ADMINISTRATIVE LAW, GOVERNMENT CONTRACTS AND THE LEVEL PLAYING FIELD

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I. INTRODUCTION

With the advent of 'new managerialism' in the Australian public sector it is timely to consider whether the legal principles applying to government contracts are, or should be, different from the legal principles applying to contracts between members of the public. Because the law applying to government contract decisions belongs to the equivocal zone where private law and public law meet, the issue is two-edged. There is an argument that the law of contract should be the same for government as it is for members of the public. There is also an argument that government should be subject to the principles of administrative law in all its decision-making, including its commercial dealings. However, special qualifications to general principles have been made at the interface of the two bodies of law. Contract law discriminates between types of decision-makers, government decision-makers being treated in certain respects as being in a special position. In administrative law the nature of the decision-maker has traditionally been important, non-governmental decision-makers not being subject to the common law principles applied in judicial review. Administrative law discriminates between types of decisions, judicial review of government contract decisions (other than those concerning contracts of employment) occurring infrequently, and the jurisdiction of ombudsmen and the scope for use of freedom of information legislation being limited.

At critical points the law is uncertain as a result of a failure to resolve the tension between the very different rationales of legal principles drawn from private law and from public law. Administrative law is itself in a

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dynamic state as the principle of freedom of executive discretion from the fetters of contracts and undertakings is increasingly undermined by the expanding requirements of reasoned and fair decision-making. However, judicial perceptions and legislative initiatives in establishing tribunals for scrutinising administrative action and mechanisms for more open government, indicate a trend towards intensifying the accountability of administrators and extending that accountability to their commercial dealings. The powerful potential of judicial review as a vehicle for challenging government decisions to enter contracts may, however, not be realised as government trading enterprises undergo corporatisation and privatisation, initiatives made less in response to the developments in administrative law than as an extension of new managerialism. It is the aim of this article to examine that potential, within the wider context described.

NEW MANAGERIALISM

In a climate of economic restraint, new managerialism advocates the adoption of corporate management principles of the private sector within the Australian public sector.[1] Both the Federal and New South Wales governments have regarded review and reform of management practices as a necessary but inadequate measure for securing the goal of efficiency. In recognition that those principles cannot be adopted in toto within the public sector, it is argued that government trading enterprises[2] must operate on a 'level playing field'.[3] Government commercial dealings will only be conducted in a truly efficient manner and public sector debt reduced, when free of the advantages and disadvantages inherent in enterprises conducted through incorporated statutory authorities or 'statutory corporations'. The level playing field requires the ejection of the commercial areas of government endeavour from the public sector into the private sector, competing on equal terms with private sector firms. Government trading enterprises must therefore be 'corporatised', a step which need not necessarily lead to privatisation. Achievement of the goal

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1 See I.Beringer, G.Chomiak, H.Russell, *Corporate Management: The Australian Public Sector* (1986); R.W.Cole, "The Public Sector: The Conflict Between Accountability and Efficiency" (1988) 47 *AJPA* 223.

2 In New South Wales, for example, the Urban Transit Authority, State Rail Authority, Electricity Commission of New South Wales (Elcom), Grain Handling Authority, Maritime Services Board, Government Printing Office, State Bank. See the Grain Handling Authority (Corporatisation) Act 1989 (N.S.W.). See also the definition adopted in the Report by the Steering Committee on Government Trading Enterprises, *A Policy Framework for Improving the Performance of Government Trading Enterprises* (1988) (hereinafter *Sturgess Report).* See also M.N.Miah, "The Financial Accountability and Control Structure of Public Sector Utilities" (1988) 47 *AJPA* 263.

3 Sturgess Report *ibid.* For discussion see R.C.Mascarenhas, "Government-Public Enterprise Relations - A Comparative Perspective" (1988) 47 *AJPA* 35; G.Scott and P.Gorringe, "Reform of the Core Public Sector: The New Zealand Experience" (1989) 48 *AJPA* 81.

of efficiency is to be measured in terms of commercial performance, which will be enhanced by arms-length contractual relations between the enterprises and government and by market discipline as the primary avenue of accountability.

The Federal Government has implemented these principles in relation to government business enterprises in the area of transport and communications.[4] In particular, the Australian National Line and Overseas Telecommunications Ltd have been converted from statutory corporations to incorporated companies.[5] The Australian Telecommunications Commission and Australian Postal Commission remain statutory corporations, but their corporate structures have been updated and their names changed to Australian Telecommunications Corporation and Australian Postal Corporation.[6] In New South Wales it is proposed that under the State Owned Corporations Act 1989 (N.S.W.) selected government trading enterprises will by Act of Parliament become "State owned corporations", with complete State ownership and the Treasurer and nominated Ministers as voting shareholders. The State owned corporations envisaged in the State Owned Corporations Act 1989 (N.S.W.) do not represent the State, cannot render the State liable for their obligations.[7] Such corporations will be free from most statutory forms of review in the administrative law context.[8] Accountability is to be secured chiefly through the Companies (New South Wales) Code 1981, and to Parliament, through statements of corporate intent, annual reports, reports of the Auditor-General, scrutiny by the Public Accounts Committee and duties of the responsible Minister to table in Parliament specified information.[9]

Of what significance is corporatisation to government contract decisions? Although purchasing decisions of departments are of vital

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4 *Reshaping the Transport and Communications Government Business Enterprises*, Statement by the Minister for Transport and Communications (May 1988). See also Minister of Finance, Hon. Peter Walsh, *Proposed Policy Guidelines for Statutory Authorities and Government Business Enterprises* (1986). For discussion of the Federal policy, see "Public Management Forum: Policy Guidelines for Government Business Enterprises" (1986) 45 *AJPA*.

5 ANL (Conversion into Public Company) Act 1988 (Cth); OTC (Conversion into Public Company) Act 1988 (Cth).

6 Australian Telecommunications Corporation Act 1989 (Cth); Australian Postal Corporation Act 1989 (Cth).

7 State Owned Corporations Act 1989 (N.S.W.) s.9.

8 State owned corporations will not be subject to review by the Government and Related Employees Appeal Tribunal or under the Freedom of Information Act 1989 (N.S.W.):*id.*, s.36(1),37. The applicability of the Affirmative Action (Equal Employment Opportunity for Women) Act 1986 (Cth) may be modified by regulation:*id.*, s.35(3). However, the Independent Commission Against Corruption is to have jurisdiction to investigate corrupt conduct of such corporations and their officials: *id*, s. 36(2). Nor is the jurisdiction of the N.S.W. Ombudsman excluded: see Ombudsman of New South Wales, *Fourteenth Annual Report 1988-89*, Pt 1, 49-53.

9 Note the dilution of the concept of the level playing field in *Id.*, Pt 4, ss. 11, 8(c), 16.

importance to management of public funds and the commercial survival of suppliers, decisions of major political and fiscal importance are also made by statutory corporations which are to varying degrees entitled to benefit from the special position enjoyed by government.[10] The principle of the level playing field requires that as incorporated companies these enterprises be subject to the ordinary principles of the law of contract. As a party to contracts made with such corporatised government trading enterprises, government will still enjoy a special position and its decisions be subject to existing administrative law scrutiny. However, the general impact of corporatisation is the diminishment of the role of administrative law.

If the playing field is truly levelled, at one stroke government trading enterprises have stripped from them the benefit of special protection and also rid themselves of the existing limited responsibilities of rational and fair decision-making under principles of administrative law. The level playing field resolves the tension at the interface of contract law and administrative law by giving primacy to contract law. It may be desirable that government trading enterprises be deprived of any special position they enjoy as public authorities so that they compete on an equal footing with other private commercial entities. It may not be desirable that such enterprises, with power to affect the interests of large sectors of the public in a dramatic way, should be free to disregard principles of rational and fair decision-making which otherwise regulate the executive branch of government.

II. CONTRACT LAW

The Crown is liable to actions in contract in State, Territory and Federal courts.[11] However, administrators are in certain respects regarded as being in a privileged or special position regarding liability in contract. This special position emerges in the context of the binding effect of statutes, the intention to create legal relations, the doctrine of executive necessity and the shield of the Crown, but must be reconsidered in the light of section 64 of the Judiciary Act 1903 (Cth).[12] These principles merit a relatively brief discussion below, little progress having been made in the case law in recent years in resolving the uncertainties associated with them.[13]

As a preliminary to that discussion it is appropriate to discuss some broader arguments of relevance to the principles. In a challenge to the

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10 See, for example, New Darling Harbour Authority Act 1984 (N.S.W.); Sydney Harbour Tunnel (Private Joint Venture) Act 1987 (N.S.W.).

11 See M.Aronson and H.Whitmore, *Public Torts and Contracts* (1982), Ch.1.

12 This paper does not attempt to outline the issues of authority of officers or the payment and recovery of public funds.

13 The most recent discussion is D.Rose, "The Government and Contract" in P.D.Finn (ed.), *Essays on Contract* (1987).

classical principles of contract law, it has been argued that contract might be absorbed into tort or restitution.[14] Amongst the many theories as to the essence of contract is the theory that individuals subject to the ordinary principles of the law of contract have a choice of either performing their contractual obligations or instead not performing and paying damages for resultant injury to the other party.[15] An argument that government should be subject to the same law of contract as members of the public therefore leads to the conclusion that government is also free to break contracts and pay damages. Yet the legal rules placing the government in a special position are criticised not just because some rules suggest that government need not even pay damages for breach of contract. They are also criticised on the ground that government ought not to be a contract breaker, like ordinary members of the public, but should rather act as a model contract holder. Such a model contract holder acts with propriety, common sense, commercial morality and principles of good administration, and acts in accordance with expectations it has generated in its commercial dealings and the interests of the public both in achieving social goals and wise expenditure of public funds. If government does not honour its promises, which induce expectations in members of the public, harm will be done to the ultimate value of reciprocity between government and governed. The rule of law requires that the law of contract be respected by government for the very purpose of securing such reciprocity.

A. STATUTES BINDING THE CROWN

Liability in contract often depends upon applicable legislation. Some statutes expressly exempt particular government contracts from the application of particular statutes.[16] However, there is also a general principle of construction that the Crown is not bound by a statute unless the Crown is expressly named in the statute or by necessary implication it was intended to be bound by the statute.[17] A statute of the Commonwealth is presumed not to bind the Crown in right of State. The immunity extends to protect from liability under the statute those who contract with the Crown, if an order enforcing a statute will prejudice the Crown, by affecting the efficacy or operation of a contract, arrangement or

14 P.S.Atiyah, "Contracts, Promises and the Law of Obligations" (1978) 94 *LQR* 193; *The Rise and Fall of Freedom of Contract* (1979); For a survey of the theories and their applicability in Australia, see B.Coote, "The Essence of Contract" (1988) 1 *JCL* 91, 183.

15 See O.Holmes, "The Path of the Law" (1897) 10 *Harv L Rev* 497; discussed in P.S.Atiyah, *Essays on Contract* (1986), 57*ff*.

16 A good illustration is the Sydney Harbour Tunnel (Private Joint Venture) Act 1987 (N.S.W.) which, inter alia, provides (in s. 7) that the agreements annexed to the Act are not subject to the operation of the Frustrated Contracts Act 1978 (N.S.W.).

17 *Bradken Consolidated Ltd* v. *Broken Hill Pty Co. Ltd* (1979) 145 CLR 107, 116; *Burgundy Royale Investments Pty Ltd* v. *Westpac Banking Corp.* (1987) 76 ALR 173, 175-8. For an illustration of the application of the principle, see *Electricity Commission of New South Wales* v. *Australian United Press Ltd* (1954) 55 SR (N.S.W.) 118. For a critique of this rule see P.W.Hogg, *Liability of the Crown* (1987), 194, 198-9.

understanding to which the Crown is a party.[18] In a recent application of this principle of construction, *New South Wales Bar Assoc.* v. *Forbes Macfie Hansen Pty Ltd*[19] Einfeld J. suggested a limitation to its scope. Advertising agents who under contract with the New South Wales Government presented advertisements promoting the Government's new Transcover and Workcare legislation, could not thereby be guilty of offences under the Trade Practices Act 1974 (Cth), an Act which did not bind the Crown in right of the State of New South Wales. However, Einfeld J. observed that this immunity of individuals holding contracts with the government should not be extended into social and humanitarian spheres, but should be confined to commercial, contractual and similar activities of the immune government, where restriction of action would directly impinge on or derogate from the freedom of the State from the statute's reach.[20]

B. INTENTION TO CREATE LEGAL RELATIONS

The requirement of intention to create legal relations in order that a contract be formed is subject to special qualifications in the case of contracts between governments and between governments and individuals. Unlike representations made by individuals, statements made by a government may be taken to be 'announcements of policy', or 'administrative arrangements', in connection with which there is no evidence of the government intending by its representations to induce the individual to act in a certain way, nor evidence that the government has voluntarily assumed a legally enforceable duty when the individual acts upon the representations.[21] In some of the cases the absence of an intention to create legal relations appears to be supported by the presence of an element of government subsidy or assistance.[22] In one such case, *Placer Development Ltd* v. *Commonwealth,*[23] the High Court divided because the element of government subsidy co-existed with such a strong commercial element, evidenced by the fact that some of the provisions in the agreement, not directly in issue, were expressed not to create legal rights and obligations. In the minority, Menzies and Windeyer JJ. said that the agreement was clearly intended to create legal relations, Windeyer

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18 *Bradken Consolidated Ltd* v. *Broken Hill Pty Co. Ltd* note 17 *supra.* See also *Re Telephone Apparatus Manufacturers' Application* [1963] 1 WLR 463.

19 (1988) 82 ALR 431; see also *F.Sharkey & Co. Pty Ltd* v. *Fisher* (1980) 33 ALR 184.

20 *New South Wales Bar Assoc.* v. *Forbes Macfie Hansen Pty Ltd id.,* 437.

21 *Australian Woollen Mills Pty Ltd* v. *Commonwealth* (1954) 92 CLR 424, 457-9 (affirmed by Privy Council (1955) 93 CLR 546); *Milne* v. *Attorney-General (Tas.)* (1956) 95 CLR 460; *The Administrative & Clerical Officers' Assoc., Commonwealth Public Service* v. *Commonwealth* (1979) 53 ALJR 588.

22 For example, *Australian Woollen Mills* v. *Commonwealth* note 21 *supra; The Administration of the Territory of Papua and New Guinea* v. *Leahy* (1961) 105 CLR 6 (for discussion see R.D.Lumb "Contractual Relations Between Government and Citizen" (1961) 35 *ALJ* 45); *Placer Development Ltd* v. *Commonwealth* (1969) 121 CLR 353.

23 Note 22 *supra.*

J. strongly affirming the view that government ought not to be treated as in a special position:

> A basic assumption of our law is that bargains are to be kept. This applies today to the contracts which the Crown makes with a subject as forcefully as it does to contracts between subject and subject.[24]

Where an agreement is made between governments or between government instrumentalities a stronger argument may be raised that the agreement is of a 'political' nature, and hence not intended to give rise to legal relations.[25]

It is true that in several of the leading decisions cited in support of this principle, ordinary principles of contract law (other than a special qualification to the principle of intention to create legal relations) alone could have supported the conclusion of the absence of a contract.[26] Policy announcements may equally be described as not constituting offers capable of acceptance, even by conduct so as to form unilateral contracts, since they do not contain even an implied request to take action.[27] *Milne* v. *Attorney-General (Tas.),*[28] *South Australia* v. *Commonwealth*[29] and *Administrative & Clerical Officers Assoc., Commonwealth Public Service* v. *Commonwealth*[30] are explicable on the basis that there were fundamental matters still to be agreed between the parties. However, the judgments in *South Australia* v. *Commonwealth*[31] buttress those conclusions with principles which seek to place government in a special position with regard to the intention to enter legal relations.

The absence of an intention to create legal relations cannot on its own provide a convincing basis for placing the government in a special position under the law of contract. The 'policy' or 'political' nature of a representation is a notoriously ill-defined feature of a statement or decision, as cases on the developing concept of justiciability in

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24 *Id.*, 373.

25 *South Australia* v. *Commonwealth* (1961) 108 CLR 130; *John Cooke & Co. Pty Ltd* v. *Commonwealth* (1922) 31 CLR 394. See also *Blyth District Hospital Incorp.* v. *South Australian Health Commission* (1988) 17 ALD 135, 137 *per* King C.J. The Chief Justice did not deal with the peripheral issue of whether an agreement between the Commonwealth and South Australia for the implementation of the Medicare scheme in that State was justiciable by the parties to the agreement, but Bollen J. held that either party to the agreement could enforce it. See further below, in relation to the concept of justiciability, discussion accompanying notes 104-118.

26 This is an argument developed by D.Rose note 13 *supra,* 238-42. See also H.K.Lücke, "The Intention to Create Legal Relations" (1970) 3 *Adel L R* 419, 425-6.

27 *Australian Woollen Mills Pty Ltd* v. *Commonwealth* note 21 *supra,* 458.

28 Note 21 *supra.*

29 Note 25 *supra,* a factor clearly evident in the judgments of Dixon C.J. and Kitto J., and to a lesser extent in that of Owen J. Both bases for decision appear in the judgments of Windeyer, Taylor and Menzies JJ. Absence of intention is the sole basis for decision only in the judgment of McTiernan J. In the judgments of Dixon C.J., Taylor and Menzies JJ. there is support for the view that the agreement provided the framework for a series of separate, possibly unilateral, contracts (see *id.*, 141, 150).

30 Note 21 *supra.*

31 Note 29 *supra.*

administrative law demonstrate.[32] How is this feature of policy or the political to be identified in order to distinguish these cases from cases of representations made by government in the context of commercial dealings where there is no doubt that the government intends to enter legal relations? In the context of non-contractual representations no attempt is made to draw a distinction between political and non-political statements as a basis for precluding the raising of an estoppel.[33] Is it not also possible for individuals, corporations and associations which are traditionally regarded as non-governmental to make offers capable of acceptance involving representations which can be characterised in the same way?

C. THE DOCTRINE OF EXECUTIVE NECESSITY

According to the doctrine of executive necessity the Crown may not enter into a contract which would fetter its future executive action. Some of the leading cases on the doctrine were actually disposed of upon the ground that there was no contractual obligation in the first place, rather than upon any inconsistency with a later exercise of a statutory power or duty.[34] However, there is authority for the view that the Crown is in a special position in that its express contractual undertaking regarding the future exercise of a statutory power is invalid.[35] Breach of such a contractual obligation does not found an action for damages.

The doctrine of executive necessity has rightly been criticised.[36] Government ought not to be completely free to ignore its contractual obligations without incurring any penalty. Attempts have been made to confine this sweeping doctrine by drawing elusive distinctions. The doctrine might be confined by permitting its application to arrangements where the government purports to give an assurance as to what its executive action will be in the future in matters concerning the welfare of

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32 See *Minister for Arts, Heritage and the Environment* v. *Peko-Wallsend Ltd* (1987) 75 ALR 218; and below, discussion accompanying notes 104-118.

33 See below, discussion accompanying notes 158-182.

34 In *Rederiaktiebolaget Amphitrite* v. *R* [1921] 3 KB 500 there was no intention to create legal relations. In *William Cory & Son Ltd* v. *London Corp.* [1951] 2 KB 476 and *Ansett Transport Industries (Operations) Pty Ltd* v. *Commonwealth* (1977) 139 CLR 54 (hereinafter *Ansett*) a term could not be implied limiting the future exercise of a discretionary statutory power. The point was made by E.Campbell in "Agreements about the Exercise of Statutory Powers" (1971) 45 *ALJ* 338. See also *Commissioners of Crown Lands* v. *Page* [1960] 2 QB 274.

35 *Ayr Harbour Trustees* v. *Oswald* (1883) 8 App Cas 623; *Birkdale District Electric Supply Co. Ltd* v. *Southport Corp.* [1926] AC 355, 364 *per* Lord Birkenhead; *William Cory & Son Ltd* v. *London Corp.* note 34 *supra*, 484 *per* Devlin L.J.; *Cugden Rutile (No.2) Pty Ltd* v. *Chalk* [1975] AC 520.

36 See P.W.Hogg, "The Doctrine of Executive Necessity in the Law of Contract" (1970) 44 *ALJ* 154.

the State, but not to commercial contracts.[37] Or the doctrine might be confined to acts done for a general executive purpose and not applied to acts done for the purpose of achieving a particular result under a particular contract.[38] In the most recent High Court decision, *Ansett Transport Industries (Operations) Pty Ltd* v. *Commonwealth*,[39] Mason J. (as he then was) suggested that where the administrator who has the discretionary power is also the party to the contract, the contract will indeed be invalid.[40] Where, however, the party to the contract and the repository of the power are different persons, a statutory duty (in a statute approving the contract) will arise which can be enforced by injunction. If the statute preserves a discretionary power which could be exercised inconsistently with the contractual undertaking, then only an action for damages should be available.

Justice Mason hoped that at the level of remedies there could be achieved a "reasonable compromise" of the competing principles of preservation of public confidence in government contracts and preservation of the freedom of government from fettering of its discretion to act in the public interest.[41] But *Ansett* provides no clear guidance as to how the doctrine might be limited in cases where the party having the discretion is also a party to the contract or where, despite the parties being different there is no statute approving the contract. The valid criticism has also been made that there is little difference between the case where the repository of the power is the same as the government party to the contract and cases where those decision-makers are formally different.[42] This is because the rule prohibiting administrators from acting under dictation tends to be modified in the case of powers vested in senior public servants, who in the view of some High Court judges have little option but to apply government policy.[43] Where government policy has been translated into contractual obligations it is even more likely that a statutory decision-maker will give conclusive weight to the policy, or in fact to the existing legal obligations of the government, unless aware that present government policy now indicates that the contract should be broken.

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37 A distinction made by Rowlatt J. in The *Amphitrite* note 34 *supra*, 503. In *Ansett* note 34 *supra*, 113 Aickin J. observed that such a distinction "is not one which leaps to the eye."
38 *Commissioners of Crown Lands* v. *Page* note 34 *supra*, 292-4 *per* Devlin L.J.
39 Note 34 *supra*.
40 *Id.*, 76.
41 *Id.*, 74-5.
42 Aronson and Whitmore, note 11 *supra*, 199.
43 *R* v. *Anderson; Ex parte IPEC-Air Pty Ltd* (1965) 113 CLR 177 *per* Windeyer J.; *Ansett* note 34 *supra*, *per* Barwick C.J. and Murphy J. *Cf. IPEC-Air per Kitto* and Menzies JJ. and *Ansett per* Mason J.

In *Ansett* Mason J. did not regard the fact that several authorities[44] arose out of the exigencies of war and concerned the requisition of property, as a factor warranting a wholesale dismissal of the doctrine of executive necessity. Despite the care with which Mason J. preserved a field of operation for the doctrine, supreme court judges have since displayed a tendency to confine the doctrine to discretionary decisions made under the exigencies of war. In *Northern Territory of Australia* v. *Skywest Pty Ltd*[45] the Northern Territory Government sought to award a contract for aerial medical services to the existing contract holder, although Skywest had accepted an offer made by an authorised officer of the Tender Board following a public tendering process. The Supreme Court of the Northern Territory held that a valid contract had been formed with Skywest. Noting that the Government had not argued that it was relying upon the doctrine of executive necessity, Mr Justice Kearney suggested that the doctrine is confined to cases of "overriding public interest, such as the exigencies of war."[46] Kearney J. was firmly of the view that government ought to set an example by not being a contract-breaker:

> In general, and for good reasons, a government rightly regards itself as bound to carry out a contract it has lawfully and properly entered into, when the other party is not in breach. These reasons are rooted in common sense and good government – in general, in a proper concern to protect the public revenue against unnecessary and unwarranted loss, to preserve the government's reputation for integrity and to retain its credibility, particularly with the business community ... But a government is not only a party to a contract; through its control of parliament it is a law-maker. In that capacity it has an interest in ensuring that the people respect and observe the law, and to do so it must display by its actions some minimum respect for its own rules. Further it is in the public interest that when a government contracts with an ordinary person, it deals fairly with that person, and is seen to do so. Accordingly it would be a serious matter for the rule of law if a government were perceived as refusing without proper cause to perform a contract for services to the public entered into in accordance with all the legal safeguards designed to protect the public interest.[47]

D. SHIELD OF THE CROWN

A statutory authority may be able to enjoy the protection of the special position of the Crown, or 'shield of the Crown' if it operates only as an agent or servant of the Crown, rather than as an entity exercising an

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44 *The Amphitrite* note 34 *supra* and *Commissioners of Crown Lands* v. *Page* note 34 *supra.*

45 (1987) 48 NTR 20.

46 *Id.*, 47.

47 *Id.*, 46. See also the tort case *Verwayen* v. *Commonwealth,* unreported, Full Court of the Supreme Court of Victoria, 17 November 1988 where Kaye and Marks JJ. held that the doctrine of executive necessity now has a very narrow scope, being confined to situations of war time or other national emergency. The doctrine was not available to place the Crown in a special position with regard to liability in an action for personal damages arising out of the collision of H.M.A.S. Voyager and H.M.A.S. Melbourne resulting from sheer carelessness in manoeuvres which were neither participation in war nor inherently dangerous.

independent discretion.[48] The test applied is one of government control over the body.[49] Thus, in *Burgundy Royale Investments Pty Ltd* v. *Westpac Banking Corp.*[50] the Northern Territory Loans Management Corporation was not intended to have any significant degree of autonomy from the Northern Territory Government, and was therefore not bound by the Trade Practices Act 1974 (Cth) which did not bind the Crown in right of the Northern Territory. On the other hand, in *Bourke* v. *State Bank of New South Wales*[51] Wilcox J. held that the State Bank of New South Wales was in performing its functions substantially independent from Ministerial control and therefore was not entitled to the statutory immunity of the Crown in right of New South Wales in respect of the Trade Practices Act 1974 (Cth).[52]

E. THE IMPACT OF SECTION 64 OF THE JUDICIARY ACT

Whether government is entitled to a special position in any of the ways described has to be questioned in the light of section 64 of the Judiciary Act 1903 (Cth) (hereinafter the Act) and similar state provisions.[53] Section 64 provides that in any suit to which the Commonwealth or a state is a party, the rights of the parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject. Section 64 requires that the rights of the parties be ascertained, as nearly as possible, by the same rules of law, substantive and procedural, statutory and otherwise, as would apply if the Commonwealth were a subject instead of being the Crown.[54] Section 64 has also been held to be ambulatory in character and thus capable of operating upon legislative changes made after section 64 was enacted.[55]

Following the High Court decision in *Commonwealth* v. *Evans Deakin Industries Ltd*[56] the scope of operation of section 64 of the Act remained unclear. The High Court held that in entering into a building contract the Commonwealth was subject to the Subcontractors' Charges Act 1974 (Qld) (entitling an unpaid sub-contractor to charge on moneys payable by the Commonwealth to the contractor). The Queensland statute was

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48 *Bradken Consolidated Ltd* v. *Broken Hill Pty Co. Ltd* note 17 *supra;* see also *Crouch* v. *Commissioner for Railways (Qld)* (1985) 62 ALR 1, 5.

49 *State Bank of New South Wales* v. *Savings Bank of Australia* (1986) 161 CLR 639, 648.

50 Note 17 *supra.*

51 (1988) 85 ALR 61.

52 *Cf. Rural Bank of New South Wales* v. *Bland Shire Council* (1947) 74 CLR 408; *Rural Bank of New South Wales* v. *Hayes* (1951) 84 CLR 140.

53 See, for example, Claims Against the Government & Crown Suits Act 1912 (N.S.W.) s. 4.

54 *Maguire* v. *Simpson* (1977) 139 CLR 362; *Asiatic Steam Navigation Co. Ltd* v. *Commonwealth* (1956) 96 CLR 397, 427; *Commonwealth* v. *Evans Deakin Industries Ltd* (1986) 161 CLR 254, 264 (hereinafter *Evans Deakin*).

55 *Maguire* v. *Simpson* note 54 *supra.*

56 Note 54 *supra;* see also *Strods* v. *Commonwealth* [1982] 2 NSWLR 182.

expressed to bind the Crown but it was clear that the statute did not of its own force bind the Commonwealth. The majority of the High Court suggested that section 64 applies without qualification to government contracts,

> [o]f a kind commonly entered into by ordinary members of the public ... (where application of the statute) would not be incompatible with the position of the Commonwealth or detrimental to the public welfare.[57]

However, in *Evans Deakin* the High Court clearly reserved the possibility that when performing "a function peculiar to government" the Crown could be in a special position.[58] A similar distinction was made by Dixon C.J. in *South Australia* v. *Commonwealth,* in the course of holding that section 64 did not alter the substantive principles relating to the special position of inter-governmental political agreements:

> But it is one thing to find legislative authority for applying the law as between subject and subject to a cause concerning the rights and obligations of governments; it is another thing to say how and with what effect the pinciples of that law do apply in substance. For the subject matters of private law and public law are necessarily different. What is in question here is an agreement assuming to affect matters which are governmental and by nature are subject to considerations to which private law is not directed. That is particularly true of financial provisions, the fulfilment of which in constitutional theory at least must be subject to parliamentary control.[59]

When is a function peculiar to government? The answer to this question might provide the essence of the public/private distinction which forms the basis for the special position of government in the law of contract. In litigation concerning ordinary contracts for the supply of goods and services, section 64 is certainly applicable and hence the ordinary law applies. Government does not enjoy a special position. Although the scope of governmental functions is uncertain, the importance of section 64 is in any event declining. In a case which raises issues involving both section 109 of the Commonwealth Constitution and section 64, it was said that the constitutional provision, as the basic law, must receive prior consideration.[60] Section 64 is to be construed as intended to extend a litigant's rights in a suit in particular circumstances only if, and to the extent that, there is no directly applicable and inconsistent Commonwealth law already regulating those circumstances.[61] Thus, in *Deputy Commissioner of Taxation (Cth)* v. *Moorebank Pty Ltd* and *Deputy Commissioner of Taxation (Cth)* v. *D.T.R. Securities Pty Ltd*[62] the High Court held that a general scheme in Commonwealth legislation dealing with liability for and recovery of income tax left no room for the application of state statutes of limitation by virtue of section 64. It was unnecssary for the High Court to consider the extent to which section 64 is

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57 *Ibid.* For a detailed analysis of the decision see Rose note 13 *supra.*
58 Note 54 *supra,* 265.
59 Note 25 *supra,* 140.
60 *Dao* v. *Australian Postal Commission* (1987) 162 CLR 317.
61 *Id.,* 331-2.
62 (1987-88) 165 CLR 55, 56.

ineffective to apply state laws in circumstances where their application would interfere with the discharge of an essentially governmental function such as the collection of taxes.[63]

The Commonwealth & Commonwealth Instrumentalities (Application of Laws) Bill 1989 (Cth) seeks to address the long standing uncertainties of the operation of section 64. It is proposed that section 64 be amended so that it ceases to operate in relation to rights created by a written law where the Commonwealth or a state is not subject to that law either under the Bill when enacted or otherwise. The Bill is intended to determine exhaustively the liability of the Commonwealth and its servants and agents, and Commonwealth corporations, under Commonwealth, state and territory laws.[64]

III. ADMINISTRATIVE LAW

In contrast to the uncertainty surrounding the special position of the Crown in the law of contract, a robust rejection of traditional protections has characterised the general development of administrative law since the 1970's. With the statutory reforms of the 'new administrative law', many federal administrators became subject to investigation by the Ombudsman,[65] to new duties to provide statements of reasons for their decisions,[66] to review on the merits by the Administrative Appeals Tribunal,[67] to a simplified and therefore more readily utilised procedure for gaining judicial review,[68] and by 1982, to duties to disclose policies and

63 In the courts below, Lee J. at first instance and Samuels J.A. (in dissent in the New South Wales Court of Appeal) held that the collection of money by means of income taxation, and the supervision and enforcement of the collection provisions, are essential aspects of the business of government, functions not exercisable by members of the public. Assimilation of the position of government to that of an ordinary litigant was not possible in such a case. However, the majority view of McHugh J.A. (with whom Glass J.A. agreed on this point) was that section 64 removes the special position of the Crown, even where the performance of the functions under challenge could not be exercised by members of the public: *DTR Securities Pty Ltd* v. *Deputy Commissioner of Taxation (Cth)* (1987) 8 NSWLR 204. See also *Deputy Commissioner of Taxation* v. *Jonrich Pty Ltd* (1986) 70 ALR 357 where the minority view of Derrington J. was akin to that of Lee J. and Samuels J.A. in *DTR Securities,* that there is an identifiable class of essentially governmental activities which cannot be equated with interaction between subjects, and which are excluded from the operation of section 64. *Cf. Verwayen* v. *Commonwealth* note 47 *supra.*

64 At the time of writing the Bill was before the Senate and the Senate Standing Committee on Legal and Constitutional Affairs was considering a reference on the shield of the Crown.

65 Ombudsman Act 1976 (Cth).

66 Administrative Decisions (Judicial Review) Act 1977 (Cth) s.13; Administrative Appeals Tribunal Act 1975 (Cth) ss.28, 37, 38.

67 Administrative Appeals Tribunal Act 1975 (Cth) ss.25, 43(1), together with other enactments conferring jurisdiction.

68 Administrative Decisions (Judicial Review) Act 1977 (Cth).

give access to documents under the Freedom of Information Act 1982 (Cth). In other Australian jurisdictions the office of ombudsman has been introduced but other reforms are following more slowly.[69] No doubt the reforms of the new administrative law provided a fertile backdrop to judicial activism in developing the common law test of the justiciable decision, discussed below.

Although administrative law issues may arise as collateral matters in actions for breach of contract, the present purpose is to examine the scope for direct review of governmental decisions concerning contracts. The accountability of government in its commercial activities may be sought in review by ombudsmen, auditors, parliamentary committees and other tribunals, by the use of freedom of information legislation and privacy legislation and by judicial review. This paper cannot canvass all these avenues of review, but will deal briefly with review by ombudsmen, freedom of information legislation and then examine in more detail the scope for judicial review.[70]

A. OMBUDSMEN

Ombudsmen investigate and make recommendations to government concerning "actions relating to matters of administration." This is a form of review on the merits on the basis of criteria of administrative error which go well beyond those applied in judicial review.[71] Ombudsmen generally have no power to investigate actions of "incorporated companies or associations" but do have power to investigate "a body corporate, or an unincorporated body, established for a public purpose by, or in accordance with the provisions of an enactment."[72] Thus, private firms may not be investigated but statutory authorities, even if incorporated, may be investigated. The Commonwealth Ombudsman may, for example, investigate actions of the Australian Broadcasting Corporation and the Australian Postal Commission. Certain statutory authorities declared by regulation not to be prescribed authorities subject to investigation, include the Australian National Airlines Commission, the Commonwealth Savings and Trading Banks and the Australian Shipping Commission.[73] However, some statutory authorities are declared to be prescribed authorities, including the Australian Bicentennial Authority and the Commonwealth Accommodation and Catering Services Ltd.[74]

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69 With regard to the other reforms, Victoria has taken the lead, with the enactment of the Administrative Law Act 1978 (Vic.), the Administrative Appeals Tribunal Act 1984 (Vic.) and the Freedom of Information Act 1982 (Vic.). See also the Freedom of Information Act 1989 (N.S.W.).

70 Nor are questions of constitutional validity considered in this article.

71 See Ombudsman Act 1976 (Cth) s.15; Ombudsman Act 1974 (N.S.W) s. 26.

72 See, for example, Ombudsman Act 1976 (Cth) s.3(1) definition of "prescribed authority".

73 Ombudsman Regulation reg.4, Sch.1.

74 *Id.*, reg. 5, Sch.2.

Whether the jurisdictional definition "action relating to matters of administration" encompasses the commercial activities of government has been the subject of controversy. In *British Columbia Development Corp.* v. *Friedman*[75] the Supreme Court of Canada held that the Ombudsman of British Columbia had jurisdiction to investigate commercial decisions of a statutory corporation regarding the sale or lease of land within a redevelopment area. As Dickson J. pointed out, a transaction can be characterised as a matter of administration even though it carries a business flavour, there being nothing in the word "administration" to exclude the proprietary or business decisions of governmental organisations.[76]

In 1984 the Commonwealth Ombudsman set up a single special investigation team for investigating complaints arising from the Commonwealth government's commercial dealings.[77] In the early 1980's the Ombudsman took the view that if an agency caused detriment by defective administrative action, say in the tendering process, whether or not the action was taken in good faith, then there was prima facie a case for recommending that an ex gratia payment of compensation be made.[78] The amount of compensation payable was calculated on the basis of probable loss of contract damages allowing for mitigation and reductions on account of the failure of the tenderer to clarify matters in the tender.[79] By 1987 the incumbent Ombudsman took the view that where there is a clear statutory intention that an agency should exercise independent commercial judgment he would in his discretion not investigate its pricing decisions, except in a clear case of improper or unreasonable pricing policy. Even if standard charges for Telecom services appeared unfair in particular cases, it was not appropriate for particular commercial judgments to be taken in isolation where the statutory authority had the "responsibility for balancing the books overall and [is] accountable for its judgments".[80]

In some cases agencies have responded to an ombudsman's recommendations by making tendering procedure fairer. As a result of complaints regardng tendering procedures of local councils, the New

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75 (1984) 14 DLR (4th) 129.

76 *Id.*, 147. Note that this is implicitly assumed in section 13 (4) of the Ombudsman Act 1974 (N.S.W.), which permits the Ombudsman to have regard to the trading or commercial nature of a function in exercising his discretion to decline to investigate.

77 Commonwealth Ombudsman and Defence Force Ombudsman, *Annual Reports 1983-84* (1985), Ch.6.

78 *Id.*, 86-7.

79 A.C.Castles, "New Frontiers ... Recommending Recompense: Ex Gratia and Compensation Based on Fairness" in "The Ombudsman Through the Looking Glass 1977-1985" (1985) 12 *Canb Bull Pub Adm* 260.

80 Commonwealth Ombudsman and Defence Force Ombudsman, *Annual Reports 1986-87* (1987), 33. For further examples of investigation of Telecom contract decisions see Commonwealth Ombudsman and Defence Force Ombudsman, *Annual Reports 1987-88* (1988), 43-5. Some of these decisions now fall under the scrutiny of AUSTEL.

South Wales Ombudsman set up a working party which drafted a new ordinance covering tendering procedures and the letting of contracts, together with guidelines for the assistance of councils.[81] Another illustration is provided by the Industrial Sugar Mills case where a special report to Parliament by the Commonwealth Ombudsman and mediation by the Senate Standing Committee on Constitutional and Legal Affairs failed to result in an ex gratia payment by the government.[82]

The present position of the Commonwealth Ombudsman presents a compromise between the demands of new managerialism and concepts of accountability found in administrative law, but with greater weight being given to the latter. Complainant tenderers are warned that investigation will only result in future correction of improper procedures. Recommendations will no longer be made for ex gratia payments of compensation for loss of contract in cases of unfair tendering procedures, but only for the costs incurred in lodging the unsuccessful tender.[83] The Ombudsman rejects the argument, (which is based on the principle of the level playing field) that because private firms are not liable to compensate unsuccessful tenderers if they mismanage consideration of the tenders, government should be in the same position:

> the Commonwealth should not be equated with a private organisation. It should be a model organisation in its commercial dealings. If this standard is not maintained, it could lead to corruption in the system. The obligation to pay compensation in those cases where the appropriate standard of performance is not maintained serves to bring its obligations to the attention of the agency concerned. ... [T]he Commonwealth is in a special position in this respect and should honour the expectations that are created by its stated tender procedures.[84]

B. FREEDOM OF INFORMATION

Freedom of information legislation at the federal level, in Victoria and New South Wales applies to government departments and to authorities, the general definition being similar to that of the ombudsman legislation, excluding private firms but including statutory corporations.[85] However, the express exclusions are to be noted. Amongst the agencies exempt from the Federal Act are the Australian National Railways Commission, the Australian Shipping Commission, the Commonwealth Bank, Canberra

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81 Ombudsman of New South Wales, *Thirteenth Annual Report* (1988), 101.

82 *Annual Reports* 1986-87, 49-50.

83 Commonwealth Ombudsman and Defence Force Ombudsman, *Annual Reports 1987-88* (1988), 21-3.

84 *Id.*, 22-3. See also Ombudsman of New South Wales, note 8 *supra.*

85 See Freedom of Information Act 1982 (Cth) s.4(1) (hereinafter the *FOI Act*); Freedom of Information Act 1982 (Vic.) (hereinafter the *FOI Act (Vic.)*) s.5(1); Freedom of Information Act 1989 (N.S.W.) (hereinafter the *FOI Act (N.S.W.)*) ss.6(1), 7, 8.

Commercial Development Commission and the Snowy Mountains Engineering Corporation.[86] Some government trading enterprises are exempt only in relation to documents in respect of their "competitive commercial activities".[87] These include the Australian Dairy Corporation, the Australian Egg Board, the Australian Meat and Livestock Corporation and the Australian Postal Commission. The Australian Broadcasting Corporation is exempt in relation to its programme material and the Reserve Bank in relation to a broadly described class of documents. Other bodies (established by a Minister or the Governor-General, or incorporated companies or associations over which the Commonwealth is in a position to exercise control) may be declared by regulation to be subject to the Act.[88] Amongst the bodies which have thus been brought under the Federal Act are the Commonwealth Accommodation and Catering Services Ltd and the National Media Liaison Service.[89]

Amongst the agencies entirely exempt from the application of the New South Wales Act are the Government Insurance Office, the State Bank, the Treasury Corporation and the Office of the Public Trustee (in its capacity as executor, administrator or trustee).[90] Government trading enterprises at present subject to the Act as statutory corporations will be removed from its ambit if they become State owned corporations.[91]

Documents relating to the contractual decisions of agencies which are subject to such legislation may in any event be exempt from disclosure under one or more exemption provisions.[92] Of particular relevance to government contracts is the exemption in each Act for documents containing trade secrets, other information having a commercial value that could be destroyed or diminished by disclosure, or information concerning a person in respect of his business or professional affairs, or concerning the business, commercial or financial affairs of an organisation or undertaking which would be adversely affected by disclosure.[93] In the Federal Act the "undertakings" whose documents enjoy this protection include undertakings carried on by, or by an authority of, Commonwealth, state or local government.[94]

Under each Act there is a 'reverse FOI' procedure by which a claim for an exemption by a person other than the agency may be considered by the agency. Thus, an agency in possession of a document containing information concerning the commercial dealings of any person shall not

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86 FOI Act s.7(1), Sch.2 Pt I.
87 *Id.*, s.7(2), Sch.2 Pt II.
88 *Id.*, s.4(1)(b).
89 Freedom of Information (Miscellaneous Provisions) Regulation reg.3 Sch.1.
90 FOI Act (N.S.W.) s.9, Sch.2.
91 See note 8 *supra.*
92 See generally P.Bayne in M.Aronson and N.Franklin, *Review of Administrative Action* (1987) Ch.12.
93 FOI Act s.43(1); FOI Act (Vic.) s.34(1),(2),(4); FOI Act (N.S.W.) s.6(1), Sch.1 para. 7.
94 FOI Act s.43(3).

give access to the document unless reasonably practicable steps have been taken to obtain the views of the person concerned as to whether this exemption is available.[95]

Other exemptions of possible relevance cover documents whose disclosure would constitute a breach of confidence,[96] and those subject to legal professional privilege.[97] Of major importance is section 39 of the Federal Act which provides that if disclosure of a document would have a substantial adverse effect on the financial or property interests of the Commonwealth and disclosure is on balance not in the public interest, the document is exempt. As well, the Federal Act exempts documents whose disclosure would be contrary to the public interest by reason that it would, or could reasonably be expected to have a substantial adverse effect on the ability of the Commowealth to manage the economy of Australia or result in undue disturbance of the ordinary course of business in the community by giving premature knowledge concerning proposed government action.[98] The sorts of documents which may be included in the exception are the regulation of financial institutions, interest rates, proposals for expenditure and borrowings by the Commonwealth, a state or an authority of the Commonwealth or state.[99] The New South Wales provisions mirror sections 39 and 44 of the Federal Act whilst the Victorian provision is worded substantially differently and contains express exemption for instructions issued for the guidance of officers of an agency in the execution of contracts.[100]

C. JUDICIAL REVIEW

Where judicial review is sought the sources of jurisdiction invoked differ from those invoked in actions for breach of contract. The High Court has original jurisdiction to grant prohibition, mandamus and injunctions against "officers of the Commonwealth" under section 75(v) of the Commonwealth Constitution. Since 1983 the Federal Court has had a parallel jurisdiction under section 39B of the Judiciary Act 1903 (Cth). The limitations upon the remedies available and the requirement of an "officer of the Commonwealth" may preclude judicial review of some government contracts in these jurisdictions. Statutory corporations such as the Australian Telecommunications Commission and the Australian Postal Commission are not officers of the Commonwealth.[101] Such limitations may be overcome if the pendent jurisdiction of the High Court

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95 FOI Act s. 27; FOI Act (Vic.) s.34(3); FOI Act (N.S.W.) s. 32.
96 FOI Act s.45, FOI Act (Vic.) s.35; FOI Act (N.S.W.) s.6(1), Sch.1 para.13.
97 FOI Act s.42; FOI Act (Vic.) s.32; FOI Act (N.S.W.) s.6(1) Sch.1 para.10.
98 FOI Act s.44.
99 *Id.*, s.44(2).
100 FOI Act (N.S.W.) s.6(1), Sch.1 paras 15, 14; FOI Act (Vic.) s.36.
101 *Businessworld Computers Pty Ltd* v. *Australian Telecommunications Commission* (1988) 82 ALR 499, 500; *Post Office Agents' Assoc. Ltd* v. *Australia Postal Commission* (1988) 84 ALR 563, 575. Note the new names of these bodies, note 6 *supra.*

or the accrued, associated or cross-vested jurisdiction of the Federal Court, is invoked.[102] In any event most judicial review of federal administrative decisions proceeds within the Federal Court's jurisdiction under the Administrative Decisions (Judicial Review) Act 1977 (Cth) (hereinafter ADJR Act), the scope for review of contract decisions under this Act being considered below. The State and Territory Supreme Courts have inherent supervisory jurisdiction to issue the prerogative remedies against inferior courts and administrators as well as power to grant declarations and injunctions.[103]

1. Common Law Test of Justiciability

One aspect of the question of reviewability is that of justiciability, the issue of which decisions are amenable to judicial review. Justiciability presents an initial hurdle which may preclude extension of the principles of administrative law to government contract decisions, either because of the high-level status of the administrator who enters the contract, or because the power to enter the contract was non-statutory. As a result of two landmark decisions of the High Court it was clear by 1982 that the Queen's representative (whether Governor-General, Governor or the Administrator of the Northern Territory) is in principle amenable to judicial review for improper purpose, or denial of procedural fairness.[104] Not only did the status of the administrator become immaterial for the purposes of review, so too did the source of the administrator's power. It became clear that some prerogative powers of the Crown are justiciable.[105] The tenor of the new mood that immunity doctrines are being eroded is expressed well by Murphy J.:

> [a]ny general immunity of the Crown deriving from doctrines such as 'The King can do no wrong' and 'The King cannot be sued in his own courts' is entirely inappropriate for a modern democractic society.[106]

What are the implications of these developments for review of government contract decisions? Clearly the principle that the status of the administrator does not on its own preclude review is readily extended to

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102 *Phillip Morris Inc.* v. *Adam P.Brown Male Fashions Pty Ltd* (1981) 148 CLR 457; Federal Court of Australia Act 1976 (Cth) s.32; Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth).

103 State jurisdiction to review federal administrative action under section 39(2) of the Judiciary Act 1903 (Cth) is limited by section 9 of the ADJR Act and sections 3(1) and 6 of the Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth). Note the simplified procedure available in the Supreme Court of Victoria under the Administrative Law Act 1978 (Vic.) and in the Australian Capital Territory under the Administrative Decisions (Judicial Review) Ordinance 1989 (A.C.T.).

104 *R.* v. *Toohey (Aboriginal Land Commissioner); Ex parte Northern Land Council* (1981) 151 CLR 170; *FAI Insurances Ltd* v. *Winneke* (1982) 151 CLR 342.

105 *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] AC 374 (hereinafter *GCHQ*); *Minister for Arts, Heritage and the Environment* v. *Peko-Wallsend Ltd* note 32 *supra.*

106 *R.* v. *Toohey (Aboriginal Land Commissioner); Ex parte Northern Land Council* note 104 *supra* 230; see also *id.*, 220 per Mason J.

review of contract decisions made at a high level of the executive.[107] The difficult question is whether contract decisions are non-justiciable either because of the source of the power exercised or because they belong to a category of their own. Although actions for breach of contract or for declarations of the validity of contracts are common in relation to government contracts, there is little authority on the question whether judicial review, applying the principles of administrative law, is available. It will be necessary to examine sources of power, and types of agreements.

A contract may be entered by an administrator in exercise of a statutory power or the personal capacity of the executive branch of government at common law to enter contracts. The common law capacity of the Crown to enter contracts is strictly speaking only found in statute in Australia. The source of the Commonwealth's power is section 61 of the Commonwealth Constitution. The sources of State and Territory power are equivalent provisions in the respective constitutions.[108]

An agreement may set as a condition precedent to its operation a requirement that Parliament approve the agreement. But it does not follow from such a term and the subsequent approval of the agreement in an Act of Parliament that any more extensive or different legal obligation is imposed by the Act upon the government than the terms of the agreement provide.[109] The Act does not convert the terms of the agreement into legal provisions.[110] However, legislative backing does make clear that the government signatory to the contract has the authority of government and secures approval by Parliament of the executive's entry into the agreement.[111]

Inter-governmental contract decisions appear to be non-justiciable because they are in a category of their own. There are dicta in cases concerning actions for breach of contract that because of their 'political' character, contracts between a state government and the Federal Government are not justiciable in actions by the parties to them.[112] Nor

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107 In *Blyth District Hospital Incorp.* v. *South Australian Health Commission* note 25 *supra,* 138 King C.J. said that review is available for denial of procedural fairness "irrespective of whether [the decision] is made in the exercise of a power derived from statute, common law or the prerogative".

108 *New South Wales* v. *Bardolph* (1934) 52 CLR 455. See, for example, Northern Territory (Self-Government) Act 1978 (Cth) s.31 considered in *Northern Territory of Australia* v. *Skywest Pty Ltd* (1987) 48 NTR 20, 39.

109 *Placer Development Ltd* v. *Commonwealth* note 22 supra, 357; *Secretary, Department of Aviation* v. *Ansett Transport Industries Ltd* (1987) 72 ALR 188, 208; *South Australia* v. *Commonwealth* note 25 *supra.*

110 *P.J.Magennis Pty Ltd* v. *Commonwealth* (1949) 80 CLR 382, 410.

111 *Ibid.*

112 *South Australia* v. *Commonwealth* note 25 *supra,* 140-1, 154 *per* Dixon C.J. and Windeyer J.; *Placer Development Ltd* v. *Commonwealth* note 22 *supra,* 367-8 *per* Windeyer J; *Commonwealth Aluminium Corp. Ltd* v. *Attorney-General* [1976] Qd R 231 *per* Dunn J.

can an inter-governmental agreement generate a public duty enforceable by a non-party.[113]

There is little authority on the question whether a private individual who is a party or tendering to become a party to a government contract may invoke the supervisory jurisdiction of the superior courts in relation to decisions under the contract or the tendering process. In *Cord Holdings Ltd* v. *Burke*[114] the Supreme Court of Western Australia appeared to accept but did not clearly address the proposition that a decision to award a contract made in exercise of a statutory power was justiciable.

In *White Industries Ltd* v. *Electricity Commission of New South Wales*[115] the New South Wales Solicitor-General submitted on behalf of the Minister who had directed the Electricity Comission (Elcom) to accept a tender for the supply of coal, that exercise by the Crown of its common law right to contract was not subject to judicial review. Elcom had in fact exercised a broadly expressed statutory power rather than a common law power. Unfortunately Yeldham J. proceeded to find the grounds of review were not made out, leaving the issue of justiciability, whether general or limited to certain grounds of review, unresolved. Further, Yeldham J. rejected shortly the notion that there was a contract with all tenderers additional to the contract formed with the successful tenderer.

However, in *Waverley Transit Pty Ltd* v. *Metropolitan Transit Authority*[116] the Supreme Court of Victoria expressly rejected a submission by the Metropolitan Transit Authority (MTA) that its decision to accept a tender for the operation of a bus route service was not amenable to judicial review on any administrative law grounds. This submission rested on the argument that government ought not to be in the same position as ordinary citizens with regard to its contractual decisions, but should be free, like private citizens, from administrative law. Mr Justice O'Bryan held that because the MTA's approval was a statutory precondition to the grant by the Road Traffic Authority of a commercial passenger vehicle licence under the Transport Act 1983 (Vic.), the case was on all fours with *FAI Insurances Ltd* v. *Winneke*[117] and other cases of denial of procedural fairness in the renewal or revocation of a licence.

The difficulty is that in *FAI Insurances Ltd* and other procedural fairness cases dealing with licences, there was no duality of function. A statutory power to approve or grant licences was exercised but no separate contract for the supply of services was entered into as in the *Waverley* case. Whilst the contract decision was paramount for the MTA, it was under the statutory provisions inextricably linked with the subsequent licence

113 *Blyth District Hospital Incorp.* v. *South Australian Health Commission* note 25 *supra*, 137-8.
114 (1985) 7 ALN 72 (hereinafter *Cord Holdings*).
115 Unreported, Supreme Court of New South Wales, Yeldham J., 20 May 1987.
116 (1988) 16 ALD 253 (hereinafter *Waverley*).
117 (1982) 151 CLR 342 (hereinafter *FAI Insurances Ltd*).

decision to be made by the Road Traffic Authority, the very terms of the contract, such as duration, determining the conditions of the licence.

The concentration in *Cord Holdings* upon the test of implication of procedural fairness (rather than the initial issue of justiciability), and the linking in the *Waverley* case of the contract with the licence, indicate that these are not firm authorities for the justiciability at common law of government contract decisions.[118] However, there is no authority contrary to the view that government contracts which are not inter-governmental are justiciable. The leading authorities liberalising the test of justiciability indicate that it should make no difference that the power exercised is common law rather than statutory.

2. Administrative Decisions (Judicial Review) Act 1977 (Cth)

Since other sources of Federal Court jurisdiction may also be invoked,[119] issues of jurisdiction under the Administrative Decisions (Judicial Review) Act 1977 (Cth) (hereinafter ADJR Act) should arise infrequently.[120] However, an entitlement to a statement of reasons under section 13 of the ADJR Act depends upon establishing that the decision is reviewable under that Act. A section 13 statement is a valuable tool for identifying errors of law before making a decision to initiate legal proceedings. In respect of some classes of decision which are reviewable under the ADJR Act there is no entitlement to a section 13 statement of reasons.[121] Of particular relevance to review of contract decisions is the exclusion in Schedule 2 of the Act from such an entitlement of decisions which may be gathered into three broad groups. The first group covers high level funding and financial decisions of government.[122] The second group includes decisions in respect of the commercial activities of specified statutory authorites.[123] Included are various produce marketing authorities, transport authorities and the Commonwealth Banks. The third group covers decisions of a personnel nature in the public sector.[124]

Aside from the express exclusion of decisions of the Governor-General and the classes of decision listed in Schedule 1 to the Act, under section 3(1) of the ADJR Act decisions which are "of an administrative character made, proposed to be made, or required to be made ... under an

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118 For discussion of the English position see H.Woolf, "Public Law - Private Law: Why the Divide? A Personal View" (1986) *PL* 220, 225; D.Oliver, "Is the *Ultra Vires* Rule the Basis of Judicial Review?" (1988) *PL* 543, 552-3.

119 See above.

120 See the observations made in *Post Office Agents Assoc. Ltd* v. *Australian Postal Commission* note 101 *supra,* 565; *Cash* v. *Australian Postal Commission* (unreported, Federal Court of Australia, Spender J., 10 August 1989).

121 See ADJR Act ss.13(11), 13A, 14, Sch.2.

122 *Id.,* Sch.2 paras. (g),(h),(i),(l).

123 *Id.,* Sch.2 paras. (k),(p).

124 *Id.,* Sch.2 paras. (a),(b),(o),(q),(r),(s),(t),(w), (y).

enactment" are reviewable by the Federal Court under the Act. The first two elements of the general definition of jurisdiction under the ADJR Act present few difficulties in actions challenging contract decisions. The expression "decision" has been construed liberally, and its amplification in section 3(5), which links with section 6 of the Act, permits conduct engaged in for the purpose of making a decision to be challenged.[125] Decisions to enter contracts and decisions made under contracts can hardly be argued to be other than of an administrative character, an expression which is also construed by the Federal Court as one of wide import.[126] The third requirement in section 3(1) of the ADJR Act is that the decision be made "under an enactment", amplified by the definition in section 3(1) of the term "enactment". The difficult cases for present purposes are those where the decision is made in exercise of the common law power to enter contracts, and those where the decision is arguably made under a contract rather than under the relevant enactment.

An exercise of the government's personal capacity to enter contracts does not qualify as a decision made under an enactment.[127] An illustration is found in *Hawker Pacific Pty Ltd* v. *Freeland*[128] where a disappointed tenderer sought review of a decision to award a contract to supply aircraft and of the issue of the purchase order, contending that the tender accepted did not comply with the specifications in the invitation to register interests. Fox J. held that the decision to award the contract and the purchase order were made in exercise of "an inherent prerogative or governmental power" and were not reviewable under the ADJR Act. The Finance Regulations, made under section 71 of the Audit Act 1901 (Cth), regulated the steps leading up to the award of the contract, but were not the source of the power to contract.

When the common law power to enter contracts is abrogated by statute, review is available under the ADJR Act. *Hawker Pacific* is usefully compared with *Australian Capital Territory Health Authority* v. *Berkeley Cleaning Group Pty Ltd*[129] where an unsuccessful tenderer established that

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125 See *Donnelly* v. *Australian Telecommunications Commission* (1984) 6 ALD 134; *A.C.T. Health Authority* v. *Berkeley Cleaning Group Pty Ltd* (1985) 7 ALD 752; *Century Metals & Mining N.L.* v. *Yeomans* (1988) 85 ALR 29.

126 *A.C.T. Health Authority* v. *Berkeley Cleaning Group Pty Ltd id.*, 754; see above discussion of the term "administrative" in the definition of the jurisdiction of an ombudsman accompanying note 76.

127 Decisions made under section 61 of the Commonwealth Constitution are not made under an enactment. See *Dixon* v. *Attorney-General* (1987) 75 ALR 300. Other common law powers relating to proprietary rights of the Commonwealth and the broad general administrative power of the Commonwealth to make arrangements for the proper carrying out of its functions are similarly unreviewable under the ADJR Act. See *Clamback* v. *Coombes* (1986) 78 ALR 523; *N. McDonald Pty Ltd* v. *Hamence* (1984) 5 ALN 568; *Taranto (1980) Pty Ltd* v. *Madigan* (1988) 15 ALD 1, 5; *Merman Pty Ltd* v. *Comptroller-General of Customs* (1988) 16 ALD 88.

128 (1983) 52 ALR 185 (hereinafter *Hawker Pacific*); see also *ABE Copiers Pty Ltd* v. *Secretary of Department of Administrative Services* (1985) 8 ALN 141.

129 Note 126, *supra.*

an exercise of statutory power to award a contract to provide cleaning services at Woden Valley Hospital was reviewable under the ADJR Act. The generality of the power "to enter contracts" did not preclude a conclusion that the decision was made under an enactment.[130]

A startling illustration of the scope for review of decisions and conduct involved in the tendering process and indeed in the disposition of Commonwealth property, is found in *Century Metals & Mining N.L.* v. *Yeomans.*[131] When the Phosphate Mining Corporation of Christmas Island failed, a liquidator was appointed by the responsible Minister to wind up the Corporation, under the provisions of the Phosphate Mining Corporation of Christmas Island (Winding Up) Ordinance 1987 (Cth). An unsuccessful tenderer sought review of decisions and prior conduct of the liquidator and of the Minister. French J. rejected the submission that the source of power to make the ultimate decision was the common law executive power over Commonwealth property. Disposal of Crown land is regulated by the Lands Acquisition Act 1955 (Cth), and in addition in this case by the Christmas Island Act 1958 (Cth), the Administration Ordinance 1968 (Cth) and the Lands Ordinance 1987 (Cth) which abrogated the common law power. The liberal definition of "decision" and conduct leading up to a decision permitted review under the ADJR Act of most of the steps taken in the tendering process.[132]

Once a contract has been formed questions still arise as to whether a decision is made under the contract or under a related enactment, for the purposes of determining justiciability under the ADJR Act. A decision may be made both under a contract and under an enactment for the purposes of the ADJR Act.[133] The difficult cases arise in the context of employment by statutory authorities. Many public sector disciplinary, promotion, redeployment and dismissal decisions made in exercise of statutory powers of officers or appeal bodies are reviewable.[134] However, ADJR Act review is not available where, as for example in *The Australian National University* v. *Burns,*[135] a dismissal decision is made under a

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130 *Id.*, 755.

132 For an illustration of the abrogation by statute of another common law power, otherwise non-justiciable, see *Newby* v. *Moodie* (1988) 83 ALR 523.

133 *Secretary, Department of Aviation* v. *Ansett Transport Industries Ltd* (1986) 70 ALR 743; affirmed (1987) 72 ALR 188; *The Australian National University* v. *Burns* (1982) 43 ALR 25, 31.

134 See, for example, *Colpitts* v. *Australian Telecommunications Commission* (1986) 70 ALR 554; *Bishop* v. *Bryan* (1988) 15 ALD 754.

135 Note 133 *supra.* See also *Australian Film Commission* v. *Mabey* (1985) 59 ALR 25. Note that such a decision may be made under an "instrument" within the meaning of the definition of "enactment" in section 3(1) of the ADJR Act and hence be reviewable: *The Australian National University* v. *Burns* note 133 *supra,* 36, 40; *Chittick* v. *Ackland* (1984) 53 ALR 143; *Secretary, Department of Aviation* v. *Ansett Transport Industries Ltd* (1986) 70 ALR 743, 752; affirmed (1987) 72 ALR 188; *Merman Pty Ltd* v. *Comptroller-General of Customs* note 127 *supra,* 93; *Clamback* v. *Coombes* (1986) 78 ALR 523.

contract which sets out rights and duties regarding dismissal, rather than in exercise of a broad statutory power regarding appointments. A statutory power need not necessarily be stated in precise rather than general terms in order for the decision to be made under the statute.[136] The question is one of degree because the ADJR Act looks to the immediate or proximate source of power. In *Post Office Agents Assoc. Ltd* v. *Australian Postal Commission*[137] the ultimate source of the Australian Postal Commission's power to make arrangements with a state government for the doing of acts in conjunction with the operation of postal services was a provision in the Federal enactment. However, Davies J. held that the proximate source of the Commission's power to alter current arrangements for the sale by post office agents of New South Wales government duty stamps was the existing contractual arrangement into which the Commission had indeed entered in exercise of that statutory power. The decision was not reviewable under the ADJR Act.[138]

3. Statutory Requirements

In connection with the entry into contracts and the exercise of contractual rights a statutory body can be in a different position from a private citizen.[139] The statute may expressly require certain considerations to be taken into account in making such decisions, or require that others be excluded from consideration. Excess of substantive power in entering a contract generally raises questions of the authority of the relevant officer. In an unusual repudiation of general principles of ultra vires, in favour of the view that government should honour its contractual obligations, in *Altmann* v. *City of Adelaide*[140] Millhouse J. held that a council could not repudiate a contract, otherwise valid, by arguing that it had no power to enter the contract under its by-laws. A 10 year licence to operate cruise launches on the River Torrens was therefore valid although the by-laws provided only for annual licences:

> Not only would it be an outrage, it would severely damage the ability of any local government body to make contracts - other parties simply would not deal with councils if contracts could be repudiated like that.[141]

More often the argument is that a decision is ultra vires for failure to comply with statutory procedural requirements. These may be found either in an empowering Act or in general provisions applying to all exercises of the common law executive power to enter contracts, such as the Finance Regulations made under the Audit Act 1901 (Cth). Does a

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136 *Duncan* v. *Defence Force Retirement & Death Benefits Authority* (1980) 30 ALR 165; *Molomby* v. *Whitehead* (1985) 63 ALR 282. *Cf. Sellars* v. *Woods* (1982) 5 ALN 7.
137 Note 101 *supra.*
138 See also *Cash* v. *Australian Postal Commission* note 120 *supra.*
139 See *Webster* v. *Auckland Harbour Board* [1987] 2 NZLR 129, 131 *per* Cooke P.
140 (1986) 43 SASR 353.
141 *Id.*, 366.

failure to comply with such procedures result in the invalidity of a decision to enter a contract? The legal effect of non-compliance with a statutory procedure depends upon whether, as a matter of the proper contruction of the legislation, parliament intended that non-compliance would result in invalidity.[142] If so, the procedure is described as mandatory rather than directory. The difficulty in the case of the Finance Regulations is that there is no specific legislative context in which the court may consider Parliament's intention with regard to contracts dealing with a particular subject matter.

Compliance with statutory procedures may give action taken under a contract a significance which government later seeks to deny. In *Commonwealth* v. *Crothall Hospital Services (Aust) Ltd*[143] the acceptance of invoices for the weekly costs of cleaning services, in compliance with procedural requirements under section 34 of the Audit Act 1901 (Cth), constituted an acceptance of variations to those weekly costs, variations being provided for in the terms of the contract.

Courts have invariably held statutory or administrative procedures for tendering or otherwise entering government contracts to be directory. In *Australian Broadcasting Corporation* v. *Redmore Pty Ltd*[144] a majority of the High Court (Mason C.J., Deane and Gaudron JJ.) held that a statutory precondition of obtaining the approval of the Minister before entering into a contract for an amount exceeding $500,000 was directory. It was for the Australian Broadcasting Corporation's Board to enforce the condition and failure to observe it could constitute misconduct for the purpose of disciplinary proceedings or a report by the Auditor-General to the responsible Minister. No doubt it was significant to the majority that the ABC was itself seeking to rely upon the non-compliance in order to avoid its contractual obligations under a lease. The minority (Brennan and Dawson JJ.), on the other hand, held that the statutory precondition must be given effect, rendering the contract invalid. On this view the statutory precondition served the purpose of protection of public funds in a more effective manner than administrative procedures such as report by the Auditor-General could.

In *Northern Territory of Australia* v. *Skywest Airlines Pty Ltd*[145] a Tender Board had made an independent decision to award a contact to supply aerial medical services acting under directions issued under the Financial Administration and Audit Act 1978 (N.T.) and Treasury Regulations. When the Northern Territory government sought to break the contract, the Supreme Court of the Northern Territory rejected its reliance upon the

142 *Hunter Resources Ltd* v. *Melville* (1988) 62 ALJR 88.
143 (1981) 36 ALR 567.
144 (1989) 84 ALR 199.
145 Note 108 *supra.*

provisions in the Contracts Act 1978 providing for government contracts to be made by a Minister or his delegate. This procedure was purely facultative or permissive.[146]

4. Abuse of Power

Judicial consideration has been given to abuse of power in relation to government contract decision-making most frequently on the basis of failure to take into account relevant considerations or taking into account irrelevant considerations.[147]

In *White Industries Ltd* v. *Electricity Commission of New South Wales*[148] the unsuccessful tenderer submitted that Elcom had failed to act in accordance with "sound business principles" in awarding the contract to another company whose tender was for a higher price. Without deciding whether there was a legal duty to do so, Yeldham J. held that Elcom had acted in a business-like manner in taking into account less quantifiable factors extraneous to the tender, such as the possible technological problems associated with the plaintiff's mining method and the risk and consequences of industrial disturbance if a particular tender were accepted. Moreoever, securing or creating jobs was a relevant consideration.

In *Century Metals & Mining N.L.* v. *Yeomans*[149] it was argued that a liquidator exercising a statutory power to wind up the Phosphate Mining Corporation of Christmas Island, took into account irrelevant considerations in having regard in a broad way to the social and economic impact of the proposals for recommencement of mining on the Christmas Island community. Mr Justice French held that the liquidator had acted properly in giving primacy to the return on the assets. The social and

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146 *Id.*, 41. See also *Hawker Pacific Pty Ltd* v. *Freeland* (1983) 52 ALR 185, 191 where Fox J., although not having to decide the issue finally, considered that a direction made under regulation 127A(I) of the Finance Regulations relating to certificates of exemption (from the requirement publicly to invite tenders) issued under regulation 52AA(4), created a directory procedure. The direction dealt with internal administrative procedures and non-compliance was not intended to result in invalidity of an award of a contract. Further, in *Jim Harris Ltd* v. *Minister of Energy* [1980] 2 NZLR 294, Casey J. held that "Stores Board Instructions" emanating from the Treasury were departmental instructions and guidelines which the Minister was not bound to take into account in accepting a tender. A similar approach was taken in *Century Metals & Mining N.L.* v. *Yeomans* (unreported, Federal Court, French J., 16 March 1989).

147 For two cases where tenderers failed to establish unreasonableness on the basis of *Assoc. of Provincial Picture Houses Ltd* v. *Wednesbury Corp.* [1948] 1 KB 223, see *Jim Harris Ltd* v. *Minister of Health* [1980] 2 NZLR 294 (failure to gain renewal of a contract held for 23 years) and *Webster* v. *Auckland Harbour Board* note 139 *supra* (dramatic increase in fee for foreshore licence). On acting under dictation see note 43 *supra*, and *Century Metals & Mining N.L.* v. *Yeomans*, note 146 *supra*, where, although the ground of review was not established, French J. criticised the Minister's use of a statutory liquidator to create a facade of independent decision-making.

148 Note 115 *supra*.

149 Note 146 *supra*.

economic impact of the proposals were not irrelevant considerations but were not relevant considerations which the liquidator was *bound* to take into account.

It will be more difficult to establish the relevant or irrelevant considerations type of abuse of power where the decision-maker is a Minister.[150] Indeed in *Century Metals* the Minister was entitled to exclude from consideration the social and economic impact of the contending proposals (such as unemployment of Island residents) and address those issues in other ways.

5. Procedural Fairness: Hearing

The case law relating to denial of procedural fairness in government contract decisions reflects the rapid expansion of this ground of review since 1985. In *Cord Holdings Ltd* v. *Burke,*[151] Smith J. held that procedural fairness was not implied in relation to the exercise of a statutory power of a Minister to negotiate and enter into an agreement with a public company to construct and establish a casino. An unsuccessful tenderer claimed that it had a legitimate expectation of a hearing by a cabinet sub-committee before the final decision was made. Mr Justice Smith held that the unstructured nature of the statutory discretion to enter contracts indicated that procedural fairness was not implied. This reasoning has support in older decisions, but since the High Court decision of *Kioa* v. *West*[152] it has become clear that the broadness or unstructured nature of a discretionary power does not indicate that procedural fairness is not implied.[153] The test of implication will be whether the tenderer's interests are affected in a manner substantially different from other members of the public. On tendering for a renewal of a contract of substantially the same nature, regarding the same goods or services, a current contract holder would have a legitimate expectation attracting the protection of procedural fairness.[154] It is likely that courts will be reluctant to imply procedural fairness in relation to other tenderers.[155]

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150 In *White Industries Ltd* v. *Electricity Commission of New South Wales* note 115 *supra,* Yeldham J. said it would be very difficult to challenge the Minister's direction to Elcom regarding acceptance of a tender, where that direction was influenced by irrelevant considerations. Further, it was probably not the proper role of a court in judicial review to sit in judgment on the business soundness of a Minister's decision.

151 (1985) 7 ALN 72.

152 (1985) 159 CLR 550.

153 *Century Metals & Mining N.L.* v. *Yeomans* note 146 *supra.* See also the liberal approach to the implication test of King C.J. and Matheson J. (Bollen J. contra) in *Blyth District Hospital Incorp.* v. *South Australian Health Commission* note 25 *supra.*

154 See *Waverley Transit Pty Ltd* v. *Metropolitan Transit Authority* note 116 *supra* on the authority of *FAI Insurances Ltd* v. *Winneke* note 117 *supra,* 361. Non-renewal could seriously upset plans, cause economic loss and perhaps cast a slur on the reputation of the insurer.

155 In *White Industries Ltd* v. *Electricity Commission of New South Wales* note 115 *supra,* Yeldham J. applied *Cord Holdings Ltd* v. *Burke,* note 114 *supra.* Note the view of Wilcox J. in *"Sydney" Training Depot Snapper Island Ltd* v. *Brown* (1987) 14 ALD 464 that procedural fairness could not be implied in relation to the exercise by the Commonwealth of a mere right of private property, in this case the issue of a notice to quit.

Nevertheless, in *Century Metals* French J. held that where a tender process is adopted, participation in that process necessarily involves the tenderer in expenditure and inconvenience, and hence an impact upon the economic well-being or reputation of the tenderer, giving rise to a legitimate expectation that the contract will not be refused unfairly. In practical terms this means an expectation of a hearing which is in the circumstances of the case fair. No other conclusion was open to French J. in view of the clear recognition that reputation and financial interests are protected by procedural fairness.

Since the content of procedural fairness depends upon the circumstances of the case, the opportunity arises at this second stage for a careful approach in the case of government contracts. Procedural fairness did not in *Century Metals* require the liquidator to afford a tenderer an opportunity to rectify omissions or deficiencies (even those which led the decision-maker into factual error or miscalculation regarding the tender), which should have been addressed in its proposal. These included the absence of any offer to make a cash payment for acquisition of the Corporation's assets, and ambiguity as to the tenderer's preparedness to meet the costs of demolition of plant on conclusion of the mining.

6. Procedural Fairness: Bias

The content of the bias rule is likely to be less exacting in relation to the tendering process where a decision-maker has a continuing involvement and policy orientation, as compared with the content of the rule in the context of courts and tribunals.[156] It would be impractical to find prejudgment in prior knowledge of matters relevant to the decision and formulation of policy for tackling the question. On the other hand, in *Waverley Transit Pty Ltd* v. *Metropolitan Transit Authority*[157] O'Bryan J. held that a fair-minded person would have reasonably suspected that the Tender Evaluation Committee had predetermined which tender would be accepted. The very tendering process had been instituted in the hope that Quince's, the successful tenderer, would offer a competitive price (although it was not the lowest) and by accepting it the Metropolitan Transit Authority (MTA) could precipitate a restructuring of the private bus service industry. The MTA had a real interest in the outcome of the tendering process and had appointed a biased committee.

D. ESTOPPEL

The basic rationale of estoppel, that a person who makes a representation by a statement or conduct will be precluded in later legal proceedings from denying the representation, is not comfortably

156 *Century Metals & Mining N.L.* v. *Yeomans* note 146 *supra.*
157 Note 116 *supra.*

accommodated within fundamental doctrine in administrative law. A principle emerged that estoppel cannot be raised to prevent the performance of a statutory duty or to hinder the exercise of a statutory discretion.[158] However, estoppel is enjoying a re-emergence in Australia on account of two developments. One is the application in the administrative law context of the recent High Court decision of *Waltons Stores (Interstate) Ltd* v. *Maher*[159] in which the law relating to estoppel was liberalised. The second is the acceptance in Australia of a basis for establishing denial of procedural fairness which in itself is a form of estoppel.

1. Doctrine of Estoppel

The apparently harsh application of the principle in *Southend-on-Sea Corp.* v. *Hodgson (Wickford) Ltd*[160] (the *Southend-on-Sea principle*) has been modified in certain respects which cannot be discussed here in detail.[161] However, the *Southend-on-Sea* principle is applied without question or qualification where to raise the estoppel would endorse acts clearly inconsistent with a duty, liability or prohibition imposed by statute.[162]

The question remains whether the *Southend-on-Sea* principle should be applied in a similar manner to statutory discretionary powers.[163] There are cases where an estoppel had been raised in relation to the exercise of a statutory discretionary power. In *Altmann* v. *Corporation of the City of Adelaide*[164] an exercise by the Adelaide City Council of its general incidental power to enter contracts created exclusive rights in a licensee to ply "Popey" hire boats on the Torrens River for ten years, excluding the exercise by the Council of power under a by-law to grant a concurrent licence for a year to a competitor.[165]

Moreover, applying the High Court decision in *Waltons' Stores (Interstate) Ltd* v. *Maher,*[166] courts have shown a preparedness to question the *Southend-on-Sea* principle, permitting estoppel to be raised in the

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158 *Maritime Electric Co. Ltd* v. *General Dairies Ltd* [1937] AC 610; *Southend-on-Sea Corp.* v. *Hodgson (Wickford) Ltd* [1962] 1 QB 416 (hereinafter *Southend-on-Sea*).

159 (1988) 62 ALJR 110; (1988) 164 CLR 387 (hereinafter *Waltons*).

160 *Southend-on-Sea,* note 158 *supra.*

161 See *Western Fish Products Ltd* v. *Penrith District Council* [1981] 2 All ER 204; *Wells* v. *Minister of Housing and Local Government* [1967] 1 WLR 1000; *Brickworks Ltd* v. *Warringah Shire Council* (1963) 108 CLR 568, 577-8 *per* Windeyer J.; *Randwick Municipal Council* v. *Derria Pty Ltd* (1979) 49 LGRA 95.

162 *Howell* v. *Falmouth Boat Construction Co. Ltd* [1915] AC 837; *Wormald* v. *Gioia* (1980) 26 SASR 237; *Chapman* v. *Commissioner, Australian Federal Police* (1983) 50 ACTR 23; *Formosa* v. *Secretary, Department of Social Security* (1988) 81 ALR 687.

163 For an answer in the affirmative, see *Formosa's* case, *id.,* 695 *per* Davies and Gummow JJ.

164 Note 140 *supra,* 368-9.

165 An application of the principle in *Dowty Boulton Paul Ltd* v. *Wolverhampton Corp.* [1971] 1 WLR 204. See also *Ski Enterprises Ltd* v. *Tongariro Park Board* [1964] NZLR 884.

166 Note 159 *supra.*

administrative law context in relation to discretionary powers rather than duties.[167] The prohibition upon the raising of an estoppel to hinder the exercise of a discretionary power was apparently completely jettisoned in *Waverley Transit Pty Ltd* v. *Metropolitan Transit Authority*.[168] The Supreme Court of Victoria applied *Walton's* case without qualification to an authority exercising power to regulate the metropolitan bus services. The Metropolitan Transit Authority (MTA) allowed members of the Bus Operators Association area to believe that when their current short-term contracts expired, the new system for the grant of licences to operate bus services in the Melbourne metropolitan area would be one of renewal by non-competitive registration of interests by existing operators and negotiation rather than an open tender system. The MTA made representations that larger operators who engaged in take-overs and mergers to become more cost efficient by economies of scale would be preferred in the contract renewal process. These representations induced the plaintiff company to take over another run-down bus operation and also to replace a large proportion of its fleet of buses and improve its depot facilities at a cost of over $1 million. At a date closer to the expiration of the short term contracts, in response to a request for guarantees, the MTA assured members of the Bus Operators Association that tenders would only be called if no operator expressed an interest in a route, or if there was evidence of collusion amongst operators, or a fair price could not be agreed with an operator who alone expressed interest in a route. As a result of the solidarity of the Association's members, the overwhelming majority of operators submitted proposals expressing interest only in their existing route services. However, Quince's, a charter bus operator with no route service experience responded independently of the Association, expressing interest in, inter alia, routes operated by Waverley. The MTA consequently thought it opportune to introduce a tender process so as to create a "musical chairs" situation which would restructure the industry to make it more competitive and economical. Although Quince's tender was for a price higher than that of Waverley, the Tender Evaluation Committee awarded Quince the contract.

Mr Justice O'Bryan held that the MTA had denied procedural fairness and was also estopped from denying its representations to the disappointed tenderer. The latter ground, orthodox promissory estoppel, proved to be the more important one, when it came to consideration of appropriate remedies.[169] The High Court decision in *Waltons Stores*

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167 This is evident in two immigration cases, *Kurtovic* v. *Minister for Immigration, Local Government and Ethnic Affairs* (1989) 86 ALR 99 (at the time of writing an appeal from this decision to the Full Federal Court was pending) and *Rubrico* v. *Minister for Immigration and Ethnic Affairs* (unreported, Federal Court, Lee J., 31 March 1989).

168 Note 116 *supra*.

169 See below, discussion accompanying note 192.

(Interstate) Ltd v. *Maher*[170] established that promissory estoppel may be established where there is no pre-existing relationship, provided there was an element of encouragement by the party estopped. In this case a contractual relationship in any event existed between the parties. The MTA had encouraged a reasonable belief that the contract would be renewed, and in that belief the plaintiff had sustained a financial detriment in acquiring another company and improving its facilities. The MTA knew and intended that the plaintiff would act on the belief of renewal of their contract which the MTA had induced in the plaintiff. Applying the test of Brennan J. in *Waltons'* case as to unconscionable conduct, equity required that the consequent detriment to the plaintiff be avoided.

The *Waverley* case illustrates how since *Waltons* case promissory estoppel may be used as a sword as well as a shield.[171] However, the extraordinary aspect of the *Waverley* case is that promissory estoppel was raised against an administrator with no mention being made of the *Southend-on-Sea* principle. The MTA had a policy of dealing with the expiration of the current short term contracts in such a way that a restructuring of the industry would be precipitated. It had formed the view, apparently as an expert body and having sought the advice of a financial consultant, that in this way cost efficiency in the private bus service industry could be achieved. The objective of efficency was not simply a reflection of new managerialism. In the exercise of its functions the MTA was required under section 16(3) of the Transport Act 1983 (Vic.) "to provide a competitive and efficient passenger transport alternative to private transport". Raising the estoppel certainly fettered the exercise of the MTA's discretion in utilising the tendering process to achieve the restructuring objective. Yet restructuring may not have been the only means for achieving competition and efficiency. At bottom what concerned O'Bryan J. was that the MTA was seeking to achieve a lawful objective by an inequitable or unfair means, in actual fact, by trickery and deception of the bus operators.

The *Waverley* case may prove to be an isolated case, because it does not tackle explicitly the *Southend-on-Sea* principle. However, it is at the least indicative that, since *Waltons'* case, in judicial review of administrative action, courts will be more inclined to question the *Southend-on-Sea* principle. The *Southend-on-Sea* principle aside, *Waltons'* case removes two impediments to establishing promissory estoppel in the administrative law context. The first is that the use of estoppel as a sword significantly widens the scope for the use of estoppel where judicial review

170 Note 159 *supra.*

171 However, it is arguable that the estoppel point was part of the plaintiff's independent cause of action for denial of procedural fairness and hence was maintainable without reliance upon this aspect of *Waltons'* case: see *id.*, 521 *per* Mason C.J. and Wilson J.

is sought by an individual of administrative action, rather than raised as a collateral issue in a tort or contract action. Second, there is no need to establish a pre-existing legal relationship. As Brennan J. pointed out in *Waltons'* case, an equity created by estoppel is raised where a person acts or abstains from acting on an assumption or expectation as to the legal relationship between himself and the party who induced him to adopt the assumption or expectation.[172] There may be an assumption that a legal relationship exists or that no legal relationship exists. This is important in cases where an individual seeks a benefit from an administrator or is engaging in the tendering process. The requirement of estoppel is less onerous in this respect than that of procedural fairness, where it must be shown that the decision affects an existing interest. Conversely, procedural fairness does not require detriment to be established whilst estoppel does.

2. Procedural Fairness as a Form of Estoppel

A limited form of estoppel has been made available under the rubric of procedural fairness, in cases where action in accordance with a non-contractual representation is not ultra vires. This development had undermined the *Southend-on-Sea* principle even before the decisions on estoppel applying *Waltons'* case.

This development stems from *Attorney-General of Hong Kong* v. *Ng Yuen Shiu*[173] where the Privy Council held that in the very special circumstances of an illegal immigrant having come forward in response to an undertaking that his case would be dealt with on its merits,

> [w]hen a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty.[174]

In the House of Lords decision in *Council of Civil Service Unions* v. *Minister for the Civil Service,*[175] *(GCHQ)* the principle received a logical extension to representations contained in regular practices which a person reasonably expects to continue. In *Kioa* v. *West,*[176] the extension of the scope of procedural fairness in *Ng Yuen Shiu* and *GCHQ* was approved in obiter by several judges of the High Court. As the most fundamental facet of the doctrine supporting the *Southend-on-Sea* principle, courts have maintained that government is free to change policy without affording a hearing to those affected by such a decision.[177] To put the position in very

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172 *Id.*, 123.

173 [1983] 2 AC 629 (hereinafter *Ng Yuen Shiu*), which affirmed the principle stated by Lord Denning M.R. in *R.* v. *Liverpool Corp.; Ex parte Liverpool Taxi Fleet Operators' Assoc.* [1972] 2 QB 299.

174 *Id.*, 638.

175 [1985] 1 AC 374.

176 (1985) 159 CLR 550, 567, 582-3, 618.

177 *Re Findlay* [1985] AC 318; *Peninsular Anglican Boys' School* v. *Ryan* (1985) 69 ALR 555.

general terms, when an administrator makes a 'pure policy' decision affecting an individual's interests, procedural fairness normally requires the administrator to disclose any adverse facts to the individual, but not the applicable policy.[178] How this principle is to be reconciled with the principle in *Ng Yuen Shiu,* which indicates that an administrator may have a duty to honour a promise to give a hearing before making a 'pure change of policy' decision, will emerge from the High Court's decision in the pending appeal from the Full Federal Court of Australia's decision in *Haoucher* v. *Minister for Immigration and Ethnic Affairs.*[179]

Estoppel under the name of procedural fairness has been raised in relation to a variety of administrative decisions.[180] *Cord Holdings Ltd* v. *Burke,*[181] a challenge by a disappointed tenderer, where Smith J. distinguished *Ng Yuen Shiu,* cannot be regarded as good authority since the decision in *Kioa* v. *West.*[182] In the context of pre-contractual negotiations or representations concerning the operation of contracts, however, there appears to be little scope for implying a representation in an invitation to tender.[183]

E. STANDING AND REMEDIES

In private law standing is not an issue, but in public law it is, supposedly on the ground that only an appropriate plaintiff may be permitted to litigate matters affecting the public interest. The current holder of a government contract has an existing interest which should normally found standing to challenge a decision not to renew the contract.[184] The standing of other would-be litigants is less straightforward.

The "person aggrieved" test of standing under the ADJR Act requires that a person suffer as a result of the decision beyond the suffering of an ordinary member of the public.[185] Where a supplier of goods, having responded to a public advertisement, registers its interest, the issue to it of a selective invitation to tender gives the supplier such an interest.[186] Even

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178 *State of South Australia* v. *O'Shea* (1987) 73 ALR 1.

179 (1988) 83 ALR 530. In *Haoucher's* case, the majority (Northrop and Lee JJ.) gave primacy to the no-fettering of policy principle, whilst the minority (Sheppard J.) applied the principle in *Ng Yuen Shiu.* In *Kurtovic's* case note 167 *supra* Einfeld J. preferred the view of Sheppard J.

180 For an example of its application in the context of public employment, see *Cole* v. *Cunningham* (1983) 49 ALR 123. It is interesting to compare this decision with *Chapman* v. *Commissioner, Australian Federal Police* note 162 *supra.*

181 Note 151 *supra.*

182 (1985) 159 CLR 550.

183 Such a submission was rejected in *White Industries Ltd* v. *Electricity Commission of New South Wales* note 115 *supra.*

184 See, for example, *Jim Harris Ltd* v. *Minister of Energy* note 147 *supra* where the issue of standing coalesced with that of the implication of procedural fairness.

185 ADJR Act ss. 3(4), 5, 6, 7; *Tooheys Ltd* v. *Minister for Business and Consumer Affairs* (1981) 4 ALD 277.

186 *Hawker Pacific* note 128 *supra,* 189-90. In *White Industries Ltd* v. *Electricity Commission of New South Wales* note 115 *supra,* the standing of a disappointed tenderer for a contract for the supply of coal was challenged. However, Yeldham J. found it unnecessary to decide the point, proceeding to find that the substantive grounds of review were not made out.

more clearly, in submitting a tender in response to such an invitation, the cost of tendering and the volume of documentation indicate the supplier is a "person aggrieved" by the decision made.[187] However, merely being a business competitor of a successful tenderer is not sufficient to ground standing.[188] This is illustrated by *Davoren* v. *Crone*[189] where trade unions for professional engineers and some of their members, had no standing to challenge a departmental decision to permit the importation of two small vessels by a company which did not employ union labour (even though the competitive position of the company was improved so that it was able to gain from the Queensland Government a contract which had previously been held by a company which did employ union labour).

It is in the context of remedies that the argument for not exposing government contract decisions to administrative law principles is at its strongest. While litigation regarding the disposition of government property is resolved the value of assets may fall, bargains may be lost, and the opportunity to utilise funds generated by the sale of assets may be lost. While litigation concerning the acquisition of property is resolved, the purchase price may rise and bargains may be lost. New managerialism in the public sector would be stymied even in the most commercial aspects of government decision-making where government might have hoped to adopt unreservedly the principles of corporate management.

Judicial review offers less at the level of remedies than does an action for breach of contract in that damages are not available for administrative error.[190] The result of judicial review is generally that the decision is set aside and the administrator ordered to decide again according to law. In judicial review declarations are normally made against governments, rather than coercive orders, especially orders directing the expenditure of public funds. The traditional reason is that this would be incompatible with the dignity of the Crown.[191] The reason given more frequently now is that it is inconceivable that the government would not comply with a declaration by the court.[192]

In view of the traditional approach, it is extraordinary that in *Waverley Transit Pty Ltd* v. *Metropolitan Transit Authority*[193] O'Bryan J. ordered

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187 *Hawker Pacific* note 128 *supra*, 190.
188 *Id.*, 189.
189 Unreported, Federal Court, Pincus J., 8 February 1989.
190 *Macksville & District Hospital* v. *Mayze* (1987) 10 NSWLR 708; *Park Oh Ho* v. *Minister for Immigration and Ethnic Affairs* (1988) 81 ALR 288.
191 Note 54 *supra*, 393.
192 Compare the view of O'Leary J. (with whom Asche J. agreed) with that of Kearney J. in *Northern Territory of Australia* v. *Skywest Airlines Pty Ltd* note 108 *supra*, 44, 49. Mr Justice Kearney took the view that government should not enjoy unnecessary privileges or exemptions from the ordinary law. He regarded the traditional reason as no longer acceptable and held that all remedies, including specific performance, are in principle available against a government in relation to contract, subject only to the need for government to act in the public interest.
193 Note 116 *supra*.

the MTA to extend the contract of Waverley, the existing operator and disappointed tenderer, for a further two years and restrained the authority from proceeding with the agreement made with its competitor, the successful tenderer, Quince's. As a result the MTA failed to trigger the restructuring of the industry, a goal arguably in keeping with its own statutory objects. There is a clearer mandate for coercive orders against government in section 16(1)(d) of the ADJR Act than in the common law. In one case, for example, the provision permitted the Federal Court to take the extreme course of quashing a decision to post a person to a senior overseas position but moulding the remedy to suit the circumstances by postponing the order for a period to enable a fresh decision to be made and transfer of the present holder of the post.[194]

Federal Court judges have taken the view that standards imported from areas of the law concerned solely with proprietary and contractual interests of private parties are not necessarily applicable in the administration of the ADJR Act.[195] Whilst taking into account the public interest may be understandable in relation to restraint of regulatory schemes or deportation decisions, the pertinent question is whether such factors ought to be abandoned in applications to restrain the commercial dealings of government. Are the standards of private law or those of public law appropriate?

In the *Century Metals* litigation French J. granted a stay under section 15 of the ADJR Act, restraining the Minister and the liquidator from further negotiating, or concluding a contract, with the company which had made the preferred proposal for acquisition of the Corporation's assets and recommencement of mining on the island.[196] A motion for a stay had been adjourned on voluntary undertakings from the Minister and liquidator not to proceed, but without cross-undertakings by the applicant, pending the determination of objections to competency of the court to review the decisions under the ADJR Act. A few days after the objection had been determined in favour of the applicant and the hearing of the substantive grounds of review set down for a date one month hence, French J. had to consider whether the interim restraints should be continued.

Mr Justice French accepted that there was a risk of loss to the liquidator and the Commonwealth arising from delay due to the proceedings. The unused plant, equipment, fixtures and fittings on the island were

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194 *Styles* v. *Secretary, Department of Foreign Affairs and Trade* (1988) 84 ALR 408 (reversed on substantive grounds in *Secretary, Department of Foreign Affairs and Trade* v. *Styles* (unreported, Full Federal Court, Bowen C.J., Pincus and Gummow JJ., 28 August 1989)

195 *Collins* v. *Minister for Immigration and Ethnic Affairs (No. 2)* (1982) 5 ALD 32, 33 *per* Bowen C.J.; *Dallikavak* v. *Minister for Immigration and Ethnic Affairs* (1985) 61 ALR 471, 479-81 *per* Jenkinson J.; *United States Tobacco Company* v. *Minister for Consumer Affairs* (1988) 82 ALR 509.

196 *Century Metals & Mining N.L.* v. *Yeomans* note 131 *supra.*

deteriorating in the tropical island conditions, the liquidator was losing the benefit of funds to be generated by the sale of these assets and might not achieve the same return for their sale if the deal with the preferred tenderer, Elders IXL Ltd (Elders), fell through. However French J. treated as irrelevant the claim for loss of revenue incurred as a result of the voluntary interim undertaking not to proceed with the negotiations, and a claim of projected loss which would result from the Minister's own decision not to recommence mining on the island. Interestingly, French J. admitted into evidence an affidavit from Elders regarding its loss, although Elders had not been joined as a party to the application or the motion for a stay, and accepted that there was a risk of loss to that company. However, the submission of Elders that the case turned upon purely commercial considerations was rejected. Mr Justice French took into account the significant element of public interest which was intermingled with private interests, the public interest being the social and economic impact upon the island's population of a decision regarding the future of mining on the island. The 'setting' of the Minister's decision was different from the setting of commercial decisions between private parties. For that reason the applicant was not required to offer the respondents an unrestricted undertaking as to damages in the usual form. It was sufficient that an undertaking be made to pay such compensation as the court directed for loss sustained by reason of any deterioration of the plant up to the date of the determination of the proceedings. His honour also suggested that even if the ground of review were established at the final hearing, the discretion to decline relief might be more readily exercised because the decisions challenged were of an interim nature.[197]

In the event the applicant in *Century Metals* failed to establish any ground of review. The case need not be understood as indicative of an approach blind to the demands of new managerialism. In another case the public interest may indicate that a stay of government decision-making be refused on the ground of the public interest in "effective and economical public administration".[198] The *Century Metals* case was extraordinary in that the Government's decision affected not only public funds but also affected in a very personal way the economic and social interests of the entire population of one of Australia's island territories.

IV. CONCLUSIONS

It would be consistent with new managerialism to rid government contract decisions of amenability to principles of administrative law, whether investigation by ombudsmen, freedom of information legislation or judicial review. Although the special position of government under

197 *Id.*, 51.

198 *Morton* v. *Radford* (1985) 61 ALR 414 (even though the professional interests of a medical practitioner charged with excessive servicing were at stake).

contract law ought to improve the efficiency with which government might break its contracts and avoid statutory duties, government is prepared to forgo such privileges in order to level the playing field to secure commercial success.

There is a strong case for removing the special advantages of the Crown in contract actions, even if only on account of the uncertainty of their scope. Is there a case for removing the applicability of administrative law to commercial dealings of government? Those principles which represent an advantage, such as the *Southend-on-Sea* principle are being undermined. There is an emerging potential for the application to government contract decisions of the principles of abuse of power and procedural fairness, which impose duties upon administrators unknown to private sector contract holders.

It is possible for the corporate structure of statutory authorities to be improved, largely securing the goal of commercial efficiency sought by new managerialism, without removing the applicability of administrative law principles. Is there any justification for an uneven playing field, where government assumes greater responsibilities than private sector competitors? Are there, on the other hand, circumstances where it would be desirable for the principles of administrative law to apply to private sector firms, redressing this unevenness?

It might be argued that the extension of administrative law principles to the commercial dealings of government provides a disincentive to individuals who would otherwise contract with public authorities. On this view, since judicial review results in delay and costs, government commercial decisions ought to be non-justiciable. Certainly challenges by unsuccessful tenderers may deter successful tenderers from dealing with the government again. The government's efficient pursuit of legislative goals may be impaired. Whether review has this effect depends partly upon whether courts adapt their procedures and remedies so as to control unnecessary losses.

A complete response to the argument would require some evidence that judicial review has a positive impact as a public affirmation that in its commercial dealings government acts in a reasoned and fair manner. The knowledge that government contract holders are accountable upon failure to conform to principles of good administration, which include commercial morality, should encourage public confidence and create an incentive for dealing with the government.

The Administrative Review Council has recommended that the scope for review under the ADJR Act of government contract decisions not be expanded but that further consideration should be given to the sorts of administrative procedures which might be introduced to ensure fairness in the tendering process, even by way of administrative review.[199] The test of

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199 Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No. 32 (1989), 30-2, 37.

justiciability, the test for the implication of procedural fairness, the test of standing and the court's discretion to decline relief certainly present hurdles which at present severely restrict the scope for judicial review. These hurdles in a sense present a criterion for measuring the extent to which an administrative decision is of a private law nature in that it directly affects an existing interest of a private individual.[200] When contract law becomes a regulatory technique of government then the argument for extending and intensifying the scope for application of administrative law principles, whether or not judicial, is strengthened.[201] Until the potential for review is realised in a fashion which constitutes unacceptable disruption of efficient conduct by government of its commercial dealings, there appears no reason for introducing further restrictions. Moreover, administrative law principles may need to be adapted to cases where the public nature and impact of the exercise of a private right suggests that accountability beyond the discipline of the financial market is appropriate. The application of administrative law principles to non-statutory corporations is unlikely but not inconceivable.[202] It is conceivable because the interpenetration of the public and the private precludes strict rules as to where administrative law principles end.[203] Administrative law must now be added to the bodies of law whose boundaries with contract law require renegotiation.

200 See A.Lucas, "Judicial Review of Crown Corporations" (1987) *Alberta L Rev 363.*

201 D.Oliver, "Is the *Ultra Vires* Rule the Basis of Judicial Review?" (1988) *PL* 543, 551-3.

202 See *Forbes* v. *New South Wales Trotting Club Ltd* (1979) 143 CLR 242, 264, 268-9, 274-6, *per* Gibbs C.J., and Murphy J.; *R.* v. *Panel on Takeovers and Mergers; Ex parte Datafin PLC* [1987] 1 QB 815.; *Cf. "Sydney" Training Depot Snapper Island Ltd* v. *Brown* note 155 *supra.* Note the voluntary self-regulation by a newspaper concern and by the banking industry in Australia in their institution of private versions of ombudsmen.

203 C.Harlow, "'Public Law' and 'Private Law': Definition Without Distinction" (1980) *MLR* 241.