CHAPTER 1

INTRODUCTION

THE COUNCIL

1.1 The Administrative Review Council was established under the *Administrative Appeals Tribunal Act 1975* as an integral part of the Commonwealth system of administrative law. The Council advises the Attorney-General on a broad range of administrative law issues.

THE REPORT

1.2 This Report examines the administrative law implications of the contracting out of government services and makes recommendations to ensure that members of the public have access to avenues of complaint and redress where government arranges for the provision of services or the performance of activities by private contractors.

1.3 The Report is based on the principle that rights and remedies which are available to members of the public when services are delivered by government agencies should not be lost or diminished as a result of contracting out. As well as making recommendations relating to these remedies, the Report considers how existing systems of governmental, financial and Parliamentary accountability should be modified to take account of the increasing use of contractors to perform activities and provide services on behalf of government agencies.¹

1.4 The effect of particular contractual arrangements on members of the public will depend, in part, on the drafting of the contract, arrangements for the monitoring and evaluation of the contractor’s performance and the approach taken by the agency to the enforcement of the contract if the contractor fails to comply with it. This Report offers guidance to agencies in the preparation of contracts and in the monitoring and evaluation of contractors’ performance.

¹ As a result of the Industry Commission’s Report No 48, *Competitive Tendering and Contracting by Public Sector Agencies*, AGPS, Melbourne, 1996, the Government is requiring agencies to undertake a systematic review of agency activities. The Government considers that such reviews are necessary to ensure that the energies of an agency are focused on those activities that are primarily the responsibility of the Commonwealth. Where it is decided that an activity falls outside the Commonwealth domain, an agency should consider whether that activity is best devolved to a more appropriate level of government, privatised or discontinued: the Minister for Finance and Administration, the Hon John Fahey MP, Foreword to *Competitive Tendering and Contracting. Guidance for managers*, Department of Finance and Administration, March 1998; Media Release, Minister for Finance 37/96.
1.5 The Council uses the expression ‘contracting out’ to refer to the use by the Government of contractors to provide services to the public on behalf of the Government. The term ‘contractor’ is used to refer to both private sector contractors and not-for-profit bodies funded wholly or in part by Government.

1.6 The Government also ‘contracts in’ services where it uses contractors to provide services, such as information technology, directly to Government. Although this Report focuses on the position of recipients of services that have been contracted out, the discussion and recommendations in this Report are also relevant to members of the public who are not themselves service recipients but who are affected by the activities of contractors who provide services directly to the Government (for example, debt collection services).

1.7 Many of the recommendations in the Report may also be applicable to not-for-profit bodies which receive funds to provide a government service, whether or not they have entered into a contractual relationship with a government agency to provide the service.

WHAT THE REPORT EXCLUDES

1.8 The Terms of Reference that the Council set itself for this project are set out in Appendix 1.2

1.9 The primary focus of the Report is on service recipients and others who may be affected by the actions of a government contractor. For reasons explained in the Issues Paper3, the decision to contract out, the tender process and the delivery by the States of Commonwealth-funded programs have not been dealt with. Some of these issues are already being considered by other bodies.4

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2 This Report is an extension of a series of inquiries that the Council has conducted into developments in public administration that affect the administrative law system, particularly where services are not provided directly by government but by bodies that have been distanced from government by commercialisation, corporatisation and privatisation. Report No. 38, Government Business Enterprises and Commonwealth Administrative Law, Canberra, 1995 (the GBEs Report) and Report No 40/ALRC Report No 77, Open government: a review of the federal Freedom of Information Act 1982, 1995 (the FOI Report) addressed issues concerning bodies that have been distanced from the Government by commercialisation, corporatisation and privatisation. Report No 37, Administrative Review and Funding Programs, AGPS, Canberra, 1994 (the Community Services Report) developed principles for reviewing decisions under particular funding programs, including programs where the Commonwealth funds State Governments to provide services to members of the public.


HOW THIS REPORT WAS PREPARED

1.10 In February 1997, the Council published an issues paper, *The Contracting Out of Government Services*, which is referred to throughout this Report as ‘the Issues Paper’. The Issues Paper covered a range of topics, including access to information, complaint handling and compensation. Approximately 1700 copies were distributed free of charge throughout the public, private and community sectors. The Council has received 30 submissions on the Issues Paper.

1.11 In December 1997, the Council published a discussion paper, *The Contracting Out of Government Services, Access to Information*. Copies of this Discussion Paper were sent to everyone who had received or requested a copy of the Issues Paper. The Discussion Paper was prepared as a contribution to the growing body of material available on the contracting out of government services. It was intended to provide guidance and practical solutions to government agencies, public service managers and other groups involved in the contracting out process.


1.13 In addition, the Council undertook extensive consultations through meetings and telephone conferences with a number of organisations and individuals.

STRUCTURE OF REPORT

1.14 Chapter 2 outlines the current mechanisms of government accountability and notes how these may be affected by the process of contracting out. Chapter 3 describes the remedies that members of the public have under the administrative law system where services are provided by government agencies. These remedies are contrasted with the remedies that are currently available where government services are provided by contractors. The issues of complaint handling and access to information through the *Freedom of Information Act 1982* (the FOI Act) are discussed in Chapters 4 and 5.

1.15 Chapter 6 examines the extent to which decisions taken by contractors should be subject to judicial and merits review. Chapter 7 examines the possibility of service recipients being able to enforce the contract between the government agency and the contractor. The question of compensation for loss or damage suffered as the result of the actions of a contractor is the subject of Chapter 8. In Chapter 9 the Council draws together a number of its recommendations and provides guidance to government agencies on the issues that need to be considered in developing contracts with contractors.

Outsourcing’. The Management Advisory Board and the Management Improvement Advisory Committee have published *Before you sign the dotted line, Ensuring contracts can be managed*, MAB/MIAC Report No. 23 May 1997.

5 Administrative Review Council, op. cit.


7 A list of the people and organisations that made submissions is at Appendix 2.
The Contracting Out of Government Services
CHAPTER 2

GOVERNMENT ACCOUNTABILITY

INTRODUCTION

2.1 While much of this Report deals with the needs of individual service recipients and members of the public, this Chapter looks at the broader issues of government accountability and Parliamentary oversight. It recommends possible changes to the existing mechanisms of accountability to ensure appropriate levels of accountability are maintained when services are contracted out.

2.2 Accountability is fundamental to good governance in modern open societies. It is necessary to ensure that public moneys are expended for the purposes for which they are appropriated and that government administration is transparent, efficient and in accordance with law. Public acceptance of Government and the roles of officials depends upon trust and confidence founded upon the administration being held accountable for its actions. The expectation that Government should be accountable is a product of the electorate’s grant of power to Government.

GOVERNMENT ACCOUNTABILITY AND CONTRACTING OUT

2.3 In its report, Competitive Tendering and Contracting by Public Sector Agencies, the Industry Commission drew attention to the need to preserve accountability when services are contracted out.

The Commission agrees with numerous inquiry participants that, while responsibility to do certain things can be transferred, accountability for the results cannot.

Whatever the method of service delivery, a government agency must remain accountable for the efficient performance of the functions delegated to it by Government…

FORMS OF GOVERNMENT ACCOUNTABILITY

MINISTERIAL RESPONSIBILITY

2.4 The principle of responsible government, under which a Minister is accountable to the Parliament, is recognised in section 64 of our Constitution.

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2.5 The principle requires Ministers to accept responsibility for the overall administration of their portfolios, both in terms of policy and management. Ministerial responsibility does not mean that Ministers are individually liable for every action of public servants within their portfolios.\(^{10}\)

2.6 Ministerial responsibility is achieved through a number of mechanisms, in particular Parliamentary questions and debates, and the provision of detailed information in the context of the budget estimates.

2.7 Contracting out does not affect Ministerial responsibility to Parliament. Ministers are responsible to the Parliament for the way in which agencies within their portfolios manage their contractual relationships with service providers. As will be seen below this will not always provide adequate redress for individuals.\(^{11}\)

**PUBLIC SERVICE ACCOUNTABILITY**

2.8 The Australian Public Service undertakes substantial functions on behalf of the Government. There are, therefore, accountability relationships between Government and the Public Service and from the Public Service through (or on behalf of) Government to the Parliament.\(^{12}\)

2.9 Section 25(2) of the *Public Service Act 1922* states that the Secretary of a Department shall, under the Minister, be responsible for its general working, and for all the business of the Department and shall advise the Minister in all matters relating to the Department. This provision requires a public servant to produce information obtained in their official capacity to their Departmental Secretary (or agency head\(^{13}\)) or responsible Minister, when directed to do so.

2.10 Other important elements in these accountability mechanisms are the statutory requirement that agency heads provide annual reports to Ministers\(^{14}\) for tabling in Parliament and the budget forecasts and other documentation which are authorised by Ministers for use by Parliamentary committees as part of the budget estimates process.

**Annual Reports**

2.11 Annual reports must be prepared in accordance with Requirements presented from time to time by the Prime Minister to the Parliament after approval by the

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\(^{10}\) MAB/MIAC Report No. 11 op. cit., at page 6.

\(^{11}\) The Department of Primary Industry and Energy noted in its submission that in contracting out services, government inevitably loses a degree of control over service delivery.

\(^{12}\) MAB/MIAC Report No. 11 op. cit., at page 6.

\(^{13}\) Where the agency head has conferred by legislation the same powers as a Departmental Secretary.

\(^{14}\) Sections 25(6) and (7) of the *Public Service Act 1922*. 
Parliamentary Joint Committee of Public Accounts. These Requirements deal with a number of matters which should be included in annual reports. They set out formats for the reporting of financial and staffing resources. They also require agencies to report on program performance, the achievement of program objectives and results. The Requirements suggest that this section should be a balanced and candid account of both successes and shortcomings. The information contained in the annual report should be sufficient to enable the Parliament to make informed judgements on departmental performance.

**NEED FOR ADDITIONAL INFORMATION**

2.12 Attachment 3 to the Requirements sets out the information that agencies should provide to Members of Parliament and Senators on request, after annual reports have been tabled. This information is also to be made available to members of the public on request.

2.13 It is a matter for the discretion of agency heads as to whether any of the information requirements contained in Attachment 3 should be included in annual reports. The Requirements suggest that decisions of this nature might be based on the level of demand for some information.

2.14 While there is no express requirement in Attachment 3 for agencies to make available to Parliamentarians and others additional information about the performance of contractors delivering government services, it is important that agencies make sufficient information about contracts and contractors available to enable Parliament and members of the public to identify areas of interest and concern that can be the subject of further inquiry and investigation.

2.15 In its Report, *Competitive Tendering and Contracting by Public Sector Agencies*, the Industry Commission noted that information on the specification of the service, the criteria for tender evaluation, the criteria for the measurement of performance and how well a service provider has performed against these criteria is information that will assist interested people to assess contracting decisions made by agencies.

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15 In addition to these Requirements approved by the Joint Committee of Public Accounts, a number of other Acts require agencies to include particular information in their annual reports. See for example section 22C(10A) *Public Service Act 1922* (industrial democracy plans), section 74 *Occupational Health and Safety (Commonwealth Employment) Act 1991* (occupational health and safety policies and measures), section 8 *Freedom of Information Act 1982* (functions and documents of an agency) and section 311A *Commonwealth Electoral Act 1918* (advertising and market research).

16 The most recent Requirements for departmental reports were approved by the Joint Committee of Public Accounts on 17 March 1994 and updated in April 1998.

17 The Council notes that agencies are required to publish details of contracts in the *Commonwealth (Purchasing and Disposals) Gazette*. This obligation is discussed more fully at paragraph 5.52.

18 Industry Commission op. cit., page 95.
2.16 The Council recommends that agencies be required to keep relevant information relating to the management and monitoring of contracts to enable the evaluation of the effectiveness of the delivery of particular services. Such information should include details about the performance standards required of contractors, the actual performance of contractors and the number and types of complaints received by the agency and the contractor. The information kept by agencies should be publicly available.

2.17 While it would be desirable for this type of information to be collected and made readily available on request along with other information required by Attachment 3, such an obligation may be unduly onerous for government agencies. It may be easier for an agency to make the information available from time to time, for example by the publication of six monthly reports. In addition members of the public will be able to seek access to information held by the agency under the FOI Act and agencies will continue to be required to notify contracts in the Government Gazette.

**Parliamentary Committees**

2.18 The Parliamentary committee system is another means of ensuring accountability. Each House of Parliament has the power to require members of the executive government and public servants to produce information to it. This power derives from section 49 of the Constitution and is reflected in section 5 of the *Parliamentary Privileges Act 1987*.19

2.19 Where a government agency delivers a service there is a direct chain of accountability from agency to Minister to Parliament. Where the government agency contracts out the service there may no longer be a direct link from service provider to Parliament. As a consequence it may be more difficult for Parliament to maintain its current levels of oversight. In particular it may not be possible for Parliament to be able to compare the delivery of the same service by different contractors or to compare the delivery of a service by contractors with the delivery of the same service by a government agency.

2.20 Where services are contracted out the agency will have only a contractual relationship with the service provider. The only information that the agency will be able to collect from the contractor will be the information that the contractor is obliged to provide under the terms of its contract. Unless the contract is carefully drafted in a way that anticipates potential future problems and ensures that the contractor collects and provides appropriate information to the agency, the agency may not be able to seek information about particular problems or concerns that come to light during the course of the contract.

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19 A person failing to comply with a lawful order of a committee to appear or produce documents may be found to be in contempt of Parliament and be subject to a fine of up to $5,000 for a natural person or $25,000 for a corporation, *Parliamentary Privileges Act 1987*, section 7.
2.21 As a result the agency may not be able to pass the necessary information on to its responsible Minister or a Parliamentary committee to enable them to make informed assessments about the delivery of the service.

2.22 In some situations government services will be provided by bodies that are not in a contractual relationship with a government agency but which are funded by the agency to deliver the service. In these cases, it may be desirable for the government agency to collect similar information from these bodies relating to performance. Agencies should also consider whether the circumstances would warrant requiring the body to provide this information as a condition of the grant.

2.23 The Council recommends that agencies include provisions in their contracts that require contractors to keep and provide sufficient information to allow for proper Parliamentary scrutiny of the contract and its management. The information required to meet this need will vary from contract to contract according to a number of factors including the value of the contract, the nature of the service to be delivered under the contract and the characteristics of the service’s recipients.

Recommendation 1

Agencies should be required to keep relevant information relating to the management and monitoring of contracts such as will enable the evaluation of the effectiveness of the delivery of particular services. Such information should include details about the performance standards required of contractors, the actual performance of contractors and the number and types of complaints received by the agency and the contractor. The information kept by agencies should be publicly available. Agencies should include provisions in their contracts to ensure that they are able to comply with this recommendation.

Recommendation 2

Agencies should include provisions in their contracts that require contractors to keep and provide sufficient information to allow for proper Parliamentary scrutiny of the contract and its management. The information required to meet this need will vary from contract to contract according to a number of factors including the value of the contract, the nature of the service to be delivered under the contract and the characteristics of the service’s recipients.

Parliamentary committees and confidential information

2.24 Information that might once have been readily available from a government agency where it delivered the service itself, may be regarded as information of a commercial or confidential nature where the service is delivered by a contractor.
Even if that information is made available to the agency by the contractor, the agency may feel constrained from passing it on to Parliamentary committees.

2.25 Issues arise from time to time as to whether certain information should be protected from disclosure to Parliament by a claim of public interest immunity or because the information should be treated as confidential for other reasons. These issues tend to be settled on an *ad hoc* basis or by publication of procedures or guidelines such as the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*.20

2.26 These Guidelines provide that a Minister (or, on his or her behalf, the Departmental Secretary) may, on balancing the public interests involved, request that evidence be given *in camera* and on the basis that the information not be disclosed or published without the Minister’s consent. The Guidelines specify that the circumstances in which this may be appropriate include evidence which would reveal business affairs, including trade secrets or other commercially sensitive information. The resolution of any disagreement between a committee and a Minister is ultimately a political issue to be resolved through the Parliamentary processes.

2.27 The Senate Finance and Public Administration References Committee in the Report of its Inquiry into Contracting Out of Government Services concluded:

...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. The committee accepts that some matters are legitimately commercially confidential. If parliament insists on a ‘right to know’ such legitimately commercially confidential matters, the most appropriate course to achieve this would be the appointment of an independent arbiter such as the Auditor-General to look on its behalf and, as a corollary, to ensure that he has the staff and resources to do it properly.21

2.28 Although issues of commercial confidentiality have been dealt with on an *ad hoc* basis until now, this issue is likely to arise much more frequently as services are contracted out. The Council believes that, in addition to the options suggested by the Senate Finance and Public Administration Reference Committee, it would be desirable for the Joint Committee of Public Accounts to develop guidelines, in conjunction with the Prime Minister and the Minister for Finance and Administration, to identify what sorts of commercial information should be made

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publicly available to committees, what should be provided during *in camera* hearings and what information should not be sought by Parliamentary committees.

**THE AUDITOR-GENERAL**

**THE ROLE AND FUNCTIONS OF THE AUDITOR-GENERAL**

2.29 The Auditor-General’s role is to audit the Government’s accounts on behalf of the Parliament. This is an essential step in Parliament’s scrutiny of the executive. The reports prepared on those audits are tabled in Parliament and referred to the Public Accounts Committee.

2.30 The Auditor-General’s role has been described as ‘the crucial link in the process of accountability to the taxpayer on the utilisation of funding’. The reports of the Auditor-General are an ‘essential element in the operation of democratic government’.

**GOVERNMENT FINANCIAL ACCOUNTABILITY AND CONTRACTING OUT**

2.31 As a result of contracting out, agencies will be paying public funds to contractors to provide government services. The expenditure of public funds by private bodies has the potential to make it more difficult for the Auditor-General to be able to report to the Parliament on the financial operations of the Government.

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22 The office of the Auditor-General is established by the *Auditor-General Act 1997* as an independent officer of the Federal Parliament. The Act provides in section 7 that the Auditor-General is not subject to direction from anyone in relation to:

(a) whether or not a particular audit is to be conducted; or

(b) the way in which a particular audit is to be conducted; or

(c) the priority to be given to any particular matter.

‘The Act clarifies and broadens the powers and functions of the Auditor-General as the external auditor of all Commonwealth agencies’, Auditor-General Bill 1996, second reading speech, House of Representatives, 12 December 1996, the Hon John Fahey, Minister for Finance.


25 See for example the submission by the Australian National Audit Office to the Senate Finance and Public Administration References Committee, Inquiry into Contracting Out of Government Services, Submission No 23. The Committee recommended that as a bare minimum standard contract clauses, tailored as necessary by specific clauses to reflect the particular circumstances of each contract, be used as the means of providing audit access to relevant third party information and records; *Contracting Out of Government Services, Second Report*, Senate Finance and Public Administration References Committee, Parliament of the Commonwealth of Australia, Senate Printing Unit, Canberra, May 1998 at page 41.
2.32 In the Council’s view it is imperative that agencies ensure that their contracts make appropriate provision for contractors to provide sufficient information to the agency, to enable the Auditor-General to fulfil his or her role as the external auditor of government agencies.
**Recommendation 3**

Agencies should include provisions in contracts which require contractors to provide sufficient information to the agency, to enable the Auditor-General to fulfil his or her role as the external auditor of all government agencies.

**CONTRACTORS AGREEING TO BE AUDITED**

2.33 Under section 20 of the *Auditor-General Act 1997*, the Auditor-General may enter into an arrangement with any person or body (including a contractor) to audit the financial statements of the person or body, to conduct a performance audit of the person or body or to provide services of a kind commonly performed by auditors.

2.34 The Auditor-General must not perform functions under section 20 for a purpose that is beyond the legislative power of the Commonwealth. However, if the Commonwealth has the power to authorise a contractor to provide services on behalf of the Commonwealth, then the same power would authorise the Auditor-General to carry out an audit, a performance audit or other services for the contractor under section 20. However, section 20 also requires the Auditor-General to have entered into an arrangement with the contractor, which would require the consent of the contractor.

2.35 In some cases it may be desirable for agencies to require, as a condition of the contract with service providers, that they agree to the Auditor-General carrying out a performance audit of their performance under the government contract.

**Recommendation 4**

Agencies should consider when letting a contract whether it would be appropriate to require the contractor to agree to the Auditor-General carrying out a performance audit of their performance under the contract.
CHAPTER 3

ADMINISTRATIVE LAW AND CONTRACTING OUT

INTRODUCTION

3.1 This Chapter examines the way in which the administrative law system provides avenues of redress to members of the community where services are provided directly by government agencies. It also describes the wider role of administrative law in maintaining government accountability for services and in improving government administration.

3.2 The Chapter compares administrative law remedies with the rights that members of the community may have under the general law where they are concerned about or affected by the actions of a government contractor.

3.3 The Chapter shows that members of the community may find that as a result of contracting out they no longer have access to administrative law remedies currently available to them under the administrative law system and that existing private law remedies may not fill this gap.

ADMINISTRATIVE LAW REMEDIES WHERE THE GOVERNMENT DELIVERS A SERVICE

3.4 The processes of Ministerial and Parliamentary accountability described in Chapter 2 do not always provide a suitable avenue of redress for the individual affected by government action. The introduction of administrative law remedies was intended to overcome limitations in Parliamentary and judicial processes for securing redress for individuals affected by government actions.26

3.5 As a result of those reforms, a person who has a concern or a complaint about a government-delivered service has access to a number of administrative law remedies.27 The choice of remedy will depend on their concerns. These remedies cover the following circumstances (among others):

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26 These limitations were recognised and detailed in the Kerr Committee in its Report, Commonwealth Administrative Review Committee Report, Parliamentary Paper No 144 of 1971, CGPS 1971, pages 7 to 8. See also the comments of Mason J in The Queen v Toohey; ex parte Northern Land Council (1980-1981) 151 CLR 170 at page 222 that ‘… the doctrine of ministerial responsibility is not in itself an adequate safeguard for the citizen whose rights are affected. This is now generally accepted and its acceptance underlies the comprehensive system of judicial review of administrative action which now prevails in Australia.’ See also Wilenski P, Public Power and Public Administration, Hale and Iremonger, Sydney 1987 at pages 186-187.

27 More detailed information about administrative law remedies and mechanisms is contained in Appendix A of the Council’s Issues Paper.
• if a person is unhappy about the way in which a service was delivered to them or about a decision or action affecting them, they may complain to the Ombudsman, who can investigate their complaint and seek to have it resolved by the relevant government agency;

• if a person wants access to government information or personal information held by the government agency, they have rights of access under the FOI Act and can seek to have incorrect personal information about them amended;

• if a person is unhappy with a decision that affects their interests, such as a decision about their eligibility to receive a service, they may be able to:
  - seek reasons for the decision;
  - have the decision reviewed and changed by an independent tribunal;
  - have the decision reviewed by the Ombudsman, who may recommend that a different decision be made;

• if a person wants to question the lawfulness of a decision that affects their interests, they may be able to:
  - seek reasons for the decision;
  - have that decision reviewed by a court and ruled unlawful.

3.6 In addition, any personal information held by the government agency about that person will be safeguarded by the standards established by the Information Privacy Principles set out in the Privacy Act 1988. These standards apply to the collection, storage and security, access and correction, use and disclosure of personal information by the Commonwealth Government.

REMEDIES AS A FORM OF ACCOUNTABILITY

3.7 The avenues of redress that the administrative law system provides serve two purposes. First, they ensure that individual members of the community are treated fairly, lawfully, rationally, openly and efficiently by agencies. Secondly, they enhance and complement other mechanisms of government accountability discussed in Chapter 2.

3.8 The system feeds useful information back into government decision making. The reports and general work of the Ombudsman can provide guidance to administrators on good administrative practices and promote awareness of legal requirements.
3.9 Complaints provide agencies with an opportunity to monitor their performance. They can, for example, act as an early warning system. Complaints made to the Ombudsman can be used by public sector managers to identify deficiencies in their agencies or in the programs they administer. A high number of complaints about a particular area may indicate problems in that area that the agency should resolve. As one former Ombudsman has observed:

If complaints are being received regularly about a particular office or a particular program there are obviously weaknesses in that area which should be remedied.

...repeated complaints or multiplication of instances of inequity can point to a need to amend the law to overcome unexpected consequences. 28

3.10 As the result of investigations, which may be either self-initiated or following a complaint, the Ombudsman can identify systemic problems in administration which the Government can address. This feedback promotes better decision making as well as better decisions in the individual cases involved, thus ensuring more efficient and effective implementation of government policy.

3.11 Similarly, changes to primary decisions by courts and tribunals when fed back into the decision-making agency can improve that agency’s practices, again promoting better decision making in future cases, as well as better decisions in the individual cases involved.

3.12 As the Council and the ALRC noted in the FOI Report, 29 access to information contributes to the accountability of government. The FOI Act has an important role to play in enhancing the proper working of Australia’s representative democracy by giving individuals the right to demand that specific documents be disclosed by government. 30 This enables the people of Australia to scrutinise, discuss and contribute to government decision making. Such access enables the people to participate more effectively in the decision-making processes of the Government. Without such information people cannot adequately exercise their rights and responsibilities as citizens or make informed choices. 31 Access to one's own personal information also enables individuals to protect their privacy.

3.13 Thus, administrative law plays a unique role in maintaining public accountability. It ensures that the administration is accountable to an individual in respect of its decisions that affect that person. It also improves the whole system of government decision making by increasing its openness and transparency. Although the administrative law system imposes costs on government, its benefits, both in terms of providing individual remedies and in terms of improving the

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29 ARC Report No 40/ALRC Report No 77, op. cit., at paragraph 2.3.
30 ibid.
31 ibid.
quality of administration, are significant, though incapable of precise quantification.32

ADMINISTRATIVE LAW REMEDIES WHERE A CONTRACTOR DELIVERS A GOVERNMENT SERVICE

3.14 Administrative law remedies may not, in the absence of legislation, be available to people affected by the actions of government contractors.

3.15 The Ombudsman may not be able to investigate all complaints about service delivery by a contractor. Complaints to the Ombudsman can be made in relation to ‘a matter of administration’.33 This means that the Ombudsman may be able to investigate the manner in which the relevant agency has dealt with the contractor, but may not be able to address the complaint directly.

3.16 A person may make a request under the FOI Act for access to documents in the Government’s possession but members of the public, including service recipients, do not have rights of access to information or documents held by the contractor unless legislation so provides. Currently the FOI Act makes no such provision. Amendments proposed to the Privacy Act by the Government would, however, protect personal information held by government contractors.34 The Government has announced that it plans to legislate to extend the FOI Act to personal information and some other documents held by government contractors.35

3.17 Members of the public may not have any right to seek a review of a decision of a contractor that affects their interests or reasons for those decisions.36

3.18 The table below contrasts the situation where the same service is delivered by a government agency and a contractor.

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32 The submission from the Law Society of South Australia noted that there is a significant cost in social and community terms which needs to be taken into account when working out what is a cost-effective provision of government services. For this reason the provision of proper remedies and redress for actions by contracted service providers needs to consider that personal or non-dollar cost as part of the evaluation of the balancing of the needs of service recipients and other interested parties.

33 Ombudsman Act 1976, section 5(1).

34 Privacy Amendment Bill 1998.


36 Access to review may depend on a number of factors, including whether the contractor is a delegate of the agency, the terms of the legislative decision-making power exercised by the contractor or whether the contractor’s decision-making powers are based entirely on contract (see discussion in Chapter 6).
What administrative law rights and remedies does a service recipient have?

<table>
<thead>
<tr>
<th>When the government agency delivers the service</th>
<th>When a contractor delivers the service</th>
</tr>
</thead>
<tbody>
<tr>
<td>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.</td>
<td>Complaints can be made to the Ombudsman about the government agency that manages the contract but not necessarily about the actions of the contractor.</td>
</tr>
<tr>
<td>If a person wants information about a service and it is not provided, a formal request can be made for documents under the FOI Act.</td>
<td>A formal request for information under the FOI Act will cover only documents, like the contract, that the government agency possesses because the Act does not apply to documents in the possession of the contractor. The Government has announced that it plans to legislate to extend the FOI Act to documents held by third parties and to which the government agency has a legal right.</td>
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<tr>
<td>Documents relating to commercial activities of a government agency may be exempt from disclosure under the Act (see Part II and Part III of Schedule 2 to the FOI Act).</td>
<td>If the Government has relevant documents in its possession relating to a service delivery by a contractor, access may be refused if they have been given to the Government in confidence, relate to the business affairs of the contractor or contain trade secrets or any other information having a commercial value that would be destroyed if they were disclosed.</td>
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If the Government is keeping information about someone that is incomplete, incorrect, out of date or misleading, that person can use the FOI Act to get access to that information and can have it corrected.

The Government has announced that the FOI Act and the Privacy Act will be amended to extend to personal information held by contractors under government contracts.

A person 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 will be able to complain to the Privacy Commissioner about the way in which a government contractor deals with personal information received under the contract.

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 then 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.

Internal review or review by a Commonwealth review tribunal or the Ombudsman may not be available.

Other forms of review of Government action, including requests for statements of reasons for decisions under the Administrative Decisions (Judicial Review) Act 1977, are available.

The Administrative Decisions (Judicial Review) Act 1977 may not apply to some decisions made under contracts.
OTHER REMEDIES WHERE A CONTRACTOR DELIVERS A GOVERNMENT SERVICE

3.19 Although administrative law remedies may not be available to people who experience service delivery problems or are adversely affected by the activities of contractors, they may have access to private law remedies. 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;
- consumer law remedies;
- industry complaints mechanisms;
- state and territory government complaint schemes;
- changing service providers.

3.20 There are some remedies that apply to both the public and the private sectors. These include anti-discrimination and human rights mechanisms that permit members of the public to complain that they have suffered discrimination on grounds such as sex, race, disability, denial of equal opportunity or that their human rights have been violated.38

CONTRACTUAL REMEDIES

3.21 Contractual remedies are available to service recipients of government-funded services where a contract exists between the service provider and a service recipient. There may be a contract where a service recipient is charged a fee by the contractor but this will not be the case where the provider is only collecting the fee on behalf of the Government. Nor will there be a contract where a service is provided free of charge to recipients.

3.22 A service recipient and others cannot enforce the contract between the agency and the contractor because of the rules relating to privity of contract. People who

38 Complaints can be made under both State and Commonwealth legislation; the extent of coverage of the public and private sectors and the remedies that may be available may differ.
are not parties to a contract cannot generally take action to enforce that contract even though they may be the intended beneficiaries of the contract.39

3.23 Where there is a contract between the contractor and the service recipient, the service recipient may be able to take action under their contract to:

- seek damages for breach of contract; or
- (in a limited range of situations) force performance of the contract.40

Limitations of contractual remedies

3.24 A contract between the service provider and a recipient is unlikely to be in writing. Even if it is in writing the contract may not define in detail the manner in which the service is to be delivered. The service recipient’s complaint may go to the quality of the service provided without amounting to a breach of the terms of the contract.

3.25 It may not be practical for service recipients to enforce their contract for a range of reasons, including:

- an inability to meet the cost of a court action;
- the length of time the proceedings would take;
- the problems experienced by the service recipient, though inconvenient, may not be significant enough to justify the proceedings;
- the service recipient’s physical or mental disability, limited communication skills or geographical isolation may limit their capacity to take private law proceedings;
- fear that the service will be withdrawn if they take action; and
- the difficulty of quantifying the claim.

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40 The remedy of specific performance (where a court orders the person who is in breach of contract to perform the promise they have made) is discretionary and, in the case of contracts for the provision of services, the remedy of damages (monetary compensation) will usually be more appropriate. Courts do not generally order specific performance of contracts for personal services where this would mean that an unwilling person would be forced to maintain personal relations with another person, or where to do so would require the continuing supervision by the court of the performance of the contract.
3.26 Even where the service recipient can enforce a contract against the service provider, contractual remedies such as damages may be of little use.\(^{41}\) Further, if the contract does not clearly allocate the respective responsibilities of the contractor and the agency in dealing with complaints by recipients, it may be that neither the Government nor the contractor can be required to fix the problem.

**TORT LAW REMEDIES**

3.27 The law of torts may provide a remedy for loss or damage suffered by a person as the result of the actions of a contractor. The law of torts covers a range of legal actions that can be brought to seek compensation where one person is considered to have committed an act that results in some form of loss or damage to another person or a person’s property. The Government can be sued in tort in substantially the same manner as a private person.\(^{42}\)

3.28 Where claimants suffer loss or damage as result of the actions of a contractor, they may be able to sue the contractor in tort for negligence. To make out a successful negligence case, a claimant must show that the contractor owed them a duty of care; that the contractor failed to take reasonable care in the delivery of the service; that the claimant suffered damage as a result of that failure; and that the damage suffered was reasonably foreseeable.\(^{43}\)

3.29 In some situations the injured person may have rights of action against both the contractor and the Government. This may be because both have been negligent or because the Government is vicariously liable for the contractor’s negligence.\(^{44}\)

3.30 Where negligence on the part of the Government agency cannot be established, it may be difficult to show that it is vicariously liable for the tortious actions of a contractor. Contracting out arrangements will often attempt to ensure


\(^{42}\) *Judiciary Act 1903*, section 64.

\(^{43}\) The basis for the duty of care arises from the case of *Donoghue v Stevenson* [1932] AC 562 at 580 where Lord Atkin said: ‘You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.’

\(^{44}\) Vicarious liability is the term used when a person is liable for the wrongdoing of another person. For such liability to exist, there must be some special relationship between the parties. For example, an employer may be vicariously liable for the acts of an employee.
that the Government cannot be held to be vicariously liable for the actions of its contractors.

**Limitations of tort law remedies**

3.31 Tort law effectively only provides a remedy where the person has suffered loss or damage. It will not assist a person whose complaint goes only to service quality.

3.32 The reasons why service recipients may be unable or unwilling to bring court actions in contract have been noted above. Apart from the issue of privity of contract, those limitations are equally relevant to tort actions.

**CONSUMER LAW REMEDIES**

3.33 Legislation provides a range of consumer law 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. In some cases complaints may be made to a regulatory body such as the Australian Competition and Consumer Commission.

3.34 Consumer law remedies will mainly be relevant to service recipients (rather than other members of the community who have been affected by the actions of a contractor). The availability and content of these remedies varies between jurisdictions. They generally include the capacity to take action in a small claims court or tribunal. However, sometimes these sorts of legislative regimes do not apply to government bodies because of ‘Crown immunity’ and in some circumstances persons acting for government agencies may also be able to rely on that Crown immunity. This will generally be so where the legislation would significantly prejudice the government agency if it applied to the person acting for it.

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45 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.

46 There is a presumption that a statute does not bind the Crown unless by express mention or necessary implication. See *Bradken Consolidated Ltd v Broken Hill Pty Co Ltd* (1979) 145 CLR 107, 24 ALR 9, *Bropho v Western Australia* (1990) 171 CLR 1, 93 ALR 209.

47 The Full Federal Court decision in *Woodlands v Permanent Trustee Company Ltd and others* (1996) 139 ALR 127 dealt with the question of whether the Trade Practices Act applied to the States or persons acting on behalf of the States. The Full Court (at 141) held that New South Wales was not bound by the Trade Practices Act. The decision suggests (at 144) that a person or body that is not a government agency but was acting as its agent, such as a contractor with the Government, might not be bound by legislation such as the Trade Practices Act in certain circumstances. Such immunity on the part of the contractor may exist where the legislation, if applied to the provider, would significantly prejudice the government agency, for example, by
Limitations of these legislative remedies

3.35 As discussed earlier in relation to contractual remedies, service recipients may have a number of reasons for being unwilling or unable to take action in court to pursue statutory remedies.

3.36 Action in a small claims court or tribunal may require the existence of a contractual relationship between the contractor and service recipient.

INDUSTRY COMPLAINTS MECHANISMS

3.37 Some industries have established ombudsman schemes which are modelled to a greater or lesser extent on government ombudsmen. Schemes like the Banking Industry Ombudsman and the Telecommunication Industry Ombudsman are able to make monetary awards to complainants.

3.38 A number of other industries operate complaint resolution schemes. For example, the Financial Planning Association Complaints Resolution Scheme is a free service offered by the Financial Planning Association and is designed to resolve complaints between users of financial planning services and financial planners who are members of the Association. The General Insurance Enquiries and Complaints Scheme is a national scheme covering the domestic insurance area. The scheme is administered by Insurance Enquiries and Complaints Ltd. It is a free service for insurance consumers aimed at resolving disputes between policy holders and their insurance companies.

3.39 A government contractor may already be a participant in an industry-based complaint scheme or may, by virtue of the type of service they deliver, already be subject to some form of government regulation and complaint-handling scheme. In these situations, a service recipient may be able to take their complaint to an industry-based body or to a local tribunal or other government body.

3.40 However, industry-based schemes do not cover the field and many services that may be contracted out will not be covered at present by such schemes. The effectiveness of the industry-based scheme will also depend on its perceived and actual independence and impartiality.48

3.41 There remains the possibility in any private sector system that the industry complaint-handling body or the in-house complaint scheme will not be able to negotiate a solution to a problem between a contractor and service recipient.

STATE AND TERRITORY COMPLAINT SCHEMES FOR HUMAN SERVICES

3.42 All States and Territories have systems in place for dealing with complaints from consumers about health services in their State or Territory.49 The systems in South Australia and the Northern Territory deal with complaints only about public sector health services. However, the other States and the ACT accept complaints about both public and private health providers, which would include government contractors.50

3.43 Some State government agencies have been established to deal with complaints relating to the provision of disability services. Under the Community Services (Complaints, Reviews and Monitoring) Act 1993 (NSW) the Commissioner for Community Services can investigate, promote and facilitate alternative dispute resolution procedures, to report on complaints and to monitor the standards of service provision. It also provides for the NSW Administrative Decisions Tribunal to hear appeals from decisions of service providers.

3.44 In Western Australia complaints about the standards of services may be lodged with the Disability Services Commission. South Australia has a Disability Complaints Services, that assists people with a disability to resolve complaints against both Commonwealth and State funded services, against generic services provided by the Commonwealth and State Governments and against any other organisation.

3.45 Similarly, a number of State and Territory agencies may deal with complaints about aged care services.51

3.46 In New South Wales complaints by parents about child care services can be dealt with by the Community Services Commission.

CHANGING SERVICE PROVIDERS

3.47 Where a service recipient may have a choice of contractor, the ability of recipients to leave one contractor and to take up the service from another may

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50 For example, the NSW Health Care Complaints Commission, an independent statutory body, commenced operation on 1 July 1994. It aims to provide an efficient means for people to lodge complaints about health services and facilities and have them investigated by an impartial and independent body. The jurisdiction of the ACT Commissioner for Health Complaints includes health care provided by any organisation (public or private), or any health professional or other health worker and complaints can be made by a patient or consumer of a health service, a parent or guardian or a representative of the consumer.

51 For example, the Community Services Commission (NSW). In some States there may be officers within the relevant State government department responsible for taking complaints.
improve the quality of services provided by all providers of that service. The Council in its GBEs Report recognised that where a government business enterprise faces real competition, consumers of goods and services provided by the GBE can direct their custom elsewhere.\textsuperscript{52} In these circumstances the Council recommended against the extension of administrative law remedies to the commercial activities of GBEs.

3.48 The Industry Commission noted in its report\textsuperscript{53} that where there is competition between contractors providing similar services on behalf of government, disaffected people may find it easier to obtain redress for their complaints. The Commission suggested that the existence of competitive pressure may help to ensure that contractors respond quickly to the concerns of the client. Similarly, the ACT and Region Chamber of Commerce and Industry noted in its submission to the Council that giving service recipients a choice of contractors will promote the quality of service by all service providers.

3.49 For service recipients to be able to make real choices between contractors, they should be aware of performance standards and the results of contract monitoring. In these circumstances they will then be able to choose the contractor who best meets their needs.

3.50 Changing service providers may not always be a practical option for a service recipient. There may be a number of contracting out situations in which recipients will have little or no real choice of service providers, for example:

- the service recipient may not be aware of the choice;

- the service recipient’s capacity to exercise a choice may be limited by physical or intellectual disability or limited communication skills;

- there may be effectively only one provider to which the service recipient has access because of geographical isolation;

- there may be more than one provider but the service may only be free (or subsidised) from one of these providers; or

- the government agency may contract with a range of providers but the service recipient may be permitted to receive services only from a designated provider.

3.51 Of course, the range of choice available to the service recipient may change over time as other providers take up or leave the particular field of service provision.


\textsuperscript{53} Industry Commission, Report No. 48, op. cit., at page 97.
3.52 If the government agency contracts with several providers from whom the service recipient can obtain the services, and the service recipient is aware of and is capable of exercising a choice between providers, the service recipient is given some personal power. Where the service recipient has no real choice of service provider they may be unable to have their problems and complaints resolved. The then Department of Administrative Services, in its submission, suggested that while access to different suppliers theoretically provides consumers with choice, it is not of itself a remedy. A change does not correct or compensate for previous loss and inconvenience. A change may, in fact, increase the cost to the recipient, in extra travel for example. There would also be administrative costs involved.54

**DOES THE COMMUNITY HAVE SUFFICIENT OR EFFECTIVE AVENUES OF REDRESS WHERE SERVICES ARE CONTRACTED OUT?**

3.53 When government activities and services are contracted out, neither existing public law nor private law remedies may be adequate to solve problems experienced by service recipients or other members of the community who are affected by the contractor’s actions. For example, a service recipient who has no contractual relationship with the contractor will not be able to enforce the contractor’s contractual obligations to the agency, will not be able to complain to the Ombudsman about poor service and will not be able to seek access under the FOI Act to information held by the contractor that would show how the service had in fact been delivered.55

3.54 Nor do private law remedies provide the same type of feedback and enhancement of government decision making and accountability that is provided by administrative law remedies. There is a potential loss of accountability where administrative law remedies are not available and private law remedies may not fill that void. If, for example, there is no ability for service recipients to make complaints about poor service, the agency may lose valuable information about the standard of service being delivered. Further, service recipients may find that neither the agency nor the contractor will remedy a problem because each considers that it is the other’s responsibility under the terms of their contractual arrangements. The benefits of administrative law, not only for individuals but also for the community

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54 Bernd Bartl noted in his submission that even if service recipients have a choice of providers, a change of provider may require adjustments to be made by the service recipient which may not be easy for them.

55 The Civil Aviation Safety Authority Australia in its submission noted that the provision of additional remedies could benefit both government and service providers. The benefits would be difficult to quantify but more efficient contracting procedures should evolve as a result of increased accountability of contractors. The then Department of Finance argued in its submission that a blanket extension of administrative legislation could add to the cost of tendering and discourage private sector bidders, particularly smaller enterprises. The Department went on to say that, unless there are adequate avenues of redress to deal with disputes between contractors and service recipients, there will be increasing pressure on the Government to provide ‘alternative’ equitable remedies based on other than legal or statutory avenues, for example, through the Act of Grace remedies.
in general, may be lost unless they are extended by legislation and enhanced by the use of private law remedies.

**TENDENCY FOR PUBLIC AND PRIVATE LAW TO MERGE**

3.55 The traditional view of administrative law is that its mechanisms apply only to public sector agencies, leaving private law remedies, including tort law, contract and consumer protection legislation to govern activities outside the public sector. That view has already been challenged. Mechanisms originally developed in administrative law have been adopted by the private sector, for example, industry specific ombudsmen and other complaint-handling schemes. The *Privacy Act 1988* already has some application to the private sector\(^{56}\) and the Government is taking steps to extend the Privacy Act and the FOI Act to personal information held by government contractors.\(^{57}\)

3.56 A number of commentators and government studies have referred to the blurring of traditional distinctions between what is ‘public’ and ‘private’.\(^{58}\) In addition to the adoption of administrative law type remedies in the private sector, governments are increasingly looking to corporate models for reform of the public sector. The increasing reliance on contracting out is one of the changes occurring in the way government is operating.

3.57 In the following Chapters the Council considers how a mix of private and public remedies can be achieved so that the benefits of the administrative law system are not lost or diminished where services are contracted out.

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\(^{56}\) In relation to the credit reporting industry and tax file numbers.


CHAPTER 4

COMPLAINTS

INTRODUCTION

4.1 This Chapter discusses options for ensuring that people with complaints about services provided to them by contractors can have those complaints dealt with effectively. It also applies to complaints by people who are otherwise adversely affected by the activities of contractors.

4.2 There are several ways of dealing with complaints about government services delivered by contractors. It will be important in many situations that contractors themselves take responsibility for resolving complaints. Government agencies may already have in place arrangements for dealing with complaints and those arrangements could be extended to deal with complaints about contractors. There may also be industry-based schemes such as industry ombudsmen that will be able to resolve the complaint. Each of these options has its advantages and its limitations.

4.3 Because of these limitations the Council recommends in this Chapter that in addition to these methods of dealing with complaints, it should be made clear that the Commonwealth Ombudsman is empowered to investigate the actions of contractors providing services for or on behalf of government.

4.4 Whatever mechanisms are used for resolving complaints, the government agency that lets the contract should bear the ultimate responsibility for ensuring that complaints are properly dealt with and resolved.

PRINCIPLES FOR HANDLING COMPLAINTS

4.5 The ability of individuals to seek redress is an important element of government accountability which was recognised by the Industry Commission in its Report on Competitive Tendering and Contracting:

A third aspect of accountability is the ability of persons to seek redress where they are dissatisfied with the manner in which a service is provided (for instance, where quality is poor, or where confidential information is misused). A change from direct to contracted provision ought not to undermine the ability of individuals or organisations to seek redress for decisions or actions for which governments are accountable.59

4.6 The Council has identified 3 principles of complaint handling to ensure that the accountability that exists when services are provided by government agencies is not lost or diminished where services are contracted out.

**PRINCIPLE 1**

The process of contracting out government services should not deprive people of rights of access to complaint-handling mechanisms.

**PRINCIPLE 2**

The obligation to ensure that Principle 1 is met, remains with the government agency.

**PRINCIPLE 3**

Complaint-handling mechanisms should provide a quick, accessible and affordable way of resolving complaints relating to government services that have been contracted out.

**WHAT MAKES A GOOD COMPLAINT-HANDLING SCHEME**

4.7 Considerable work has been done by a number of bodies to identify standards and principles for complaint-handling systems in both the public and private sector. In the Council's opinion these standards and principles are relevant to any system that deals with complaints about contracted-out services.

**Ombudsman's Work**

4.8 The Ombudsman has recently published *A Good Practice Guide for Effective Complaint Handling*. While that publication is directed at government agencies establishing complaint systems, the principles it sets out are equally relevant to complaint handling by contractors. It identifies a number of criteria for a good complaints system including commitment, fairness, accessibility, responsiveness, effectiveness and openness.

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60 The Council endorses the comment of the then Australian Securities Commission in its submission that a remedy enabling rectification of defective service is part of the service not something external to it.


62 ibid., at page 13.
ARC Community Services Report

4.9 In the Community Services Report\(^{63}\) the Council identified a number of similar requirements identified as minimum for any complaint mechanism provided by private sector service providers receiving government funding. The Council also noted the need for privacy and confidentiality to be maintained and the need for consumers to be assured that they would not be treated unfairly or services withheld if they complained.

ALRC Reports

4.10 The ALRC, in a series of three reports prepared in conjunction with the Council's Community Services Report\(^ {64}\) reviewed the legislation administered by the then Department of Human Services and Health. The reports\(^ {65}\) dealt with child care, aged care and disability care. Each of those reports looked at complaint-handling and concluded that service recipients needed an avenue for complaints in addition to being able to approach the service provider. What they needed was access to an independent person or agency. Each of the reports also set out in considerable detail the desirable attributes that an independent complaint-handling body should have.

Department of Industry, Science and Tourism

4.11 The Department of Industry, Science and Tourism publication Putting Service First, Principles for Developing a Service Charter\(^ {66}\) provides advice to government agencies on complaint handling. It discusses a number of features of the complaint-handling process. The Department noted in its submission to the Issues Paper that many, if not most, of these features could be easily translated into a purchaser/provider framework.\(^ {67}\)

Standards Australia

4.12 Standards Australia has released an Australian Standard on complaints handling\(^ {68}\) The Standard sets out what are considered to be the essential elements

\(^{63}\) Administrative Review Council, Report No. 37, Administrative Review and Funding Programs (A Case Study of Community Services Programs), AGPS, Canberra, 1994, Recommendation 18 at page 41.

\(^{64}\) ibid.


\(^{66}\) Department of Industry, Science and Tourism, March 1997.

\(^{67}\) A purchaser/provider arrangement is one in which the purchaser is the agent who decides what will be produced and the provider is the agent who delivers the agreed outputs or outcomes.

for the management of complaints from inception to satisfaction or final determination, as the case may be, irrespective of the nature of the complaints or the size of the organisation receiving the complaint.

4.13 These standards nominate a number of minimum essential elements for effective complaint handling including:

- ‘appropriate systemic systems’ in recording complaints and their outcomes;
- appropriate reporting on the operation of the complaint-handling process against documented performance standards;
- regular reviews of the process to ensure that it is efficiently delivering effective outcomes.

4.14 Standards Australia has also produced standards on compliance programs to ensure that laws, regulations, industry codes and organisational standards are met. Complaints-handling systems are an essential element of such a program.69

IMPLEMENTING THE PRINCIPLES

4.15 Complaint handling systems consistent with these standards could include:

- complaint handling by government contractors;
- independent complaints handling mechanisms established by industry participants;
- complaint handling mechanisms established by government agencies;
- a new complaints body established by the Commonwealth for contracted out services; and
- the clarification of the jurisdiction of the Ombudsman to investigate complaints about the actions of contractors.

4.16 The Council has examined these options against the 3 principles identified above to determine whether any one option can provide a comprehensive means of redress for individual members of the public.

COMPLAINT HANDLING BY GOVERNMENT CONTRACTORS

4.17 Where services are contracted out many complaints will be easily and quickly resolved by the contractor. Some complaints will relate to a one-off failure to deliver a service. The individual complaints in these circumstances may be readily fixed by a phone call.

4.18 The importance of complaint-handling for business is becoming increasingly apparent. Complaints are not only recognised as a way of ensuring individual customer satisfaction. There is increasing recognition of the importance to management of appropriate complaint-handling schemes.\(^{70}\)

4.19 Some contractors may have in-house complaint systems already in place before they bid for government work. In some cases these in-house arrangements will provide a higher standard of complaint handling than was previously provided by the government agency that is now purchasing the service.

4.20 Establishing, or making use of, a contractor’s existing in-house complaint-handling mechanisms to deal with complaints about contracted services may provide benefits not only to the complainant but also to the contractor. Dealing directly with complaints allows the contractor to monitor the type and incidence of service delivery problems and to make appropriate changes to its method of delivery to improve its services. It can also result in increased recipient satisfaction and a greater likelihood of the contract being renewed.

4.21 However, as noted in Principle 2, the government agency remains accountable for ensuring that the public’s rights of access to complaint-handling mechanisms are retained.

4.22 This means that government agencies should be satisfied before entering into a contract that the service provider will be able to deal satisfactorily with complaints it may receive. **This would not necessarily require the contractor to establish an elaborate scheme for dealing with complaints.** In many cases it might simply require the contractor to designate a person to receive complaints and inform service recipients of the telephone number they can call to resolve difficulties.

\section*{Limitations}

4.23 Complaint-handling mechanisms may be of varying qualities. Even where standards are set out in the contract with the government agency, some contractors may be more skilful or sensitive than others in the manner in which they deal with individual complainants.

4.24 Small businesses may not necessarily have the skills or capacity to deal with all complaints, much less record and oversee trends and systemic issues.\(^{71}\)

4.25 It may not be appropriate to require particularly vulnerable clients, or clients with special needs, to approach contractors themselves. Some service recipients


\(^{71}\) Professor Enid Campbell suggested in her submission that in-house complaint mechanisms within very small organisations were not likely to be viewed with much confidence.
may fear that they will be victimised or have services withdrawn if they complain directly to a contractor. This may be so particularly where they are receiving a service for which there is a high demand or where they are receiving the service after being on a waiting list. Some recipients may find it difficult to complain because they have mobility problems or language difficulties that mean that they need assistance in formulating, documenting and lodging a complaint. The ALRC in its report on Aged Care\textsuperscript{72} noted the view expressed in submissions and consultations that older people receiving aged care are often reluctant to complain because, in part, they are frightened of reprisals, having services withdrawn or being labelled as a ‘trouble maker’.\textsuperscript{73}

4.26 Even if a complaint-handling system is in place within a contractor’s organisation and it meets the criteria identified above, the contractor and a service recipient may disagree about whether the complaint is made out and in particular whether the delivery of the service was defective.

4.27 Some complaints may raise serious allegations of misconduct or impropriety, requiring more formal mechanisms of investigation and resolution.

4.28 In the Council’s view these limitations do not mean that contractors should not be required to deal with complaints directly. Rather they suggest that there may be situations or circumstances in which contacting the contractor should not be the only avenue for service recipients with a complaint.

**Recommendation 5**

When preparing contracts, agencies need to be satisfied that contractors will be able to deal with complaints properly. Contractors’ complaint-handling procedures should normally satisfy the standards identified by Standards Australia including the recording of complaints and their outcomes. Where the contractor is a small business, simpler complaint-handling procedures may be appropriate. Agencies should also consider what information they should require from contractors about complaints to ensure that contractors’ performance can be properly monitored.

**COMPLAINT HANDLING BY INDEPENDENT INDUSTRY BODIES**

4.29 One of the advantages of contracting out is that service recipients may find that they are able to use industry complaint-handling bodies which are partially

\textsuperscript{72} ALRC Report No 72, op. cit., at page 200.

\textsuperscript{73} Similar comments were made in submissions by Professor Enid Campbell and Gerry Hoogenboom.
funded or supported by industry participants but which nevertheless provide an independent forum for the resolution of customer complaints.

4.30 Contractors may feel more comfortable dealing with an industry-based complaint scheme than they would in dealing with a scheme that is imposed on them by legislation. Further, industry schemes that are developed in consultation with service recipients and consumer organisations may be flexible and responsive to the concerns of service recipients and may help to bring about industry-wide changes in practice.

4.31 Where the contractor is a party to an industry-based scheme, the contractor is likely to be under separate contractual obligations to comply with recommendations of the industry body. The contractor may have strong incentives to remain a party to the industry scheme because of the commercial advantage it may give it in attracting clients. These contractors may therefore have a strong incentive to comply with recommendations of the industry body.

4.32 Professor Enid Campbell suggested, in her submission, that where a contractor is providing services to both government-nominated clients and private clients, it might be better to rely on an industry-based ombudsman system. Private clients might consider it unfair that they did not have access to the same complaint mechanism as the government-nominated clients.

4.33 Use of industry-based schemes to deal with complaints about government-funded services may also result in savings for the Government.

4.34 At this stage many of those industry-based schemes are in the financial area and, as such, are not likely to be of assistance to recipients of government-funded services. However, as contracting out of government services increases, there will be greater scope for contractors, service recipients and peak organisations to work together to establish independent complaint-handling schemes, particularly in the area of human services. Government agencies could have a significant role to play in the development of these new schemes by acting as facilitators between the contractors and service recipients.74

**WHAT MAKES A GOOD INDUSTRY-BASED SCHEME**

4.35 In August 1997 the Minister for Customs and Consumer Affairs, Senator the Hon. Chris Ellison, released a paper called *Benchmarks for Industry-Based Customer*
Dispute Resolution Schemes. In his foreword to the paper, the Minister noted that while a company should try to resolve complaints with its customers, there are situations where this is not possible. Subscribing to a dispute scheme that could deal with unresolved complaints was an important part of dealing with customer concerns.

4.36 The benchmarks set out in the paper have 3 purposes:

- to act as a guide to good practice for those industry sectors which intend setting up a scheme to resolve disputes between industry members and individual consumers of their goods or services;

- to provide existing schemes with objective guidance on the practices to aim for in the operation of such schemes;

- to serve as a guide for consumers in giving them some idea of what they should expect from such schemes.

4.37 The paper identified the following benchmarks for industry-based dispute resolution schemes: accessibility, independence, fairness, accountability, efficiency and effectiveness.

LIMITATIONS

4.38 There is danger that the use of private sector complaint resolution schemes could result in government agencies losing the valuable information that a complaint-handling mechanism can provide. The frequency and pattern of complaints can provide agencies with considerable information about the performance of an individual contractor as well as information about the effectiveness of the service in general.

4.39 As recognised in Principle 2, government agencies cannot abrogate their responsibility to maintain the quality of a service that is contracted out. Where complaints are dealt with by private sector bodies, government agencies will need to ensure that they are able to keep track of complaints that are being made and the way in which they are resolved. It would be useful for agencies to seek feedback from industry schemes about the incidence and types of complaints received.

4.40 There are also varying degrees of independence between industry schemes and some schemes have less effective enforcement mechanisms than others. The Civil Aviation Safety Authority Australia, in its submission, noted that ‘industry complaint handling mechanisms are not necessarily impartial, do not necessarily have expertise in the special considerations applying to government contracts, do

75 Consumer Affairs Division, Department of Industry Science and Tourism, Canberra, August 1997.
not always guarantee privacy, can be obscure (difficult to access) and do not always cater to the special needs of individuals’.

**Recommendation 6**
Where an industry-based complaint mechanism is in place, people with a complaint about a contracted service should have the option of using that mechanism rather than complaining to the relevant agency or to the Commonwealth Ombudsman. Where appropriate, the Commonwealth Ombudsman should be able to refer a complaint about a contractor to the industry body in the first instance.

**Recommendation 7**
Industry groups, contractors, service recipients, peak organisations and government agencies should work together to develop industry-based complaint-handling systems that comply with benchmarks identified in *Benchmarks for Industry-Based Customer Dispute Resolution Schemes*.

### COMPLAINT HANDLING BY GOVERNMENT AGENCIES

4.41 One of the Council's principles is that the government agency remains responsible for ensuring that members of the public are not deprived of rights of access to complaint-handling mechanisms. As part of that responsibility, an agency will need to carefully consider what role it will have in dealing with complaints about contractors where agency services are contracted out.

4.42 There are a number of advantages in government agencies retaining the capacity to deal directly with complaints that may be made against a contractor. The government agency will retain responsibility and accountability for the proper management of the contract. In particular, the agency must ensure that the contractor meets the quality standards required in the contract. If the agency retains some responsibility for dealing with complaints it will gain important knowledge of the service as delivered by the contractor. That information will assist the agency in the monitoring of the contracted out services, both as they affect individual recipients and more broadly. The agency is not then dependent solely on the contractor for information about the nature and volume of complaints.

4.43 In addition, a pattern of complaints may point to problems with the way in which the service has been defined or developed by the government agency before it was contracted out. The pattern of complaints may be an indication that there are

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76 See the discussion on the role of the Commonwealth Ombudsman following paragraph 4.59 below.
anomalies in the service which need to be resolved by the government agency and which are not matters for which the contractors should be held responsible.

4.44 The Council recommended in Chapter 2 that agencies should keep information about the number of types of complaints received as part of a requirement to keep relevant information relating to the management and monitoring of contracts. Where complaints are being dealt with directly by contractors, agencies need to ensure that they receive sufficient information about those complaints.

4.45 If the agency retains a capacity to deal directly with complaints, it can put together information it receives from the contractor for contract monitoring purposes with complaints it has received and that composite information can assist it to identify systemic problems. The agency can deal with these systemic issues to develop better contracts in future and thereby ensure that other recipients in a like position do not suffer the same problem.77

LIMITATIONS

4.46 Despite the advantages to agencies in dealing with complaints, the Council notes that a study by the Ombudsman suggests that 70% of agencies have inadequate or non-existent, general service delivery complaint mechanisms for clients.78

4.47 Where agencies do have mechanisms in place, service recipients may bypass the contractor and complain directly to the government agency in situations where this may cause unnecessary delay. There may still be situations where it would be appropriate for the government agency to require the recipient to take their complaint up first with the contractor, in much the same way as the Ombudsman has a discretion not to investigate a complaint.

4.48 This problem could be overcome by government agencies themselves having a designated complaints number that would be staffed by officers trained in accepting or redirecting complaints. Agencies would be able to draw on the experience of the Ombudsman's Office in dealing with telephone inquiries to develop appropriate training and procedures for the agencies' complaints officers.

77 The then Department of Finance suggested in its submission that where a dispute arises between a contractor and a client which cannot be resolved within the terms of the contract, it would be appropriate (and in the best interests of the recipient and good administration generally) for the Commonwealth agency to accept responsibility for remediying the problem. The Department suggested that it might minimise disruption for the agency to remedy the problem and recoup from the contractor any associated costs. The then Department of Administrative Services noted in its submission that complaints information was useful in monitoring contractor performance.

4.49 Whether or not an agency has mechanisms for dealing directly with complaints, issues will also arise as to who is ultimately responsible forremedying the complaint. As noted in the Annual Report of the Ombudsman for 1995-1996, complaints involving contracted out services sometimes resulted in buck-passing of responsibility between the department, the contractor and their insurer. The Report also noted a recurring problem of complainants suffering 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. 79

4.50 This problem of buck-passing may not be overcome without the intervention of a third body to help resolve the impasse, such as an Ombudsman.

4.51 Whether complaints are dealt with by the agency or the contractor, service recipients need to know what avenues of complaint are available to them. The agency must remain responsible for ensuring that service recipients are aware of these avenues either by the agency providing this information directly to service recipients or by requiring the contractor to do so.

Recommendation 8

Agencies should be responsible for ensuring that service recipients are made aware of all of their avenues of complaint, either by providing this information directly to service recipients or by requiring contractors to do so.

A NEW COMMONWEALTH COMPLAINTS BODY FOR CONTRACTED OUT SERVICES

4.52 The Council suggested in its Issues Paper that the Government might establish a new complaint-handling body for recipients of government services or others affected by the action of contractors. 80 Under such a system, citizens could complain, first, to a service provider about particular grievances. If the service provider and the complainant were unable to resolve the complaint, they could approach the external body.

4.53 A complaint by a service recipient of a government-funded service to or about a contractor could be characterised as a dispute between a private citizen and a private business. It could be argued in these circumstances that it would be appropriate that such complaints be dealt with by a specialist body, rather than by a government ombudsman.

80 Issues Paper, paragraphs 5.34 - 5.41.
4.54 If the role of the independent complaint-handling body is confined to dealing only with complaints relating to the activities of contractors, there may be problems with coordination and coverage in situations where a dispute arises concerning apportionment of responsibility between a contractor and a government agency.

4.55 The independent body may find it difficult to investigate systemic issues where an agency provides some services directly and some services through contractors.

4.56 The Law Society of South Australia noted in its submission that a centralised complaint-handling body would represent a significant saving for the aggrieved party in that they would not be involved in isolating or locating any of the necessary documents from within the contractor’s organisations. The Council agrees that this is a very real advantage but considers that a similar advantage would be gained from using the existing Commonwealth Ombudsman to deal with complaints about contractors.

4.57 The fact that a service is government-funded means that there is a public interest in the way in which a dispute is resolved so that the Ombudsman remains the appropriate body to deal with complaints. In addition, using the Commonwealth Ombudsman rather than creating a new body prevents duplication of resources and expertise. It also means that recipients of the same service, whether delivered by the agency or a contractor, have access to the same complaint-handling body.\(^81\)

**CONCLUSION**

4.58 The Council sees no reason to establish a separate government agency to deal with complaints about contractors.

**COMPLAINING TO THE OMBUDSMAN**

4.59 While the Council believes that complaint-handling by contractors, agencies and industry groups is important and should be encouraged, there will always be some limitations on what each of these groups can or will achieve.

4.60 Some complaints about contracted services may relate to matters where there will be a dispute between the agency and the contractor as to whether the matter is covered by the contract or who is responsible for the matter under the terms of the

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\(^81\) The Civil Aviation Safety Authority Australia preferred the establishment of a new complaint-handling body to the extension of the Ombudsman’s jurisdiction to cover complaints about contractors. The Department of Health and Family Services felt that investigation by the Ombudsman could result in considerable duplication (or under utilisation) of industry specific expertise. The Department also felt that an extension of the Ombudsman’s facility for undertaking systemic enquiries would not be warranted. The Department noted that the Ombudsman could continue to provide a mechanism for redress for contractors.
contract. In these situations complainants may find that they are referred repeatedly between agency and contractor with the complaint never being resolved.

4.61 There may also be situations where the agency and the contractor do not have any interest or incentive to remedy the complaint. If a contractor is otherwise performing satisfactorily the agency may not want to raise a one-off complaint even if, from the complainant’s perspective, the complaint is highly significant.

4.62 In some cases the service recipient may have difficulty in making a complaint directly to a contractor or an agency because of language difficulties or because of physical or intellectual disabilities. Others may fear victimisation or withdrawal of a service if they approach the agency or the contractor directly.

4.63 In each of these situations an independent body such as the Ombudsman is more likely to be able to resolve the complaint.

4.64 The Ombudsman’s Office currently provides a quick, effective, accessible and inexpensive means of resolving complaints and disputes with government agencies. Given the limitations that the Council has identified in each of the other options for dealing with complaints about contractors, members of the public need to have the additional avenue of redress that the Ombudsman provides.

**THE OMBUDSMAN’S ROLE AND POWERS**

4.65 The office of the Commonwealth Ombudsman is established under the *Ombudsman Act 1976*. Broadly speaking the Commonwealth Ombudsman investigates defective administration within a government agency. The Ombudsman investigates not only decisions, but also administrative activity – whether, for example, a decision has been made expeditiously and has been explained adequately. The role of the Ombudsman is concerned with the quality of administrative decisions and the means adopted to reach those decisions. If an administrative action of an agency has been defective, the Ombudsman can recommend that appropriate corrective action be taken. The Ombudsman is also able to investigate a refusal or a failure of an agency to take action or make a decision.

4.66 Where the Ombudsman undertakes an investigation he or she has extensive power under section 9 of the Act to enter premises, inspect files and other information and obtain information and documents from any person whom the Ombudsman believes may be able to assist an investigation. Where the Ombudsman concludes that the action taken by a government agency was wrong the Ombudsman can report the matter to the government agency under section 15 of the Ombudsman Act and make recommendations. The Ombudsman may, for

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example, recommend that the agency reconsider the complainant’s eligibility for a particular service or that the agency apologise to the complainant. The Ombudsman may also recommend that the agency provide better information to members of the public or that the agency change other aspects of its practices. In some cases the Ombudsman may recommend that an agency pay compensation where the complainant has suffered a financial loss or some other detriment as a result of an agency’s actions.

4.67 If the government agency does not undertake adequate action to correct the matters raised in the Ombudsman’s report, the Ombudsman may, in a further report, inform the Prime Minister under section 16 of the Ombudsman Act. The Ombudsman may also, as a last resort, report the matter to Parliament under section 17 of the Act.

4.68 Where a complaint is substantiated, a remedy is usually offered by the government agency. In many cases complaints can be solved quickly and informally or through a process of conciliation. Less serious complaints can often be resolved by the investigating officers telephoning the agency concerned to obtain information and discuss the issues involved. Section 6 of the Ombudsman Act provides the Ombudsman with a discretion not to investigate a complaint where, for example, the complainant has not approached the agency before going to the Ombudsman or if the complainant has an insufficient interest in the matter.

4.69 An important feature of the Ombudsman, as established under the Commonwealth administrative law system, is that the Office is independent both of the agency being investigated and the complainant. The Ombudsman does not act as an advocate for members of the public who approach the Office.

4.70 Less complex complaints can be resolved on the telephone. The Ombudsman has access to all the documents used by the government agency (unlike a court or tribunal that may not have all the documents available because they may be subject to claims of legal professional privilege etc). Users of the Ombudsman will not need to seek legal advice or assistance because the complaint-handling process is uncomplicated.

4.71 As the Prime Minister, the Hon John Howard MP, has recently noted:

The Ombudsman’s Office has given Australians increased power to challenge official actions that they consider unjust or unreasonable: with the Ombudsman as referee, imbalances of resources and influence have been removed and unnecessary, unwieldy and at times unfeeling bureaucracy has been challenged. Since its inception the Office has assisted the public sector to improve the way it operates.83

THE OMBUDSMAN AND GOVERNMENT CONTRACTORS

4.72 It is not clear whether the Ombudsman is able to investigate the actions of a private sector contractor providing services on behalf of a government agency.

4.73 The Ombudsman can, under section 5 of the Ombudsman Act, investigate ‘action that relates to a matter of administration, taken ... by a Department, or by a prescribed authority... and in respect of which a complaint has been made to the Ombudsman’.

4.74 Under section 3(5), action taken by an officer of an agency is deemed to be action taken by the agency (and hence within section 5); under section 3, references to an officer include a person authorised to exercise powers or perform functions of the agency on behalf of the agency. It could be argued that these provisions extend section 5 to the actions taken by contractors under government contracts where the contractor is, for example, acting as the agent of a department or prescribed authority.

4.75 Other provisions of the Act suggest that the Ombudsman’s jurisdiction is not limited to the actions of Commonwealth public servants. Section 3(4), for example, provides, in part, that where a person who is not an officer of a Department takes action in the exercise of a power that the person is authorised to exercise by reason of authority given by the Secretary of a Department, the action taken by the person shall be deemed, for the purposes of the Ombudsman Act, to be action taken by the Department responsible for dealing with the matter in connection with which the action is taken. It is clear from this provision that the Ombudsman’s jurisdiction is not restricted to action by officers of Commonwealth agencies.

4.76 Where, however, a service has been completely contracted out by a government agency, actions taken by the contractor may not be able to be characterised as action taken by the government agency that relates to a matter of administration. The contract may have been drafted in such a way that the manner in which the service is delivered is either entirely a matter in the discretion of the contractor or is covered entirely by the terms of the contract. The government agency may not have the ability under the terms of the contract to direct the contractor. In these circumstances the contractor may not be an agent of the government agency so that the contractor’s actions do not come within section 5 of the Ombudsman Act.

4.77 In some circumstances it may be possible to frame a complaint about a contractor as a complaint about the government agency. For example, where the contractor has been late in delivering a service or the standard of service has been poor, the service recipient might complain that the government agency failed to adequately define the service in the contract or failed to properly monitor the contractor’s performance under the contract.
4.78 Once a complaint falls within section 5 of the Ombudsman Act, the Ombudsman has extensive powers of investigation under section 9 that can be used to obtain information from the contractor.

THE ADVANTAGES OF USING THE OMBUDSMAN

4.79 Submissions received by the Council were divided on whether the Ombudsman should be able to deal with complaints against contractors. The Department of Finance, the Department of Administrative Services and the Department of Health and Family Services did not endorse this role for the Ombudsman. The Department of Immigration and Ethnic Affairs felt that the Ombudsman should be able to investigate the actions of an agency that had failed to resolve a complaint against a contractor. The Australian Securities Commission and the Public Sector Research Centre at the University of New South Wales favoured an extension of the Ombudsman’s jurisdiction.

4.80 The Senate Finance and Public Administration References Committee supported an extension of the Ombudsman’s jurisdiction in its second report on the Contracting Out of Government Services:

The committee believes strongly that complaints against service providers must be dealt with by those service providers in the first instance.... This will require service providers to develop adequate complaints handling mechanisms, the details of which should be spelt out where possible in the provider’s service charter. Where service recipients fail to receive satisfaction from the service provider, they should have the right to complain to the Ombudsman. Recourse to the Ombudsman is a well-known and simple procedure and, as the committee found in a previous inquiry, remarkably cost effective. 84

4.81 It might be argued that if contractors are required or encouraged to establish in-house complaint-handling schemes and if government agencies retain or are encouraged to develop a capacity to investigate and deal with complaints about services delivered by contractors, there is less likelihood that recipients will need to resort to the Ombudsman to have their complaints resolved. The Council does not see the Ombudsman as replacing these other avenues of complaint.

4.82 The Ombudsman does not always investigate a complaint. The Ombudman’s Office has limited resources and increasingly sees its role as an office of last resort. It is quite satisfied to direct many complaints received to other established review mechanisms when they are available. However, there is value in the Office being able to receive and direct many complaints to another more appropriate review body in the first instance. This assists members of the community in their dealings with the Government, particularly in an increasingly complex environment where a growing variety of different public and private service delivery agents are emerging.

4.83 If the Ombudsman was able to investigate complaints about contractors, problems of unevenness and lack of equity between different service recipients could be avoided. The same government service may be delivered in different locations by a government agency, a private sector contractor and a not-for-profit organisation. The avenues of redress available to recipients of the same service should not depend on the identity of the service deliverer.

4.84 The Ombudsman would also be able to identify systemic problems arising from the behaviour of particular contractors and arising from agencies’ contract drafting and contract management practices. The identification of systemic issues relating to particular contractors would provide useful information to agencies when renewing contracts.

**HOW SHOULD THE OMBUDSMAN DEAL WITH COMPLAINTS ABOUT CONTRACTORS**

4.85 The Council believes that the Ombudsman should be able to investigate complaints against government contractors and should be able to deal directly with the contractor in resolving a complaint. The Ombudsman Act should explicitly recognise the Ombudsman’s ability to investigate complaints against contractors and to work with contractors to resolve those complaints.85

4.86 The Council anticipates that in many instances complaints will be resolved quickly and informally in this fashion. Nothing in the Ombudsman Act should preclude informal dealings between the Ombudsman and contractors. The Council also considers that the Ombudsman, in dealing with complaints against contractors, should have the same powers to obtain information and documents from government contractors as he or she currently has in respect of agencies under investigation.

**Where complaints are not resolved informally**

4.87 The Council believes that ultimate responsibility for the quality of services provided by government agencies and delivered by contractors remains with the government agency. For these reasons the Council considers that the Ombudsman should not be able to make formal recommendations to a contractor under section 15 to rectify a complaint. To do so might be seen by agencies as a shift in responsibility for services away from agencies to contractors. Instead the investigation of complaints against contractors should ultimately reinforce the responsibility of government agencies. Where a complaint cannot be resolved

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85 The question of the extent of the Ombudsman’s jurisdiction to deal with complaints about contractors also arises under state legislation establishing Ombudsman or equivalent officers. The Council notes that the Legislative Review Committee of the South Australian Parliament is currently considering a Private Members Bill - Ombudsman (Private or Corporatised Community Service Providers) Amendment Bill. In his second reading speech on the Bill to the House of Assembly on 28 May 1998, Mr J.D. Hill MP noted that the intention of the Bill ‘is to maintain the ability of the Ombudsman to investigate complaints against the existing range of service providers if and when these services are privatised, outsourced or corporatised.’
through discussions between the Ombudsman and the contractor, the Ombudsman should use the formal powers under section 15 to make a report to the agency who let the contract in question.

4.88 Therefore, any amendment to the Ombudsman Act to clarify the jurisdiction of the Ombudsman to deal directly with contractors should make it clear that this extension does not in any way derogate from the responsibility and accountability of the government agency and in particular its responsibility to manage the contract.

4.89 Given that many complaints may be of a minor nature and easily resolved by the Ombudsman and the contractor, it may nevertheless be appropriate for agencies to enter into arrangements with the Ombudsman about the way with which complaints about contractors will be dealt.

4.90 Where the Ombudsman is unable to resolve a complaint and makes a formal recommendation to the agency under section 15, the agency will need to be able to take steps to resolve the issue. It can take steps to deal with the Ombudsman’s recommendation by resolving the complaint itself. Alternatively, it may have in place contractual arrangements under which it can require the contractor to act on the Ombudsman’s recommendation.

4.91 While the Council considers that the Ombudsman should not be able to make recommendations or take action directly against contractors, it would be appropriate and desirable for agencies to draft contracts in such a way that contractors would be contractually obliged to act on the recommendations of the Ombudsman.

4.92 An agency that fails to include such a term in its contracts deprives itself of the opportunity to direct the contractor to correct defects in service delivery. If the agency has put itself in a position where it is unable to ensure that the contractor rectifies the problem identified by the Ombudsman, and the agency is unable to resolve the complaint directly, the agency is likely to find itself the subject to criticism.

4.93 Agencies should also take account of a contractor’s willingness to deal with complaints and in particular the contractor’s willingness to negotiate resolutions with the Ombudsman when considering whether to renew the contract or to offer new contracts to that contractor. The possibility that a contract may not be renewed may be a powerful incentive for contractors to resolve complaints. In addition, an agency might itself be criticised for renewing a contract with a contractor who had been the subject of adverse comment in Ombudsman’s reports.

**Recommendation 9**

Members of the public who have a complaint about a government contractor should be able to make the complaint to the Commonwealth Ombudsman.
Recommendation 10

The jurisdiction of the Commonwealth Ombudsman should extend to the investigation of actions by a contractor under a government contract. The Ombudsman should also be able to deal with contractors informally to resolve complaints under the Ombudsman Act 1976. Any statutory extension or clarification of the Ombudsman’s jurisdiction should recognise that government agencies retain responsibility for proper management of their contracts.

Recommendation 11

In dealing with complaints against contractors the Ombudsman should have the same powers to obtain information and documents from government contractors as he or she currently has in respect of agencies under investigation.

Recommendation 12

Where the Ombudsman is unable to resolve a complaint about a contractor informally, the Ombudsman should be able to make a formal report to the agency, the Prime Minister and the Parliament about the complaint.

Recommendation 13

It would be appropriate and desirable for agencies to draft contracts in such a way that contractors would be contractually obliged to act on the recommendations of the Ombudsman.

Recommendation 14

The option of complaining to the Ombudsman should be in addition to avenues of complaint which should be provided by the contractor and any complaint-handling mechanisms provided by government agencies or industry arrangements. The Ombudsman should have a discretion to redirect complainants to contractors, industry-based complaint-handling schemes or the agencies where appropriate.

OVERLAP BETWEEN COMPLAINT SCHEMES AND REVIEW PROCEDURES

4.94 Any complaint-handling scheme involving the provision of government services needs to differentiate between complaints and review of decisions. Complaints about the manner in which a service is provided or the standard of the service need to be clearly distinguished from the questions of a person's entitlement to a service. If a person's complaint is that they are entitled to a different service, the real issue may be with the agency’s (or the contractor’s) decision about their entitlements. In this situation the person needs to have that decision reviewed either
by the agency or by an external tribunal. Care needs to be taken in setting up complaint-handling systems to ensure that persons with issues about their entitlements are identified at an early stage and redirected into an appropriate review system.86

86 Chapter 6 of this Report examines the need to provide appropriate external review mechanisms where contractors may be able to make decisions about entitlements to funds or services.
CHAPTER 5

ACCESS TO INFORMATION

INTRODUCTION

5.1 This Chapter deals with access to information where services are contracted out. It examines the need to preserve access rights currently provided by the Freedom of Information Act 1982 (the FOI Act) and recommends that the FOI Act be amended to deem documents in the possession of a contractor, that relate directly to the performance of their contractual obligations, to be in the possession of the government agency. The emphasis of the Chapter is on contractors who provide services to the public but the issues raised in the Chapter also apply to contractors who provide services to the Government.

ACCOUNTABILITY AND FREEDOM OF INFORMATION

OBJECTIVES OF THE FOI ACT

5.2 The object of the FOI Act is to ‘extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth by ... creating a general right of access to information in documentary form in the possession of Ministers, departments and public authorities, limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons...’.

5.3 The FOI Act aims to ‘make available information about the operation of, and in the possession of, the Commonwealth Government, and to increase Government accountability and public participation in the process of government’. The fundamental reason for these rights of access ‘is to ensure open and accountable Government’.

5.4 In its joint review of the FOI Act the Council and the Australian Law Reform Commission (ALRC) concluded that the FOI regime provided an important means of public sector accountability, although more should be done to dismantle the culture of secrecy that still pervades some aspects of public administration. In

90 ibid.
particular, the Council and the ALRC considered that the FOI Act had had an important effect on the way agencies make decisions and the way they record information. The knowledge that decisions and processes were open to scrutiny through the FOI Act and the other elements of the administrative law system imposed a constant discipline on the public sector.⁹¹

**FOI AND CONTRACTORS**

5.5 Under the FOI Act, a person has rights of access to government information or personal information held by a government agency and can seek to have incorrect information about them amended. The effectiveness of these rights is enhanced by public sector record-keeping practices and obligations to preserve records.⁹² This right of access to information is available to all members of the community.

5.6 Where a government service is delivered by a contractor the information sought by a service recipient or other member of the public may be held by the contractor rather than the government agency. Members of the public have no general right to seek access to information held by private sector bodies. In particular, service recipients and others have no right of access to information held by contractors providing services on behalf of the Government.

5.7 A request may be made under the FOI Act for access to documents in the government agency’s possession relating to the service delivered by the contractor. A person will not be able to obtain access under the FOI Act to documents in a contractor’s possession relating to the delivery of the service.

**ACCESS TO PERSONAL INFORMATION HELD BY CONTRACTORS**

5.8 The Council notes that the Government is taking steps to ensure that people have access to personal information about themselves held by contractors on behalf of the Government.

5.9 The Privacy Amendment Bill 1998 extends the current obligations of Government agencies under the Privacy Act 1988 to any person or body responsible for the provision of services under a contract with the Commonwealth or one of its agencies.

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⁹¹ ibid, paragraph 2.8.
5.10 As the Attorney-General noted in his Second Reading Speech to the Bill, the entitlements of people to have access to personal information held by agencies about them, and to have that information amended if it is inaccurate, are integral privacy principles.

5.11 The mechanisms for implementing these principles are contained in the FOI Act. The Government has announced that these provisions of the FOI Act will apply to requests by individuals for access to and correction of personal information about themselves held by contractors on behalf of the Government. FOI access to other kinds of information in the hands of contractors will also be available where a government agency has a contractual or other right of access to documents held by the contractor. Amendments to the FOI Act will ensure that such documents are subject to FOI access. In both these cases amendments will deem the relevant documents to be in the possession of the government agency.

5.12 The Council welcomes these changes being implemented by the Government. It notes, however, that the proposed changes to the Privacy Act and FOI Act extend only to access to and amendment of personal information held by contractors and to information to which the government agency has a right of access, for example under the terms of a contract. While such rights of access and amendment are important for preserving government accountability where services are contracted out, the Council’s discussion and recommendations in this Report extend further than the Government’s proposed amendments. This Report is concerned with the range of information that may be held by contractors and agencies that relates to services provided by contractors, whether or not the agency has a right to the information under contract or otherwise.

THE FOI REVIEW AND CONTRACTING OUT

5.13 The Review of the FOI Act conducted by the Council and the ALRC considered the possible extension of the FOI Act to the activities of contractors, as part of a discussion of the possible extension of the Act to the private sector. The Report of the Review argued that the democratic accountability and openness required of the public sector by the Act should not be required of the private sector. It therefore recommended that there should be no general extension of the FOI Act regime to the private sector. However, the Report noted that contracting with private sector bodies for the provision of services on behalf of the Government posed a potential threat to the government accountability and openness provided by the FOI Act. The Report considered that, given the range of situations in which services might be contracted out, it was not possible to specify with certainty what

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93 Hansard, House of Representatives, 5 March 1998 at page 534.
95 FOI Report, paragraphs 15.12-15.15.
96 ibid, paragraph 15.12.
approach to preserving information access rights would be most appropriate in any particular situation.97

5.14 The Council has now considered these issues in more detail.

**LOSS OF ACCOUNTABILITY IN THE CONTRACTING OUT SITUATION**

5.15 In the Council’s view limited access to information about services that are contracted out threatens government accountability to the community. There is potential for a diminution or loss of accountability both in relation to the services provided to individual recipients and in relation to broader questions of public interest.

5.16 A service recipient may need information in order to provide evidence of service delivery problems or to ascertain what the contract requires of the contractor. A minimum amount of information must be available for the service recipient to know whether they are being dealt with properly by the contractor.

5.17 Access to information by members of the public in general and service recipients in particular also enables a broader evaluation of the performance of contractors and of government agencies.

5.18 Of course, the interest of the public in the maintenance of government accountability through information access rights in a contracting out situation needs to be balanced against the interests of contractors. In considering the issue of preserving access to information which may be held by contractors, the Council has borne in mind a number of factors.

- Contractors will want to protect their business interests from inappropriate disclosure of commercially-sensitive information if disclosure might adversely affect their business. Any requirement on contractors to release information may allow their competitors to use the FOI system to the disadvantage of the contractor.

- Any system that facilitates the release of information to the public will involve some costs to the contractors which will be passed onto government agencies through increased contract prices.

5.19 The Council believes that it is important that the gains in government accountability that have been achieved by the FOI Act should not be lost or diminished where services are contracted out. Normal commercial practices may not, of themselves, lead to contractors providing information voluntarily to

97 ibid, paragraph 15.13. The Report noted 3 possible approaches to preserving rights of access to information in a contracting out situation - (i) making the private sector body subject to the FOI Act, (ii) deeming documents to be in the possession of the contracting agency, (iii) incorporating information access rights in individual contracts.
members of the public upon request. Appropriate regimes can and should be developed which can protect the interests of contractors while still ensuring democratic accountability through access to information.
GENERAL PRINCIPLES

5.20 The Council considers that the following principles should guide the relationships between the public, the government agency and the contractor.

Principle 1
Rights of access to information relating to government services should not be lost or diminished because of the contracting out process.

Principle 2
The Government, rather than individual contractors, should normally be responsible for ensuring that the rights of access to information currently provided by the FOI Act are not lost or diminished as a result of contracting out.

MECHANISMS FOR PRESERVING PUBLIC INFORMATION ACCESS RIGHTS

5.21 In light of these principles, the Council identified five options in its December 1997 Discussion Paper\(^{98}\) to ensure that access to information relating to government services is not lost or diminished as a result of the contracting out process. These were:

- Proposal 1 – extend the FOI Act to apply to contractors;
- Proposal 2 – deem specified documents in the possession of the contractor to be in the possession of the government agency;
- Proposal 3 – deem documents in the possession of the contractor that relate directly to the performance of their contractual obligations to be in the possession of the government agency;
- Proposal 4 – incorporate information access rights into individual contracts;
- Proposal 5 – establish a separate information access regime.

5.22 The Council also considered whether government contracts should become public documents able to be accessed directly by the public without recourse to the FOI Act.

5.23 The Council indicated in the Discussion Paper that it favoured Proposal 3 as the most appropriate way of ensuring that rights of access to information were not lost through the contracting out process. This option was also favoured by a number of submissions received by the Council.\footnote{Paul Coleman, Australian Law Reform Commission, Chris Finn, Public Interest Advocacy Centre, the then Australian Securities Commission. The Institute of Chartered Accountants in Australia and the Australian Society of Certified Practising Accountants suggested a combination of Proposals 3 and 4. The Australian Broadcasting Corporation expressed support for Proposal 3 in so far as it would apply to contracts that substitute private sector service providers for government agencies in the direct delivery of services to members of the public. The Law Society of New South Wales, TasCOS and the Australian Customs Service did not support Proposal 3. The Administrative Law Committee of the Law Council expressed reservations about Proposal 3. The Department of Veterans’ Affairs also expressed reservations about deeming documents in the possession of health providers to be in the possession of the Department.}

**PROPOSAL 1 - EXTEND THE FOI ACT TO APPLY TO CONTRACTORS**

5.24 This Proposal extends the FOI Act to contractors providing a government service in respect of documents that relate to the provision of the service. This could be achieved by extending the definition of ‘agency’ in the Act to include private sector contractors.\footnote{Under section 11 of the FOI Act a person has a legally enforceable right, in accordance with the FOI Act, to obtain access to documents of an ‘agency’. An ‘agency’ is defined in section 4 to mean a department, a prescribed authority or an eligible case manager.} This was done in the case of eligible case managers providing services under the *Employment Services Act 1994*.\footnote{*Employment Services (Consequential Amendments) Act 1994*, Part 3. Under section 6B of the FOI Act, the FOI Act applies to a request for access to a document of an eligible case manager if the document is in respect of the provision of case management services or the performance of a function conferred on an eligible case manager under the *Employment Services Act 1994*.}

5.25 In the FOI Report, the Council and the ALRC recommended that this approach should be taken wherever a legislative scheme is established under which contractors contract to provide services to the public on behalf of the Government.\footnote{FOI Report, op. cit., at paragraph 15.13.}

5.26 Proposal 1 effectively means that people seeking access to information would approach the contractor directly rather than seeking the information held by the contractor through the government agency.

5.27 Proposal 1 was supported by TasCOS in its submission because the consumer would have a direct right of access without the involvement of a third party. They also felt that Proposal 1 had a desirable educative effect.

5.28 The Council, however, is concerned that if requests for access to documents could be made directly to the contractor rather than the government agency, agencies might tend to see maintenance of access rights as the responsibility of the
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contractor. As the Council identified in its general Principles, it is the Government which should bear this responsibility.

5.29 There may, however, be some situations where a limited extension of the FOI Act to contractors may be appropriate. Where the delivery of the service is circumscribed by a statutory scheme\(^{103}\) it may be possible to identify those documents held by the contractor which are relevant to the service and to which access is required in the interests of accountability.

**PROPOSAL 2 - DEEM SPECIFIED DOCUMENTS IN THE POSSESSION OF THE CONTRACTOR TO BE IN THE POSSESSION OF THE GOVERNMENT AGENCY**

5.30 Under this Proposal the FOI Act could be amended to provide that any document that the contractor must supply to the government agency *under the terms of their contract* is deemed to be in the possession of the contracting government agency once the document comes into existence. The citizen would then have a statutory right to seek access to the document by making an FOI request to the government agency.

5.31 Requests for access would be dealt with by the government agency which would decide whether access should be granted or whether access should be denied because the document falls within one of the exemptions that protect documents relating to business affairs or that contain material obtained in confidence.\(^{104}\)

5.32 This proposal is similar to the amendments recently announced by the Government to extend the FOI Act to information held by third parties to which a government agency has a right of access.\(^{105}\) The Council supports that proposal but believes that it should be extended to cover other relevant information that may be held by contractors but to which the agency does not have a right. Limiting access to documents to which the agency has a right is potentially narrow and inflexible. For example, a document which related directly to the performance of the contract but which had not been specified in advance would not become subject to the FOI Act.

5.33 Access to important and relevant information could be lost in the contracting out situation if sufficient skill and foresight were not exercised at the time the contract was prepared to identify the documents which the contractor was obliged to create and provide to the agency.

\(^{103}\) Such as the provision of employment services by eligible case managers under the Employment Services Act.

\(^{104}\) Section 27 of the FOI Act may require the government agency to consult with the contractor before a particular document is released. These consultation requirements are discussed at paragraphs 5.96 to 5.98 below.

\(^{105}\) The Government’s proposed amendments to the Privacy Act and FOI Act are discussed at paragraphs 5.8 and following above.
5.34 If there are no contractual requirements on contractors to create documents and provide them to the government agency, or if the contractual provisions are not sufficiently clear and precise, the proposed deeming mechanism will be rendered ineffective.

The New Zealand approach

5.35 Proposal 2 is similar in effect to the New Zealand freedom of information legislation that makes use of a deeming mechanism. Both the Official Information Act 1982 (NZ) and the Local Government Official Information and Meetings Act 1987 (NZ) define ‘official information’ as any information held by a government organisation or local authority. Subject to some limited exceptions, any information in the physical possession of such a body will be official information and will be subject to requests for access.

5.36 The New Zealand legislation extends the definition of information held by a government agency or local authority to cover the contracting out situation. If government agencies or local authorities engage contractors to undertake work (of whatever nature) on their behalf, information held by those contractors relating directly to the work undertaken will, in most cases, constitute ‘official information’. Such information can be requested under the relevant Act. A request for access to information cannot be refused simply because the information is in the physical possession of the contractor.

5.37 The Official Information Act does not provide any means of compelling a contractor to disclose official information in response to a request. Nor does it require the contractor to provide documents to the Government. The legislation does not contemplate that contractors will be approached directly by members of the public with requests for access to information. Nor does it contemplate that contractors would be expected to handle a request for information made to a government agency or local authority under the Act unless they are contractually obliged to do so.

5.38 The Council understands that the practical effect of the New Zealand deeming mechanism is that the extent to which information held solely by a contractor is subject to disclosure under the Act is determined by the contract itself.

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106 Section 2(5) of the Official Information Act 1982 (NZ) provides that: ‘Any information held by an independent contractor engaged by any Department or Minister of the Crown or organisation in his capacity as such contractor shall, for the purposes of this Act, be deemed to be held by the Department or Minister of the Crown or organisation.’ Similarly, section 2(6) of the Local Government Official Information and Meetings Act 1987 (NZ) provides that: ‘Where any local authority enters into any contract (other than a contract of employment) with any person in relation to any matter, any information that is held by that person and to which the local authority is, under or by virtue of that contract, entitled to have access, shall be deemed to be held by that local authority.”

and the ability of the government agency to obtain the information. The Council's inquiries have not revealed any standard practices in New Zealand in respect of government contracts to ensure that information held by a contractor is recoverable if a request is made under the Official Information Act.

**PROPOSAL 3 - DEEM DOCUMENTS IN THE POSSESSION OF THE CONTRACTOR THAT RELATE DIRECTLY TO THE PERFORMANCE OF THEIR CONTRACTUAL OBLIGATIONS TO BE IN THE POSSESSION OF THE GOVERNMENT AGENCY**

5.39 Under this Proposal the FOI Act would be amended to provide that all documents in the possession of the contractor that relate directly to the performance of the contractor's obligations under the contract would be deemed to be in the possession of the government agency. The citizen would then have a statutory right to seek access to the document by making an FOI request to the agency. A further amendment to the Act would be needed to require contractors to provide these documents to the government agency when an FOI request is made.

5.40 Consistent with the situation that arises where documents are created by the government agency, the deeming should take effect from the time that the document is created by the government contractor.

5.41 Not all documents that relate to the contract will disclose information about the manner in which the contractor carries out its contractual obligations. The contractor's records of suppliers, sub-contractors, etc, while relating to the contract to provide the service, may not relate directly to the performance of the contractual obligations, ie the manner in which the service is delivered. These types of records are not likely to be of interest or assistance to an individual service recipient who may be experiencing problems with the delivery of the service by the contractor; nor are they likely to warrant disclosure in the interests of government accountability. Proposal 3 would not deem these documents to be in the government agency's possession.

5.42 Proposal 3 is not limited to those documents that are identified at the time the contract is signed as being required to be provided to the contracting government agency. Proposal 3 covers documents that may not have been contemplated at the time of contract negotiations but which subsequently are created by, or come into the possession of, the contractor – so long as they relate directly to performance of the contractual obligations.

5.43 The Council still considers that Proposal 3 is the most effective way of ensuring appropriate access to information held by contractors. It avoids the constraints and limitations that are inherent in Proposal 2 under which access is limited to classes of documents identified in advance in the contract.

5.44 Proposal 3 also excludes those documents relating to the contractor's business that do not bear on the delivery of the service.
5.45 The Council notes that Proposal 3 was supported by the Senate Finance and Public Administration References Committee in its Second Report on Contracting Out of Government Services.\(^{108}\)

**PROPOSAL 4 - INCORPORATE INFORMATION ACCESS RIGHTS INTO INDIVIDUAL CONTRACTS**

5.46 Under this Proposal access to documents held by private contractors would be maintained by establishing an access regime in the contract itself. The contract between the government agency and the contractor could incorporate terms that require the contractor to disclose specified documents either to the agency or, on request, to the users of the service.\(^ {109}\)

5.47 The Council maintains its view, expressed in the Discussion Paper, that the most significant problem with any contractual approach is that access to information will depend entirely on the terms of the contract. Public information access rights could be bargained away as part of the contract negotiation process. Only the government agency will be able to take action against the contractor to enforce such requirements because the service recipient and other members of the public will not be parties to the contract. The agency may not be willing to take enforcement action particularly if the disclosure of the information could embarrass the agency.

**PROPOSAL 5 - A SEPARATE INFORMATION ACCESS REGIME**

5.48 The Discussion Paper raised the possibility of establishing by statute an information access regime that applied specifically to contracted out services. This regime could be entirely independent of the current FOI regime or, alternatively, it could lay down certain requirements for disclosure specific to government contracts within the framework of the current FOI regime.\(^ {110}\)

5.49 The Council does not favour Proposal 5. Although it would achieve consistency in access rights, it would involve the duplication of the existing FOI scheme and does not offer any significant advantages over the access regimes outlined in Proposal 3.

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\(^{108}\) Parliament of the Commonwealth of Australia, Canberra, May 1998, at page 49. The Committee considered that the contribution the FOI Act has made in enhancing scrutiny of government activity is such that it should not be weakened in an outsourced environment.

\(^{109}\) The TasCOSS submission noted that, although this proposal had increased scope for flexibility, one disadvantage was the lack of legally enforceable remedies because of the rules of privity of contract. The Health Insurance Commission favoured Proposal 4. It noted that under its standard contractual arrangements any information handled by the contractor remains the information of the Commission. The Commission found this proved to be a satisfactory arrangement.

\(^{110}\) TasCOSS concurred with the advantages of this proposal that were outlined in the Discussion Paper but indicated that it would need to have the particulars of the access regime more clearly delineated in order to make an assessment of the impact on consumers, providers, government and the public.
ADDITIONAL PROPOSAL — A SEPARATE DISCLOSURE REGIME FOR GOVERNMENT CONTRACTS AND RELATED INFORMATION

5.50 The Council also raised in the Discussion Paper the possible establishment of a disclosure regime that would make all government contracts public documents. Such a regime would allow access to contracts without the necessity of making an FOI request. The Council also noted the related issue of the extent to which other information relating to contract performance should be publicly available without the need for an FOI request.

5.51 This proposal received support in submissions from the Public Interest Advocacy Centre, TasCOSS, the Corrections Working Group of the Federation of Community Legal Centres (Vic) Incorporated and Chris Finn. Submissions from the Institute of Chartered Accountants, the Australian Societies of Certified Practising Accountants, the Law Society of New South Wales and the Department of Veterans’ Affairs disagreed with the proposal.

Notification of contracts

5.52 There is already a requirement on agencies to publicise some details of their contracts. The Commonwealth (Purchasing and Disposals) Gazette is the Commonwealth Government’s primary medium for reporting all purchasing activities and advertising business and bidding opportunities for suppliers and buyers. Under the Financial Management and Accountability Regulations 1997, it is mandatory to notify available business opportunities, including activities such as invitations to bid and expressions of interest and new commitments or contracts arranged and standing offers of $2000 or greater in the Gazette.111

5.53 However, if the Chief Executive of an agency decides that details of a contract or standing offer are exempt matters under the Freedom of Information Act 1982, he or she may direct in writing that the details are not to be notified in the Gazette.112

Conclusion

5.54 The Council has concluded that, in light of these notification requirements and the availability of access to contracts under the FOI Act, a separate disclosure regime may impose costs on agencies which are not warranted by the use that is likely to be made of such a regime.

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112 ibid.
Recommendation 15

The Freedom of Information Act 1982 should be amended to provide that all documents in the possession of the contractor that relate directly to the performance of the contractor's obligations under the contract would be deemed to be in the possession of the government agency.

Recommendation 16

The Freedom of Information Act 1982 should be further amended to require contractors to provide these documents to the government agency when an FOI request is made.

THE EXEMPTIONS TO THE FOI ACT

5.55 Concerns were expressed in submissions and consultations\textsuperscript{113} that FOI requests for documents about services being provided by contractors may be rejected by government agencies. Agencies may wrongly or mistakenly claim that the documents fall within the exemptions in the FOI Act relating to confidentiality, business affairs and information of commercial value. Inappropriate reliance on these exemptions may result in a re-emergence of the culture of secrecy which existed in some government agencies prior to the enactment of FOI legislation.

5.56 The Industry Commission, in its report, *Competitive Tendering and Contracting by Public Sector Agencies*,\textsuperscript{114} noted that the practice of disclosure of information appeared to differ significantly between levels of government and across jurisdictions. The Commission recognised the need to strike an appropriate balance between the public interest in access to government information and the public interest in the protection of certain information from disclosure:

\begin{quote}
There is sometimes tension between making information on contracting decisions public and protecting commercial confidentiality. While the obligation of the government to be open and accountable may legitimately give way to conflicting considerations of ‘commercial sensitivity’ in some cases (for example, where information contains valuable intellectual property), there should be a preference for disclosure.\textsuperscript{115}
\end{quote}

COULD THE APPLICATION OF THE EXISTING FOI EXEMPTIONS UNDERMINE THE BASIC PRINCIPLES?

5.57 The FOI Act currently contains a number of exemptions that prevent the disclosure of some documents. Of particular significance in the contracting out

\textsuperscript{113} Public Interest Advocacy Centre, Public Sector Research Centre.

\textsuperscript{114} Report No 48, op. cit., at page 93.

\textsuperscript{115} ibid, at page 6.
context are the exemptions for documents that relate to business affairs (section 43) and the exemption for documents containing information obtained in confidence (section 45).

5.58 The principles adopted by the Council seek to ensure that rights of access to information are not lost or diminished where services are contracted out. The Council has examined these exemptions to determine if they will operate to undermine the Council’s principles by inappropriately exempting documents from disclosure. This discussion covers 2 situations. First, the agency may hold internally created documents or documents that have been provided by the contractor. Secondly the question of the application of the exemptions may arise in respect of documents held by the contractor but which are deemed to be in the agency’s possession because they relate directly to the performance of the contractor’s obligations under the contract.

5.59 The Council has noted a common misconception among agencies and FOI users that there is a ‘commercial-in-confidence’ exemption in the FOI Act. While this may be a convenient short hand expression to summarise those exemptions that might apply to commercially sensitive information, it is a potentially misleading expression that the Council believes should be avoided. There is no such general exemption in the Act and, as will be shown below, the fact that a document is marked ‘commercial-in-confidence’ is not determinative of the document’s confidentiality for the purposes of the FOI Act.

**SECTION 45 - CONFIDENTIAL INFORMATION EXEMPTION**

5.60 Section 45 exempts a document from disclosure under the FOI Act if its disclosure would found an action by a person other than the Commonwealth for breach of confidence. The intention of the section is to incorporate into the exemption the general law of breach of confidence.116

5.61 There are at least four basic elements for an action of breach of confidence to succeed in equity and these apply to a claim for exemption made under section 45:

- it must be possible to identify with specificity, and not merely in global terms, the information claimed to be confidential;

- the information must have the necessary quality of confidentiality, and not, for example, be common or public knowledge;

- the information must have been received in such circumstances as to import an obligation of confidence;

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• there is actual or threatened misuse of the information.\textsuperscript{117}

5.62 It is uncertain from the authorities whether it is also necessary that disclosure would cause detriment to the confider.\textsuperscript{118} Even if detriment to the confider is necessary to found a successful action for breach of confidence, it is likely to be fairly easy to establish: disclosure to a person against a confider’s wishes might be sufficient.\textsuperscript{119} There is also some doubt as to whether section 45 would apply to all situations where there is a breach of a contractual obligation of confidence.\textsuperscript{120}

5.63 For the purposes of this discussion the most significant elements of the action for breach of confidence are those relating to the inherent confidentiality of the information and the circumstances in which the information is provided to the government agency.

**Inherent Confidentiality**

5.64 For information to be subject to a duty of confidence it must have 'the necessary quality of confidence' in that it must be something which is not public property and public knowledge.\textsuperscript{121} The distinction between information that is in
the public domain, in that it is public property and public knowledge, and information that is secret is not always easy to draw.

5.65 The fact that information is not in the public domain is not, however, sufficient for it to warrant protection. Something more is required. The general principles that apply were outlined in Moorgate Tobacco Co Ltd v Phillip Morris Ltd and another (No 2) by Deane J in these terms:

Relief under the jurisdiction is not available, however, unless it appears that the information in question has 'the necessary quality of confidence about it' ... and that it is significant, not necessarily in the sense of commercially valuable ... but in the sense that the preservation of its confidentiality or secrecy is of substantial concern to the plaintiff.122

5.66 The requirement that information be 'significant' or of 'substantial concern' is not satisfied merely by the fact that the confider wishes to protect the information.123

5.67 Many of the authorities that deal with whether information should be protected are concerned with alleged trade secrets or other commercially valuable information. Information of this kind has been granted protection for a number of reasons including its commercial value, its novelty, the likelihood of detriment to the confider resulting from its disclosure, and the fact that the information can only be reproduced with a special effort.124 In the FOI context documents containing information of this nature would probably be exempt under section 43 in any event.125 Obligations of confidence can also apply to non-commercial information: in the case of personal information, FOI access to it by a third party would be subject to the exemption in section 41.126

Circumstances in which information is provided

5.68 The basis of an obligation to respect confidences ‘lies in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained’.127 Determination of whether an obligation of confidence exists also requires a determination of its scope in terms, for example, of permissible uses or disclosures of the information and the duration of the obligation. In many situations it will be apparent that there is a mutual understanding, implicit or express, that information is conveyed on the basis that it

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123 Coco v A N Clark (Engineers) Ltd (1969) RPC 41 at 48.
124 eg Measure Brothers Ltd v Measures [1910] 1 Ch 336; Gilbert v The Star Newspaper Company (Ltd) (1894) 11 TLR 4; Saltman Engineering Co Ltd v Campbell Engineering Co Ltd (1948) 65 RPC 203.
125 In some circumstances section 43 exempts documents relating to business affairs from disclosure.
126 This section exempts documents from disclosure where disclosure would involve unreasonable disclosure of personal information about any person.
127 Moorgate Tobacco Co Ltd v Phillip Morris Ltd and another (No 2) (1984) 156 CLR 414 at 438 per Deane J, quoted by the Full Federal Court in Smith Kline & French Laboratories (Australia) Ltd v Secretary, Department of Community Services and Health (1991) 99 ALR 679 at 691.
will be kept confidential. In other cases it will be necessary to decide whether ‘an obligation of conscience’ which equity would enforce has arisen in some other way.

5.69 Where there is no common understanding of confidentiality, one test for deciding whether an obligation of confidence is to be found to exist is whether information has been supplied by the confider for a limited purpose. However, the Full Court said in Smith Kline that the ‘test of confider’s purpose will not ordinarily be appropriate where each party’s interest is quite different, and known to be so’. When examining the position of the confidence, Gummow J has said that ‘equity may impose an obligation of confidence upon a defendant having regard not only to what the defendant knew, but to what he ought to have known in all the relevant circumstances’.

5.70 In the specific context of the FOI Act, the Full Federal Court in Searle Australia Pty Ltd v Public Interest Advocacy Centre suggested that since the passing of the FOI Act there can be no general understanding that all information passed to Commonwealth officers will not be disclosed to others:

Prior to the coming into operation of the FOI Act, most communications to Commonwealth departments were understood to be confidential because access to the material could be obtained only at the discretion of an appropriate officer. With the commencement of the FOI Act on 1 December 1982, not only could there be no understanding of absolute confidentiality, access became enforceable, subject to the provisions of the FOI Act. No officer could avoid the provisions of the FOI Act simply by agreeing to keep documents confidential. The FOI Act provided otherwise.

Section 45 and contracting out

5.71 Given that the exemption in section 45 will only be available if disclosure of the documents would found an action for breach of confidence and given the requirement that a document be inherently confidential before its disclosure can amount to a breach of confidence, it seems clear that the mere fact that a document is

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128 See for example, Gummow J in Smith Kline at page 124-5.
129 See the considerations suggested by the Full Court as being relevant to this question in Smith Kline at page 691.
130 ibid., at page 690.
131 Smith Kline at page 111.
133 The Attorney-General’s Department has expressed the view that in the above passage the Court was emphasising that:
...agencies and their officers cannot avoid the provision of the FOI Act by purporting to give absolute assurances of confidentiality (since FOI confers an enforceable right of access subject to exemptions, and the Tribunal can always assess the validity of a claim for exemption under s. 45(1). ... However, if the elements of breach of confidence are satisfied, then there is a basis for a s. 45(1) exemption claim (Megarry J in Coco, at 48 (and see at 50-51)). On the other hand, if not all the information in question is (or is still) confidential in character, there will be no basis for a section 45(1) claim.
marked confidential by either the contractor or the government agency will not be sufficient to bring the documents within section 45.\textsuperscript{134}

5.72 The FOI Act confers a statutory right of access on a person and an agreement between an agency and a contractor to keep information confidential will not negate this statutory right unless all the requirements of section 45 are satisfied. Even as presently drafted an agency cannot avoid the provision of the Act simply by agreeing with the contractor to invoke stipulated exemption provisions of the Act irrespective of the merits of the case.

Application of section 45 to documents deemed to be in the agency’s possession

5.73 The Council has recommended that documents in the possession of the contractor that relate directly to the performance of their contractual obligations should be deemed to be documents in the possession of the government agency from the time they are created.

5.74 The deeming provision should be drafted in such a way that it cannot be undermined by contractors and agencies agreeing to treat documents as confidential.

Section 43 - Documents relating to business affairs

5.75 For present purposes, section 43(1) provides that a document is an exempt document if its disclosure under the Act would disclose:

(a) trade secrets;

(b) information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; or

(c) information ... concerning the business, commercial or financial affairs of an organisation or undertaking, being information –

(i) the disclosure of which would, or could reasonably be expected to, unreasonably affect ... that organisation or undertaking in respect of its lawful business, commercial or financial affairs;

(ii) the disclosure of which ... could reasonably be expected to prejudice the future supply of information to the Commonwealth...

Trade Secrets

5.76 In Searle Australia Pty Ltd v Public Interest Advocacy Centre and another the Court found the term 'trade secrets' in section 43(1)(a) did not have a technical legal

\textsuperscript{134} Re Witheford and Department of Foreign Affairs (1983) 5 ALD 534 at 543.
meaning in the FOI Act, and so should be given its ordinary English meaning as it is understood in Australia. The Court said:

It may be that the more technical information is, the more likely it is that, as a matter of fact, the information will be classed as a trade secret. But technicality is not required. Many valuable trade secrets could be readily understood by a lay person, if informed of them.

... An aspect of the concept of “trade secrets” which was not discussed by the Tribunal is that the [trade] secrets must be used in or useable in the trade. A trade secret is an asset of the trade. Past history and even current information, such as mere financial particulars, may be confidential. The law may protect the disclosure of such information by a person who has obtained it in the course of a relationship which requires confidentiality, such as that of employee, solicitor or accountant. But such information may not be a trade secret.135

5.77 The Court also said that if ‘[i]nformation did not fall within section 43(1)(b) and section 43(1)(c)(i), it would be unlikely to be exempt simply because of section 43(1)(a)’.136

Information having commercial value

5.78 Since the Federal Court decision in *Harris v Australian Broadcasting Corporation and Others* 137 it has been settled that section 43:

... is a provision the object of which is to protect, within reasonable limits, the interests of third parties dealing with the agency or undertaking and supplying information to it in the course of that dealing.

5.79 It follows that the 'information having a commercial value' referred to in section 43(1)(b) must be information which has originated with the third party rather than with the Government.138

5.80 Commercial value is not a concept which has been explored to any degree in the decisions of the AAT or Federal Court, and there is uncertainty about whether the concept should be applied in the sense of 'market value', 'replacement value' or some other standard. The AAT has found that current client lists and statistical information have commercial value.139 However, 'commercial value' is difficult to define, and information which is aged or out of date may have no remaining commercial value capable of being 'destroyed or diminished'.140

136 ibid., at page 175.
138 A number of GBEs and the Attorney-General’s Department have Schedule 2 exemptions for documents relating to their competitive commercial activities.
139 *Re Rogers Matheson Clark and Australian National Parks and Wildlife Service* (1991) 22 ALD 706; *Re Organon (Australia) Pty Ltd and Department of Community Services and Health; Public Interest Advocacy Centre* (1987) 13 ALD 589.
140 *Re Angel and Department of Arts, Heritage and Environment and others* (1985) 9 ALD 113 at 127; *Re Brown and Minister for Administrative Services* (1990) 21 ALD 526.
Disclosure adversely affecting business affairs

5.81 A document may be exempt under section 43(1)(c)(i) if there is a reasonable expectation that its disclosure will have an unreasonable effect on a contractor’s lawful business, commercial or financial affairs. This means that there must be a ‘foundation for a finding that there is an expectation of adverse effect that is not fanciful, imaginary or contrived’. A similar view was adopted by the majority of the Full Federal Court in *Attorney-General’s Department v Cockcroft*, where it was said that the words ‘could reasonably be expected to’ were intended to receive their ordinary meaning and should not be paraphrased. Application of the test requires a judgment that the expected claim is reasonably based rather than ‘irrational, absurd or ridiculous’. In a separate judgment Sheppard J referred to the need for ‘real and substantial grounds’ for the expectation of particular effects. It will not be sufficient for the purposes of section 43(1)(c)(i) that the person who supplied the information asserts that disclosure will have the relevant adverse effect.

5.82 The provision also allows public interest considerations to be taken into account because the agency has to consider whether the release of the document would unreasonably affect the contractor in respect of its business affairs. This was discussed by the Federal Court in *Searle Australia v Public Interest Advocacy Centre*:

Section 43(1)(c)(i) poses the issue whether disclosure of the information would unreasonably affect a person adversely.

... If it be in the public interest that certain information be disclosed, that would be a factor to be taken into account in deciding whether a person would be unreasonably affected by the disclosure; the effect, though great, may be reasonable under the circumstances. To give two examples: if the relevant information showed that a business practice or product posed a threat to public safety or involved serious criminality, a judgment might be made that it was not unreasonable to inflict that result though the effect on the person concerned would be serious. Of course, the extent and nature of the effect will always be relevant, often decisive. Whether the effect of the disclosure is unreasonable cannot be assessed without taking into account all relevant factors.

Business Affairs Exemptions in State FOI legislation

5.83 Most State FOI Acts have a public interest test for their business affairs exemptions.

5.84 The New South Wales legislation is similar to section 43 of the Commonwealth FOI Act. The South Australian legislation exempts documents

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141 *Re Actors’ Equity Association (Aust.) and Australian Broadcasting Tribunal (No. 2) (1985) 3 AAR 1 at 6-7.*
142 *Attorney-General’s Department v Cockcroft* (1986) 64 ALR 97 at 106.
143 *Colakovski v Australian Telecommunications Corporation* (1991) 100 ALR 111 at 120-1, 123-4.
144 *Freedom of Information Act 1989 (NSW) section 32, Sch cl 7.*
the disclosure of which could result in any adverse effect on business, commercial or financial affairs. The adverse effect need not be unreasonable.\textsuperscript{145}

5.85 Under the Western Australian Act,\textsuperscript{146} information about business, professional, commercial or financial affairs is not exempt, if its disclosure would on balance be in the public interest. Under the Queensland legislation, material about business, professional, commercial or financial affairs of an agency or person is exempt if it could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to government, unless its disclosure would, on balance, be in the public interest.\textsuperscript{147}

5.86 The Victorian legislation\textsuperscript{148} includes a discretionary public interest test. Material is exempt from disclosure if it is acquired from a business, commercial or financial undertaking and the disclosure would be likely to expose that undertaking to disadvantage. In assessing that likelihood the Minister or agency can take into account a number of considerations including:

- whether the information would be exempt matter if it were generated by an agency or a Minister;
- whether the information could be disclosed without causing substantial harm to a competitive position of the undertaking;
- whether there are any considerations in the public interest in favour of disclosure which outweigh considerations of competitive disadvantage to the undertaking.

5.87 In Tasmania’s business affairs exemption, which is otherwise similar in content to the Victorian legislation, it is mandatory that account be taken of considerations in the public interest in favour of disclosure, except where the information at issue relates to trade secrets.\textsuperscript{149}

5.88 The Victorian legislation allows the Victorian Civil and Administrative Tribunal to override exemptions made out by agencies. Section 50(4) of the Victorian Act provides:

On the hearing of application for review the Tribunal shall have, in addition to any other power, the same powers as an agency or a Minister in respect of a request, including power to decide that access should be granted to an exempt document ...

\textsuperscript{145} \textit{Freedom of Information Act 1991} (SA) section 27 and Sch 1, cl 7 (1)(c).
\textsuperscript{146} \textit{Freedom of Information Act 1992} (WA) Sch 1, cl 4.
\textsuperscript{147} \textit{Freedom of Information Act 1992} (Qld) section 45 (1)(c). Note that there is some uncertainty in the drafting of section 45 and the extent of the public interest test: see Finn C ‘Getting the Good Oil: FOI and Contracting Out’ (1998) 5 \textit{Admin L} 113 at page 116.
\textsuperscript{148} \textit{Freedom of Information Act 1982} (Vic) section 34.
\textsuperscript{149} \textit{Freedom of Information Act 1991} (Tas) sections 31, 32.
where the Tribunal is of the opinion that the public interest requires that access to the document should be granted under this Act.

**Business affairs exemption and contracting out**

5.89 The majority of the Council considers that the present exemption for documents relating to the business affairs of a third party strikes an appropriate balance between the protection of the commercial interests of contractors and the interests of members of the public in having access to information about contracted services. If applied appropriately it does not compromise the principles identified by the Council.

5.90 There is clearly a concern that agencies may interpret this exemption too broadly in the mistaken view that any information relating to a contractor or a contracted out service will be commercially confidential and a perception that this has occurred in the past. Agencies may wrongly interpret section 43 as providing a blanket exemption for any information that relates to a commercial dealing by the agency.

5.91 This view is clearly incorrect. Section 43(1)(b) only prevents the disclosure of information having a commercial value that could reasonably be expected to be diminished by disclosure. Section 43(1)(c)(i) only prevents disclosure of commercial information where such disclosure could reasonably be expected to have an unreasonable adverse affect on the contractor’s business, commercial or financial affairs. Section 43(1)(c)(ii) only prevents disclosure of information where the disclosure could be reasonably expected to prejudice the future supply of information to the Commonwealth.

5.92 In releasing documents relating to a contract or the contractor’s performance the agency has to consider two issues – is the disclosure of the document reasonably likely to have an adverse effect on the contractor’s business affairs and is that adverse effect unreasonable.

5.93 For example, documents relating to the number and type of complaints that had been received from service recipients would not in the Council’s view be exempted from disclosure under section 43. If it was a high volume service with only a small number of complaints, it could not be said that disclosure of the documents is reasonably likely to have an adverse effect on the contractor’s business affairs. If, however, the documentation disclosed a high level of complaints, the disclosure of that information is more likely to be in the public interest, so that disclosure could not be said to have an unreasonably adverse effect on the contractor’s business affairs.
Conclusions

5.94 The majority of the Council therefore does not recommend any changes to section 43 at this stage. If applied appropriately by agencies it will not prevent the disclosure of information that should be available about contracted services.

5.95 However, it is clear that agencies need to take steps to ensure that FOI requests are being dealt with in accordance with the Act. Agencies also need to ensure that staff are not claiming indiscriminately that documents fall within the business affairs exemptions in the FOI Act.
THE REVERSE FOI MECHANISM

5.96 Under section 27 of the FOI Act, a government agency must consult with a person or organisation before releasing documents containing information concerning that person’s business or professional affairs or the business, commercial or financial affairs of that organisation if it is ‘reasonably practicable’ to do so. The person or organisation is able to make submissions to the government agency in support of a contention that the document that is the subject of the FOI request is an exempt document under section 43 of the FOI Act.

5.97 The Council suggested in the Discussion Paper that it may be appropriate for a contractor to state its position with respect to the release of the document when the document is provided to the agency. Contractors could indicate agreement to release documents because they are considered to be non-controversial. Any opinion of the contractor that a document is confidential should not be conclusive of the question of whether the document falls within an exemption.150

5.98 The Council has decided against recommending this course of action. It is possible given the volume of documentation that may pass between agencies and contractors in some situations that contractors might for the sake of convenience simply claim that all the documentation would fall within an exemption. Such blanket claims would only result in increased delays for applicants under the FOI Act. The Council has concluded therefore that it would be preferable for contractors to be consulted on the release of documents under FOI on a case by case basis.

AN FOI COMMISSIONER

5.99 The use of the exemptions in sections 43 and 45 in contracting out situations needs to be monitored because many agencies will be making far greater use of contracting out than in the past.

5.100 In the FOI Report the Council and the ALRC recommended the creation of a statutory office of FOI Commissioner151 whose functions would include auditing agencies’ FOI performance, providing FOI training to agencies and providing information, advice and assistance in respect of FOI requests. In addition, the Commissioner would be able to issue guidelines on how to administer the Act.152

5.101 An FOI Commissioner would be the most appropriate body to monitor the effect of contracting out on access to information under the FOI Act. The Commissioner could also play a crucial role in training agencies and in ensuring that the exemptions were applied in a uniform way across agencies.

150 Administrative Review Council, op. cit., page 23.
151 FOI Report, op. cit., recommendation 18.
152 FOI Report, op. cit., recommendation 19.
5.102 In the absence of an FOI Commissioner, the Attorney-General’s Department should issue guidelines to government agencies on how the exemptions in section 43 and 45 should be interpreted and applied by government agencies.

**Recommendation 17**

All agencies involved in contracting out should regularly provide training to staff on the meaning and operation of the FOI Act and in particular the meaning and application of the exemption provisions.

**Recommendation 18**

The Council reiterates the recommendation in the FOI Report for the establishment of an FOI Commissioner who would be able to assist agencies in dealing with FOI requests relating to contracted out services. In the absence of an FOI Commissioner, the Attorney-General’s Department should issue guidelines to government agencies on how the exemptions in section 43 and 45 should be interpreted and applied by government agencies.

**VOLUNTARY DISCLOSURE**

5.103 Although the Council has examined a number of detailed proposals that are designed to deal formally with requests for access to information, none of these proposals should preclude contractors from supplying information upon request to a member of the public where they are legally able to do so.

5.104 The Council encourages both contractors and government agencies to make information available in this way. Provisions dealing with voluntary disclosure of material may need to be provided for specifically in the contract between the agency and the contractor.153

**GUIDELINES ON WHEN INFORMATION IS TO BE TREATED AS CONFIDENTIAL**

5.105 The concern noted by the Council in this Chapter, that agencies may too readily agree to treat contractors’ documents as confidential, extends beyond documents that would be deemed to be in the agency’s possession under the Council’s proposals. These agreements may affect not only disclosure under the FOI Act; they may also influence the release of information to Parliamentary committees and more generally to the public in Annual Reports, etc. It would be desirable, in the Council’s view, for government agencies to adopt a uniform approach to the circumstances in which they will agree to treat information as confidential. Such a

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153 In some circumstances contractors may be restrained from voluntary disclosure because of legislative requirements, such as in the Privacy Act or the Crimes Act 1914.
uniform approach could be set out in guidelines issued by the Attorney-General and applicable to all government agencies.

5.106 If these guidelines were issued to Commonwealth agencies it may also be more difficult, in light of the comments in *Searle*, for agencies and contractors to claim that information had been exchanged on a confidential basis where it did not otherwise fall within those guidelines. It would therefore be more difficult for agencies and contractors to rely on the exemption in section 45 of the FOI Act.

5.107 The ACT Government has recently released draft Principles and Guidelines for the Treatment of Commercial Information held by ACT Government Agencies.\(^{154}\)

5.108 This document contains a number of principles for the treatment of commercial information held by ACT government agencies including:

- the ACT government is obliged to disclose information wherever possible, including information relating to its commercial dealings, to the people on whose behalf it is acting;
- information obtained through commercial dealings is not automatically ‘commercial-in-confidence’;
- the application of the ‘commercial-in-confidence’ classification to information and inclusion of confidentiality clauses in contracts should be subject to rigorous assessment and regular review;
- classification of information as ‘commercial-in-confidence’ and entering into confidentiality agreements is not appropriate in instances when non-disclosure is contrary to the public interest.

5.109 The draft guidelines also start with the proposition that:

> Of primary importance is the principle of open access of information to the public. The Territory will generally make available to the public information concerning its commercial dealing with private citizens or corporations.

5.110 The Council considers that guidelines should be developed setting out the circumstances in which Commonwealth agencies will treat information received from third parties as confidential. These guidelines should be tabled in both Houses of Parliament by the Attorney-General.

5.111 These guidelines should be based on the premise that rights to seek access to information should not be lost or diminished where services are contracted out. They should also provide appropriate protection of the business and commercial interests of contractors.

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\(^{154}\) Chief Minister’s Department, Canberra, April 1998.
Recommendation 19

Guidelines should be developed and tabled by the Attorney-General setting out the circumstances in which Commonwealth agencies will treat information provided by contractors as confidential.

MINORITY VIEW

5.112 Four members of the Council—Professor Marcia Neave, Justice Jane Mathews, Ms Jill Anderson and Professor Ian Lowe—disagree with the majority view that the exemptions in section 43(1)(b) dealing with information of commercial value, section 43(1)(c)(ii) dealing with business affairs and section 45 dealing with confidential information, should not be modified to deal with the contracting out situation.

5.113 We support the principle, set out in paragraph 5.20, that ‘[r]ights of access to information relating to government services should not be lost or diminished because of the contracting out process’. Our difference with the majority lies in how we seek to give effect to that principle.

5.114 The majority of the Council believes that the existing exemptions, combined with appropriate guidelines155 are appropriate to the contracting out situation. Implicit in this view is the notion that if agencies misapply the exemptions, the agency decision can be challenged in the AAT. Our view is that it is undesirable to rely on litigation by members of the public to overcome concerns about agency practice. Further, we do not believe that guidelines will be sufficient to resolve the problem. We believe that legislative changes are necessary to ensure that contracting out does not, in practice, lead to loss or diminution of rights of access to information.

5.115 Section 45,156 section 43(1)(b)157 and section 43(1)(c)(ii)158 assume that in the case of confidential information, information having a commercial value, and

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155 See Recommendation 17.
156 The AAT has stated that in the absence of an explicit public interest test in section 45, no public interest consideration should be taken into account in applying the exemption: *Re Baueris and Commonwealth Schools Commission, Department of Education* (1986) 10 ALD 77 at 85. Further, the AAT held that the objects provision of the Act did not support a presumption in favour of disclosure when interpreting the exemption provisions, applying *News Corp v NCSC* (1984) 52 ALR 277 at 279. See also *Re Maher and Attorney-General’s Department (No 2)* (1986) 4 AAR 266 at 289 and *Corrs Pavey Whiting and Byrne v Collector of Customs (Vic) and Anor* (1987) 14 FCR 434 at 447 (per Gummow J); 74 ALR 428 and discussion in Cossins A, *Annotated Freedom of Information Act New South Wales*, LBC Information Services, Sydney (1997) at 113.18.1-3.
business affairs information, the disclosure of which could reasonably be expected to prejudice the future supply of information to the Commonwealth, the public interest always requires non-disclosure. We are doubtful whether this is the case, even when contracting out is not involved. When the documents relate to purchaser/provider arrangements\textsuperscript{159} involving the expenditure of public monies, we think the assumption that the public interest lies in non-disclosure is even more difficult to justify. As currently drafted these exemptions preclude a balancing of relevant interests in the circumstances of the particular case.

5.116 Our view is that, in relation to documents relating to contracting out arrangements, section 43(1)(b) should be amended to provide that a document is exempt if its disclosure would disclose information having a commercial value that would be destroyed or diminished if the information was disclosed, and disclosure of the information would be unreasonable. Similarly, section 43 (1)(c)(ii) should be amended to provide that a document is exempt if disclosure of information would \textit{unreasonably} prejudice the future supply of information.\textsuperscript{160}

5.117 In deciding whether the disclosure would be unreasonable under section 43(1)(b) or (c)(ii), the factors which should be considered by the Minister or agency should include (but not be restricted to) whether

- the information could be disclosed without causing serious harm to the contractor
- the public interest in favour of disclosure outweighs the harm which would be sustained by the contractor if the information was released.

5.118 In deciding whether the disclosure would unreasonably prejudice the supply of information to the Government under section 43(1)(c)(ii), the Minister or agency should consider whether the public interest in disclosing the information outweighs the effect of the disclosure in prejudicing the future supply of information.

5.119 In the case of section 45, documents should not be exempt if it is in the public interest that they be disclosed. An advantage of this approach is that it would clarify the interaction between section 45 and the deeming provision, in the event that section 45 is treated as having some application to deemed documents.

5.120 It is arguable that the exemption concerning trade secrets (section 43(1)(a)) should also be subject to a public interest test. Trade secrets present particular

\textsuperscript{159} A purchaser/provider arrangement is one in which the purchaser is the agent who decides what will be produced and the provider is the agent who delivers the agreed outputs or outcomes.

\textsuperscript{160} Cossins A, op. cit., at 107.19.1 argues that this provision is intended to cover situations where the Government ‘is dependent on information that is not required to be supplied compulsorily from the business community’. It seems ill-adapted to the contracting out situation.
difficulties because they may be tantamount to property. However, as we have not had the benefit of submissions on this issue, our dissent does not extend to it.

5.121 We acknowledge that the application of a public interest test is not without problems. These could be ameliorated by specific provisions relating to public interest in the guidelines recommended at para 5.102.

5.122 The application of a public interest test to confidential commercial information is consistent with the approach taken in Tasmania and Western Australia. The review of the Freedom of Information Act conducted by the Council and the ALRC decided against such amendments to sections 43 and 45 essentially because it would jeopardise the flow of important information to government. We find this argument unconvincing. We are not aware that the public interest tests incorporated in the Tasmanian or Western Australian equivalents to sections 43 and 45 have had this effect. Nor is there evidence that the ‘public interest override’ provision in the Victorian legislation (see paragraph 5.86 above) has done so. Our view is that such changes are necessary to prevent the re-emergence of a culture of secrecy in government agencies, in relation to contracting out arrangements and to overcome concerns expressed in consultations conducted by the Council and in submissions, that agencies apply the commercial confidentiality and business affairs exemptions too readily and expansively.

5.123 Commentators have suggested that the ‘introduction of privatised or contractual modes of government may lead to the creation of a culture of secrecy and decrease the level of accountability’. Professor Arie Freiberg warns that commercial confidentiality has become ‘an all-purpose shield’. He argues that:

As the process of contracting out increases, the dividing line between what is ‘public’ and what is ‘private’ becomes ever more blurred, and as the core activities of

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161 Note, in addition, that under Freedom of Information Act 1991 (Tas) section 33, information communicated in confidence will only be exempt if it would have been exempt if it had been generated by an agency or Minister, or if disclosure would be contrary to the public interest because the disclosure would be reasonably likely to impair the ability of an agency or Minister to obtain similar information in the future.

162 Freedom of Information Act 1992 (WA) Schedule 1, cl 4(7) (information about business, professional, commercial or financial affairs is not exempt, if its disclosure would on balance be in the public interest). The public interest provision does not apply to trade secrets or if disclosure could reasonably be expected to destroy or diminish commercial value. Under Schedule 1, cl 8(4) confidential information is not exempt if its disclosure would, on balance, be in the public interest, despite a reasonable expectation that the future supply of information of that kind to the Government or agency would be prejudiced.

163 FOI Report, op. cit.

164 See submissions by Chris Finn, PIAC, Paul Moyle and see submission of the Corrections Working Group of the Federation of Community Legal Centres (Vic).

government diminish, the consequences of a policy of commercial secrecy will see a smaller and smaller proportion of public expenditures being subject to scrutiny.\(^{166}\)

5.124 Our proposed amendments to exemptions under the FOI Act go some way towards meeting these concerns.

\(^{166}\) Freiberg A, ‘Commercial Confidentiality, Criminal Justice and the Public Interest’ (1997) 9(2) CICJ 125 at page 147.
CHAPTER 6

REVIEW OF DECISIONS

INTRODUCTION

6.1 This Chapter examines the question of external review of decisions which may be taken by contractors.

6.2 The Chapter deals with 2 situations. First, contractors may be exercising statutory decision-making powers as delegates of the agency head. In these cases the relevant legislation may allow the agency head to delegate powers under the statute to persons who are not officers of the agency. The terms of the contract may authorise the contractor to make decisions under the statute as a delegate of the agency head. The contractor may, for example, be able to decide under the contract who is eligible to receive the service or to make decisions to terminate the service for particular recipients.

6.3 Secondly, situations may arise where the service that the contractor is required to provide has no statutory basis but is supported by an appropriation of funds by the Parliament. The eligibility of members of the public to receive that service may be determined entirely by the terms of the contract with the government agency.

6.4 This Chapter examines the question of whether a contractor’s decision affecting a person’s interests, either under statute or the contract, should be the subject of external review either by the Courts or a merits review tribunal. Once again, in approaching this issue the Council has adopted the principle that rights of access to external review of government decisions should not be lost or diminished where services are contracted out.

BACKGROUND

6.5 Decisions taken by government officials are presently subject to a number of external review mechanisms.

EXTERNAL REVIEW UNDER THE CONSTITUTION

6.6 Section 75(iii) of the Constitution confers jurisdiction on the High Court in relation to any matter in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party. Under this power, the High Court can issue a declaration in respect of administrative action where the Commonwealth or its agent is a party to proceedings. The High Court’s jurisdiction to issue other administrative law remedies is made explicit in section 75(v) which provides that it
has jurisdiction to grant mandamus, prohibition or an injunction against a Commonwealth officer. These remedies are commonly referred to as prerogative writs and are issued by courts to prevent officials from exceeding the limits of their powers.

**JUDICIARY ACT 1903**

6.7 The original jurisdiction of the High Court under section 75(v) is also conferred on the Federal Court by section 39B of the *Judiciary Act 1903*. This provision enables prerogative writ proceedings to be commenced in the Federal Court. The High Court is also able to remit to the Federal Court, in accordance with section 44 of the Judiciary Act, cases arising under the High Court’s jurisdiction under section 75(v).

6.8 The original jurisdiction of the Federal Court also includes jurisdiction in any matter arising under any laws made by the Parliament.\(^{167}\)

**ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) ACT 1977**

6.9 At present all decisions of an administrative character made under an enactment (other than decisions by the Governor-General and certain specified decisions) are subject to judicial review by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (the AD(JR) Act). The Act allows for the judicial review of conduct being engaged in for the purposes of making a decision of an administrative nature under an enactment.\(^{168}\) Unless a decision is explicitly exempted from the Act, it will be subject to judicial review.

6.10 The AD(JR) Act, as presently in force, does not permit review of decisions that are not made under statute, decisions that are made under statute but are made by the Governor-General and other decisions that are made under statute but are excluded from the scope of the Act by Schedule 1 of the Act.

**THE ROLE OF JUDICIAL REVIEW**

6.11 Judicial review of administrative decisions is an aspect of the rule of law which requires that executive action is not unfettered or absolute but is subject to legal constraints. The availability of judicial scrutiny of the legality of administrative action serves the twofold purpose of protecting individual rights and interests from unauthorised action and ensuring that public powers are exercised within their legal limits. In *Bank of NSW v Commonwealth*, Dixon J (as he then was) said that section 75(v) was written into the Constitution ‘to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from

\(^{167}\) *Judiciary Act 1903*, section 39B(1A)(c).

exceeding federal power’. In *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*, Deane and Gaudron JJ described sections 75(iii) and (v) as:

... an important component of the Constitution’s guarantee of judicial process in that their effect is to ensure that there is available, to a relevantly affected citizen, a Ch III court with jurisdiction to grant relief against an invalid purported exercise of Commonwealth legislative power or an unlawful exercise of, or refusal to exercise, Commonwealth executive authority.

6.12 Judicial review ensures that public powers are exercised within their legal limits and serves to enhance community confidence about the standards that will generally be applied by the Commonwealth administration in making decisions which affect the interests of individuals in the community. Through the processes of judicial review, the community is provided with an assurance that powers which are exercised by government on behalf of the people may be scrutinised by the judiciary and decisions or actions which infringe against the standards may be set aside.

6.13 Judicial review under the Constitution and under the AD(JR) Act only looks at the legality of the decisions and the processes leading up to the decision. Judicial review results in the matter being remitted to the primary decision maker to reconsider the decision. The Court does not substitute its own decision for that of the primary decision maker.

**MERITS REVIEW**

6.14 Legislation may also provide that some decisions made in the exercise of powers conferred by an enactment are reviewable, on their merits, by tribunals such as the AAT under the *Administrative Appeals Tribunal Act 1975*.

6.15 Merits review is the process by which an administrative decision of the Government is reviewed ‘on the merits’: that is, the facts, law and policy aspects of the original decision are all reconsidered afresh and a new decision – affirming, varying or setting aside the original decision – is made. Merits review is characterised by the capacity of the reviewing person or body to substitute their own decision for that of the original decision maker.

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169 (1948) 76 CLR 1, at 363.  
170 (1995) 183 CLR 168 at 204 to 205.  
172 Section 25, *Administrative Appeals Tribunal Act 1975*.  
173 The Ombudsman may undertake a form of merits review while investigating government maladministration but does not have power to substitute her or his decision for that of the original decision maker - she or he can only make recommendations. Where a statutory merits review process exists which has the potential to resolve a complaint, the Ombudsman will usually suggest that a complainant follow that route.
6.16 As the Council concluded in its Better Decisions Report, the overall objective and effect of the merits review system is to ensure that all administrative decisions of government are correct and preferable.

EXTERNAL REVIEW AND CONTRACTING OUT

6.17 The Council considers that the benefits of external review, to both the individual and the community should not be lost where services are contracted out. Because the normal lines of accountability that exist between government agencies, the Minister and the Parliament may no longer be as clear where services are provided by contractors, judicial and merits review remain particularly important.

6.18 The Council appreciates that not all decisions of a contractor that affect members of the public warrant external review. For many types of services the contractor will need to have a degree of discretion and flexibility that will be to the advantage of the service recipients and the members of the community more generally.

EXTERNAL REVIEW WHERE THE CONTRACTOR IS EXERCISING STATUTORY POWERS

Can contractors exercise statutory powers?

6.19 Much Commonwealth legislation vests decision-making powers about entitlements to services in Secretaries of Departments or Heads of Agencies. Many Acts also allow the agency head to delegate those powers.

6.20 Although some legislation allows those powers to be delegated only to officers of the agency, there is no reason why Commonwealth legislation could not vest decision-making powers in a person other than an officer of the Commonwealth. Nor is there any reason why Commonwealth legislation could not authorise a Secretary to delegate their powers under legislation to a person who is not an officer of the Commonwealth. There are no constitutional impediments to prevent a contractor exercising a statutory decision-making discretion.

6.21 However, there may be some limits on the capacity of the Commonwealth to confer executive powers on a contractor. Specifically, some commentators have suggested that because of the language of section 61 of the Constitution and the underlying constitutional principle of responsible government, it is not possible for Parliament to free a contractor from the general oversight of Ministers responsible to Parliament.

6.22 To the extent that the Constitution requires Ministers to retain such residual responsibility for the acts of contractors, it would appear that this requirement could be satisfied by ensuring that the Minister is in a position to determine that a contractor is acting lawfully and to report to Parliament on the contractor’s activities.

Review under the Constitution and the Judiciary Act

6.23 The answer to the question whether contractors can exercise statutory power depends on whether the contractor is an officer of the Commonwealth when they purport to exercise the statutory power. Traditionally, the High Court has determined whether a person is ‘an officer of the Commonwealth’ for the purposes of section 75(v) by looking at a range of factors including whether the person is appointed, removable, paid by, as well as responsible to, the Commonwealth. Assessed against these criteria, a contractor might well not be regarded as an officer of the Commonwealth for the purposes of section 75(v). However, the High Court might not apply these criteria in determining whether a contractor was amenable to the Court’s jurisdiction under section 75(v). The Court may modify the criteria or apply them in a flexible manner, so that a contractor who was engaged by the Commonwealth to perform specified services for a monetary sum, and was subject to direction and control by the Commonwealth, might be an ‘officer of the Commonwealth’. Alternatively, the Court might regard the contractor as an agent or representative of the Commonwealth for the purposes of section 75(iii).

6.24 In view of the important constitutional function served by sections 75(iii) and (v), and the broad view which the Court has taken of section 75(iii), it is likely that a statutory decision by a contractor which affected the rights and obligations of a citizen would be reviewable by the High Court in its original jurisdiction. In addition, it may be that decisions of a contractor under a statute would be reviewable under section 39B of the Judiciary Act.

6.25 The Council believes that this is an appropriate result. If a contractor is entrusted with executive power by the Commonwealth, it is desirable if not imperative, that their exercise of that power is subject to the safeguards provided by judicial review.

Judicial review under the AD(JR) Act

6.26 The applicability of the AD(JR) Act to a decision under an enactment is not affected by whether the power is exercised by the person specified in the enactment or by a person acting as their delegate.

177 See for example, Bank of NSW v The Commonwealth (1948) 76 CLR 1 per Dixon J at 367.
6.27 If a contractor were able to make decisions under an enactment, either because they were expressly authorised to do so by the Act, or because they were acting as a delegate of the decision maker specified in the Act, it appears that their decision would be judicially reviewable under the AD(JR) Act.\textsuperscript{178}

**Merits review by the AAT**

6.28 The effect of a statute may be that a decision made by a contractor will be reviewable by the AAT.\textsuperscript{179}

6.29 The Council considers that where statutory decisions are contracted out, the rights of members of the community to review of those decisions should not be lost or diminished. Where contractors are to exercise statutory decision-making powers, agencies should ensure that rights to seek review are retained.

6.30 The AAT and other merits review tribunals are not courts and their decisions are not binding, although government agencies abide by decisions of tribunals. In the case of contractors, agencies would have to include a provision in their contracts that required the contractors to abide by decisions of external merits review tribunals.

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<th>Recommendation 20</th>
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<td>Where a contractor exercises statutory decision-making powers that would be subject to merits review if the decision were made by an agency officer, the decisions of the contractor should also be subject to merits review.</td>
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<td>Where a contractor is to exercise statutory decision-making powers, agencies should ensure that the contractor is required under the terms of the contract to give effect to any decision of a merits review tribunal reviewing the contractor’s decision.</td>
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**EXTERNAL REVIEW WHERE THERE IS NO LEGISLATIVE BASIS FOR THE SERVICE**

6.31 Not all services funded by government are based on legislation.

6.32 In the absence of a specific legislative authority for the payment of money to a person by the Commonwealth, the executive power of the Commonwealth in

\textsuperscript{178} Presumably issues about ensuring that the contractor abides by the decision of the court do not arise because the contractor would be in contempt of court if they failed to obey it.

\textsuperscript{179} The Department of Health and Family Services suggested in its submission to the Issues Paper, that if a small private contractor was faced with appeals directly to the AAT, there could be a significant financial burden, which would ultimately be reflected in a higher contract price to the Department.
section 61 of the Constitution generally provides authority for the expenditure, for a particular purpose, of funds which have been appropriated by the Parliament for that purpose. Section 81 of the Constitution allows the Parliament to appropriate funds for whatever purposes it chooses.  

6.33 Where funds have been appropriated for a particular purpose, the Commonwealth can, when exercising its executive power, enter into contractual arrangements with the recipients of the funds to ensure that moneys paid over are used for the purposes for which they were appropriated.

6.34 Thus the only legislative basis for some government services delivered by private contractors may be the appropriation legislation that appropriates funds for services. In these situations the eligibility of members of the public to receive that service would be set out in the contract between the contractor and the government agency rather than in legislation.

6.35 The Government may see cost advantages in including eligibility criteria in contracts and then contracting out decision making. There may also be situations where the Government may be unable to deliver a service itself because of Constitutional limitations. Section 81 allows funds to be appropriated for such services to be delivered other than by the Government.

6.36 The Council also notes that some government services may be delivered directly by government agencies under non-statutory schemes. For example, the effect of the Commonwealth Rehabilitation Service Reform Bill 1998 is to remove eligibility criteria for rehabilitation programmes from the Disability Services Act 1986 to be replaced by contractual arrangements. Eligibility decisions for those programmes are presently made by the Commonwealth Rehabilitation Service (CRS), a Division of the Department of Health and Family Services acting as delegates of the Secretary of that Department. These decisions are reviewable by the AAT.

6.37 The Bill provides for the CRS to be separated from the Department and established as a corporation wholly owned by the Commonwealth under the Corporations Law. It will be designated as a government business enterprise which will become the provider of rehabilitation services to be purchased by the Department of Health and Family Services.

6.38 The Explanatory Memorandum to the Bill states that:

Eligibility for programs will remain unchanged for clients but operate under an administrative scheme in the form of a contract with the CRS in the first year. In subsequent years, other providers will be able to enter into contracts with the Department for the provision of these services.

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180 *Vic v The Commonwealth & Hayden* (1975) 134 CLR 338 per McTiernan J at 367-369, Mason J at 392-396 & Murphy J at 419 and *Davis v The Commonwealth* (1988) 166 CLR 79 at 96 per Mason CJ, Deane and Gaudron JJ.
6.39 If the Bill is passed, decisions about eligibility will no longer be reviewable by the AAT because they will no longer be made under legislation.

6.40 One of the effects of providing services through non-statutory means is to prevent review by the Administrative Appeals Tribunal. This is a relevant consideration when deciding to deliver services in this way. This will be particularly significant where the effect of changing the manner in which the service is provided will result in existing appeal rights being lost altogether. The Council believes that the question of the availability of merits review of decisions needs to be considered in any arrangements that relate to the provision of government-funded services whether by agencies or by contractors. When contracting out a service agencies should, wherever possible, ensure that rights of access to merits review of decisions relating to that service should not be lost or diminished.

Review under the Constitution and the Judiciary Act

6.41 Judicial review under the Constitution and section 39B of the Judiciary Act is not limited to review of decisions taken under an enactment. Decisions taken by a contractor under a non-statutory scheme may therefore, in appropriate cases, be the subject of an application before the High Court or the Federal Court for a writ of mandamus or prohibition or an application for an injunction.

Judicial review under the AD(JR) Act

6.42 In its Report No. 32, the Council considered at length the question of judicial review under the AD(JR) Act of decisions of officers of the Commonwealth under non-statutory schemes in its report on the ambit of the Act.181 The AD(JR) Act currently extends only to review of a decision under an enactment.

6.43 The Council recommended that the Act should extend to include a decision of an administrative character made, or proposed to be made, by an officer under a non-statutory scheme or program, the funds for which are authorised by an appropriation made by the Parliament. The Council repeats that recommendation.182

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**Recommendation 22**

The Administrative Decisions (Judicial Review) Act 1977 should extend to include a decision of an administrative character made, or proposed to be made, by an officer under a non-statutory scheme or program, the funds for which are authorised by an appropriation made by the Parliament.

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181 Report No. 32, op. cit.
182 Recommendation 1, Report No. 32, op. cit.
6.44 The Council noted in the Report\textsuperscript{183} the limited scope for the operation of the grounds of review set out in the AD(JR) Act to decisions under non-statutory schemes. It was, however, apparent to the Council that the natural justice ground of review could have application.\textsuperscript{184}

6.45 If decisions under non-statutory schemes are to be made by contractors under contract, the availability of judicial review on these grounds may be particularly important.

6.46 The Council notes that the English courts have been prepared to find that private and domestic bodies that do not exercise statutory powers may nevertheless be amenable to judicial review. In \textit{R v Panel on Take-overs and Mergers; ex parte Datafin plc},\textsuperscript{185} the English Court of Appeal found that the Take-overs Panel which was part of a system of self-regulation, ‘without visible means of legal support’\textsuperscript{186} and which had ‘no statutory, prerogative or common law powers’ and was ‘not in contractual relationship with the financial market or with those who deal in that market’,\textsuperscript{187} could be subject to judicial review.\textsuperscript{188}

**Merits review**

6.47 The Council has long held the view that a person should be able to seek merits review of a government decision that affects their interests. It should make no difference whether the decision-making power is based in legislation or not.

6.48 However, decisions that are not based in statute cannot be reviewed on their merits by the AAT. The AAT can only review decisions made under legislation.

6.49 The benefits of merits review outlined above apply equally to the delivery of non-statutory services by both government agencies and contractors. In the Council’s view, merits review of many non-statutory decisions that affect a person’s interests should be available through an independent external body such as the AAT.\textsuperscript{189} The Council notes that, where the service is one that the Commonwealth could not deliver directly, there may be constitutional problems in providing for merits review by a Commonwealth tribunal of decisions of contractors relating to these services. The review may need to be provided through other arrangements.

\textsuperscript{183} ibid., at paragraph 168.
\textsuperscript{184} ibid., at paragraph 171.
\textsuperscript{185} [1987] QB 815.
\textsuperscript{186} ibid., at page 824.
\textsuperscript{187} ibid., at page 825.
\textsuperscript{188} Other examples of such bodies being amenable to review are \textit{R v Advertising Standards Authority, ex parte The Insurance Service plc} [1990] COD 42 at 43 and \textit{R v Code of Practice Committee of the Association of the British Pharmaceutical Industry, ex parte Professional Counselling Aids Ltd} [1991] COD 228 at 229.
\textsuperscript{189} Or the proposed Administrative Review Tribunal announced by the Attorney-General, the Hon Daryl Williams AM QC MP, 3 February 1998, Press Release No. 386.
Recommendation 23
Where there is a change in a service from a statutory scheme to a non-statutory scheme, access to effective merits review of decisions relating to that service should not be lost or diminished.

Recommendation 24
Where services are delivered under a new non-statutory scheme, the agency should ensure that effective merits review of decisions under that scheme is available where appropriate.

6.50 The more difficult question is to identify which decisions should be reviewable and which decisions might more appropriately be dealt with through complaints mechanisms.

6.51 Given the range of services that could be provided on a non-statutory basis and the scope of the discretions which may be vested in a decision maker under such an arrangement, it is not possible for the Council to be prescriptive about which decisions should be subject to merits review.

6.52 Assistance can be found in the Council’s guidelines set out in its 17th Annual Report in which the Council identified some types of decisions that, while they affect a person’s interest, do not warrant merits review. Of particular relevance here is the Council’s category of preliminary or procedural decisions that can be seen as facilitating the making of or leading to the making of substantive decisions. An example of such a decision might be a decision to refer a service recipient to a medical practitioner for an assessment of their injury or to refer them to a specialist body to identify their vocational skills.

6.53 Another category identified by the Council are decisions that can be described as polycentric. These are decisions that relate to the allocation of a finite fund or resource, against which all potential claims for a share of that fund or resource could not be met. Such decisions are inappropriate for review because a decision to make an allocation affects the amount available for distribution to other claimants; if that decision is altered, then so is the basis of all other decisions.

6.54 This is, however, a limited exception. The fact that there is a limited fund for distribution does not of itself make allocation decisions polycentric. Even though overall programme expenditure may be notionally capped and program funding estimates may need to be marginally adjusted because decisions have been overturned on review, these are not circumstances where funding is ‘finite’ in the

sense that if one allocation of funding from the resource is altered, funding to another person or body will be directly affected.
CHAPTER 7

PRIVITY OF CONTRACT

INTRODUCTION

7.1 The Issues Paper\(^{191}\) raised the possibility of service recipients being able to enforce the contract between the agency and the contractor by taking their own legal action.\(^{192}\) This Chapter explores this possibility further.

ENFORCING THE AGENCY’S CONTRACT

7.2 There may be some situations where the subject matter of the complaint also amounts to a breach of the contract between the agency and the contractor because the contractor has failed to deliver the standard of service specified in the contract. The government agency may for various reasons not be willing or able to take action to enforce the terms of the contract itself. At present, service recipients, who are not parties to that contract, are unable to take steps to enforce it even though they may be clearly affected by the contractor’s breach.

7.3 Some commentators have suggested that recipients should be given a statutory right to enforce that contract. Professor Mark Aronson, for example, suggests that this may be a useful remedy where a patient is evicted from a service provider’s government-funded nursing home.\(^{193}\)

7.4 If service recipients were to be given the ability to enforce the contract directly, a number of issues would need to be resolved. The contract is likely to cover a number of matters going beyond the standards of the service to be delivered. The question arises whether members of the community should be able to enforce these terms of the contract or should only be able to enforce the terms that relate directly to the provision of the service to the public.

7.5 It would be necessary to identify which members of the public should be able to enforce the contract. Extending enforceability could be a useful remedy where services are provided to a group of recipients who are identifiable at the time the contract is let. This may be the case where the service to be provided is highly specialised and will be utilised by a fairly small group of recipients. However, this


\(^{192}\) There are already some statutory exceptions to the rule on privity of contracts: see for example, section 48(1) Insurance Contracts Act 1984 (Cth), Property Law Act 1969 (WA), Property Law Act 1974 (Qld).

approach is less practical where a contractor provides services to a broad range of recipients who will only be identified by the agency after the contract is signed.\textsuperscript{194}

CONCLUSION

7.6 The Council does not consider that providing a new statutory right to enforce the contract between the agency and the contractor will generally provide a useful remedy for service recipients. In Chapter 3 the Council outlined the difficulties that recipients would face in enforcing the terms of any contract that might exist directly between the recipient and the contractor. Each of these practical difficulties also arises where the service recipient tries to enforce the contract between the agency and the contractor.

7.7 Professor Enid Campbell, in her submission, noted that to establish a cause of action a recipient of services would need to be assured of access to all documents constituting the contract and also show that the particular defect in service about which he or she complained was a breach of the contract. She suggested that few service recipients would choose to use this option. The then Australian Securities Commission suggested in its submission that an extension of existing or modified administrative law remedies to contractors would make the creation of statutory exemptions to privity of contract unnecessary.\textsuperscript{195}

7.8 On a number of occasions, Dr Nicholas Seddon has identified the limitations on contractual remedies when the government agency enforces the contract with the contractor.\textsuperscript{196} These limitations would also apply to any action by recipients to enforce the contract.

7.9 The principal remedy for breach of contract is monetary damages, which measures the amount lost due to non-performance. The onus is on the party claiming to prove its loss. For many types of services the contractor’s actions that have given rise to the complaint may have resulted in considerable inconvenience or

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\textsuperscript{194} In its report \textit{Privity of Contract: Contracts for the Benefit of Third Parties}, the United Kingdom Law Commission recommended that contracting parties be able to confer a right to enforce a contract on a third party even if the third party is not in existence at the time of the contract. The third party would have a right to enforce the contract provided he or she is capable of being ascertained when the contractor’s duty to perform in favour of the third party arises. United Kingdom Law Commission, Law Com No 242, London HMSO (Cm 3329), July 1996.

\textsuperscript{195} The Department of Immigration and Multicultural Affairs, in its submission, suggested that creating a statutory exception to the rule of privity of contract might act as an impediment to flexibility and innovation and could add an unnecessary cost burden to the service recipient, service provider and the agency.

\textsuperscript{196} See for example, Seddon N, ‘Commentary: Privatisation and Contracting Out - Where are we going?’ in \textit{Administrative Law under the Coalition Government}, 1997 National Administrative Law Forum, Australian Institute of Administrative Law, Canberra, 1997 at page 146; ‘Ministerial Control after Contracting Out - Pie in the Sky?’ (1997) \textit{13 AIAL Forum} 25. On the issue of the limitations of contractual remedies in disputes between the agency and the contractor see Dr Seddon’s submission to the Senate Finance and Public Administration References Committee’s Inquiry into Contracting Out of Government Services, Submission No 38.
distress to the service recipient. The actual monetary loss or damage that has been suffered may be quite small. The recovery of that amount from the contractor may not be a realistic or effective resolution of the complaint as far as the individual service recipient is concerned. In Chapter 8 the Council recommends that recipients who have suffered some minor loss or damage should be able to recover that amount quickly and directly from the government agency.

7.10 In some cases the courts can order that a contract be specifically performed. The remedy of specific performance is only ordered where damages are an inadequate remedy. Courts are reluctant to grant specific performance of contracts when the contractual obligations require constant supervision.

7.11 Where the service recipient has access to a range of complaint-handling mechanisms as noted in Chapter 4, the provision of a statutory right to enforce the agency’s contract provides no additional benefits to the recipient.

ELIGIBILITY CRITERIA IN CONTRACTS

7.12 There may be circumstances in which the contract specifies eligibility conditions for a service and particular individuals can show they satisfy these conditions. In this situation, an ability to enforce the terms of the contract relating to eligibility may be a useful remedy, particularly if such a remedy can be sought through local, small claims or magistrates’ courts.

Recommendation 25

Agencies should consider when contracting out a service, whether legislation should, in appropriate circumstances, provide third parties with the ability to enforce particular terms of the contract. Any contractual remedies so provided should not detract from other remedies such as complaint-handling mechanisms and should not relieve the agency from responsibility of enforcing the contract itself.
CHAPTER 8

COMPENSATION PAYMENTS

INTRODUCTION

8.1 This Chapter examines the position of members of the community who may suffer loss or damage as the result of the actions of a government contractor. The Council recommends the extension of the existing compensation schemes under the Chief Executive’s Instructions to cover people who have suffered minor loss or damage as the result of the actions of a contractor while delivering a government service.

BACKGROUND

8.2 The former Commonwealth Ombudsman in her 1993-94 Annual Report documented a complaint investigated by the Ombudsman’s office about an Australia Post contractor who damaged a pensioner's mailbox when delivering mail. The pensioner went to Australia Post for compensation and was told that the contractor was not an Australia Post employee and the effect of the mail delivery contract was that Australia Post was not vicariously liable for the actions of the contractor. The matter was between the pensioner and the contractor. The contractor offered one-third the cost of the repairs and nothing further. Although the contractor had taken out property damage insurance cover he did not wish to claim because the cost of the repair was less than the excess on his policy. The only remedy available to the pensioner was to take the contractor to court to obtain compensation.

8.3 The problem was resolved after intervention by the Ombudsman's Office. Subsequently Australia Post amended its contracts to provide that where a dispute arises, Australia Post can (after its own assessment) make a compensatory payment to the consumer and then recover any damages from the contractor.

8.4 This complaint demonstrates the problems that can arise where neither the agency nor the contractor is willing to resolve a complaint but it is clear that a member of the public has suffered damage as a result of a contractor’s actions. While the amount in this example may seem small in terms of the overall value of the contract, to the person affected it may be financially significant.

COMPENSATION FOR MINOR LOSS AND DAMAGE

8.5 As noted in Chapter 3, people who have suffered loss or damage as a result of the actions of a contractor may have remedies available to them in tort and contract. However, even where the loss or damage suffered is minor there may be difficult questions of law involved in determining who should pay the damages. The government agency may consider that the terms of its contract require the contractor to make good the loss. The contractor may claim that the actual damage suffered is not covered by the terms of the contract. The cost to the government agency and the contractor of determining issues of liability may exceed the amount in dispute. In the meantime the person seeking compensation may be suffering what to them is considerable inconvenience while feeling that the agency and the contractor are buck-passing the problem.

8.6 In the Issues Paper, the Council proposed a simple compensation scheme to allow service recipients, or any other persons, to recover compensation for minor loss or damage suffered because of the actions of a contractor. Under the scheme a person would be able to approach the government agency directly to seek compensation in these circumstances. The agency would be able to pay compensation and then seek reimbursement from its contractor who had caused the damage.

8.7 The idea behind this suggestion was the former arrangement in Finance Direction 21/3. That Direction set out the circumstances in which the Commonwealth would pay compensation where a claim was based on the legal liability of the Commonwealth. In particular, at the time the Issues Paper was published, it allowed Departmental Secretaries to settle claims against the Commonwealth that involved less than $2000 where a Secretary was satisfied ‘as a matter of common sense’ that the Commonwealth was liable. Shortly after the Issues Paper was published this amount was increased to $10,000.

8.8 This Finance Direction has now been superseded by Chief Executive’s Instructions issued under the Financial Management and Accountability Act 1997.199

8.9 The compensation scheme suggested in the Issues Paper was not intended to be limited to recipients of services. If, for example, a contractor knocked over the neighbour’s letter box while delivering a service at another’s premises, the neighbour should be able to seek simple compensation directly from the agency rather than have to take the matter up directly with the contractor.

199 The directions issued for the Attorney-General’s Department provide:
Settlements for amounts not exceeding $10,000 can be approved by Division/Office Heads … on the basis of a common sense view that the settlement is in accordance with legal principle and practice.
8.10 The Issues Paper suggested a possible limit of $2000 per claim based on the then limit under Finance Direction 21/3. The Paper also suggested a lower option of $500 so that the scheme would be used only for claims that could be substantiated with a minimum of difficulty but which might otherwise have a 'nuisance' value to the government agency.

8.11 The Law Society of South Australia, in the context of supporting the development of contracting out legislation, suggested that:

...[the legislation] could well specify that the sponsoring body would be responsible for the provision of compensation under any one of the existing schemes. It would then be up to the sponsoring body to pursue the contractor for reimbursement or some other response to the need for payment of the compensation to effected parties. This has the advantage identified elsewhere in the paper of ensuring that the sponsoring body is kept informed of any breaches or faults occurring under the contract. There should be no limitation on the rights of an effected party in relation to a detriment suffered by them over and above the limited (sic) already in existence.

8.12 The Department of Primary Industry and Energy referred to its recent experience in a situation in which:

The Ombudsman has...suggested that future Government contract contain provision that, where necessary, the agency...can make restitution to a party affected by the contractor and subsequently obtain recompense from the contractor. The Department considers this suggestion raises issues of policy and financial risk and effectively admits liability before the matter has been tested. The Department's stance is supported by legal advice obtained with regard to the Ombudsmans' suggestion.

8.13 The Department of Employment, Education, Training and Youth Affairs felt that service recipients should not have access to a new compensation scheme.

8.14 The Department of Finance in its submission said:

Should a dispute arise between a contractor and client, which cannot be resolved within the terms of the contract, it would be appropriate (and in the best interest of the recipient and good administration generally) for the Commonwealth agency to accept responsibility for remedying the problem. It may minimise the disruption for the agency to remedy the problem and recoup from the contractor any associated costs.

8.15 The Department of Administrative Services did not support a new compensation scheme, asserting that ‘Existing legal and consumer protection mechanisms would be adequate’.

8.16 The Department of Immigration and Multicultural Affairs advised that its contracts:

include standard clauses which require contractors to maintain insurance policies for professional indemnity, public liability and property damage. These provisions are an important protection for the service recipient, in the event that any loss is caused by the action of the contractors. The effect of these provisions is to ensure that the financial risk for compensating service recipients for loss is borne by the contractor.
is open to the Commonwealth to include in a contract clauses which, in the event of
default or damage by the contractor, require the contractor to make good any damage
caused to a service recipient. However, DIMA would see this occurring on a case by
case basis and would question a uniform approach for all contracts.

8.17 The Civil Aviation Safety Authority Australia supported the Council’s
proposal as being cost-effective for all involved and providing a simple remedy
where otherwise the person adversely affected might be deterred from seeking
compensation due to expense.

CONCLUSIONS

8.18 Although some government agencies did not support the payment of
compensation in these circumstances, the Council believes that the present scheme
under the Chief Executive’s Instructions should be extended to cover loss or damage
caused by contractors for a number of reasons.

8.19 The general approach adopted by the Council throughout this Report is that
the process of contracting out should not result in a loss or diminution of the
avenues of redress currently available where services are delivered by government
agencies directly. At present small claims against the Commonwealth can be easily
settled on the basis of a ‘common sense’ approach to liability. Persons affected by
the actions of contractors in the course of providing government services should not
be required to go to any greater expense or trouble to have minor claims settled.

8.20 The Council’s approach has also been that government agencies are
responsible for ensuring that those avenues of redress are not lost or diminished.
Allowing agencies to settle minor claims directly and then pursue the matter with
the contractor is consistent with this approach.

8.21 Agencies can include provisions in their contracts that will enable them to
recover from contractors any amounts that they pay out under this scheme. Contractors
might be required, for example, to maintain insurance cover for any
damage they cause or to contribute to a special fund that could be used to meet the
claims. Alternatively they might be required to indemnify the agency for some or all
of the payments made under this scheme. Any concerns that payments under the
scheme could be seen as an admission of liability can be dealt with by the agency
obtaining appropriate releases from the recipients of the payments while the
contract between the agency and the contractor would set out arrangements for
determining who should bear the ultimate cost of the payment.

8.22 Given that the upper limit for matters being settled as a matter of common
sense under the Instructions is currently $10,000, the limit for agency heads settling
claims involving contractors should also be $10,000.

8.23 The criterion for making a payment under the scheme might be that the
agency head is satisfied that as a matter of common sense either the agency or the
contractor is liable for the loss or damage. The question of who should bear the loss or damage as between the agency and the contractor would be determined by contractual provisions which could include a provision for disputes to be resolved by arbitration.

8.24 The Council recommends the extension of the existing arrangements rather than the creation of a new statutory right to compensation. Currently decisions under these arrangements are not reviewable by the AAT (and the Council does not see a need for a right of review by the AAT). However, a person who is unhappy about the amount that is offered by the agency or the refusal of the agency to make a payment should be able to complain to the Ombudsman. The Ombudsman will be able to monitor the use and consistency of payment in and across agencies to ensure the consistent treatment of members of the community affected by the actions of contractors.

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<th>Recommendation 26</th>
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<td>Agency heads should be empowered under the existing arrangements for the Chief Executive’s Instructions to be able to make payments to people who have suffered loss or damage as a result of the actions of a contractor where as a matter of common sense either the contractor or the agency is liable for the damage.</td>
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<th>Recommendation 27</th>
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<td>The Ombudsman should monitor claims and payments under the scheme.</td>
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CHAPTER 9

CONTRACTIONS

INTRODUCTION

9.1 This Chapter summarises recommendations made earlier in the Report relating to the drafting of contracts and discusses the steps that can be taken by agencies to ensure that their contracting out arrangements minimise the instances of poor or inefficient service delivery. The Chapter looks at the role that users of government services can play in assisting agencies in contract preparation and monitoring the performance of contractors.

9.2 The Chapter is not intended as a comprehensive guide to contract drafting, management, and evaluation where services are contracted out. Instead it concentrates on the issues that agencies need to consider to ensure that the levels of accountability that are provided by administrative law and financial and Parliamentary oversight are maintained where services are contracted out. A number of government agencies are examining the other ways in which government contracts can be improved.200

CONTRACT DRAFTING

9.3 When preparing a contract agencies will need to consider four broad questions:

• what is the scope of the service to be provided by the contractor and how is it to be provided;

• who is responsible when things go wrong and what obligations they have to fix the problem;

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200 These include the current project of the Australian National Audit Office in drafting a ‘Better Practice Guide for Contracting Out’ and the Department of Finance and Administration’s Competitive Tendering and Contracting: Guidance for Managers’, March 1998. The Attorney-General’s Department has released a Legal Practice Briefing 27 (1996) ‘Commonwealth IT Outsourcing’. That briefing lists a number of features that need to be included in these outsourcing contracts and many of these features need also to be considered for contracting out of services. The Public Service and Merit Protection Commission has identified principles of good practice in human resource management in the context of contracting out: Outsourcing: Human Resource Management Principles, Guidelines and Good Practice, AGPS, Canberra, September 1996. See also MAB/MIAC Report No. 23, Before you sign the dotted line… Ensuring contracts can be managed, Parkes ACT, May 1997 and the National Archives of Australia Records Issues for Outsourcing - A guideline for agencies about their responsibilities for recordkeeping in outsourcing arrangements, Canberra, July 1998. See also the House of Representatives Standing Committee on Family and Community Affairs What Price Competition” Report on the Competitive Tendering of Welfare Service Delivery, June 1998.
• what information service recipients and other members of the public are entitled to and how they are given access to that information; and

• how will the contractor’s performance be evaluated.

A CLEAR DEFINITION OF THE SERVICE AND STANDARDS OF SERVICE

9.4 The Industry Commission noted that competitive tendering and contracting (CTC) offers the potential to enhance the accountability of Government.

First, CTC can enhance accountability by requiring the contracting agency to specify clearly the service to be delivered and to allocate precisely responsibilities between the agency and the contractor for delivery of the service. This makes it easier to identify the cause of any failure. …

Second, CTC can enhance accountability by requiring the contracting agency to specify the criteria on which the contractor’s performance is to be measured and monitored.201

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

9.6 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. However, it also needs to anticipate, as far as practicable, the myriad circumstances of the intended recipients of the service.

9.7 Some services will be easier to define than other services. Services that are intended to provide assistance to people with disabilities, health problems or impaired mobility may be harder to define in a way that ensures that the individual needs of the intended recipients are met. An element of flexibility may be needed to ensure that particular recipients receive appropriate service.

9.8 The contract needs to make clear what standards of performance are required, for example, the hours when a service is to be available and any special access arrangements for persons with disabilities or frail aged persons. It needs to set out the amount and quality of information to be provided to service recipients by the contractor. If these standards are clear, it will be easier for recipients to identify who is responsible when they experience problems. It will also be easier for standards of performance to be evaluated and monitored.

Involving consumers to improve contracts

9.9 Service recipients or consumer groups could contribute to this process of accurately defining the services to be provided and the way in which this will be done and assessed. The insights and experiences of service recipients (whether obtained directly or through consumer groups) will assist agencies in defining the quality and standards of service required of contractors.

9.10 There are various ways in which the insights and experiences of service recipients may be obtained. For example:

- the views of all or a selection of the recipients of a service might be canvassed directly;
- prospective contractors might be required, when seeking a contract for provision of a service, to provide referees who can attest to the quality of services that have been provided to them by that provider;
- prospective contractors might be required, when seeking a contract for provision of a service, to indicate what steps they would take to assess the needs of potential service recipients;
- the government agency might consult peak organisations or consumer representative groups; and
- the government agency might monitor the pattern of complaints by recipients or require contractors to do so and use this information in renewing contracts.

9.11 In its submission to the Issues Paper, the Department of Industry, Science and Tourism acknowledged the role of consumers in setting service standards. The Department noted that the way in which this occurs will depend on many factors with the most obvious one being the size of the contract. Arrangements which might be entirely appropriate for a major contract, with the provision of services to thousands of customers, might be too elaborate for a less significant contract. The Department of Health and Family Services suggested that the involvement of consumer representatives in the drafting of some categories of contracts may help provide consumers with assurance that their concerns are being addressed and result in ‘plain English’ contracts.\(^{202}\)

9.12 The Department of Employment, Education and Youth Affairs felt that:

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\(^{202}\) The then Department of Administrative Services noted in its submission that involving consumers in the contract drafting process had the potential to blur the lines of responsibility and interfere with the management of the contract. Holding agencies accountable for the outcomes of their contracting processes, including adequate consultation with consumers and other interested parties, was likely to be much more effective.
Given the number and complexity of...contracts, [consumer involvement in the contract drafting process would] not be a viable option because of the cost and level of administration involved in implementing and maintaining such a process. It would also be difficult to distinguish between the actual and potential consumers of any service, let alone who might be potential tenderers. Where the circumstances justify it, consumer involvement can be achieved in the pre-tender processes such as issuing exposure drafts or requests for proposals.

9.13 Although the introduction of consultation mechanisms may involve some additional direct costs to Government, the benefits of such consultation may be significant in some cases.

9.14 The Consumer Law Centre Vic Ltd’s publication *Contracting Out, The case for consumer rights in the provision of local government services* referred to a case study on Meals on Wheels, where the Older Persons Action Centre (OPAC) had received reports of meals being left on doorsteps, without the deliverer checking that the older person was home and that they were able to eat the food, or checking the older person’s general well-being.203 OPAC felt that a complicating problem was that many of the people eligible for Meals on Wheels were often frail, arthritic or had failing memories and could not be expected to take complete responsibility for retrieving a meal from the doorstep. As the Consumer Law Centre noted:

This also underlies the critical social support role played by deliverers of meals: the service is much more than the minimal provision of a meal.

9.15 Examples such as this not only demonstrate the importance of agencies clearly defining the service to be delivered, but also illustrate the assistance that service recipients, community groups or peak organisations can provide to agencies in developing the specifications for the service.

**Recommendation 28**

As a general rule, where an agency’s contract involves the provision of services, the agency should develop effective mechanisms for obtaining information from service recipients, either directly or through community groups or peak organisations, which can be used in defining the service.

**Customer service charters**

9.16 Customer service charters can also play an important role in helping to define service and performance standards and may be particularly useful when services are difficult to define precisely.

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9.17 Customer service charters can take a number of forms. They can have a broad application, across various areas of activity, or they can be developed to apply to particular industries or areas of activity. A common feature of charters is that they contain a series of undertakings (or service promises) to customers about how a service will be delivered.\textsuperscript{204}

9.18 The Government Service Charter Task Force in the Department of Industry, Science and Tourism has developed a framework for introduction of customer service charters across the Commonwealth public sector.\textsuperscript{205} Service Charters for government agencies will require agencies to set standards of service or key undertakings seen as important by agency customers.

9.19 The Department of Finance and Administration has noted that agency’s contracts for the delivery of services should reflect the standards outlined in agency service charters. The standards required of a contractor should be no less than those that would be expected were the service to be provided directly by the Commonwealth.\textsuperscript{206}

9.20 There are a number of options open to agencies in using service charters to help define service standards including:

- incorporating key features of a charter in the contract;

- requiring the contractor to comply with relevant parts of the government agency’s own charter;

- requiring the contractor to comply with a minimum set of standards; and

- encouraging contractors (perhaps by offering incentives) to develop additional standards, or making the development of suitable charter features a requirement before contract renewal.

9.21 Service charters are most likely to be an effective means of setting and maintaining standards if they are accompanied by appropriate monitoring and evaluation of the contractor’s performance.

\textsuperscript{204} The Council notes that Schedule 1 to the \textit{Aged or Disabled Persons Care Act 1954} sets out a Charter of Residents’ Rights and Responsibilities in relation to hostels.


\textsuperscript{206} \textit{Competitive Tendering and Contracting, Guidance for managers}, Department of Finance and Administration, March 1998, page 18.
COMPLAINT HANDLING

9.22 Any contract will need to make provision as to who is responsible for what in the delivery of the service. It will be particularly important for service recipients and other members of the community that contracts have unambiguous arrangements for the resolution of complaints about service delivery and for the payment of compensation to persons who have suffered loss or damage as the result of action by a contractor.

9.23 In Chapter 4 the Council discussed complaints about services provided by government contractors. The Council recommended that:

- When preparing contracts, agencies need to be satisfied that contractors will be able to deal with complaints properly. Contractors’ complaint handling procedures should normally satisfy the standards identified by Standards Australia including the recording of complaints and their outcomes. Where the contractor is a small business, simpler complaint-handling procedures may be appropriate. Agencies should also consider what information they should require from contractors about complaints to ensure that the contractors' performance can be properly monitored.

- Where an industry-based complaint mechanism is in place, people with a complaint about a contracted service should have the option of using that mechanism rather than complaining to the relevant agency or to the Commonwealth Ombudsman. Where appropriate, the Commonwealth Ombudsman should be able to refer a complaint about a contractor to the industry body in the first instance.

- Agencies should be responsible for ensuring that service recipients are made aware of all of their avenues of complaint, whether provided by the contractor or the agency.

- Members of the public who have a complaint about a government contractor should be able to make the complaint to the Commonwealth Ombudsman. The jurisdiction of the Commonwealth Ombudsman should extend to the investigation of actions by a contractor under a government contract. The Ombudsman should also be able under the Act to deal with contractors informally to resolve complaints. In dealing with complaints against contractors the Ombudsman should have the same powers to obtain information and documents from government contractors as he or she currently has in respect of agencies under investigation.

- Any statutory extension or clarification of the Ombudsman’s jurisdiction should also recognise that government agencies retain responsibility for proper management of its contracts.
• Where the Ombudsman is unable to resolve a complaint about a contractor informally, the Ombudsman should be able to make a formal report to the agency about the complaint.

• The option of complaining to the Ombudsman should be in addition to avenues of complaint which should be provided by the contractor and any complaint-handling mechanisms provided by government agencies or industry arrangements. The Ombudsman should have a discretion to redirect complainants to the contractor or the agency where appropriate.

9.24 As discussed in Chapter 4, agencies will need to consider when preparing the contract whether contractors should be obliged to comply with any recommendations made by the Ombudsman as a result of a complaint.

9.25 The way in which agencies should ensure that service recipients are made aware of all of their avenues of complaint will depend on the nature of the service, the needs of the recipients of those services and the size of the contract. Where it is likely that service recipients may feel vulnerable about complaining about a service, because they fear reprisals or withdrawal of the service, it would be desirable that agencies take steps to inform recipients of their rights to seek redress. For other services all that may be needed is for the contractor to provide service recipients with a card or pamphlet setting out the contractor’s telephone contact numbers and indicating any further avenue of complaint the Ombudsman if the contractor does not resolve the problem.

ACCESS TO INFORMATION

9.26 Agencies need to make provision in their contracts to ensure that they are able to obtain information from contractors so that:

• rights of access to information through the FOI Act will not be effectively diminished or lost;

• agencies will be able to manage the contract and evaluate the performance of the contractor;

• agencies will remain appropriately accountable by being able to respond to inquiries by the Auditor-General, the Parliament and the Ombudsman.

FREEDOM OF INFORMATION

9.27 In Chapter 5 the Council recommended that the FOI Act be amended to provide that all documents in the possession of the contractor that relate directly to the performance of the contractor's obligations under the contract be deemed to be in the possession of the government agency. Access to those documents can then be sought under the FOI Act.
CONTRACTORS’ RECORD-KEEPING OBLIGATIONS

9.28 The FOI Act applies to documents, not information. It cannot be used to require an agency (or a contractor under the Council’s proposal) to prepare a document that was not in existence before the request was made. Even where information may be held within an agency, if it has not been documented it is not accessible under FOI.

9.29 An FOI request does not compel the agency to create the document to which access is sought. For example, an agency may not be in the practice of keeping a record of the cost per recipient of providing a service. However it may be possible for that information to be identified by an appropriate interrogation of the agency’s financial IT systems. If, however, the agency did not have the information about the cost per recipient in documentary form at the time of the FOI request, it could not be required to create the document. Even where officers of the agency are aware of particular information it is not accessible under FOI if it has not been documented.

9.30 While the deeming provision recommended by the Council is important to ensure that rights to seek access to information are not lost or diminished, the deeming provision needs to be supported by appropriate record-keeping obligations on contractors. If the contractor does not keep records relating to the way in which they have delivered the service, there will be no information accessible under the FOI Act.

9.31 Agencies will therefore need to set out in the contract the contractor’s obligations to keep documentary records of the way in which they deliver the service.

9.32 Under the Council’s proposals, agencies may need to include provisions in their contracts to oblige contractors to hand documents over to agencies where those documents will be deemed to be in the possession of the agency.

INFORMATION NEEDED FOR OTHER PURPOSES

9.33 Sufficient record-keeping obligations need to be included in an agency’s contracts to enable the Auditor-General to have access to the information needed to fulfil that Office’s statutory duties. Agencies also need to be able to satisfy their own obligations of accountability to Ministers, the Ombudsman and the Parliament.

9.34 The issue of record keeping by contractors is also linked to the issues of performance standards and contract monitoring. The Council has suggested in Chapter 2 that agencies should keep information about the performance standards required of contractors, the actual performance of agency contractors and the number and types of complaints received by the agency and the contractor.

207 The expression ‘document’ is widely defined in section 4 of the Act to include articles on which information has been stored electronically.
Compensation Payments

Contracts will need to provide for the collection and recording of this information by contractors.

**Recommendation 29**
Agencies should require contractors to keep and make available records to enable the agencies’ accountability for management of the contract to be maintained.

**MONITORING CONTRACT PERFORMANCE**

9.35 Government agencies remain accountable for the services that are delivered by contractors. The proper monitoring of the contractor’s performance is a key part of that accountability.

9.36 The Department of Immigration and Multicultural Affairs noted in its submission to the Issues Paper that:

Performance monitoring is essential for accountability and ensuring that clients are served in the way intended by a contract. Monitoring systems need to be agreed upfront and focus on information essential to measuring contract outcomes.

9.37 The Management Advisory Board and the Management Improvement Advisory Committee last year completed a report on effective contract management. The report suggests that:

there are two dimensions of accountability against which provider performance need (sic) be monitored. The first is accountability for the expenditure of public resources and the second is accountability for results or outcomes.

9.38 Agencies will need to determine how a contractor’s performance is to be monitored and evaluated before the contract is settled. Even if the strategy for evaluation is not included in the contract, there may need to be provisions to ensure that contractors maintain records and provide information to the agency so as to allow it to carry out its evaluation.

**PUBLIC INVOLVEMENT**

9.39 The recipients of contracted services will be uniquely placed to assess the way in which the contractor has been providing the service. The Council recommends

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209 At page 47.
210 The then Department of Administrative Services noted in its submission that as part of their planning for any major contract impacting on community services, agencies would be expected to consult with consumer representatives and other stakeholders about service standards and key performance indicators. Feedback on the level of consumer satisfaction against
that agencies seek the comments and views of service recipients as part of any strategy to monitor and evaluate the performance of particular contractors. Agencies may develop formal consultation processes as part of such a strategy.

**Recommendation 30**

As a general rule, where an agency’s contract involves the provision of services, the agency should develop effective mechanisms for obtaining information from service recipients, either directly or through community groups or peak organisations, which can be used to monitor and evaluate the performance of particular contractors.

**COORDINATION OF CONTRACTING PRACTICES**

9.40 The Council posed the question in the Issues Paper whether a central government agency should be given the task of reviewing and/or coordinating government contracting practices. Some submissions emphasised that the agency that lets the contract remains primarily responsible for its management and monitoring.211

9.41 The Council notes that a number of bodies already have a role in reviewing agency contracting practices. The Ombudsman currently has the power to investigate agency practices relating to the tendering process and the way tenderers and contractors are treated by government agencies. The Council is recommending in this Report that the Ombudsman’s role in investigating complaints about contractors be clarified. The Ombudsman’s investigation of complaints about contractors will reveal further information about the way in which agencies are preparing their contracts.212

9.42 The Auditor-General will be in a position to gain an overview of agencies’ contracting practices through the audits of government agencies. In Chapter 2 the Council discussed the need for agencies to make contractual provision to allow the Auditor-General to obtain sufficient information from contractors to allow for the proper auditing of agencies. In carrying out audits of government agencies, the Auditor-General will also gain an overview of agencies’ practices in relation to contracting out.

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211 The Civil Aviation Safety Authority Australia in its submission suggested that the existence of a central government agency responsible for coordinating government contracting practices would be useful particularly if the agency were able to provide advice and assistance in drafting contracts, the setting of standards and evaluation. The actual monitoring of the performance of the contract may need to remain with the contracting agency where the service provided involves matters of technical expertise specific to the contracting agency.

212 The use of the Ombudsman for this purpose was noted in the submission by Kevin Tuffin.
9.43 Parliamentary committees will play an important role in examining agencies’ contracting out arrangements.

9.44 In Chapter 5 the Council noted the role that could be played by the FOI Commissioner in providing guidance to agencies in dealing with FOI requests involving information held by contractors.

9.45 The Department of Finance and Administration is also providing guidance to agencies on how to undertake competitive tendering and contracting with the publication of material to assist agencies in managing the process. 213

9.46 At this stage the Council does not see a need for a central government agency to be given the task of reviewing or coordinating government contracting practices. However, the Council may revisit this issue in the future if the experiences of the Ombudsman, the Auditor-General and Parliamentary committees indicate to the Council that agencies are not taking sufficient steps to maintain appropriate levels of accountability in respect of both individuals affected by the actions of contractors and the broader issues of financial and parliamentary accountability.

9.47 The importance of these issues is summarised by the comments made by the Premier of Victoria in a submission to the Issues Paper:

The government remains accountable for ensuring that the outsourced services are effectively delivered. Appropriate levels of accountability can be maintained by setting out in the contract between the government and the service provider the precise scope of services which must be delivered, the quality of service required, the means of achieving delivery and quality, and the criteria upon which the contractor’s performance shall be evaluated.

A CONTRACTING OUT ACT

9.48 The Council raised the question of a Contracting Out Act in its Issues Paper. 214 The Council noted that a general Act could cover a range of issues such as minimum standards for complaint handling and evaluation of contractors’ performance.

9.49 The Council, at this stage, feels the incorporation of minimum standards into a general Act may impose unduly inflexible arrangements on agencies. The Council has avoided a prescriptive approach throughout this Report preferring instead to leave agencies with flexibility to develop contractual arrangements which best suit the types of services being contracted out, the needs of the recipients of those services and the nature of the contractor’s business. Provided agencies ensure that

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213 Competitive Tendering and Contracting, Guidance for managers, Department of Finance and Administration, March 1998; The Performance Improvement Cycle, Guidance for managers, Department of Finance and Administration, March 1998.

service recipients’ rights of access to remedies are not lost or diminished, the Council does not see a need, at this stage, for minimum standards to be included in a general Contracting Out Act.

9.50 If, however, it becomes apparent that service recipients are losing access to remedies through the contracting out process, the Council will re-visit the question of the desirability of a Contracting Out Act.
APPENDIX 1

TERMS OF REFERENCE

The Council will examine in what circumstances federal administrative law and/or other safeguards should exist to preserve appropriate government accountability where services are provided to the community on behalf of government by private sector contractors.

The Council will examine whether federal administrative law remedies (and/or other safeguards) should be available to members of the public to seek redress from private sector contractors providing services on behalf of the Commonwealth Government.

In considering what safeguards and remedies should be available, the Council will consider the potential costs and benefits that might result from the provision of these remedies and safeguards.

The Council will consider the ways in which those remedies and safeguards should be provided, whether through legislation, contractual arrangements etc.
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