MINISTERIAL CONTROL AFTER CONTRACTING OUT

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What is contracting out?

Government has long procured goods and the carrying out of public works by means of contracts with private operators. The use of the contract was never so limited, but in recent times the character of public administration has been altered significantly as a consequence of the growth of the use of competitive tendering and contracting (CTC) as a means for the discharge by government of its functions and obligations.[1]

More generally speaking, one may say that what was said in 1971 about developments in the USA and in the UK applies now (if it has not applied for some time) to Australia: "Contracting is no longer limited to the logistic periphery of government action but has moved into the main arena of policy-making".[2]

Why is there so much contracting out?

Harden argues that it will promote

> ... an institutional separation of functions. Specifically, responsibility for deciding what services there shall be is distinguished from responsibility for delivering the services.[3]

He (and many others) see benefits in this:

> this separation of the roles of 'purchaser' and 'provider' offers the opportunity not only to pursue economy, efficiency and effectiveness, but also to enhance both individual rights and accountability for government decisions.[4]

Ministerial control via the law of contract

A supposed virtue of the contract state is that it allows for a clear demarcation between the role of policy creation and the carrying into effect of some policy. At the level of rhetoric, it is not hard to formulate an argument that the contract state may enhance the accountability of government at the same time as it allows a measure of independence to the contractors to get on with the job of carrying out the contract. But there is obviously some tension here, and attention should be paid to how "[t]hrough the contract, we hope to achieve a satisfactory equilibrium between the conflicting values".[5]

In recent years, governments have attempted to enhance policy control over semi-independent agencies of government by means of empowering ministers to give directions or to set guidelines to be followed by those bodies when they exercise statutory powers.

Ministerial directions and guidelines might be a means to enable the government to ensure that the contract is performed in a way which conforms to government policy. On the face of it, this is simply a matter of expressing in the contract the power to give directions or formulate guidelines in words which will be appropriate to achieving the object. There are now plenty of examples in statutes and quite a bit of case-law to give guidance as to the legal

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effects of such provisions.[6] In these contexts, the judges have limited the extent of such powers by reference to those fundamental principles of statutory interpretation which are employed to limit all government power. Those principles may of course be displaced by language which is clear enough to achieve that result.

An interesting question - to which I cannot give an answer - is whether the judges would employ the same approach were they to be called upon to interpret a provision in a contract which empowered a minister to give directions to a contractor. This is but one dimension of the problem of how we classify ostensibly private bodies which perform public functions. As a matter of classification, the problem is one of contract law, but in a number of ways the judges might import public law values into the contract via an implied term.[7] A bolder approach might classify these contractors as a species of the public actor.

If the matter is looked at as a matter of contract law, some interesting questions might arise. Would there be a point at which the width of the contractual right to direct negates the contract? In other words, might it be that the extent of the power vested in the Minister to direct how the contract is to be performed leads to the conclusion that no contractual relationship resulted?[8]

The answer to the question just posed is likely to be "no", but it does point to the inadequacy of a body of law designed to deal with bargains between citizens. We need I think to free ourselves from the notion that when it comes to making a contract, the government is just like any other legal person. There are public interests at stake here which need to be accommodated. These ruminations lead to the question asked by many others: do we need a discrete body of law about public contracts? I suspect that we do.

Other ways of enhancing control or ensuring that the government's objectives are met

There are alternatives to directions or guidelines, and they might be more effective ways of ensuring that the government retains policy control and ensures that its objectives are met. More than that, there might be ways which would make the "service" provider accountable to the public. There are many who have spoken of the role of devices such as performance indicators, and of means whereby consumers might make the "service" provider accountable for the performance of the contract.

There has been a great deal of thinking along these lines. Much of it is cast in language taken over from one or other kind of the ways in which economists look at the world. There is much talk of service providers and clients. A great deal of attention is paid to reducing the costs and the size of government.

A recent issues paper of the Administrative Review Council (ARC) draws attention to these kinds of devices.[9] It also asks whether existing public law means for making those who exercise public power accountable should be enhanced to draw within their orbit the actions of those contractors who engage directly with members of the public. Thus, it asks questions about the role for judicial review, tribunal review, the Ombudsman and for legislative regimes such as the *Freedom of Information Act 1983*.

This kind of questioning is not limited to bodies such as the ARC. While a "key message" of the recent Industry Commission report is that CTC "is about helping public sector managers get best value for money by ensuring that the best provider is chosen for the task at hand",[10] it also accepted that "while responsibility to do certain things can be transferred, accountability for the results cannot".[11] It was said that "[w]hatever the method of

service delivery, a government agency must remain accountable for the efficient performance of the functions delegated to it by government ...".[12]

The Commission identified a number of means by which accountability might be enhanced through creative use of the contract with the non-government person or body who performs services for or on behalf of government. It also emphasised that "[a] change from direct to contracted provision ought not to undermine the ability of individuals or organisations to seek redress for decisions or actions for which governments are accountable".[13]

Constitutional questions about the contract state

I suspect that there are many who will say that merely the asking of these questions shows that the ARC and the Industry Commission have missed the point. It is apparent that there are many in government who see these means for checking the government as obstructions to efficient and cost-effective management or indeed to the proper role of ministers and the cabinet.[14] The non-government actors in the contract state are often not subject to the existing public law means for checking government. This is seen by many as a positive virtue.

But we are, I think, entitled to ask whether there is a point where at least some of the forms of contracting out are inconsistent with the basic principles of our form of democratic government.

There is a cynical response to this kind of question, encapsulated well in Sir Humphrey Appleby's observation:

> B[ernard] W[oolley]'s problem is that he has studied too much constitutional history - or at least, takes it too much to heart. He was arguing, not very articulately I must say, that 'if you've got a democracy, shouldn't people, sort of, discuss things a bit'.[15]

One can of course fail to see that constitutional principles are merely means to the end of achieving the sort of society we want. This point has been well made by Mr Kim Beazley MHR:

> The basis of democracy is not responsible government, separation of powers or any other constitutional formula or legislative/administrative process. They are tools to create the possibility of an orderly life and the advancement of democratic principles. The basis of democracy is that each individual in society has a right to determine how he or she is collectively governed. Implicit in this is a right of access to information on how decisions are made that directly and indirectly affect our lives.[16]

But concepts such as responsible government and separation of powers (and notions of human rights and the like) have been taken seriously because experience tells us that if they are we will advance democratic principles and thereby our quality of life.

Of course there are obvious and quantifiable costs of operating a democracy (such as the costs of elections and the like). There are also costs not so easily quantifiable. But there are also costs in not operating a democracy. There is in any event a limit to how far one pursues this line of thinking. In the end it is a question of what political philosophy should underpin our society. As Smith observes, "[m]ajor choices on institutional arrangements are ultimately questions of political theory rather than neutral principles of management".[17] In any event, one can argue, as does Smith, that a democratic system is congruent with a good administrative system:

> Each nation must learn to satisfy heightened popular expectations - by improving existing institutions and by inventing new ways to serve social needs - within a framework of democratic control if that capacity is to endure.[18]

Before one gets too excited about all this it has to be said that it is not clear just how

far Australian governments will go towards the contracting state. The problem becomes acute where government contracts out functions of decision-making in relation to laws which define rights and obligations of citizens, or in some other way contracts out the power of the state in relation to citizens. This has happened in the UK.

Take for example subsection 69(2) of the *Deregulation and Contracting Out Act 1994* (UK):

> If a Minister by order so provides, a function to which this section applies may be exercised by, or by the employees of, such person (if any) as may be authorised in that behalf by the office-holder or Minister whose function it is.

The section applies, inter alia, "to any function of a Minister or office-holder (a) which is conferred by or under an enactment: ..." (subsection 69(1)). Some functions - including a power or duty to make delegated legislation - are excluded (section 71).

The sidenotes to sections 72 and 73 seem to assume that an order made under section 69 has the effect of "contracting out" the exercise of the function. The purport of subsection 72(2) is that actions taken by the person authorised under subsection 69(2) to exercise of the function shall be treated as having been done by the Minister or office-holder in whom the function is vested; (although this picture is confused by subsection 72(3)).[19]

I have not looked for direct analogies in recent Australian practice, although the schemes which underpin privately run prisons might be instructive. There are of course some historical precedents, such as the company form of colonial administration, represented by the East India Company and the like. But these were forms designed for non-democratic polities. Are they suitable for a democratic government based on responsible government? Is there a point where the power of the minister is so remote from the decision-making that the scheme is simply unconstitutional? The basis for this kind of argument might be that the scheme offends the doctrine of responsible government.

This doctrine is embedded in the federal constitution,[20] and it does have ramifications for the way in which executive power may be lawfully exercised. Would a court shape the law of contract so far as it relates to government contracting in order to sustain responsible government?

Perhaps this is unlikely. The courts might answer in terms of the doctrine itself. In *New South Wales v Bardolph*,[21] Sir Owen Dixon said that:

> [i]t is a function of the executive, not of parliament, to make contracts on behalf of the Crown. The Crown's advisers are answerable politically to parliament for their acts in making contracts.

It is also true that judges no longer have much regard for the worth of the doctrine. This attitude is sometimes put forward as the justification for judicial activism in the field of implied rights. Sir Gerard Brennan has said that

> [a]s the wind of political expediency now chills Parliament's willingness to impose checks on the Executive and the Executive now has a large measure of control over legislation, the courts alone retain their original function of standing between government and the governed.[22]

But, with respect, perhaps it is time for the courts to turn their attention to the ways in which they can revitalise those elements of our constitutional structures which enhance the participation in the affairs of government of the citizens.[23] Imperfect as it is, the doctrine of responsible government is one such means.

Endnotes

1 See generally the report of the Industry Commission, *Competitive Tendering and Contracting by Public Sector Agencies*, report No 48, 24 January 1996, AGPS, Melbourne ("Industry Commission Report"). This report is a valuable review of this phenomenon.
2 Bruce L R Smith, "Accountability and Independence in the Contract State" in Bruce L R Smith and D C Hague, *The Dilemma of Accountability in Modern Government* (1971) at p 13.
3 I Harden, *The Contracting State* (1992), p xi.
4 Ibid.
5 Ibid. p 4.
6 See for example *Riddell v Secretary, Department of Social Security* (1993) 42 FCR 443; *Secretary, Department of Social Security v Kratvchvil* (1994) 53 FCR 49; *Smoker v Pharmacy Restructuring Authority* (1994) 53 FCR 287; and *Lynch v Minister for Human Services and Health* (1995) 61 FCR 515.
7 As may be seen in those cases concerned with the disciplinary powers of 'domestic' bodies such as sporting associations.
8 The general point is made by Harden, above (see p 4), and see D W Grieg and J L R Davis, *The Law of Contract* (1987) at 283ff, citing cases such as *Placer Development Ltd v Commonwealth* (1969) 121 CLR 353.
9 Administrative Review Council, *The Contracting Out of Government Services* AGPS, 1997.
10 Industry Commission Report (see note 1), p 1.
11 Ibid, p 4.
12 Ibid.
13 Ibid, p 6.
14 I have examined the influence of managerialist thinking in Peter Bayne, "Administrative Law and the New Managerialism in Public Administration" (1988) 62 ALJ 1040. A research paper (N Rossiter, "What Cost FMIP? Administrative Convenience and the Rule of Law") on file in the Faculty of Law, ANU, advances the thesis that the Financial Management Improvement Program (FMIP) carried further the view that public law controls and the rule of law are seen as barriers to proper management.
15 J Lynn and A Jay, *Yes Prime Minister* vol 1, (1986, BBC Books), p 176.
16 Quoted in P Bayne, *Freedom of Information* (1984), p 7.
17 Smith, op cit, p 55.
18 Ibid.
19 See M Freedland, "Privatising *Carltona*: Part II of the Deregulation and Contracting Out Act 1994" [1995] *Public Law* 21.
20 See the recognition accorded in the doctrine in *The Engineers case* (1920) 28 CLR 129, p 146ff.
21 (1934) 52 CLR 455 at 509.
22 The Hon Justice Sir Gerard Brennan, "Courts, Democracy and the Law" (1991) 65 ALJ 32 at 35.
23 Of course, the implied right to free political speech may be seen in this way.