public law to maintain in a meaningful and coherent condition".[29] Notably, and predictably, these links are asymmetrical, whereby the state has a set of obligations towards the individual, but the individual has few obligations to the state. Freedland's "constitutional citizenship" therefore has much in common with Marshall's classic formulation of social citizenship and the concept of guaranteed social rights.[30]

Market citizenship is the creation of neo-liberal thought, particularly of the "law and economics" school, and conceptualises the citizen as an individual who exercises economic power through making and enforcing economically sound and rational consumer contracts.

> Note how well this approach equips governments engaged in neo-liberal projects of privatisation to respond to the difficulties of absolute privatisation. Instead of simply denying the responsibility of the State for the activity in question, they can transform it into a responsibility for creating and maintaining consumer choice, and for policing the quality of service afforded to the consumer, in relation to the activity in question. Instead of formally severing the link between the citizen and the State in relation to a given service generally regarded as a public service, governments maintain that they have actually reaffirmed those links in a different form. Moreover, they can and do assert the superiority of that form, by contrasting it to the monopolistic form of service provision in the purely public sector.[31]

Freedland then postulates that in the public-service sector, constitutional citizenship is the notion of citizenship that regulates the relationship between citizen and state, while market citizenship regulates the relationship between the citizen and the service-provider.

For example, according to the principles of constitutional citizenship, while the private sector provider has taken over the primary responsibility of direct service-provision, either through a contract with the state or through "full" privatisation, the state maintains secondary, indirect, and ultimate responsibility to the citizen.

> It thus becomes apparent that if public law is to maintain its vigour, indeed its very integrity, in this sector, it is necessary to make sure that each of the divided parts of public responsibility is maintained in a state where it can be effectively asserted by the citizen – in other words, it is not possible, vis-à-vis the citizen, to "play both ends off against the middle" in three-sided public-service situations.[32]

The problem for the citizen is that it is very difficult to assert the public responsibility of the state when the state is not the primary service-provider and where there is no direct legal relationship between the citizen and the state in respect of the service in question. The "processes of democracy" are a fairly weak means of effectively asserting state responsibility. It might be argued that the electoral cycle acts as an effective means of ensuring that governments remain accountable for the public policy decisions they make in respect of contracting out and privatisation and for the performance of the service-providers. To the extent that any policy failure is sufficiently disastrous and widespread to attract the short attention span of the tabloid press at election time, this may be so, but it is not the kind of issue that normally loses elections.[33]

Similar problems arise with market citizenship. For the state to be able to claim that the consumer citizen keeps providers accountable through market choices, it is important that

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29 Freedland, op cit p 9.

30 TH Marshall, *Citizenship and Social Class*, Cambridge, Cambridge University Press, 1950.

31 Freedland, op cit pp 9-10.

32 Ibid, p 8.

33 The Intergraph controversy in Victoria, and the related saga of the role of the Auditor-General, is one example where it could be argued that the electorate did hold the government accountable for the consequences of its addition to contracting out.

competition between providers be strong. For example, the Administrative Review Council has argued that competitive market forces can substitute for administrative review as a mechanism for improving decision-making by public bodies.

Though its 1995 report *Government Business Enterprises and Commonwealth Administrative Law* dealt with GBEs rather than contracting out, both phenomena represent forms of public administration in which a direct line of accountability from delivered outcomes to government is more difficult to draw than in situations where government is the provider. The report defined GBEs as bodies that are controlled by government, that are principally engaged in commercial activity, and are separate legal entities from government.

The ARC argued that because GBEs operate as if they were private sector providers in a market, competitive pressures should guarantee their responsiveness to the demands of the citizen-consumer and lead to improved performance, and therefore administrative law was unnecessary to ensure accountability.[34] Despite the fact that the report identified that in many cases, GBEs do not operate in competitive markets, often have substantial market power, and do not face the same level of financial risk as genuinely private bodies, the ARC still managed to assert a groundless faith in the market as an accountability mechanism that rendered administrative law unnecessary.

In its 1998 report *The Contracting Out of Government Services*, the ARC recognised that the same argument could easily be applied in that context: competition rather than regulation will ensure improved customer service. However it qualified the tenor of its remarks about the value of competition:

> Where the service recipient has no real choice of service provider they may be unable to have their problems and complaints resolved. The then Department of Administrative Services, in its submission, suggested that while access to different suppliers theoretically provides consumers with choice, it is not of itself a remedy. A change does not correct or compensate for previous loss and inconvenience. A change may, in fact, increase the cost to the recipient, in extra travel for example. There would also be administrative costs involved.[35]

What is not clear is how strong the competition has to be before it begins to have any salutary effects on private providers and at what point in the competition continuum the state's administrative law structures might be withdrawn.[36]

Civil Society and Citizenship

These observations suggest that constitutional citizenship, whose rights are protected by public law, and market citizenship, whose power is protected by private law, are each, on their own, inadequate to the task of providing a conceptual framework for ensuring accountability of the state to the citizen in situations where their relationship is mediated by intermediary non-government organisations. This suggests that the focus of attention should shift from the individual citizen who is the service-receiver to the service-provider, and to the regulation of the relationship between the state and the service-provider.

It is submitted that the intermediary non-profit bodies of civil society embody a third concept of citizenship – which I will refer to as engaged citizenship. This notion of citizenship recognises that citizens are not simply atomistic individuals invested with either social rights and/or market power, but are involved in a variety of informal and formal networks and groups with other individuals, and it is these connections that empower them as individuals

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34 ARC Report No 38, 1995, AGPS, pp 38-39.

35 ARC Report No 42, 1998, AGPS, para 3.52.

36 See Hannes Schoombee, "Privatisation and Contracting Out – Where are we going?" *Administrative Law under the Coalition Government*, ed John McMillan, 1997, AIAL, p 135.

within society. The consequences for citizens of the decline of such organisations is felt across wider society:

> The decline of social capital threatens not only the capacity to act together, but individual well-being. Putnam's data strongly suggest that a significant degree of positive freedom, measured in confidence in the social order and one's fellow citizens, turns out to be essential to individual self-confidence and well-being.
> Read from this perspective, the [USA's] contemporary civic deficit is indeed rooted in the moral order. The problems of civility, declining social trust, the disconnection between polity and society, as well as the evident dysfunction of the political system itself, are ultimately consequences of widely held beliefs about the nature of society and how life is to be lived. Free agency, an orientation that exalts the maximising of individual advantage (defined according to individual preference) as the supreme guiding principle, has emerged as our dominant cultural strategy, counselling the individual to invest heavily in self-enhancement and personal advantage, with little left over for the cultivation of relationships that do not immediately advance these goals.[37]

Civil society organisations that promote engagement and connection are vital to the experience of an individual as a citizen, a member of the national community. They are both representative of and responsible to the individuals who claim membership or who, in some other way, are engaged through them with other individuals and groups. Their primary purpose may be "private" or limited, for example the promotion of religion, education, the development of the arts, or sport, or self-help and mutual support, the protection of animals or the environment, but, from a public policy viewpoint, they serve the public purpose of engaging individuals in the life of society, encouraging investment in shared goals, and enhancing the quality of life – in other words, they can serve the common good.

As such, it makes sense for governments to enter partnerships with these organisations for the promotion of civic engagement. Such partnerships are not without dangers, however. On the one hand, the state could dominate such partnerships and the civil society organisations will lose their non-state voluntary identity. On the other hand, the private purposes of these organisations might dominate, with the possibility that public resources are used inappropriately to promote socially divisive and exclusive networks. This is precisely why the legal system needs to evolve a conceptual framework for the regulation of such partnerships.

4 The new social contract

The need for a conceptual legal framework to protect both public values and purposes and those of civil society organisations in new social partnerships was highlighted in 2000 by concerns expressed from both sides of the relationship. For example the following represents the fear that some faith-based organisations have about loss of identity:

> As funds from state contracts begin to constitute the bulk of financial resources of church welfare groups, the culture of these organisations changes – for the worse. Instead of remaining relatively autonomous institutions of civil society, they could find themselves developing into pseudo-state organisations which cater to the state's welfare priorities rather than following their own agenda. A regulatory mentality, bureaucratic mindset and non-religious motivations may undermine the religious spirit of *caritas* that created and shaped these organisations.[38]

> The key issue is whether the voluntary groups and church groups can supplement state services without that relationship becoming blurred. A lot of voluntary organisations juggle two roles: they may provide services to their particular client group, but they also act as very important advocates on behalf

37 William M. Sullivan, "Free Agent Nation? The Political Consequences of Cultural Commitments", *The Responsive Community* Volume 11, No 1 Winter 2000, p 28. Though written about the USA, the salient points can apply with similar force to Australia.

38 Samuel Gregg, "Playing with fire: churches, welfare services and government contracts", *Issue Analysis*, No 14, August 2000, Centre for Independent Studies, Sydney.

> of that group. And it becomes more difficult for them to do that if they are integrated into the State system.[39]

On the other side of the ledger, there is a different set of concerns:

> With increasing pressure to contract out to the charitable and church sector work previously done by government departments such as the CES, concern has been around for some time that some of these religious bodies may attempt to impose religiously-based criteria on the staff they employ under those government programmes. In the worst case, the fear is that government funds could be used for covert evangelisation and proselytisation.[40]

The involvement of the then Commonwealth Minister for Employment Services, Tony Abbott, in this debate revealed a somewhat ambiguous attitude. On the one hand, he rose to the defence of church groups:

> No Australian Government has ever interfered with the freedom of religious organisations to run themselves. As Minister for Employment Services, I reject any attempt to tell Job Network members that they are not free to uphold their own ethos in their own internal employment practices.[41]

On the other hand, when the St Vincent de Paul Society criticised the Government for devolving too many of its responsibilities to the non-government sector, the Minister implied the Society did not have a solid grasp of the Catholic social principle of subsidiarity, which, he suggested, encouraged devolution to community organisations.

Assuming the Minister had read his Catechism closely, he would have found subsidiarity defined as follows:

> A community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather *should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good.*[42] (emphasis added).

For "a community of a higher order" we can read "the state", which remains ultimately accountable for its efforts to promote the common good, and is responsible to the organisations of civil society ("communities of a lower order") for providing the conditions under which they can thrive (as long as those organisations themselves are acting for the common good). The principle does not suggest that the state should burden voluntary organisations with responsibilities more properly assumed by government.

In other words, the social *compact* between the state and organisations of civil society is one in which those organisations are owed an obligation by the state of support and non-interference; and the state is owed an obligation by these organisations to cooperate with the state's efforts to coordinate the delivery of social services in the interests of the common good.

I use the term "social services" rather than "public services" for the reasons mentioned in Section II of this essay. Social services is a better term to describe public services, since public services implies that these services are essentially public in the sense that the public, state sector should provide them. Social services include human services but extends beyond that category to include what might be termed essential social infrastructure that enables society to function.

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39 Lisa Harker, "The Religion Report", Radio National, 12 April 2000.

40 John Cleary, "The Religion Report", Radio National, 9 August 2000.

41 "Political correctness run amok", Ministerial media release No 63, 11 September 2000.

42 *Catechism of the Catholic Church*, St Pauls, Homebush 1994, no 1883.

But these services are social in another sense. They represent a *social* responsibility, not just a public responsibility. That is, all members of society, as citizens, are responsible for their production and delivery. This responsibility extends beyond the payment of taxes so that the state can deliver these services itself. It requires the establishment of voluntary organisations of civil society, as well as businesses. Between them, the state, the market and civil society are responsible for the provision of social services, though the ultimate responsibility for coordinating the efforts of all rests with the state, especially when the market fails. These sectors of society are then engaged in the constant negotiation of a *social compact* for the delivery of services and the fulfilment of their mutual responsibility.

This compact can be expressed in contracts between the state and non-government bodies, but these contracts are not "private" contracts, but "social contracts" and as such they should have a special legal status. They are not simply an exchange of money for goods or services like a private contract would be, but represent an arrangement for the delivery of social services and the fulfilment of mutual responsibility for the common good. Such contracts have a special character about them that the law should recognise.

The "Compact on Relations between Government and the Voluntary and Community Sector in England" provides an example of the kind of thinking that is required. Presented to Parliament in November 1998, the Compact

> provides a framework which will help guide our relationship at every level. It recognises that Government and the sector fulfil complementary roles in the development and delivery of public policy and services, and that the Government has a role in promoting voluntary and community activity in all areas of our national life.
>
> …They enable individuals to contribute to the development of their communities. By doing so, they promote citizenship, help to re-establish a sense of community and make a crucial contribution to our shared aim of a just and inclusive society. This Compact will strengthen the relationship between Government and the voluntary and community sector and is a document of both practical and symbolic importance.[43]

While the Compact is not a legally binding document, it is a "memorandum concerning relations between the Government and the voluntary and community sector." The Compact will initially apply to central Government Departments and to the range of organizations in the voluntary and community sector, and sets out a number of principles and undertakings on both sides. From the perspective of administrative law, the Compact provides the following:

> **Resolution of disagreements**
>
> 14. The Compact sets out a general framework for enhancing the relationship between Government and the voluntary and community sector. As far as possible disagreements over the application of that framework should be resolved between the parties. To assist this process, where both parties agree, mediation may be a useful way to try to reach agreement, including seeking the view of a mediator. Where behaviour which contravenes this framework constitutes maladministration, a complaint may be brought to the Parliamentary Commissioner for Administration in the usual way. The Government will, in the light of experience, consider whether there is a need to strengthen the complaints and redress process in relation to the Compact.

What is useful about this "compact" approach is that it establishes a formal framework for thinking about these partnerships and resolving disagreements about its application. While it is not a legally binding document, it does provide the basis from which a legal framework might evolve.

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43 Tony Blair, "Message from the Prime Minister", *Compact on Relations between Government and the Voluntary Sector in England.*

In terms of the argument presented here, such a compact might lead, in time, to a new type of contract and a new body of contract law, which I will call "social contract law".

How would "social contract law" differ from private contract law and public administrative law? It would regulate a new kind of contract, the "social" contract, which would have a special legal status conferred by statute (say, a *Social Contracts Act*), and would be any contract entered into by government for the delivery of social services, in the broad sense of that term, to the community. Such contracts might have at least the following four characteristics:

- A limited number of types of decisions or conduct made by the non-government contractor would be subject to administrative appeal to the Administrative Appeals Tribunal (or state/territory equivalent), but the grounds for appeal and available remedies would be strictly limited (say, to failure to observe natural justice in the former case, and to declaration in the latter).

- The state could not avoid vicarious liability, by virtue of privity, for failure of service-delivery by the contractor. The social contracts legislation would include a clause similar to that in Section 4 of the New Zealand *Contracts (Privity) Act 1982:*

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

- "Commercial in confidence" could not be invoked to exempt social contracts from Freedom of Information requests.

- Social contractors would not be constrained from making public comment on any aspect of government policy.

- Non-government contractors would be required to have high standards of governance and conduct.

Conclusion

This list may not be exhaustive.[44] It is a tentative attempt to address a perceived need, to suggest a concrete proposal for the establishment of a new legal framework for regulating new public-private partnerships for the delivery of social services. If this proposal or something like it was implemented, a jurisprudential tradition would develop over time which would recognise and value the special nature of such social partnerships. The rapid multiplication and diversification of such partnerships in recent years has seriously tested the ability of the traditional public-private legal dichotomy to balance issues of public accountability on the one hand and the organisational autonomy of social partners on the other. The recognition that there is a public element about such partnerships is not enough to justify the full scrutiny of public administrative law to the decisions taken by private and civil society organisations engaged in these partnerships; but neither is the recognition that there is also a private, non-public element enough to justify the complete removal of such scrutiny.

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44 The English *Compact* document provides a list of "undertakings" by both parties, which might be incorporated into such contracts.

The development of such a legal framework strikes this author as important for another, not unrelated reason: the contemporary relevance of the law's role in the moral-cultural system. The public-private dichotomy reflects the historical influence of liberalism on the constitutionalism of Western democracies, in particular liberalism's view of constitutions as in some way encapsulating the social contract between free individuals and the state. This has created a lacuna in our legal reasoning that is becoming more obvious as liberalism's belief in the individual, unencumbered by social influences, networks and traditions, becomes increasingly untenable as the basis for a satisfactory understanding of citizenship. Notions of citizenship that privilege individual rights and freedoms, without reference to civil society and its organizations as the mediator and context for their exercise, cannot provide the basis for a public culture that values civil society organisations as legitimate partners for the state in the promotion of the common good.

In particular, the Enlightenment's rationalist project, which propelled the individual to the forefront of political theory, simultaneously devalued the significance of the individual's voluntary connections with others in communities and groups that sought meaning beyond the individual. It thereby initiated the privatisation of religion and morality described by Tawney. In the West there is an increasing awareness of the negative effects of this disintegration. Individualistic materialism has been found wanting, and the renewal of the moral-cultural system, in which the law must play a part, requires attention. Roy Webb, Vice-Chancellor of Griffith University, gave it attention in 1998:

> In the past Australian universities have, with some important exceptions, largely seen themselves as secular institutions, pursuing the preservation, transmission and development of knowledge without much reliance upon or regard for, and sometimes even with hostility towards, the religious and spiritual dimensions of life.
>
> At its most severe, the secularisation of our universities proceeded upon the assumption that the paradigms of religion and of scientific rationalism were in fundamental opposition; that sooner or later the domain of religion would be crowded out by the ever-increasing explanatory power of rationalist endeavour.
>
> I believe that we can now say that the most extreme episodes of secularism have passed.
>
> The re-emergence of emphasis on the spiritual, moral and ethical dimensions of life is evident in the Australian community in a number of encouraging ways, although there is still enormous distance to be covered.[45]

Our legal system currently regards, and guarantees, freedom of religion as an expression of individual choice. Governments are happy to fund religious schools for the same reason (and for the fiscal benefits as well); they fund religious hospitals because they are there. In other words, our legal system and public administration is indifferent to the religious nature of the contributions made by religiously-based organisations of civil society, regarding them as legitimate only insofar as they represent the collective choices of individual citizens. They are not valued as a constitutive and essential element of the political economy and the fabric of society. The evolution of a legal framework which does recognise those contributions as constitutive and essential, by recognising the special character of the social partnerships such organisations forge with the state for the common good, and which protects their identity and autonomy, would begin to cover some of that "enormous distance".

45 Cited in David Tacey, *ReEnchantment: the new Australian spirituality,* Harper Collins, Pymble, 2000 pp 8-9.