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## The Contracting Out of Government Services

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In March 1997 the Administrative Review Council released an Issues Paper entitled *The Contracting Out Of Government Services*.

The release of this Issues Paper was particularly timely.

On 11 December 1996, the Minister for Finance, the Hon John Fahey MP, announced, in response to the Industry Commission's Report *Competitive Tendering and Contracting by Public Sector Agencies*,<sup>1</sup> that public service managers would be "required to systematically review their responsibilities and assess the cost and effectiveness of these activities". This review process will include consideration of whether the use of competitive tendering and contracting or other performance improvement tools would enable government services to be delivered better. The Government is to undertake a review in 1998-99 to determine how well new approaches to delivering government services have been adopted and implemented.<sup>2</sup>

### What the Issues Paper Is About

The Issues Paper examines the legal position of members of the public where service delivery to members of the public or which affects members of the public is contracted out. The Council has not dwelt upon the issue of definition of "clients" of services, noting instead that there are services which might be characterised as being provided direct to Government rather than to members of the public, which can directly impact on members of the public, for example, debt collection services. In such cases access to rights and remedies can be just as important as in those cases in which services are provided directly to them, for example, medical or counselling services.

### The Effect of Contracting Out For Administrative Law Remedies

Where services are contracted out, administrative law rights and remedies which were previously available to members of the public will no longer be available unless legislation specifically provides that such rights and remedies should continue. These are the rights and remedies which, for example, enable a member of the public to seek information about the service, to complain about defects in the way the service was delivered or about non-delivery, to have information about them protected from disclosure that they do not know about, and to find out about and correct information about them that is incorrect or misleading. Contracting out may also involve giving private sector service providers a right to make decisions about entitlements. This may raise concerns for those who, if the Government was making the decisions, would have a range of rights which enable them to seek re-consideration of those decisions.<sup>3</sup>

The Issues Paper explains the two positions in which a service recipient, or other member of the public, may find themselves in the following table.

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| When The Government Delivers The Service  | When Contractors Deliver The Service  |
|---|---|
| Complaints can be made to the Commonwealth Ombudsman about decisions or action or practices and procedures which are unlawful, oppressive or unreasonable in all the circumstances.   | Complaints can be made to the Ombudsman about the Government agency that manages the contract but not about the actions of the contractor.  |
| <p>If a person wants information about a service and it is not provided, a formal request can be made for that information under the Freedom of Information Act.</p> <p>Government documents relating to commercial activities may be exempt from disclosure under the Act (see Part II and Part III of Schedule 2 to the Freedom of Information Act).</p>                  | <p>A formal request for information under the Freedom of Information Act will only cover information, like the contract, that the Government possesses because the Act does not apply to documents that the contractor might have.</p> <p>Even if the Government has relevant documents in its possession, access may be refused if they relate to the business affairs of the contractor (this includes documents that contain trade secrets or any other information having a commercial value that would be destroyed if they were disclosed).</p> |
| If the Government is keeping information about someone that person can use the Freedom of Information Act to get access to that information and can have it corrected if the information is incomplete, incorrect, out of date or misleading.   | The Freedom of Information Act does not apply to a contractor so a service recipient has no right to find out what information the contractor has about the recipient or to get it corrected.   |
| Anyone can complain to the Privacy Commissioner if they are concerned about how the Government collects and handles personal information and there are Information Privacy Principles which set out how the Government is to treat this information and the circumstances in which agencies can pass the information to someone else.                                       | A person cannot complain to the Privacy Commissioner about how a contractor collects and handles personal information.  |
| Where the action complained about is a decision authorised by legislation, the complainant may be able to seek review of the decision on its merits by first, internal review and next by a Commonwealth review tribunal or the Ombudsman. Each tribunal only has jurisdiction to review decisions where legislation specifies that review of those decisions is available. | Applications for internal or administrative review cannot be made.  |
| Other forms of review of Government action, including requests for statements of reasons for decisions under the <i>Administrative Decisions (Judicial Review) Act 1977</i> , apply only to Commonwealth actions.   | The <i>Administrative Decisions (Judicial Review) Act 1977</i> does not apply to some decisions made under contracts.   |

The Table shows what happens to administrative law remedies when services are contracted out. Although they may not have access to administrative law remedies, people affected by the actions of contractors may have other options and remedies available to them.

The Issues Paper summarises the private law remedies which may be available to people who experience service delivery problems or are adversely affected by the activities of contractors.

These remedies include:

- contract – if the service recipient has a contract with the service provider the recipient can take action to enforce the proper performance of the contract; others affected by the contractor's activities will not be able to enforce the contract;
- torts – a person who suffers loss or injury as a result of an act by the contractor may be able to sue for damages under the law of torts;
- legislative remedies – provisions in the *Trade Practices Act 1974* and a number of State and Territory Acts enable dissatisfied consumers to take action in courts (or in small claims courts or tribunals). Some of these legislative remedies will be available to service recipients only if there is a contract between the recipient and contractor. Other remedies may be more widely available.<sup>4</sup> In some cases complaints may be made to a regulatory body such as the Australian Competition and Consumer Commission;
- access to information – where a person takes proceedings in court against a contractor, the rules of discovery provide a means of obtaining information relating to the litigation.

There are also a range of industry-based complaint-handling mechanisms or industry Ombudsmen – and these are described in the Issues Paper – or the more traditional, informal remedy of consumer choice or complaining directly to the contractor.

There are some limitations with these remedies.

Contract and tort, for example, are court-based remedies which may be costly or complex remedies to use or inappropriate for certain types of problems. In many cases a service recipient may not have a contract with a service provider (for example, because the service is provided free). If a service recipient has a contract with the contractor (because they pay the contractor for some cost of the service), the recipient can take action to enforce that contract but in most cases there is not likely to be a written contract. Even where a contract does exist the recipient's complaint may go to questions about how the service was provided rather than being about conduct amounting to a breach of contract.

Other remedies such as industry complaint-handling bodies may not be able to deal with particular types of complaints or there may not be a complaint-handling body for a particular type of service. Consumer choice can promote the quality of services provided by all providers. However, the contracting out of services may mean that the Government funds or subsidises the provision of a service by only a limited number of providers. Consumer choice may not be an effective remedy where a particular service is only available free or at a subsidised rate from one or a limited range of providers. In many cases, the contractor may be happy to remedy the problem but may be more willing to do so if the contract it has with the Government requires this to occur.

### **A Good Contract is of Prime Importance**

Some problems can be prevented. The Paper notes the steps that can be taken to make sure that government contracts with service providers are drafted to minimise the instances of poor or inefficient service delivery. Some of these steps are already being taken by the Government.

A good contract will anticipate, and contain measures to deal with, contingencies that can affect the performance of the contractor, such as illnesses, power failures or mechanical breakdowns. It also needs to anticipate, as far as practicable, the myriad circumstances of the intended recipients of the service.

When a Government agency contracts out the delivery of a service, it may be the first time that the agency has needed clearly to articulate the scope of the service and the manner in which it is to be provided.

The contract needs to make clear what standards of performance are required, for example, the hours when a service is to be available, any special access arrangements for persons with disabilities or frail aged persons and any other arrangements necessary to cater for service recipients with special needs. The contract needs to set out the amount and quality of information to be provided to service recipients by the contractor. Any rights of access to information may only be of practical use if there are appropriate record-keeping obligations. If these standards are clear, it will be easier for recipients to identify who is responsible when they experience problems and for standards of performance to be evaluated and monitored.

### **Is There A Need For Additional Remedies**

The Commonwealth Ombudsman's latest Annual Report lists a range of issues raised by complaints made about contracted out services.

“... as a direct result of these new contracted arrangements, the Ombudsman's office has been receiving a new range of complaints from suppliers of contracted services and the consumers of these services.

Often the rules associated with contracting out can be muddy, contradictory or not yet written. When things don't work out, problems can arise for the consumer and the service deliverer because many service delivery mechanisms are currently outside the Ombudsman's jurisdiction, and no other accountability mechanisms are readily available.

This year we examined some 300 complaints which raised a range of issues including:

- the inability of consumers to recover losses due to the actions of contracted service providers;
- stand offs where the victim (client) is told to “prove it” or take legal action before the situation is resolved;
- buckpassing of responsibility between the various parties (the department, contractor and/or insurer);
- inadequate or ambiguous contractual arrangements about:
  - required service standards;
  - changing service obligations during the course of a contract; and
  - procedures related to the termination of the contract;
- the absence of accessible and effective dispute resolution procedures;
- oppressive behaviour by some government agencies towards small business;
- favouritism or misleading information in tender processes; and
- inappropriate use of statutory powers by agencies during commercial disputes.

A recurring problem occurs when complainants suffer losses as a consequence of a contractor's actions. If the relationship between the contractor and the agency is not clearly defined, or the underlying insurance arrangements are unclear or non-existent, the government agency, its contractor and their respective insurance companies can all deny liability for a problem."<sup>5</sup>

The Issues Paper discusses the limitations of the currently available private law and consumer remedies. The Paper also notes that, while there are also some limitations in administrative law remedies (for example, some users find proceedings in certain tribunals too formal or adversarial), they are arguably more accessible by people with special needs than are private law remedies. Mechanisms such as the capacity of the Ombudsman's Office to resolve minor complaints quickly and informally is particularly useful.

### What Are The Options

The Council does not suggest a one size fits all approach but has identified 4 options which could be relied upon to provide additional remedies and redress for people affected by the actions of service providers. Combinations of the options can also be used.

**First**, service recipients might be given the ability to sue on the contract between the Government and the provider to the extent that the contract relates to the service to be provided to the particular recipient.

**Secondly**, new remedies might be established that could be accessed directly by people affected by the action of contractors.

For example, service recipients and others might be given a direct right of action against the Commonwealth to recover compensation for minor loss or damage suffered as a result of the action of a contractor. It would then be up to the Government to work out with the contractor how it recoups that compensation. This simple type of compensation scheme might overcome the problem of complainants being referred between a government agency and the contractor where both argue that the other is liable.

The Government might also establish a complaint-handling body for recipients of contracted government services. Such a body might, for example, deal with complaints about the operations of all contractors delivering Government services. Alternatively it might deal only with complaints about contractors in a sector where there is no industry ombudsman available.

Another issue canvassed in the Paper is the possible need for a right of access to information concerning the service or the contractor. Access to information may be important for people with a complaint. If they cannot ascertain the details of the service that the contractor was supposed to provide it will be difficult if not impossible for them to be able to take advantage of other remedies.

**Thirdly**, contractors might be required to establish their own complaint-handling mechanisms and to provide access to information about the service. Such an obligation could be imposed on contractors by legislation or included in contracts between the Government and service providers or be part of a regime of customer service charters which service providers are required to observe.

The obligation to deal with complaints might in appropriate situations be as simple as requiring the contractor to have a nominated complaints person who will be the first port of call for service recipients. More complex service arrangements might require more complex complaint-handling processes.

**Fourthly**, existing administrative law mechanisms such as the Ombudsman and the Freedom of Information Act regime might be extended so that they can be used to deal with complaints by service recipients about services provided by private contractors. Making use of these existing remedies like the Ombudsman and the Freedom of Information Act rather than setting up new remedies would have some financial advantages as well as the advantage that those administering these existing remedies are experienced in dealing with complaints.

Copies of the paper are available free of charge from the Council Secretariat by telephoning Mary Roberson on 06 247 5100.

The President of the Council, Professor Marcia Neave, will be talking about the Council's contracting out project at a seminar at the Leo Cussen Institute, 1st Floor, 360 Little Bourke Street, Melbourne, on 7 July 1997 at 5.30pm. The cost is \$60 and the contact at the Institute is Patricia Palman on 03 96023111.

#### Notes

- <sup>1</sup> Industry Commission Report No 48, *Competitive Tendering and Contracting by Public Sector Agencies*, AGPS, Melbourne, 1996.
- <sup>2</sup> Media Release, Minister for Finance 37/96.
- <sup>3</sup> The Paper does not deal specifically with decisions to contract out and the tender/contract process. There are a number of other agencies dealing with aspects of these areas and, in any event, the remedies available to people aggrieved by aspects of these processes are unchanged by the contracting out process. Also excluded from consideration is the delivery by the States of Commonwealth-funded programs. In such cases, administrative law remedies are a matter for State law. Aspects of Commonwealth/State funding arrangements have previously been considered by the Administrative Review Council in its Report No 37, *Administrative Review and Funding Programs*, AGPS, Canberra, 1994.
- <sup>4</sup> For example, section 74 of the Trade Practices Act provides that where there is a contract for the supply of services by a corporation, there is an implied warranty that the service will be rendered with due care and skill. Under section 82 of that Act, a person who has suffered loss or damage because of false or misleading representations by a service provider (whether or not there is a contract between them) will be able to recover the amount of that loss or damage. However, the Issues Paper notes that there is some possible uncertainty about whether service providers might be able to claim immunity from legislation such as the Trade Practices Act.
- <sup>5</sup> *Commonwealth Ombudsman Annual Report 1995 - 96*, Canberra, 1996 at pages 9 - 10.