Government contracts: using the right spectacles

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Public lawyers have struggled with the public–private dichotomy for a very long time. It is the key to the judicial review gateway, whether under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) or under non-statutory administrative law. When is a decision of an administrative character? When does it involve an exercise of public power? The dichotomy is essential for determining whether certain immunities operate, particularly immunity from statute. In this context, the dichotomy is central to the interpretation of legislation that purports to deal with Crown immunity. It may influence the interpretation of government contracts and legislation applying to those contracts. There are many other areas of law where the distinction is crucial.

The labels 'public' and 'private' have been criticised for being almost impossible to pin down, let alone be determinative of the outcome of a particular dispute. Some commentators have suggested abandonment of the dichotomy or, alternatively, a recognition of convergence so that public law values are applied across the board.[1] This article does not engage with that debate.

Nor does it engage with another area of current interest: the constitutional constraints on government contracting. These are sometimes quite surprising — they come out of left field — because their origins are buried in the *Constitution* and were not foreseen by the parties. Thus the Commonwealth does not have the power, executive or legislative, to make funding agreements for the provision of chaplaincy services in schools across Australia.[2] The Commonwealth cannot be taken before a state tribunal when it insists on discriminatory recruitment criteria for its contractor's employment of personnel.[3] A state cannot raise a levy payable to the state by a contractor to a Commonwealth entity carrying out construction work on land acquired by the Commonwealth for public purposes within the meaning of s 52(1) of the *Constitution*.[4] These types of cases are plainly public and do not turn on identifying that fact or weighing its significance to the dispute.

Instead, this article is confined to observations about the use of contract in what is undoubtedly the public sphere — namely, government. In this article, these observations are necessarily selective. The reason they have been selected is that, because of the many controversies generated by the use of contract by government, they show, in the author's

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1 Three examples of this theme: CD Stone, 'Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?' (1982) 130 *Pennsylvania Law Review* 1441; S Thomson, 'Judicial Review and Public Law: Challenging the Preconceptions of a Troubled Taxonomy' (2017) 41 *Melbourne University Law Review* 890; G Airo-Farulla, '"Public" and "Private" in Australian Administrative Law' (1992) 3 *Public Law Review* 186.

2 *Williams v Commonwealth* (2012) 248 CLR 156; [2012] HCA 23 (executive power); *Williams v Commonwealth (No 2)* (2014) 252 CLR 416; [2014] HCA 23 (legislative power).

3 *Meringnage v Interstate Enterprises Pty Ltd T/A Tecside Group* [2020] VSCA 30 (the continuing saga of federal jurisdiction matters only being decided by a court and not a tribunal).

4 *Construction Industry Training Board v Transfield Services (Australia) Pty Ltd* [2017] SASCFC 103 (Transfield was a contractor to Australian Rail Track Corporation, a wholly owned Commonwealth company. The Corporation was treated as an emanation of the Commonwealth).

view, the difficulties encountered when the oil of public is mixed with the water of private.[5] These difficulties can, in some instances, result in perverse or bizarre consequences. In others, the tension is resolved satisfactorily.

Contrasting values in the mix

Good government according to law involves 'openness, fairness, participation, accountability, consistency, rationality, accessibility of judicial and non-judicial grievance procedures, legality and impartiality'.[6] Taggart's similar list included 'honesty'.[7] Contract is almost perfectly opposite in its value system, apart from honesty, which is common to both. (You cannot exempt yourself from liability for fraud.) Contract is traditionally about protecting secrecy; no duty to act fairly; participation restricted to the parties; no obligation of accountability unless specified in the contract; no duty to act consistently unless an estoppel operates; no duty to act rationally or impartially unless tempered by a good faith obligation or legislation such as discrimination legislation; and access to grievance procedures provided by the state through the courts or by private resolution such as arbitration. Hence the oil and water reference above, though it is not clear which is more suitable to which side.

Apart from these contrasting values, the institution of contract is traditionally about freedom to bargain for private gain with minimum external regulation — laissez faire. The role of the courts is to take a minimalist stance in resolving disputes. By contrast, the role of the courts in relation to government conduct is to be interventionist where needed to advance the public interest; to pronounce on such matters as lack of fairness, openness, accountability and rationality; and to hold a government party accountable for its actions.[8] The remedies are very different for wrongdoing: money (almost invariably) for breach of contract; and correction of the bad decision or conduct in the public sphere.

Public law values and principles are not all sweetness and light. Over many centuries it has been thought necessary to accord government (originally the king or the queen) a number of immunities. The most important still-current immunities are immunity from statute[9] and, in a sense, immunity from contract. The latter is embodied in the executive necessity doctrine and its closely related rule against fettering.[10] These darker sides to public law will be discussed below.

Bringing these value systems and principles together in government contracts inevitably creates tensions raising many questions. Should government commercial decisions be subject to scrutiny in the same way as are other government decisions? Should it be possible for a citizen to have access to the terms and conditions which apply to a contracted-out service provided to the citizen, particularly when it is borne in mind that public

5 As noted below, it is not clear which is which.
6 M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) [1.10].
7 M Taggart, 'The Province of Administrative Law Determined?' in M Taggart (ed), *The Province of Administrative Law* (Hart Publishing, 1997) 3.
8 T Daintith, 'Contractual Discretion and Administrative Discretion' (2005) 68 *Modern Law Review* 554, 556.
9 See N Seddon, *Government Contracts: Federal, State and Local* (The Federation Press, 6th ed, 2018) Chs 4 and 6.
10 Ibid Ch 5.

money is being spent on the service? Should administrative law apply to a decision or conduct of an outsourced service provider? Is it appropriate for a decision to award a government contract to be subject to administrative law remedies or the Ombudsman's scrutiny? Is it appropriate for public sector tender processes to be subject to a high degree of regulation as compared to private sector tender processes? Should traditional government immunity apply in connection with regulatory legislation, such as the competition and consumer legislation? Are there some inherent limits on what government can do by contract — that is, a function is so fundamentally governmental that it cannot be outsourced?

One type of contracting where tensions are most evident and troublesome is in the outsourcing of government functions to contractors — in particular, the provision of services to the public. This is a very large subject that cannot be canvassed in this article, although it is touched on. Suffice it to say here that contract is not very good at capturing the important public values that must be included in this kind of outsourcing. It is sometimes baffling why governments choose contract over traditional public service delivery for this kind of activity.[11]

Should the courts, when adjudicating on a problem arising from a 'public' contract, make adjustments or take a modified stance to accommodate the difficult mix of values and principles that do not arise in an ordinary private sector contract dispute?

The spectacles metaphor

There are certainly statements of high authority drawing attention to the proper recognition of the public in government dealings.

In *Commonwealth v John Fairfax & Sons Ltd*[12] (*John Fairfax*) Mason J employed an illuminating rhetorical device when he wrote about government secrecy and the law of confidentiality:

> The equitable principle has been fashioned to protect the personal, private and proprietary interests of the citizen, not to protect the very different interests of the executive government. It acts, or is supposed to act, not according to standards of private interest, but in the public interest. This is not to say that equity will not protect information in the hands of the government, but it is to say that when equity protects government information it will look at the matter through different spectacles.[13]

This usage was repeated by Kirby J in *ABC v Lenah Game Meats Pty Ltd*[14] (*Lenah Game Meats*):

> Special considerations govern the provision of injunctive relief where the information in question concerns the activities of public bodies or governmental information. In such cases it is necessary for courts to wear 'different spectacles'.[15]

11 Ibid [1.12]. One example is the debacle that resulted in the contracting out of vocational training, in competition with the TAFEs.
12 (1980) 147 CLR 39; [1980] HCA 44.
13 Ibid 51 [26]. See also *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10, 31; [1995] HCA 19 [39] (Mason CJ).
14 (2001) 208 CLR 199; [2001] HCA 63.
15 Ibid 275 [181]. Gummow and Hayne JJ also briefly referred to Mason J's 'spectacles' metaphor at 259 [137].

The 'spectacles' device was again used in *Williams v Commonwealth*[16] (*Williams*), where Gummow and Bell JJ wrote:

> The law of contract has been fashioned primarily to deal with the interests of private parties, not those of the Executive Government. Where public moneys are involved, questions of contractual capacity are to be regarded 'through different spectacles'.[17]

What can we draw from this usage? In one sense it is almost empty of content. It cannot be elevated to a determining principle. However, in context, in each case the meaning becomes clearer. In *John Fairfax* Mason J went on to spell out a substantive principle that has been very influential — namely, a government claim to secrecy, either on the basis of public interest immunity or on the basis of confidentiality, will be scrutinised very closely. In fact, Mason J said that the onus is on the government to show that disclosure will harm the public interest. It is not sufficient that the government would prefer the relevant information to be secret. In *Lenah Game Meats* Kirby J was discussing the exercise of discretion to grant an injunction and concluded that the implied freedom of political communication determined that the injunction should not be granted. The third usage in *Williams* was not about public information but about whether it is correct to assume that the government is in the same position as an individual or corporation in its contracting activities. It was concluded that it is not: the government does not enjoy freedom of contract. Government enterprise is very different from private enterprise in many ways, not the least for the reason that it is not spending its own money.[18]

In each case, the spectacles are used to ensure that the 'public' is properly focused — that is, the complex of concerns that stem from the extra responsibilities imposed on, and expected of, government as compared with private sector entities.

Getting the focus right — the *Town Investments* case

In *Town Investments Ltd v Department of the Environment*[19] (*Town Investments*) it was necessary to interpret legislation that was aimed at curbing inflation. The case involved two leases to government, each to the 'Secretary of State for the Environment'. The legislation applied to 'business tenancies' which, in turn, required answers to the three questions: who was the tenant in each lease? Were the premises occupied by the tenant? If so, were they occupied for the purpose of a business carried on by the tenant? The Court of Appeal[20] had concluded that the tenant was the Secretary, the premises were not occupied by the tenant and the tenancy was not a business tenancy. The House of Lords reached the opposite conclusions. The importance of this case is that it illustrates the need for public spectacles. The use of these spectacles resulted in a decision that was exactly the opposite from that resulting from the use of private spectacles. The Court of Appeal (and the dissenting Lord Morris of Borth-y-Guest in the House of Lords) looked at the questions from a private law perspective. The lease provided that the Secretary was the tenant. The premises were in

16 (2012) 248 CLR 156; [2012] HCA 23.
17 Ibid 236 [151].
18 See the remarks of Finn J in *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1, 40–2.
19 *Town Investments Ltd v Department of the Environment* [1978] AC 359.
20 *Town Investments Ltd v Department of the Environment* [1976] 1 WLR 1126.

fact occupied by public servants from other departments and certainly not by the Secretary. The purposes of public servants were not 'business'. Lord Diplock, on the other hand, saw the issues quite differently:

> My Lords, the fallacy in this argument is that it is not private law but public law that governs the relationship between Her Majesty acting in her political capacity, the government departments among which the work of Her Majesty's government is distributed, the ministers of the Crown in charge of the various departments and civil servants of all grades who are employed in those departments.[21]

Taking this approach meant that the tenant was in effect the government, which was similar in many respects to a corporation. It followed that the premises were occupied by the tenant. This was for the business of government.[22]

The case illustrates the importance of not putting on private blinkers but, instead, understanding that government in its dealings is different from private enterprise and this difference can have a substantive effect.

An example of not using the spectacles: *JS McMillan Pty Ltd v Commonwealth*[23]

Mention has been made of government immunities. The focus here is on the principal legislation governing commerce in Australia — the *Competition and Consumer Act 2010* (Cth) and its accompanying Australian Consumer Law (Sch 2 of the Competition and Consumer Act). Is government in its contracting activities bound by this legislation?

This legislation does include express sections which are apparently aimed at removing Crown immunity. At all levels of government, the government is bound by the legislation in so far as it 'carries on a business'.[24]

What does 'business' mean?

This then raises the question: what does 'carries on a business' mean when considering government commercial activity? The bizarre answer to this is that case law has established that government *procurement* for government purposes does not constitute 'business'.[25] The consequence of this is that a very major area of economic activity in Australia[26] is exempt from the principal legislation governing commerce. Thus, the sections that purport to remove Crown immunity actually maintain it in a very substantial way — namely, in respect of government's principal commercial activity of procurement. The main effects of this

21 [1978] AC 359, 380.

22 The meaning of 'business' in the context of government is discussed below as it arises under the competition and consumer legislation in Australia.

23 (1997) 147 ALR 419.

24 This expression appears in s 2A (how the Commonwealth is bound), s 2B (how the states and territories are bound by Pt IV), s 2BA (how local government is bound by Pt IV) and in each state and territory Act which adopted the Australian Consumer Law.

25 The case law is discussed by Seddon, above n 9, 317–24.

26 Seddon's rough estimate is that government procurement across all governments in Australia represents approximate 6.5 per cent of GDP. See N Seddon, 'Holes in Hilmer Re-visited: Government Exemption from Australian Competition and Consumer Law' (2012) 20 *Australian Journal of Competition and Consumer Law* 239, 240. In 2017–2018 the Commonwealth alone spent $71.1 billion on procurement: <https://www.finance.gov.au/business/selling-government-procurement>.

exemption are that governments are able — are permitted — to engage in anti-competitive practices when undertaking procurement;[27] and governments can engage in misleading or deceptive conduct in their commercial dealings with impunity.[28] Suppliers to government are, of course, bound by this legislation.

How did this extraordinary state of affairs arise? It all started with s 2A of what was the *Trade Practices Act 1974* (Cth) which now appears in the Competition and Consumer Act. It provides that the Act 'binds the Crown in right of the Commonwealth in so far as the Crown in right of the Commonwealth carries on a business, either directly or by an authority of the Commonwealth'. The 'carries on a business' formula was then mimicked at all levels of government.[29]

The important case that examined what these crucial words mean was *JS McMillan Pty Ltd v Commonwealth*[30] (*JS McMillan*). The case involved a Commonwealth tender for the sale of AGPS, the former publishing service of the Commonwealth. One of the bidders, McMillan, alleged that, in the conduct of the tender process, the Commonwealth had engaged in misleading conduct in breach of s 52 of the Trade Practices Act. Justice Emmett so found.

It was then necessary to consider whether the Act as a whole bound the Commonwealth. This particular activity was the one-off sale of a Commonwealth asset. It was relatively easy to conclude that this did not amount to carrying on a business and Emmett J so held. However, he conducted a wider examination of these crucial words. The words 'carries on a business' or just 'business' have been considered by the courts in a number of contexts. Justice Emmett considered private sector cases and cases involving government and the application of s 2A.[31] He expressed the opinion that the AGPS, when supplying services to Commonwealth agencies, was carrying on a business.[32] But, crucially, he stated that the purchasing agencies would not be carrying on a business when buying services for ordinary government purposes.[33] This was *obiter dicta*. Justice Emmett was of the opinion that the words 'in so far as' in s 2A signify that the Commonwealth can be carrying on a business when engaged in one activity but not so when engaged in another activity. His Honour quoted the second reading speech when s 2A was introduced:

27 As in *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1; [2007] HCA 38, where the ACCC conceded that state and territory governments were not bound by Pt IV of the Trade Practices Act when conducting a tender to purchase medical supplies.

28 As in *JS McMillan Pty Ltd v Commonwealth* (1997) 147 ALR 419, discussed below; *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2003] FCA 50 [1369]–[1395] (Finn J).

29 At state level this appears in the Acts which adopt the Australian Consumer Law. See, for example, *Fair Trading Act 1987* (NSW) s 36. This section is functionally the same in all state and territory legislation that adopted the Australian Consumer Law.

30 (1997) 147 ALR 419.

31 His Honour did not consider the *Town Investments case*, where a very wide view of the meaning of 'business' in the context of government was taken.

32 This was technically incorrect because s 2C of the Act states that business does not include a transaction in which the Commonwealth is on both sides. AGPS was a unit within the Department of Administrative Services.

33 (1997) 147 ALR 419, 437.

Government commercial operations

I announced last December that the government had decided in principle that its commercial operations should be subject to the same restraints of the Trade Practices Act as apply to like operations of private enterprise. I then informed this House that the government was studying the detailed implementation of this decision. This bill gives effect to that decision in cl 4 which provides that the Act is to apply to all business undertakings of the Commonwealth Government and its authorities.[34]

Justice Emmett drew from this that the intention of Parliament was to apply the Act to the Commonwealth only when it engaged in business in a private sector sense — that is typically, entrepreneurially. This interpretation of Parliament's intention was not compelled by the words used by the Minister. It depends which spectacles one uses. Given that the new s 2A was about a rather important public law principle — government immunity from legislation and its removal — it would seem to be appropriate to use public spectacles. From this focus, 'commercial operations' in the context of government does not denote entrepreneurial activity and 'business undertaking' similarly can be interpreted as 'government business', which is principally procurement. In fact, the government rarely engages in commercial operations in a private sector sense. That is left to government business enterprises, such as electricity generators or port facilities. When applied to the executive government, s 2A has almost no work to do if the interpretation of 'business' in a private enterprise sense is adopted.[35]

This examination was *obiter dicta* because the factual inquiry concerned a one-off sale of a government asset, not the procurement activities of government. The conclusion that the sale of AGPS did not constitute carrying on a business and that, therefore, the Commonwealth was not liable for misleading conduct is unexceptionable.[36] However, the *obiter dicta* about government purchasing for ordinary government purposes not amounting to carrying on a business has much wider ramifications. It has been treated in subsequent cases as authoritative in supporting the proposition that government procurement does not amount to carrying on a business.[37]

It is submitted that the interpretation adopted by Emmett J and followed in later cases was the result of wearing the wrong spectacles. The essence of s 2A is not 'business', and certainly not business in a private sector sense, but instead removal of government immunity from legislation — very much a public law concern.

There is high authority for the proposition that the word 'business' must be interpreted according to the context in which it is used. That context, in the present instance, is removal of government immunity. The contextual nature of 'business' was acknowledged by

34 Australia, House of Representatives, *Debates*, 3 May 1977, Minister John Howard, p 1447.

35 There are a few small parts of the Commonwealth which do sell their services and thus could be said to be carrying on a business in the private sector sense. Two examples are the Defence Science and Technology Organisation and the Australian Bureau of Agricultural and Resource Economics and Sciences.

36 Justice Emmett indicated that he was not happy about the result of the litigation but pointed out that it was for the Parliament to determine the extent to which the Trade Practices Act bound the Commonwealth.

37 *Corrections Corp of Australia v Commonwealth* (2000) 104 FCR 448; *Sirway Asia Pacific Pty Ltd v Commonwealth* (2002) ATPR (Dig) 46–226; [2002] FCA 1152; GEC *Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2003] FCA 50 [1369]–[1395] (Finn J); *Knevitt v Commonwealth* [2009] NSWSC 1341. Compare *Murphy v Victoria* (2014) 45 VR 119; [2014] VSCA 238, where a more nuanced approach to the meaning of 'business' in the government context was advanced.

Emmett J.[38] The High Court in *Re Australian Industrial Relations Commission; Ex parte Australian Transport Officers Federation*,[39] in the context of 'the activities of public authorities and departments of government, which do not or may not carry on commercial undertakings for profit', observed:

> Of all words, the word 'business' is notorious for taking its colour and its content from its surroundings: see *Federal Commissioner of Taxation v Whitfords Beach Pty Ltd* (1982) 150 CLR 355 at pp 378–379. Its meaning depends upon its context. It is common and apt to speak of 'the business of government': see, for example, *Conway v Rimmer* (1968) AC 910 at p 952.

The chameleon metaphor (an 'etymological chameleon') was also used by Lord Diplock in *Town Investments*[40], where, as already noted, it was appropriate to treat leasing of accommodation for public servants as government business. He made the point that the word 'business' embraces 'almost anything which is an occupation, as distinguished from a pleasure — anything which is an occupation or a duty which requires attention is a business'.[41] And, as noted earlier, Lord Diplock made it clear that the kind of problem of statutory interpretation facing the House had to be considered from the perspective of public law, not private law.[42] In short, when considering whether legislation binds the Crown, this is a public problem and should not be viewed through private spectacles which test the government's procurement activities against inappropriate private enterprise norms.

The great irony is that government procurement in Australia has been regarded in the cases as not private enough — it is a governmental activity — at least in respect of the application of the Competition and Consumer Act to government. This is in contrast with the general attitude, discussed briefly below, that the courts have taken to government contracting — namely, that it is 'private' and no special public rules should apply.

It is worth noting that the High Court has made it pretty clear that claims to Crown immunity will not be treated with any enthusiasm. This can be seen by what was said by Gibbs CJ in *Townsville Hospitals Board v Council of the City of Townsville*:

> All persons should prima facie be regarded as equal before the law, and no statutory body should be accorded special privileges and immunities unless it clearly appears that it was the intention of the legislature to confer them.[43]

This was in the context of whether a statutory corporation could claim Crown immunity. Similarly, the High Court denied Crown immunity to another statutory corporation in *McNamara (McGrath) v Consumer Trader and Tenancy Tribunal*,[44] even though legislation stated that the body was immune.[45] In *Re Residential Tenancies Tribunal of New South*

38 (1997) 147 ALR 419, 435, citing Mason J in *FCT v Whitfords Beach Pty Ltd* (1982) 150 CLR 355, 378–9, who spoke of the words like 'business' having 'a chameleon-like hue, readily adapting themselves to their surroundings, different though they may be'.

39 (1990) 171 CLR 216, 226 (Mason CJ, Gaudron and McHugh JJ).

40 [1978] AC 359, 383.

41 Ibid, citing Lindley LJ in *Rolls v Miller* (1884) 27 Ch D 71, 88; [1881–5] All ER Rep 915, 920.

42 *Town Investments* [1978] AC 359, 380.

43 (1982) 149 CLR 282, 291.

44 (2005) 221 CLR 646; [2005] HCA 55.

45 The High Court overturned *Wynyard Investments Pty Ltd v Commissioner for Railways (New South Wales)* (1955) 93 CLR 376, a decision of 50 years' standing, on exactly the same legislation.

Wales and Henderson; *Ex parte Defence Housing Authority*[46] the High Court denied immunity to a Commonwealth statutory corporation that was held to be bound by state residential tenancies legislation. A claim to derivative immunity was denied to a supplier to government in *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd*.[47] A claim to immunity under s 2B of the Trade Practices Act (that is, it was argued that the body was not carrying on a business) was denied to a Northern Territory GBE in *NT Power Generation Pty Ltd v Power and Water Authority*.[48] A claim by the executive government to be immune from local legislation was denied in *Bropho v Western Australia*.[49] There is a decision that goes against this trend — *Commonwealth v Western Australia*,[50] where it was held that the Commonwealth was not bound by the *Mining Act 1978* (WA).

These cases do not directly provide a court with a basis for reading 'carries on a business' in the context of government procurement in a broad way to include purchasing by government. But they do indicate that the ancient legacy should be kept to a minimum. This can be done through the well-established precedents discussed above on the meaning of 'business' in the public sphere. A similar stance of paring back Crown immunity was taken by the Australian Law Reform Commission.[51] More recently, specific recommendations about the immunity provided by the words 'carries on a business' have been made.[52] Significantly, the Harper review recommended that the words be replaced by 'in so far as [governments] undertake activity in trade or commerce'.[53] This would substantially fix the problem.[54] This has not been implemented. It appears that governments prefer to be free to engage in anti-competitive practices and not to be bothered by the pesky prohibition of misleading conduct.

Privileging the private

The point is noted above that the non-recognition of procurement for government purposes as 'business' (it is not private enough) is in contrast with the emphasis in other cases that government contracting is 'private'. This is usually in the context of attempts to use judicial review in connection with contracting. Cases of this kind generally are concerned to prevent the intrusion of administrative law in a 'private' domain. An example is *General Newspapers Pty Ltd v Telstra Corp*,[55] where a statutory corporation (Telecom) was held to be engaging in private activity when entering into a contract, despite a specific power to contract provided

46 (1997) 190 CLR 410.
47 (2007) 232 CLR 1; [2007] HCA 38.
48 (2004) 219 CLR 90; [2004] HCA 48.
49 (1990) 171 CLR 1; [1990] HCA 24.
50 (1999) 196 CLR 392; [1999] HCA 5.
51 Australian Law Reform Commission, *The Judicial Power of the Commonwealth — A Review of the Judiciary Act 1903 and Related Legislation* (ALRC 92, 2001) in which, among other things, the Commission made comprehensive recommendation about winding back Crown immunity. See also Australian Parliament, Senate Standing Committee on Legal and Constitutional Affairs, *The Doctrine of the Shield of the Crown* (AGPS, 1992).
52 Productivity Commission, *Review of NCP Reforms* (No 33, 28 February 2005) recommendation 10.1; Senate Finance and Public Administration References Committee, *Commonwealth Procurement Procedures* (July 2014) recommendation 12.
53 Commonwealth of Australia, *Competition Policy Review Final Report* (March 2015, chair Prof Ian Harper) recommendation 24.
54 N Seddon, 'Government Exemption from Competition and Consumer Law: Has Harper Patched the Holes?' (2015) 23 *Australian Journal of Competition and Consumer Law* 181.
55 (1993) 45 FCR 164.

for in its legislation. Accordingly, when contracting, Telecom was not making a decision 'under an enactment' for the purpose of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Davies and Einfeld JJ said:

> A contract entered into by a corporation under a general power to enter into contracts is not given force and effect by the empowering statute. The empowering statute merely confers capacity to contract, whilst the validity and effect of the contract is determined by the ordinary laws of contract.[56]

Similarly, in the New Zealand case of *Schelde Marinebouw BV v Attorney-General and Tenix Defence Pty Ltd*[57] it was held that a government tender process governed by a pre-award contract is not amenable to administrative law challenge. The Court considered that, where a private law regime has been chosen to govern the tender process, it is inappropriate to resort to judicial review. This binary, either/or, approach is not self-evident and there are tendering decisions that show that both public and private law can be employed:[58]

> The view that contracting belongs entirely to the private sector is a regrettable, but predictable, result of a binary approach which insists on seeing power as being either public or private.[59]

The same point can be made about the meaning of 'business', discussed above. It is possible that a particular activity is both business and governmental. They are not mutually exclusive.[60]

In Australia it is firmly established that a decision made under a public contract is not amenable to judicial review.[61]

Another perspective on the private–public debate, in connection with the proper domain of administrative law, is the High Court's decision in *Neat Domestic Trading Pty Ltd v AWB Ltd*[62] (*Neat*), where it was held by the majority that the exercise of statutory powers by AWB Ltd was not amenable to judicial review, principally because AWB was private in form (a company) and function (maximising returns) and it was said that it was not possible to impose public law obligations on AWB while at the same time accommodating pursuit of its private interests. The High Court was not prepared to follow the path of the English Court of Appeal in *R v Panel on Take-overs and Mergers, Ex parte Datafin*[63] (*Datafin*), in which a body, not created by legislation but which exercised important public powers, was amenable to judicial review.

The High Court continued its private path when examining the powers exercised by a

56 Ibid 173 (Davies and Einfeld JJ).
57 [2005] NZAR 356. This was a case involving no statutory overlay.
58 An example is *Lovegrove Turf Services Pty Ltd v Minister for Education* [2003] WASC 66 — appealed on another issue [2004] WASCA 305. See also *Willow Grange Pty Ltd v Yarra City Council* [1998] ANZ Conv R 415.
59 M Aronson, 'A Public Lawyer's Responses to Privatisation and Outsourcing' in M Taggart (ed), *The Province of Administrative Law* (Hart Publishing, 1997) 46.
60 *Murphy v Victoria* (2014) 45 VR 119, 138; [2014] VSCA 238 [58] (Nettle AP; Santamaria and Beach JJA).
61 *Australian National University v Burns* (1982) 43 ALR 25. Followed in numerous cases and endorsed by the High Court in *Griffith University v Tang*, discussed below.
62 (2003) 216 CLR 277; [2003] HCA 35.
63 [1987] QB 815; [1987] 1 All ER 564.

publicly funded university established by legislation[64] in *Griffith University v Tang*[65] (*Griffith University*). It was held that a decision to exclude a student from PhD candidature was not a decision made 'under an enactment' for the purpose of the *Judicial Review Act 1991* (Qld). Nor was the relationship governed by contract (or at least that was assumed by all parties). So the student was in a legal vacuum.

The High Court's decisions in *Neat* and *Griffith University* were controversial, attracting a large response, mostly critical, from legal scholars.[66] The cases and the responses demonstrate that striking the right balance in the mixture of public and private law is difficult. The cases represent a marked reluctance to allow judicial review to expand its boundaries — that is, it should be confined to the narrow concept of what has traditionally be seen as public, no matter that the decision in each case had a public aspect (by history and legislation in *Neat* and by function and legislation in *Griffith University*). These decisions confirmed two private points made in earlier decisions: that a decision under a public contract (for example, termination) is not amenable to judicial review;[67] and that a statutory corporation, with a standard contract-making power conferred by legislation, is not making a decision under that legislation when it enters a contract.[68]

Despite these decisions, McHugh, Hayne and Callinan JJ in *Neat* left open the possibility that 'public law remedies may be granted against private bodies' in that the judges decided the case on the narrower ground that, in the specific circumstances of that case under the relevant legislation, no reviewable power was being exercised. The larger question was not being answered.[69] This left the way open for a lower court to show more public concern about the impact of contract as a tool of public administration. For example, in *CECA Institute Pty Ltd v Australian Council for Private Education and Training*, Kyrou J said:

> In my opinion, the *Datafin* principle represents a natural development in the evolution of the principles of judicial review. Indeed, it is a necessary development to ensure that the principles can adapt to modern government practices. The last 20 years or so have seen a growing tendency by the legislature and the executive to out-source important governmental functions to private organisations. As this trend is unlikely to abate, the *Datafin* principle is essential in enabling superior courts to continue to perform their vital role of protecting citizens from abuses in the exercise of powers which are governmental in nature.[70]

So far, this idea of letting public law in has not flourished in Australia. By contrast, the position in the United Kingdom is very different, albeit with some contradictions and difficulties.[71]

64 *Griffith University Act 1998* (Qld).
65 (2005) 221 CLR 99; [2005] HCA 7.
66 Seddon, above n 9, 455 n 209.
67 Confirming *Australian National University v Burns* (1982) 43 ALR 25.
68 Confirming *General Newspapers Pty Ltd v Telstra Corp* (1993) 45 FCR 164, discussed above.
69 (2003) 216 CLR 277, 297; [2003] HCA 35 [49]–[50].
70 *CECA Institute Pty Ltd v Australian Council for Private Education and Training* [2010] VSC 552 [99] (Kyrou J).
71 E Aspey, 'The Search for the True Public Law Element: Judicial Review of Procurement Decisions' (2016) *Public Law* 35.

The private paradox: enhanced accountability

Privileging the private may have a beneficial effect. This is demonstrated in two areas: tendering and the rule against fettering.

Tendering

The development of the private law of tendering posits two contracts, one governing the tender process itself and the other the contract awarded after completion of the tender process. This has occurred in the context of government procurement.[72] There is no reason why the same analysis could not apply in the private sector, but this has not happened. It is a peculiarly 'public' phenomenon. It is justified in public terms: the integrity of a government tender process is paramount[73] — in particular, that government conducts itself according to high standards and the fact that public money is being spent and value for money is best achieved by a proper competition.

However, this development is vulnerable to a basic contract law principle: parties can always opt out. If parties wish to engage commercially, it is open to them to exclude contract. This is a rare phenomenon in the private sector, but is nevertheless a longstanding principle. The parties can expressly declare that they do not intend to create legal relations in their dealings.[74] The Commonwealth has taken advantage of this principle. After the decision in *Hughes Aircraft Systems International v Airservices Australia*[75] (*Hughes Aircraft*), the Commonwealth routinely includes a clause in the request for tender that states that the tender process is not contractual.[76]

This is unfortunate because contract is the most effective device for ensuring accountability and proper process in a tender. It is more effective than judicial review (even if it is available) because the remedies available — in particular, damages for a wronged tenderer — are more likely to concentrate the minds of public servants to conduct a process with probity and fairness.[77] This is borne out by Canadian experience, where there is a very large number of government tender challenge cases. Further, the existence of a process contract ('contract A' in Canadian terminology) is usually not excluded. In one case, an attempt was made to exclude a process contract. This was treated as a signal that judicial review should operate and that the exclusion of contract was considered to be of itself a breach of procedural fairness in public law.[78]

72 The leading Australian case is *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1, where Finn J called the first contract a 'process' contract. In Canada there are hundreds of cases of this nature arising from government tender processes. See Seddon, above n 9, ch 7.

73 *Hughes Aircraft*, ibid, 28–9.

74 N Seddon and R Bigwood, *Cheshire & Fifoot Law of Contract* (LexisNexis Butterworths, 11th ed, 2017) 5.14.

75 (1997) 146 ALR 1.

76 State adoption of this measure has been patchy.

77 The exclusion of contract has been to some extent alleviated by the *Government Procurement (Judicial Review) Act 2018* (Cth), which provides limited redress to a tenderer if there has been a breach of the Commonwealth Procurement Rules. This legislation does not provide for full damages as contract can, nor does it provide for a contract to be set aside once awarded.

78 *Canada (Attorney General) v Rapiscan Systems Inc* [2015] FCA 96 (CanLII).

Meanwhile in Australia, at least at Commonwealth level, the salutary effect of a pre-award contract in government tenders is neutralised. It is worth noting that the two bases on which Hughes Aircraft Systems International won its case — breach of a process contract and misleading conduct — have gone. The case law on the interpretation of 'business' occurred after the *Hughes Aircraft* decision.

The rule against fettering

Perhaps the most controversial doctrine associated with government contracts is executive necessity and its related sub-rules about fettering.[79] Executive necessity in its purest form allows a government simply to break a contract without the usual consequences because it is necessary to do so for some pressing governmental reason.[80] Freedom to govern trumps freedom of contract. Perhaps more than any other issue in the public–private debate, this is quintessentially the most stark. It has been labelled 'sovereign risk' — a pejorative label. It renders void the relevant contract.

The boundaries of this principle are ill-defined and the formulation in *Rederiaktiebolaget Amphitrite v The King*[81] (*Amphitrite*) is generally regarded as stated too widely.[82] Some of the associated sub-rules are unexceptionable — for example, that government cannot contract out of legislation and cannot pledge through a contract to legislate, or not legislate, in a certain manner. Another sub-rule is that it is said that the government cannot by contract fetter a future exercise of executive power. The limits of this sub-rule are very uncertain, not least because it is usually the executive power that supports contract-making by government. Does the principle mean that, if the government makes two contracts that are in some respect inconsistent, the later contract must prevail over the earlier contract which could not fetter the exercise of executive power in the second contract? The private sector answer to this problem is that both contracts are effective and, if there is a breach of one of them, the usual contract remedies apply.

A solution to the controversies and uncertainties stemming from executive necessity was suggested by Mason J by way of *obiter dicta* in *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth*[83] (*Ansett*). This was that the contract under consideration is not void but it could not be enforced by coercive orders such as an injunction of specific performance but could be the subject of a damages remedy.[84] This solution preserves the underlying rationale of the fettering doctrine that government must be free to govern (and break the contract) and, at the same time, protects the contractor. It is clear that the denial of the remedies of injunction or specific performance is because of the government's imperative to be unhindered in its task of implementing its policies and programs and not for one of the

79 Seddon, above n 9, ch 5.

80 Said to originate in the controversial decision of Rowlatt J in *Rederiaktiebolaget Amphitrite v The King* [1921] 3 KB 500 and recognised in the High Court with some reservations in *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 74 (Mason J); *A v Hayden* (1984) 156 CLR 532, 543; [1984] HCA 67 [8] (Gibbs CJ).

81 *Rederiaktiebolaget Amphitrite v The King* [1921] 3 KB 500.

82 A claim to executive necessity was given short shrift by White J in *New South Wales Rifle Association Inc v Commonwealth* (2012) 293 ALR 158; [2012] NSWSC 818.

83 (1977) 139 CLR 54.

84 Ibid 76.

reasons that guides a court's discretion under the ordinary law of contract. To this extent the rule against fettering is preserved. The unavailability of these remedies means that the contract does not fetter. Even if the contract was one in which the discretionary remedy could be made, it would not be ordered. This idea has been supported by way of *obiter dicta* in a number of later cases,[85] but in no case was there an occasion to apply it.

The Mason solution involves the donning of private spectacles to modify a public law doctrine that is generally regarded as unsatisfactory in generating sovereign risk. In *Searle v Commonwealth*[86] (*Searle*) for the first time in Australia, the Mason solution has been applied.

Mr Searle joined the Navy as a marine technician. After being signed up, he entered into a training contract under which he would undertake a course of training towards a Certificate IV in Engineering. The training contract expressly said that it was legally binding. Under it the Navy undertook to provide a training plan and the various components to achieve the certificate. The Navy failed to provide these elements of training. The Navy had decided no longer to sign up servicemen or women to training contracts of the kind entered into by Mr Searle. After leaving the Navy, Mr Searle sued for damages for breach of contract. He argued that, if he had achieved the certificate, he could have obtained a more remunerative job in civilian life than he in fact got. Other Navy personnel were similarly affected and joined a class action.

There is a special legal background to this story. Going back to medieval times, English law held that the Crown does not enter into contracts with its servants. This applies in Australia although, for the ordinary public service, it has been superseded by elaborate legislation. Not so for the military, or at least not so as to remove the basic proposition that there is no employment contract between an ADF member and the Commonwealth.[87] Such members are engaged at her Majesty's pleasure.

The Commonwealth said that the basic employment arrangement was not contract but, instead, an exercise of the Crown's prerogative (or executive) power. Even if the training contract was a separate arrangement, over and above the underlying employment arrangement, the training contract could not fetter the Navy's prerogative right to direct, control and manage Mr Searle as a military person (dubbed 'Naval Command' in the Court of Appeal). The Commonwealth could simply break the training contract with impunity. This argument succeeded before the trial judge, Fagan J.[88] The training contract could not prevent, for example, a decision to post Mr Searle to a ship or to an overseas posting, even if such a posting prevented the required training.

85 *Hughes* (1997) 146 ALR 1, 74–5 (Finn J); *L'Huillier v Victoria* [1996] 2 VR 465, 481 (Callaway JA); *Upper Hunter Timbers Pty Ltd v Forestry Commission of NSW* [2001] NSWCA 64 [58] (Giles JA); *Peregrine Mineral Sands Pty Ltd v Wentworth Shire Council* [2014] NSWCA 429 [4]–[6] (McColl JA).

86 [2019] NSWCA 127.

87 See the then applicable provision in 2011: *Defence (Personnel) Regulations 2002* (Cth), reg 117.

88 *Searle v Commonwealth* [2018] NSWSC 1017.

On appeal, the NSW Court of Appeal took this opportunity to examine the longstanding controversy about executive necessity, described as 'exceedingly vague and far reaching',[89] 'ill-defined'[90] and dogged by uncertainty.[91] The lead judgment by Bell P was supported by short judgments from Bathurst CJ and Basten JA. It was held that the training contract did not amount to a fetter on the Commonwealth's executive (or prerogative) power of Naval Command and that the Commonwealth was in breach and liable to pay damages. Bell P, having noted that the case raised very important questions of principle,[92] undertook a thorough and learned analysis of this controversial area of contract and public law, citing 24 academic sources. His Honour summed up the tension:

> What underlies the debate and difficulties attending the Fettering Doctrine is the existence of two competing considerations: on the one hand, the importance of a Minister, government department or public authority remaining free to act in the future in the public interest and for the public benefit by reference to relevant considerations at the time a particular prerogative or executive power is to be exercised and, on the other hand, the desirability of government being able to contract and of contractual counterparties having confidence that their bargains will be honoured.[93]

In *Searle*, the contest was not between two inconsistent contracts but between a contract and the prerogative or executive power of government. Should the latter trump the former?

Absent a possible fettering argument, there was no basis for challenging the contract. The Commonwealth conceded[94] that it had the power to enter into such a contract and did not attempt to argue that it lacked that power, absent a fettering argument. The training contract was within power.[95]

At a factual level, the training contract simply did not fetter the power of Naval Command. Any resort to Naval Command that detracted from the obligations arising from the training contract did not fetter the Commonwealth in any real sense. Even the possibility of having to pay damages in accordance with the Mason solution would not amount to a practical fetter, although some commentators have canvassed the possibility that the spectre of damages would in effect amount to a fetter.[96] The Court of Appeal did not consider that this was a real possibility.[97]

Bell P, during the course of his wide-ranging examination of the academic and judicial criticisms of the fettering doctrine, was clearly motivated by the fundamental principle that contracts should be kept, not just for the sake of the contractor but also from the perspective of government, because otherwise it would not be a credible commercial player[98] — a point made by Mason J in *Ansett*,[99] among others. Bell P was also concerned to modify a doctrine

89 Citing PW Hogg, *Liability of the Crown in Australia, New Zealand and the United Kingdom* (Law Book Co, 1971) 130.
90 Citing DW Greig and JLR Davis, *The Law of Contract* (Law Book Co, 1987) 218.
91 [2019] NSWCA 127 [101]–[112] (Bell P).
92 Ibid [27].
93 Ibid [97].
94 Ibid [138].
95 Ibid [151], [156].
96 Ibid [127].
97 Ibid [130], [145].
98 Ibid [108]–[112], [116]–[118].
99 *Ansett* (1977) 139 CLR 54, 74–5.

that has brought the government into disrepute, contrary to the judicially-stated idea that government must act in accordance with the highest ethical standards.[100]

Having considered a number of possible ways suggested by commentators and academics in which the invalidating effect of the fettering doctrine could be pared back,[101] Bell P found the Mason solution to be the most satisfactory. This solution does not bring government contracts into exact alignment with private contracts because, as noted, it preserves the fettering doctrine to the extent of denying injunction or specific performance. But it does equate to the proposition that contracts provide a choice: to perform or pay damages.

The Commonwealth decided not to appeal.

Conclusion

This article has attempted to show through selected examples the difficult tensions and dilemmas stemming from the mixing of contract and government. A motif has been the necessity of looking broadly at the various issues and understanding that the public–private tension must be recognised — that is, both sides must be considered and weighed. Where the tension is a zero-sum game, the solution must in some cases give ascendancy to the public and in other cases ascendancy to the private. In some cases, the proper approach is to look from the perspective of 'both … and' rather than 'either … or'. The solution will almost inevitably be controversial.

100 [2019] NSWCA 127, [108]–[112].
101 Ibid [114].