

AVOIDING THE WORST OF ALL WORLDS:



GOVERNMENT ACCOUNTABILITY FOR OUTSOURCED EMPLOYMENT SERVICES

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1 OVERVIEW

This paper examines the impact of Government outsourcing within the context of recent changes to Australia's welfare system. A case study of Job Network employment services will show that outsourcing Government services may have the effect of diminishing Government accountability mechanisms, without necessarily diminishing Government control. The accountability mechanisms that have been weakened by outsourcing employment services to the Job Network are:

1. Judicial and merits review
2. Critique of Government policy by Non-Government Organisations (NGOs)
3. Public access to information via Freedom of Information (FOI) legislation

On the first issue, it will be seen that judicial and merits review do not apply to the Job Network, as the Job Network was created via contract rather than via legislation, and hence is not deemed to exercise statutory decision-making powers. It will be argued that the Job Network does indeed exercise statutory powers in practice, if not in name. Further, it is argued that the Government maintains influence over private Job Network Providers (JNPs), in much the same way as they influenced their public predecessors: the key difference is that the present relationship between JNPs and the Government is less transparent and accountable.

On the second issue of NGO critique, it will be argued that the capacity of NGOs to criticise Government policy has diminished due to the nature of their engagement with Government. As the State has retreated from the role of service provision, NGOs have been called upon

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to fill the gap. This has increased NGO budgets, while simultaneously compromising their ability to act as a check on Government power.

On the third issue of FOI legislation, it will be seen that the Job Network is not deemed to be a 'public body', and hence is not subject to the full bundle of administrative law rights and remedies. Further, the contractual relationship between the Government and JNPs is characterised as 'commercial in confidence'. Due to these characterisations, FOI legislation is largely impotent to unlock the details of Government dealings, for example tendering processes, which greatly diminishes Government transparency. These three factors are cumulatively described as producing 'the worst of all worlds'.

This paper concludes with speculative solutions to these problems. The first is to 'call a spade a spade' and allow JNPs to exercise statutory decision-making functions, given that they already do this in practice. This would bring the Government's relationship with the Job Network back within the realm of judicial and merits review. The second suggestion is that the relationship between NGOs and the Government be re-characterised as a 'social contract', which would allow NGOs to 'be themselves' and adhere to their core values, while also providing Government services. The third solution would be to ensure that a) the public has access to information with regards the Government's dealings with the Job Network; b) Government contracts with JNPs be routinely published; and c) 'commercial in confidence' exemptions to FOI legislation be made significantly more narrow. While these solutions would not produce an ideal world, it will be argued that they would, at least, avoid the worst of all worlds.

1.1 The birth of the Job Network

When the Keating Labor Government introduced its *Working Nation* reforms to Australia's welfare system in 1994, it began a welfare reform process that the Howard Government happily continued. This reform process would see the Australian Government progressively withdraw from a direct involvement in welfare provision, preferring instead to outsource employment services to private and non-government agencies. The Job Network was created in 1998 to replace Commonwealth Employment Services (CES), and is currently the primary point of contact for job seeking welfare recipients of employment age.

These changes were ostensibly introduced in order to free employment services from the burden of Government bureaucracy, and subject them instead to the rigours of the free market. In the Second Reading Speech to the Reform of the Employment Services Bill 1996, it was stated that '[t]he aim of this legislation is to establish the mechanisms to deliver employment services and to establish a fully competitive market for employment assistance to job seekers'. It was claimed that the changes would further use 'competition to drive improvements in quality, performance and price'.¹ The Senate blocked the Bill, prompting the Government to make these changes through use of its general constitutional power to enter into contracts, rather than through legislation. A web of contractual arrangements was forged with various private and community providers, who would take on the role of employment service provision. This became known as the 'Job Network'.

Employment services were contracted out on the assumption that free market accountability would be a better discipline on the Job Network than administrative law and bureaucratic regulation. This is based on the notion that '[u]nlike political institutions, for which decisions to ensure accountability have to be consciously made, the market has the advantage of having a naturalistic, built-in mechanism of accountability'.² The Government has nonetheless maintained substantial control over the Job Network, while simultaneously gaining an exemption from administrative law review. What has emerged is a 'highly regulated quasi-market'³ kept on a short leash by DEWR (the Department of Employment and Workplace Relations).

Mark Considine explains:

...the [Job Network] quasi-market is controlled by a government department that is the monopoly purchaser of services. This gives senior bureaucrats enormous power to steer this market from behind the safe walls built upon the commercial-in-confidence tender process, and contracts written leave the agencies with little room to manoeuvre. It also appears that, in such a system, neither bureaucrats nor successful contractors have incentives to have the details or processes enacted within these contracts exposed to outside scrutiny.⁴

In theory, this public-private mesh is considered desirable, as 'competition will drive down costs, enhance accountability, diminish reliance on breach action, and provide job seekers with a greater range of choice and individual service.'⁵ However, in practice, welfare recipients are 'married' to a JNP, and it is very difficult for a person to choose another provider should they become dissatisfied. DEWR is the monopoly purchaser of services, and Centrelink is the sole supplier of clients. This amounts to a highly regulated and controlled 'market-bureaucracy'⁶, with little accountability to the public it serves and ostensibly represents.

JNPs are subject to directions from the Government, which may be political or ideological in origin. These interventions diminish efficiencies that may otherwise have been gained by subjecting the Job Network solely to market discipline. The Government admittedly also had the capacity to steer the CES (Commonwealth Employment Service) (the predecessor of the Job Network), so this in itself is not a radical shift. The key difference is that, because the Job Network was contracted out, instead of legislated for, this 'steering' is no longer subject to the same checks and balances as before. The three key counter-balances to Government power that have been weakened are:

i. Judicial and merits review of administrative action

Services provided by the Job Network have been substantially removed from the ambit of administrative law. The package of administrative law rights and remedies roughly consists of judicial and merits review; Freedom of Information legislation; privacy legislation; and Ombudsman review. Of these, only the Ombudsman retains oversight of the Job Network.⁷ This reduction has been achieved without the Government relinquishing control of the Job Network to the market, as DEWR still manages to discipline JNPs, predominantly via the private law of contract. In short, this allows the Government to substantially shirk *accountability* for the Job Network whilst still maintaining *control*.

ii. NGO critique

The second key benefit to the Government of outsourcing employment services to the Job Network is that of decreasing external criticism and community dissent.⁸ In line with the neoliberal rhetoric of smaller government producing more efficient outcomes, NGOs have been contracted into the provision of employment services. This move has both captured and tamed these NGOs. Whilst Governments steer their activities, their capacity to reciprocally feed back into the public policy process through public comment, has significantly decreased. This has been achieved through a number of strategies, including disciplinary measures such as the exclusion of dissident organisations from major advisory boards; through de-funding said dissidents; through contracts requiring forewarning of media comment by NGOs; and through funding agreements that include confidentiality clauses.⁹ This effectively neutralises a large number of agencies that would otherwise be best placed to criticise and inform Government welfare policy.

iii. Media and public scrutiny

The third key benefit to Government of 'contracting out', is that it acts as a 'cloaking device'¹⁰. This is because private providers are not subject to public access laws, such as the Commonwealth *Freedom of Information Act 1982*. This means that the substance of the relationships that the Government forms with private providers, and the performance of said providers, is 'secreted' from public view.

These checks were traded in exchange for the efficiencies of the free market, on the understanding that the market would take the wheel in respect of the outsourced functions. The promise of a free and unfettered market did not materialise, however, as the Job Network still remains subject to political controls. Without judicial or merits review, NGO critique, media scrutiny, nor even an unfettered 'free market', what we are left with is 'the worst of all worlds'.

1.2 Case study: breaching and the Job Network

The above assertions will be illustrated through a case study of one of the more controversial functions of JNPs - that of monitoring job-seeker compliance with 'activity requirements'.¹¹ These requirements include attending job interviews, attending TAFE courses, keeping a 'dole diary', and doing 'work for the dole'. Under the Government's 'mutual obligation' agenda, welfare recipients (which, as of June 2006 include those on Parenting Payment and the Disability Support Pension) who do not fulfil these obligations will have their payments reduced by up to 26% for 26 weeks, or suspended altogether for up to eight weeks. It is the role of JNPs to issue participation reports to Centrelink, which inform them when mutual obligations are not met, on the basis of which breach orders are made.

DEWR has the capacity to influence JNP decision-making with regards to participation reports, through contractual and other disciplinary mechanisms. The extent to which this control is being exerted is not clear, as the relationship between DEWR and JNPs is opaque, due to the aforesaid diminution of public accountability and transparency.

This situation is concerning because, while the Job Network is contractually answerable to the Government, it is not so contractually answerable to the public. The Government is not legally answerable to the public on behalf of the Job Network either. Further, the Government is not accountable to the public with regards its own dealings with JNPs, as these dealings are outside administrative law and are deemed 'commercial in confidence'.

Much of the literature on the Job Network is located in the public policy field, and is focused on how best to monitor policy implementation in a welfare framework comprised of 'some 11,000 community or church organisations [which are] in aggregate responsible for billions of dollars spent on welfare services.'¹² Enhancing contract compliance and control is usually considered to be key in this regard. To move beyond this approach, this paper poses the question: How appropriate is Departmental contractual control over the Job Network, given that this control is largely unsupervised? Stated in the alternative, if it is agreed that Government ceding unfettered control to the Job Network would be inappropriate, then how is the public to ensure that the Federal Government be held responsible and accountable for its dealings with the Job Network?

1.3 The way forward

Jenny Stewart has argued that 'Administrative law was not designed to deal with contracts, which by definition are instruments of exchange, rather than of command.'¹³ But what happens when the Government uses contracts as a tool of Executive command, and are substantially unchecked? To put it simply, the less counterbalances there are to the exercise

of power, the more power the possessor holds. Planned or not, the outsourcing of employment services has substantially increased the power of the Australian Government. This is chiefly because it has decreased the counterbalances to Government power, by disempowering the judiciary, Parliament, NGOs, the public, the media and the market.

From here, two divergent paths present themselves: the first takes us back to the old days of the CES (it seems unlikely that there is political will to venture down this path); the other acknowledges the reality of Government outsourcing, and attempts to forge ahead and adapt. It will be argued that the latter of these paths should be chosen, for pragmatic reasons more so than on principle. This option would involve legislating to allow the Government to outsource some statutory decision-making functions with respect to employment services. It would also involve re-negotiating the 'social contract' between NGOs and Government, and introducing other amendments to Government Procurement and Freedom of Information legislation. It will be argued that such a course of action would not sacrifice anything more than that which has already been lost; it would merely be to 'call a spade a spade', and abandon the worst of all welfare worlds that we currently inhabit.

2. BACKGROUND

In this section the ideological framework the Government (more specifically DEWR) operates within will be sketched. This will provide background to the welfare agenda the Government is seeking to implement, as it is framed through economic and moral prisms. This ideological framework will be related to the current 'breaching' regime, which will form the focus of this case study on the Job Network.

2.1 Poverty as personal choice

According to the former Minister for Employment Services, Mal Brough MP, as many as one in six job seekers are 'cruising dole bludgers'. Brough alleges that 'these people are content to collect a benefit from the Australian taxpayer and feel that work would have a negative impact on their quality of life and free time...'¹⁴ These people do not deserve to be on welfare, because the welfare system is designed as a temporary stopover for citizens who are unemployed through no choice of their own. Brough goes on to warn those that feel 'relaxed about being unemployed', that he intends 'to make them feel a lot less comfortable and far more active.'¹⁵ The eight week penalty system fits within this agenda, as according to Brough '[c]ompliance clearly is a strong motivator and also flushes out dole cheats'.¹⁶

According to Tony Abbott, '[i]t's the responsibility of government to try to put policies in place which over time, will allow people to improve their situation'. It is, in other words, the Government's responsibility to create a 'level playing field', which allows people to assert their own initiatives for self-improvement, unhindered by regulation or a heavy tax burden. It is not the job of Government to look after its citizens; this is the responsibility of the individual. Abbott continues:

But we can't abolish poverty because poverty in part, is a function of individual behaviour. We can't stop people drinking; we can't stop people gambling; we can't stop people's substance problems; we can't making mistakes that cause them to be less well off than they might otherwise be. We cannot remove risk from society without also removing freedom, and that's the last thing that any government should do.¹⁷

Within this paradigm, unemployment and poverty are a product of individual choice. Welfare is not the solution, as it gives people an easy alternative to working for a living. Abbott explains that '[t]here are lots of dirty, difficult, risky and poorly-paid jobs which few people would choose to do if they had an alternative.'¹⁸ Many of these low-paid, risky jobs will presumably proliferate under WorkChoices, the purpose of which is to increase the quantity

of work by decreasing its quality. It would defeat the purpose of the new Industrial Relations regime, if people were able to fall back on Welfare rather than take these 'dirty, difficult, risky and poorly paid' jobs.

Executive Officer of the Welfare Rights Centre, Michael Raper, asserts that the 'Welfare to Work' penalty system means effectively that '[i]f you were offered a job, any job, any position, and you decline it, you will suffer an 8 week no payment breach.'¹⁹ This is supported by Abbott's statement that '[f]or people on the dole, however, there is no alternative to taking the job that's offered. Otherwise, unemployment is no longer a matter of inability to find work but a question of lifestyle choice'.²⁰

2.2 Contracting out the State

'Dole bludgers' may be the rhetorical target of the Welfare to Work reforms, but there is a broader ideological agenda at work than kicking dole-cheats. The moral position 'Welfare to Work' takes is supplemented by a large dose of economic rationalism, key to which is the construction of an unfettered free market, consisting of economies, markets and money.²¹ The 'invisible hand' of the market is argued to produce more efficient and productive outcomes than State regulation. For this reason, both Liberal and Labor, state and federal Governments, have, in the past 20 years, dismantled the welfare state, and cast its components adrift into a de-regulated, competitive marketplace. This has been described as the new "common sense" of politics²², and has variously become known as Government 'outsourcing', 'contracting-out' and privatisation, or more metaphorically, governments choosing to steer rather than row.

Mark Aronson observes that in Australia, this economic paradigm has well and truly superseded that of the welfare state, as '[e]conomic theories of government intervention to correct market failure have been supplemented with theories of intractable failure by government itself.'²³ This politico-economic paradigm shift has come at a cost: chiefly a reduction in Government transparency and accountability. Richard Mulgan suggests it may be that the more efficient a service is, the less is its adherence to public law principles, and vice versa.²⁴ This is because bureaucrats are thought to value due process above achieving results efficiently.²⁵ Conversely, the private sector tends to dispense with procedural fairness and transparency, as it tends to hinder efficiency and capacity to compete. According to Dr Nick Seddon, contracting out impinges on accountability by:

- *'by-passing parliament'*: actions that would otherwise require legislation may be done by the Executive, the creation of the Job Network being a prominent example²⁶;
- *'keeping parliament in the dark'*: parliamentary committees are often denied access to details of contracts as these are tagged 'commercial in confidence';
- *'keeping people in the dark'*: the confidentiality of Government dealings with private providers also prevents public access to information;
- *'loss of control'*: if Government wishes to exert influence over a service provider, instead of issuing a command to rectify a problem, it must enter into a contractual negotiations with the provider;
- *'passing the buck'*: contracting out breaks the ministerial chain of command, and makes it less clear who is responsible and/or accountable for any problems;
- *'erosion of citizens rights'*: due to the principle of privity, a citizen does not have any right to sue on a contract between Government and a contracted service-provider. Rights to redress through Ombudsman, judicial or merits review are also corroded, as is the ability to make an FOI request.

- *'tying down future administrations'*: Governments are bound to fulfil contracts entered into by previous Governments, whether or not they wish to do so.²⁷

The Executive is given power to enter into certain classes of contracts by legislation, but above and beyond this has a general capacity to enter into contracts without any statutory authority under s61 of the Constitution. Outsourcing allows the Executive to by-pass the legislative process, thus largely excluding parliamentary debate and public consultation. Aside from purportedly promoting greater efficiency, when government services are outsourced, they tend to fall into a black hole of 'commercial in confidence' subject matter, beyond the scope of public inquiry.²⁸ This means that contracts between individual JNPs and the Government are immune from scrutiny, and that the terms and conditions upon which these JNPs are engaged cannot be evaluated.

These two dimensions, economic and moral, are not necessarily co-supportive. This is because by handing over the reins to the market, the Government *potentially* cedes capacity to effect its moral agenda. However, as will be discussed, the Government has not ceded this control, and still exerts its moral and political influence over the Job Network. This is particularly the case in the compliance or 'breaching' regime, which JNPs play a key role in. Background to this regime will be detailed in the following section.

2.3 Case study focus: the breaching regime

Since July 2006, a new wave of 'Welfare to Work' reforms has taken effect. These changes have been introduced under the banner of 'Mutual Obligation', which creates 'a clear link between receiving income support payment and a job seeker actively participating in an employment related service and meeting their requirements.'²⁹ Perhaps the most controversial of the Coalition Government's 'Welfare to Work' policy objectives, is the compliance regime JNPs are obliged to play a part in. This regime involves JNPs monitoring their clients' compliance with activity tests. To satisfy the 'Activity Test' the welfare recipient must:

demonstrate they are actively looking for suitable paid work; accept suitable work offers; attend all job interviews; agree to attend approved training courses or programs; never leave a job, training course or program without a good reason; give Centrelink accurate details about any income earned; and enter into and carry out a Preparing for Work Agreement if asked.³⁰

New applicants for Disability Support Pension and Parenting Payment now have reduced payments: single parents receive \$30 less per week, and the disabled receive \$45 less per week.³¹ The range of people required to sign 'Activity Agreements' and subject to 'Activity Testing' has expanded, now including people with disabilities, single parents, very long term unemployed people, people on personal support programs, and mature aged unemployed people.³²

Strict measures were introduced to ensure compliance with this regime. This notably includes 'breaching' customers who do not adequately cooperate with Centrelink, or partake enough in the employment services provided by the Job Network. If a client is 'breached' three times, or is given one 'serious breach' (for example, by being fired from a previous job for misconduct, or refusing to accept a 'reasonable' job offer), their payment will be cancelled for a period of eight weeks.

Centrelink continues to be responsible for making final decisions as to whether a breach penalty should apply. However, these decisions are substantially based upon information provided by Job Network members. JNPs are expected to ensure job seekers are aware of their obligations; actively encourage the engagement of job seekers; make reasonable efforts to contact job seekers before reporting non-compliance to Centrelink; and provide

appropriate documentation of their reasons for reporting or not reporting compliance to Centrelink.

3. DIMINISHED ADMINISTRATIVE LAW JUDICIAL REVIEW

In this section, the relationship between the Government and the Job Network will be evaluated within the context of administrative law doctrine. As will be seen, the relationship has been substantially extracted from the scope of administrative law review, rights and remedies. An account will be given of how this was done, as will the consequences flowing from this extrication.

The original (and arguably more legitimate) strategy the Coalition Government employed to implement their Welfare changes was to repeal the *Employment Services Act 1994* and introduce the Employment Services Bill. The legislature was hostile to this change, however, and the Bill was blocked. Impatient with Senate negotiations, the Executive changed tack and moved to instead create the Job Network through a matrix of contracts. An account of this is given below:

Senator Jacinta Collins—I was actually hoping that the department could refresh my memory. The issue relates back to the Employment Services Act 1994. It appears that the government had intended to repeal that act by the proposed reform of the Employment Services (Consequential Amendments) Act and to introduce the Reform of Employment Services Act by the Reform of Employment Services Bill 1996, which was defeated in the Senate. Was it post that defeat that the government got advice that it did not really need this Bill to be passed anyway and went by executive power instead?

Mr. Gibbons—What you have just read to us is partly correct. The government in introducing the Job Network had proposed to repeal the Employment Services Act –

Senator Jacinta Collins—It wasn't Minister Reith back then, was it?

Mr. Gibbons—to give the Job Network a statutory base with a fresh act. The legislation did not pass through the Senate in the timetable convenient to the government.³³

The *Employment Services Act 1994* was never repealed by the legislature, and remains on the statute books. The Executive managed to avoid the 'check and balance' of the Legislature, by making 'a dubious distinction' between the purchase of employment service processes, which the Employment Services Act covers, and the purchase of Employment Service outcomes.³⁴ While the Executive has an indisputable power to enter into contracts on behalf of the government, Kate Owens notes that 'the question of whether legislation empowering specific government contracts modifies or displaces a more general executive power to contract is, perhaps, more controversial.'³⁵ Despite this uncertainty, or perhaps due to it, the Legislature passed an Act that retrospectively approved of the creation of the Job Network, rendering its legality no longer in question. The manner of the Job Network's creation was important and has continuing consequences, as by using the Executive power to contract rather than legislation to create it, administrative law review, rights and remedies substantially no longer apply.

3.1 Administrative law jurisdiction

To be reviewable, a decision must be of an administrative character and made 'under an enactment', as per the *Administrative Decisions (Judicial Review) Act 1977(ADJR)* (ss 3 and 5). The final decision to 'breach', or disqualify a job seeker from benefits due to an infringement of the activity test or an Activity Agreement, will fall under the ADJR Act. Centrelink has the official delegation to make this decision, even though 'these decisions are now made on the basis of information provided by Job Network Agencies.' JNP decisions with regards 'breaching' a client are deemed not to be made under an enactment, and hence not of an administrative character. This is due to the bifurcated nature of the decision to

breach a client, with the JNP sending through a negative participation report, and Centrelink making the final statutory decision as to whether or not to impose the breach penalty on the basis of this report.³⁶

Such antecedent decisions made by the Job Network are not subject reviewable, as *Australian Broadcasting Tribunal v Bond*³⁷ ruled that only complete and final decisions, not pre-decisional errors, are subject to the ADJR Act. Further, *Neat Domestic v Australian Wheat Board*³⁸ and *Griffith University v Tang*³⁹ have firmly established that in Australia, judicial review will not be extended to government functions which have been contracted out. Meanwhile, a merits review application to the Social Security Appeals Tribunal is only available for 'officers' making decisions under the *Social Security Act 1991* (Cth). Since Job Network members are not officers, but 'merely provide services under the terms of their contracts,' their decisions are not subject to merits review either.⁴⁰

3.2 Breach fluctuations

The imposition of financial penalties is not new to Australia's social security system; payment reductions for not cooperating with welfare providers have long existed. What has caused alarm in recent years is the explosion in the volume and severity of these penalties, since the Coalition Government came to office. Between 1997 and 2001, breaching penalties rose by 340 per cent⁴¹. Breaching rates have, on the whole, risen dramatically since the inception of the Job Network. In 1997-1998 breach rates were at 120,718⁴², then rose dramatically to a high-point of 386,946 in 2000-2001. Following a surge of public pressure from community organisations to bring these figures down⁴³, they fell to 98,272 in 2003-2004, but in the 2005-2006 financial year rose again to 132,447.⁴⁴ In the 1999-2000 financial year, 24% of breaches originated from breach recommendations by JNPs. This spiked in the next 6 months to February 2001 to 39%. In that same year JNPs were responsible for at least 50% of all third breaches that result in an eight week non-payment period.⁴⁵ While a high proportion of JNP recommendations are rejected by Centrelink and do not result in a penalty being imposed on the unemployed person, the fact remains that an increasing proportion of all breaches are initiated by JNPs.⁴⁶ Following the surge of public pressure to reign in this trend of increasing breach-penalties, the Government acted to bring down the level of breaching, and by 2003 they were back down to pre-1997 levels, though they have begun to rise steadily once more.⁴⁷

The increase in breaching was caused by a combination of factors, including increased departmental pressure on Centrelink to discipline clients with breach penalties. The volume of breach reports being passed to Centrelink for evaluation also increased, as 'Job Network agencies came under contractual pressure to report non-compliance with participation plans.'⁴⁸ The above stated moral position of the Government with respect to welfare recipients may to some extent explain why it might seek, through DEWR, to control the Job Network in such a way as implement a more punitive compliance system.

This contractual pressure on the Job Network at one stage included a Key Performance Indicator (KPI) that stipulated that a set percentage of breach reports should be referred across to Centrelink. After this became public an outcry ensued, and 'breach quotas' are apparently no longer included as express contractual terms. There is no guarantee of this however, because these contracts are confidential. Indeed, the only reason the 'breach quota' policies became known was that the information was leaked by an anonymous source from within Centrelink. A system of accountability that relies upon phantom informants to break confidentiality is patently inadequate.⁴⁹

The fact that breaching rates are so sensitive to political pressure from the Executive, through DEWR, either to bring breaching numbers up or down, suggests that administrative ideals are not being adhered to. The political sensitivity of breach rates troubles the ideal of

democratic accountability, because it indicates that those implementing the legislation (JNPs and Centrelink) are not doing so independently. This is more concerning in the case of the Job Network, because outsourcing social security functions to non-government bodies (i.e. JNPs) has taken such dealings outside of the ambit of merits and judicial review and FOI transparency mechanisms.

According to the 'separation of powers' doctrine, rules are to be created by the legislature, and their enforcement is delegated via the executive to lower level 'neutral' bureaucrats, who adjudicate individual cases. The role of the judiciary, in this case, is to act as a check upon the Executive, in order to ensure that they do not act in excess of the power they have been legitimately granted by the legislature. However, any pressure that DEWR puts on JNPs is not reviewable, as the relationship is deemed private and confidential, as opposed to public and transparent.

The power to take away a person's livelihood for a period of two months is grave, and the consequences for persons affected can be severe.⁵⁰ For this reason, the lack of exposure to judicial or merits review is significant because '[a] number of decisions made solely by [job network] members under their contracts can have important ramifications for job seekers.'⁵¹ JNPs have a wide discretion as to what sort of assistance will be provided to the job seeker, for example, whether to attend TAFE, what training will be appropriate, and what job a client will be 'suitably' placed in. Owens notes that 'if a job seeker disagrees with any of these judgements and therefore refuses to cooperate, it is the member's responsibility to report them for a potential breach...'⁵² Although Centrelink makes the final decision as to which clients will be breached, 'its decisions are instigated by, and reliant on, information provided by members. Indeed, members themselves have suggested that they essentially possess the power to breach job seekers.'⁵³

3.3 Findings of fact v findings of law: a dubious distinction

The rationale for JNP decision making being exempt from review, is that it is characterised as a mechanical, antecedent 'fact finding' process, which requires no discretion. It is Centrelink that purportedly makes the normative decision as to how the relevant legislation applies to these facts. This is a dubious philosophical distinction, and although the problem is relatively abstract, it has very real consequences for the rights of welfare recipients.

Part B, clause 4 of the *Social Security Act 1991* sets out the obligation of specified classes of job seekers to fulfil their activity test requirements in order to be eligible for social security benefits. A JNP is obliged to inform Centrelink if these activity requirements have not been met, for example, where a job seeker refuses a job offer. This is construed as a question of fact, yet the determination of a 'breach' requires substantial normative input from the Job Network Member, and as such arguably involves questions of law. Aronson *et al* summarise the difference between questions of fact and law thus:

A question of fact involves an inquiry into whether something happened or will happen, and is quite separate from any assertion as to its legal effect. A question of law involves the identification and interpretation of a norm, which is usually of general application.⁵⁴

The finding that an activity test requirement has been breached is reliant upon the JNP being satisfied that there was no 'reasonable excuse'⁵⁵ for the participation failure, and that the client has not taken 'reasonable steps'⁵⁶ to fulfil their obligations. This is consistent with Aronson *et al*'s observation that '[f]act finding inevitably involves a prior knowledge of what facts might be legally relevant. We cannot know which facts to look for unless we know why we are looking, and it is the law which tells us that.'⁵⁷ When a client does not do what they are expected to do, their conduct becomes 'reportable' to Centrelink: this is a discretionary judgement. In spite of being contractually bound to report all non-compliance with activity

agreements to Centrelink, 'in practice, studies have reported significant variation in agencies' willingness to recommend breaches.'⁵⁸ David de Carvalho further explains that 'while [a JNP's] funding contract gives them no *official* discretion about whether or not to report breaches or possible breaches, they do exercise a *de facto* discretion of this kind.'⁵⁹

If it is accepted that JNP decisions actually involve the exercise of statutory discretions, and make 'findings of law', the fact that they fall outside the ambit of judicial review, is concerning. Further, the variability in JNP breach recommendations raises concerns in terms of treating like cases alike, a key element of administrative fairness. A solution could be to insist that DEWR control JNP decision-making more vigorously, given that they involve statutory discretions. However, this would potentially undermine the administrative law doctrine that prohibits the fettering of delegated discretions.

This exemplifies one of the unresolved contradictions in administrative law: the imperative to make administrative power accountable back up the chain of command; and the countervailing principle that discretion, once delegated, must be exercised by the delegate alone, unhindered by direction or dictation.⁶⁰ This doctrine labels as 'improper' 'an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case.'⁶¹ This problem is exacerbated in the case of JNPs, because their relationships with DEWR are not subject to judicial review. This means that the public has no way of knowing whether or not discretions are being exercised appropriately by JNPs, or if they are being inappropriately fettered by DEWR.

4. DIMINISHED NGO SCRUTINY OF GOVERNMENT POLICIES

The State's retreat from welfare provision has provided the non-government sector an opportunity to fill the void that was left behind. This has been a mixed blessing. NGOs have been boosted financially, whilst simultaneously neutralised, as their capacity to publicly criticise Government policies has diminished. Their new role as government service providers has also compromised the ability of these NGOs to adhere to their own values and priorities. According to Considine, contractual pressure has meant that non-profits have been pushed to de-prioritise their own goals, such as 'granting everyone an equitable share of service resources', and 'responding to needs rather than to market signals'.⁶²

DEWR disciplines the Job Network largely through contractual mechanisms. Written into contracts are terms requiring:

- strict confidentiality;⁶³
- regular reporting to DEWR;⁶⁴
- compliance with contractual Key Performance Indicators;⁶⁵
- compliance with changing Departmental policies;⁶⁶
- general departmental access to JNP premises and records;⁶⁷ and
- general departmental access to JNP databases and IT systems⁶⁸

Job Network contracts are obtained through a process of competitive tendering, and exist under a cloud of uncertainty, given that there is no guarantee that their contracts with DEWR will be renewed. The Draft Services Contract includes a terms stating that '...DEWR may, as its sole option, extend the Service Period for one or more periods of time up to a total of three years, by giving notice to the Provider not less than 20 Business Days prior to end of the Service period.'⁶⁹ This uncertainty naturally acts as an ever-present discipline, encouraging JNPs to behave in such a way as to increase the likelihood that DEWR will re-engage them. If the Provider 'fails to fulfil, or is in breach of an of its obligations under [the]

Contract⁷⁰, DEWR may exercise an array of remedies, including the withholding of funding instalments; the reduction of funding or fees; the reduction of participant numbers and the scope of the service, to name but a few.

Far from operating in a 'free market' where JNPs are at liberty to devise their own methods of producing optimal outcomes, free of regulatory or bureaucratic constraints, JNPs exist under DEWR's looming guillotine, constant surveillance, and detailed contractual regulations. Off-site contract managers at DEWR monitor JNP performance against contractual targets.⁷¹ According to MacDonald *et al*, there has been at certain times 'increased pressure from [DEWR] on the Job Network and Centrelink to increase breaching'.⁷² The Commonwealth Ombudsman similarly found that there was 'indeed increased pressure on the Job Network to apply breaches to customers without evidence or due process, and such recommendations were being readily accepted and processed by Centrelink'.⁷³

4.1 The taming of the third sector

This partnership between NGOs and the government has come at a cost, and has in part recast these organisations in the government's own image. Contracting out Government services has allowed the Federal Government to 'tame' the welfare sector, as entering into partnerships with Government has increasingly meant that NGOs must become depoliticised. These partnerships put NGOs in a conflicted position, and Smith warns that in such situations:

...voluntary sector and social movement organisations may find themselves practicing a politics that is profoundly ambiguous, namely, a politics that, in some ways, entails participation in implementing neoliberal policies and practices, and that, in other ways, resists such policies and practices.⁷⁴

A large body of evidence suggests that, once welfare agencies have been brought on board, the Executive will not let them *be themselves*. Chalmers *et al* observe that this 'social coalition' causes '[d]iscrepancies from conflicting objectives and a lack of commitment from service providers to government goals. While governments pursue cost cutting and efficiency, community groups such as churches and charities may emphasise community service'.⁷⁵ It has been alleged that this is part of a broader Government push to silence dissent, and 'by outsourcing welfare... the Howard Government has also been able to extend its reach to silence another group'.⁷⁶

Organisations that have been critical of government policy have lost influence and favour to those willing to toe the government's line. Sarah Maddison and Clive Hamilton argue that both the Salvation Army and Mission Australia are two organisations that have been 'captured' through their willingness to work with government.⁷⁷ The appointment of members of these organisations to government advisory boards, to 'prestigious positions' and the allocation of 'large sums of federal government money' are just some of the benefits these 'tamed' organisations have garnered.⁷⁸ Their policy advice is also more likely to be taken on board.⁷⁹ Bacon asserts that the competitive tendering process is divisive and has corroded 'relationships between community agencies, which had hitherto involved the sharing of information, experience and resources'.⁸⁰

Wilma Gallet, who instigated the Salvation Army's *Employment Plus* Job Network Agencies, articulates the conflicted position NGOs have found themselves in:

The reality is that our agencies report increasing government control over their programs, and decreasing discretion and freedom to implement the kinds of programs that most truly reflect our core mission.⁸¹

Ray Cleary, the CEO of Melbourne City Mission, similarly 'raised concerns that the Job Network contract barred public comment on social justice issues; hence church-based providers could lose their independence to advocate for the marginalised.'⁸²

The taming of welfare NGOs has been achieved through a variety of techniques, such as the Panopticon like 'EA3000'⁸³ IT system JNPs are required to use, and which DEWR has total access to. The efficacy of these techniques has been evinced by the shift in the changing behaviour of non-profit NGOs: In 1996 not for profits spent considerably more time with their clients than did the for-profit JNPs, but by 1999 there was little to no difference between these agency types⁸⁴, presumably due to the contractual and economic pressures inherent in NGO enlistment in the Job Network.

4.2 Biting the hand that feeds them

Whether the Government likes it or not, their relationship to JNPs is one of exchange, rather than purely command. This means that the Job Network has one bargaining chip up its sleeve, namely, the power not to come to the table. Particularly when they work together, this power can be utilised to assert a 'check' upon the more draconian aspects of the Government's welfare policies.

In 2006 exactly this occurred, when JNPs boycotted a scheme whereby certain 'vulnerable' clients would be subject to 'financial case management' when they are cut off payment for 8 weeks.⁸⁵ This scheme would involve JNPs deciding what a client's financial priorities are, and paying their bills for them. Church-based JNPs were finally pushed to boycott this system, their chief objection being that the scheme was abhorrent to their 'core mission' or role as advocates of marginalised groups. It was claimed that 'the 8 week loss of income was simply punitive, that it didn't acknowledge the complex difficulties many people have sticking to the rules: undiagnosed mental illnesses are a big issue, and homelessness is another.'⁸⁶ This 'financial case-management' initiative fell on its face, given that there were insufficient JNPs willing to implement it.

Given that the Government needs these agencies to do its bidding, these boycotts may be used to pressure the Government to grant these 'advocacy NGOs' more independence in feeding back into the public policy process. There may be further opportunities for JNPs down the track to collectively 'bite the hand that feeds them' with regards the harsher aspects of the breaching regime, in order to avoid being completely coopted by the Government's agenda.

5. DIMINISHED PUBLIC SCRUTINY OF GOVERNMENT PERFORMANCE

Recent events involving Opposition Leader Kevin Rudd and his wife Therese Rein have brought attention to the ambiguous relationship between the Australian Government and the Job Network. After it was revealed in May 2007 that 58 employees of Rein's Job Placement business were paid less than award wages,⁸⁷ Rein was pressured to sell the business in order to avoid a real or perceived conflict of interest that may arise if Rudd becomes Prime Minister.⁸⁸ An underlying issue that received less attention was the more fundamental lack of transparency in the tendering process between the Government and individual JNPs. This lack of transparency means that if Rein had not committed to sell her Australian Job Placement Business, neither the public, the media, nor the Parliament, would be able to adequately assure itself that the conflict was not causing problems.

The reason for the opaqueness of the Government-JNP relationship is that the individual contracts that make up the Job Network, and form the essence of the relationship between JNPs and the Government, are deemed 'commercial in confidence'. John Jessup describes the frustration that this can produce for unsuccessful JNPs:

You would send in a request or a complaint or ask for clarification of what went wrong with your tender, or how you might enhance it for next time, and basically get told, "Sorry, we can't answer your question"; it's either commercially in confidence or they refer you back to the guidelines, or they say, "We don't know, you need to talk to Canberra."⁸⁹

Such commercial in confidence claims are not only a source of frustration for JNPs themselves; they frustrate basic principles of democratic accountability. In order to ensure that Governments are accountable for the fulfilment of their designated functions, it is essential that the public have access to *information*. In the case of the Job Network, this information includes details of the basis on which JNPs are contracted to perform Government services, and whether or not these functions are being met. Anecdotal evidence from those accessing employment services will not be sufficient to construct a detailed and holistic picture of how a Government service is being run. There is therefore a strong public interest dimension to making this information available, a view supported by Administrative Review Council, which stated:

A service recipient may seek access to information in order to provide evidence of service delivery problems or support a view as to what the contract requires. Access to information by members of the public in general and service recipients in particular may enable a broader evaluation of the performance of contractors.⁹⁰

Confidential commercial information is exempt from the operation of the Commonwealth *Freedom of Information Act 1982* by virtue of ss 43 and 45, which are essentially designed to protect commercial value and privacy. This exemption is problematic, as the same information may hold private interests that support confidentiality, and public interests that support disclosure.⁹¹ It may be in private interests that sensitive information be kept secret from competitors. Yet it is also in the public interest to know how the public purse is being spent, whether the tendering process is valid, whether the terms on which contractors are engaged are suitable, and whether on-going relations between DEWR and the Job Network are appropriate. It is presently too easy for Government lawyers, and the lawyers of the agencies they contract with, to include excessive commercial in confidence claims.

Tony Harris explained to ABC Radio National's *Background Briefing*:

I've been approached by two very large financial institutions in Australia who are now complaining to me that governments are requiring confidentiality provisions which even they in the private sector believe are so restrictive as to be massively inappropriate. Now it appears to me that governments just don't want to be accountable, and are using private sector participation and so are reducing the amount of information that's available. It is really outrageous.⁹²

It has been suggested that Government outsourcing is consistent with a general preference for secrecy. Warwick Funnell contends that 'government has found that it can still shield itself from a prying public by shifting as much responsibility for service delivery as possible to providers more at a distance from immediate public influence.'⁹³ Particularly in the case of services that a Department is relatively new to administering (as is the case with DEWR and the Job Network), and which may be the subject of political controversy, there is a 'natural inclination to disclose as little as possible'.⁹⁴ These assertions do not require conspiracy theories to be supportable; they are a mere manifestation of the logic of power and its accumulation. As Funnell explains:

Secrecy has long been a characteristic of both government and private business. Societies controlled by privileged and powerful interest groups, classes or parties prefer secrecy to disclosure and are less compelled to answer for their actions... they particularly do not relish the exposure of their faults.⁹⁵

5.1 *The scope of secrecy*

The Joint Committee for Public Accounts and Audit (JCPAA) consulted with various stakeholders in 2000 on the issue of Government use of commercial-in-confidence clauses. Commenting on this practice, the Australian National Audit Office stated that 'it is probably too easy at the moment for agencies to claim commercial-in-confidence. We think the weighting should come back the other way...'⁹⁶ The Senate Finance and Public Administration References Committee was less equivocal in the issue, stating:

The Committee is firmly of the view that only relatively small parts of contractual arrangements will be genuinely commercially confidential and the onus should be on the person claiming confidentiality to argue the case for it. A great deal of heat could be taken out of the issue if agencies entering into contracts adopted the practice of making contracts available with any genuinely sensitive parts blacked out.⁹⁷

The JCPAA directly addressed the problem of commercial-in-confidence claims with respect to DEWR Employment Services Contracts. Consultations with DEWR revealed a markedly secretive attitude to parliamentary inquiries. According to DEWR, it was 'satisfactory for the parliament to know the total cost of the Job Network and the outcomes being achieved for that money.'⁹⁸ In this view, it is enough for Parliament to know how much money goes into, and how many outputs emerge from, the black hole of the Government's relationship with the Job Network. DEWR explained that '[p]arliament will be able to have how many outcomes are being achieved in every category and how much public funds are being used to achieve those outcomes. I think that is what parliament requires.' According to this view, accountability relates merely to expenditure, as opposed to conduct.

The JCPAA firmly rejected DEWR's position, maintaining that 'the parliament and its various committees will determine what information is needed to scrutinise executive government'. In the present circumstances, the public and the parliament have no means of ascertaining whether or not there are genuine reasons for exempting government contracts from FOI legislation or notifying contracts in the *Purchasing and Disposal Gazette*.

5.2 *Unsupervised contractual supervision*

Richard Mulgan contends that a basic problem of contracting out is that the relationship it sets up is too narrow. He states:

Because contracting out confines the duty of contractors to the performance of the terms of contracts and confines the right of supervising principals to enforcing the terms of the contract, it rules out the possibility of day-to-day supervision and intervention.⁹⁹

In opposition to this description, it is here argued that the substance of the relationship is in fact broad, and that a good deal of 'micro-management' occurs by virtue of the comprehensive access DEWR has to the Job Network's IT system, records and statistics. The draft contractual provisions are Government policy objectives. For example 49.1(b) of the Draft Services Contract with JNPs states that:

The provider must, in carrying out its obligations under this contract, comply with any of DEWR's policies notified by DEWR to the provider in writing, referred to or made available by DEWR to the Provider (including by reference to an internet site), including any listed in the Specific Conditions.¹⁰⁰

Such provisions allow DEWR to influence and change day-to-day practices of JNPs. The example of the Breaching Regime discussed above illustrates the reality that DEWR indeed exerts heavy influence over JNP practices, particularly when aspects of JNP operations become politicised. It is here contended that the Job Network is in fact supervised closely by DEWR; the real problem is that this supervisory power is not balanced with accountability. It

is commonly accepted that outsourcing diminishes Ministerial responsibility, as Departments ostensibly relinquish control to NGOs. This allows Ministers to disclaim much responsibility for the day-to-day dealings of the Job Network. However, given that DEWR has ubiquitous access to JNP data and computer systems, they act as a highly intrusive 'all-seeing-eye' on JNP operations.

FOI and privacy legislation do have some bearing on the Job Network, but they do not apply directly. This is because although JNPs carry out public functions, they are not 'public bodies' for the purposes of the ADJR Act. FOI and privacy legislation apply to greater or lesser extents via contractual arrangements with various Departments, which impose idiosyncratic complaints procedures, privacy restrictions and access requirements. This causes some confusion, as agencies that now carry out Government functions do not have the same compliance and accountability cultures that exist in the public sector, and are often subject to differing requirements:

Not only do these departments have different procedural requirements as noted above, but on interpretation of privacy issues in the same or very similar situations, they often differ, both between themselves and within each department. All of these factors make it difficult for an organisation such as Not For Profit to comply with privacy requirements at a best practice level.¹⁰¹

Given the privity of the contracts between DEWR and each individual JNP, citizens are not able to bring actions against individual JNPs for breaches of FOI or Privacy legislation. It is arguably inappropriate to rely on DEWR to instead police Job Network compliance in this regard, given that a major purpose behind this legislation is to provide direct, unmediated accountability to the citizenry, with respect to information pertaining to individuals, and policies that affect citizens more broadly.¹⁰² Further, given these contractual arrangements are confidential, the public is presently not even able to assess whether or not the terms of JNP contracts *allow* DEWR to protect the public sufficiently.

It is suggested here, that in order to ascertain whether or not the system is working as it should, the blindfold of 'commercial in confidence' claims should be removed. The ubiquitous use of 'commercial in confidence' clauses in contracted out services has the potential to short-circuit the democratic system, by blacking-out the interface between the public and the Government that serves them.¹⁰³ This interface must first be transparent if it is to permit accountability. It is precisely this transparency that is undermined in the case of the Job Network, by over-use of confidentiality claims and the consequent non-applicability of Freedom of Information legislation.

6. CONCLUSIONS: AVOIDING THE WORST OF ALL WORLDS

In the arena of Employment Service Provision, there has, in recent years been a dramatic reduction in transparency and accountability. This paper has argued that this is due chiefly to the ousting of merits and judicial review, the 'taming' of NGOs engaged in the Job Network, and the 'secreting' of the Job Network and its relationship with DEWR from public view. The Job Network is not accountable to a 'free market', but rather a 'highly regulated quasi-market'¹⁰⁴, over which DEWR still exercises substantial and largely unsupervised control. The 'check' of the legislature is also avoided, because the basis of the Job Network was contract, rather than legislation.¹⁰⁵

This paper will conclude with speculative solutions to the problem of Government accountability (and its precondition of transparency) for outsourced employment services. This will involve a reinvigoration of the three diminished counterbalances to Government power detailed in this paper, namely, administrative law review, NGO critique and public scrutiny.

6.1 Administrative law review

It is suggested that if government services must be outsourced, then administrative law supervision should be extended to cover the activities of outsourced agencies, given the nature of the power they exercise over the citizenry. This will mean making the job network, particularly with respect to their involvement in the compliance regime, subject to the full compliment of administrative law rights and remedies, including ombudsman review (as presently exists), merits review, judicial review, freedom of information legislation and privacy legislation. The why and the how of this enterprise is set out briefly below.

It was noted in the 2002 Report *Making It Work*, that in relation to the social security system, 'it is inevitable that mistakes will be made, or appear to be made, in some of the very high volume of matters handled by the system.'¹⁰⁶ It was also maintained that 'there are many occasions on which its operation in relation to particular jobseekers can be reasonably described as arbitrary, unfair or excessively harsh.'¹⁰⁷ This applies to JNPs as much as it does to Centrelink, as when someone is 'breached', it is the result of a number of incremental decisions, made by both JNP and Centrelink staff. In recognition of this, two key steps need to be taken:

1. the breaching regime should be clarified and simplified by giving JNPs the statutory delegation to make decisions to 'breach' welfare recipients;
2. these decisions must be made fully accountable, and the conditions under which they are made must be made transparent.¹⁰⁸

In relation to the first point, outsourcing statutory decision-making functions directly to JNPs would clarify exactly who is responsible for such decisions, by removing the bifurcated decision-making process that is currently shared by JNPs and Centrelink.¹⁰⁹ Decreasing the complexity of the system would lead to less information loss and increased efficiency.

In relation to the second point, accountability would be achieved by making JNP decisions reviewable by the SSAT on the basis of merit. As it currently stands, according to s 129(1)(a) of the *Social Security (Administration) Act 1999* (Cth) a person may appeal to the SSAT if they are affected by 'a decision of an officer under the social security law'. In order to implement this change, the definition of 'officer' would need to be expanded to include relevant JNP staff exercising statutory delegations. This would entail usual rights of appeal to the AAT and Federal Court.

Judicial review would provide a further layer of accountability to JNP decision making. Allowing Government to contract out certain legislative functions set out in the *Social Security Act 1991* (Cth) would bring JNP statutory functions within the ambit of judicial review. Added benefits of judicial review would include, for example, giving welfare recipients recourse to natural justice, as described in the excerpt below:

Courts have always placed strict requirements on the right of a person to be afforded natural justice before a penalty is imposed. This carries two principles relevant in the present context. First, the onus of establishing a breach of the law leading to the imposition of a penalty is on the party asserting that a breach has occurred. Second, a penalty cannot be imposed unless the person affected has a reasonable opportunity to present their case in answer to the assertions being made against them. Neither of these basic principles of the rule of law are sufficiently observed in the administration of the breaches and penalties system.¹¹⁰

In order to achieve this expansion of judicial review, it would be necessary to pass legislation equivalent to that proposed by the Employment Services Bill of 1996. In hindsight, it seems that opposition to this bill may have been misguided. This would allow JNPs to exercise statutory decision making functions, which would fall within the range of decisions

reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Given that JNPs already exercise these functions in practice (if not in name), to do so would merely ‘call a spade a spade’. These decisions would then be subjected to supervision, which would check inappropriate fettering or dictation from DEWR.

This step has been taken in the UK, for example in the *Contracting Out (Functions Relating to Child Support) Order 2006*.¹¹¹ This order allows the Crown to contract out some of the Child Support Agency’s functions to the private sector, namely ‘some clerical case management, debt collection and additional trace activity.’¹¹² This does not mean that every function may be out-sourced; when debating this order Lord Skelmersdale asserted that he would ‘need to be much more convinced that case management should ever be contracted out...’¹¹³ This order may have given the Crown more explicit capacity to outsource some of its functions, however, it was debated and passed through Parliament. The relationship is consequently more transparent and operates within the realm of administrative law doctrine, rights and remedies.

While not a completely satisfactory solution, this legislative move would avoid the ‘worst of all worlds’ predicament that now exists, by bringing the Job Network back within the ambit of administrative law supervision. The bureaucratic burden of the Job Network being made transparent and accountable may result in decreased market efficiencies, but these efficiencies were already diminished by (unsupervised) Government controls. In any case, this trade off is arguably not too high a price to pay for a functional democracy.

6.2 NGO critique

In recent years the State has been reconfigured, with Government shrinking and the non-government sector being called upon to fill the gap. This has caused a blurring of boundaries between the government, non-government and business sectors. As these three sectors begin more and more to intermingle, new concepts of governance and accountability need to be developed.

An example of such re-conceptualisation can be found in the various ‘compacts’ being negotiated between Government and third sector agencies.¹¹⁴ David de Carvalho has suggested a ‘renegotiation of the social contract’ between government and the non-government sector. Instead of a model of democracy where the government ‘steers’ and NGOs ‘row’, de Carvalho suggests that we adopt a model where the state directs and coordinates the activities of said NGOs, whilst recognising that each NGO responds to different community needs in different ways. State governments within Australia are already making such efforts, for example in June 2006 the NSW State Government and the NSW Human Services Sector began to implement the Working Together for NSW Agreement. This agreement seeks to provide a collaboratively designed framework setting out the ‘values and principles that guide working relationships between the two sectors.’¹¹⁵ A similar agreement has been forged in the UK, between the government and third sector.¹¹⁶ Such agreements will hopefully go some way to ameliorating the ‘conflict of interest’ currently inherent in working with Government, by letting these NGOs ‘be themselves’ and adhere to their own community oriented value-base. More broadly, De Carvalho asks:

Can we develop a form of contract that enhances both the ability of the public and Parliament to hold governments accountable for contracted services and the ability of civil society organisations to be faithful to their own ethos and accountable to their own mission?¹¹⁷

There is not space within this paper to do full justice to de Carvahlo’s proposition. However, various academics and activists are increasingly engaged with this problem.¹¹⁸ Suffice it to say, that de Carvahlo’s call for the re-thinking and reinvigoration of civil society, warrants further consideration by all stakeholders, in particular, by Government.

Even without this, there remain advantages to NGOs, in bringing the Job Network within the scope of judicial and merits review. While NGO independence and capacity to criticise government may still be compromised, their relationship would nonetheless be open to public and judicial scrutiny, and their discretion more freely exercisable. Further, there has been increasing awareness of the costs and risks that NGOs take in taking up these Government contracts. NGOs will have to weigh up these risks, and it may well be that they start to reject contractual arrangements which compromise their advocacy work.

6.3 Public scrutiny

In order for government to be accountable it must first be transparent. In order to achieve this, steps must be taken to ensure that there is a much freer flow of information into the public domain. As Goodman asserts, '[i]n a system which actually withdraws basic income support as a penalty, it is critical that all safeguards work both efficiently and beneficially, as the system tends to assume guilt until innocence is proven.'¹¹⁹

The first step is to make government contracts available for public view. Nick Seddon suggests in this regard that

there needs to be a radical change of policy by governments. The solution is to adopt the American habit of publishing government contracts in their entirety with deletions only for information that is genuinely confidential, such as trade secrets.¹²⁰

In this vein, amendments should be made to the Commonwealth FOI and procurement legislation, to ensure that 'commercial in confidence' claims are not abused. This means that the mere presence of a commercial dimension to a transaction between government and a non-government party should not obscure the fact that the transaction is also profoundly public in nature. In short, the public nature of the Job Network needs to be properly recognised in Commonwealth procurement and FOI legislation.

Presently, the *Senate Order on Government Agency Contracts* requires DEWR to merely list the contracts it has engaged in, state whether or not there are confidentiality provisions therein, and provide a coded reason for such provisions, such as 'trade secret, other' or 'Privacy Act, other'.¹²¹ The basic problem is that it is presently far too easy for Government lawyers to insert broad confidentiality provisions within Government contracts, with little justification. A range of accountability options aimed at ameliorating this problem is detailed below.

With respect to Parliamentary accountability, the Australian National Audit Office made the following recommendations:

- that budget funded agencies... ensure that before they enter into any formal or legally binding undertaking, agreement or contract that all parties to that arrangement are made fully aware of the agency and contractor's obligation to be accountable to parliament;
- that any future Requests for Tender and contracts entered into by a Commonwealth agency include provisions that require contractors to keep and provide sufficient information to allow for proper parliamentary scrutiny, including before parliamentary committees, of the contract and its arrangements.¹²²

With respect to disclosure to the public, the Australian National Audit Office recommended that strict criteria be applied before information is deemed confidential from the public. Accordingly, information to be protected must:

- be able to be identified in specific rather than global terms
- have necessary quality of confidentiality

- prove that there is 'detriment to the confider' if made public¹²³

The Victorian Parliament Public Accounts and Estimates Committee has recommended the creation of a legislative framework which renders Government contracts *prima facie* public, and requires 'specified information about all tender documents and the resulting contract to be made publicly available... unless application is made at that time restrict publication.'¹²⁴ A good example of such legislation is the ACT's Government Procurement Amendment Bill 2001, which restricts recognition of 'commercial in confidence' clauses. A poor example of this is the NSW *Freedom of Information Amendment (Open Government – Disclosure of Contracts) Act 2006*, which leaves the 'commercial in confidence' exemption fully intact, and contains the proviso that 'Information is required to be published under this section by an agency only to the extent that the agency has the information or it is reasonably practical for it to obtain the information.'¹²⁵

Disappointingly, little has been done in recent years to correct the present information imbalance. David Marr laments:

The failure of freedom of information laws, which the High Court last year confirmed gives federal ministers virtually a free hand to withhold documents from the public. Calls for reform of the FOI laws by the press, NGOs, lawyers' groups and the Commonwealth Ombudsman, have all been ignored.¹²⁶

In order for the principles of 'Open Government' to be upheld, there must be a reversal of the onus that presently exists in favour of confidentiality. This is essential both to protect the basic rights of the citizenry to have access to information with respect to their individual dealings with Government agencies, and more broadly to ensure that the activities and relationships that Government agencies engage in are appropriate and accountable.

6.4 Summary

It has been argued here that outsourcing employment services has lead to a weakening of counterbalances to Government power, without the government needing to sacrifice control. This has lead to a crisis in accountability, which poses fresh challenges to Australia's democratic system.

Speculative solutions to these problems have been offered, in the hope that debate about Australia's welfare system and outsourcing more generally, may be reinvigorated. These solutions involve re-subjecting the Job Network to judicial and merits review, reconfiguring the Government's relationship with civil society, and amending FOI legislation in order to expose the Job Network to the light of public scrutiny. While these solutions admittedly would not produce an ideal world, it is suggested that they would, at least, avoid the worst of all worlds.

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- 66 This includes 'any of DEWR's policies notified by DEWR to the provider in writing, referred to or made available by DEWR to the Provider (including by reference to an internet site) including any listed in the Specific Conditions.' Ibid, part 49.1 entitled 'Compliance with Laws and Government Policies' p.199
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