

Government Accountability and Access to Information on Contracted-out Services

*Madeline Campbell**

Madeline Campbell LLB is a Principal Solicitor in the Australian Government Solicitor's Office in Canberra. She has specialised in administrative law since 1987. As Principal Solicitor she provides legal advice and assistance to Commonwealth agencies particularly in relation to information access law including freedom of information, privacy, archives and ombudsman issues. She appears as counsel before courts and tribunals in such matters. Madeline provides training courses on information access and administrative law and has presented papers on these topics to seminars. She has published regularly in this field since 1990.

*The views expressed in this article are Madeline Campbell's own and not necessarily those of the Australian Government Solicitor's Office.

Since the introduction of the Federal Government's administrative law legislation during the 1970s and 1980s, Australians have been used to obtaining access to information on the manner of delivery of government services especially to themselves. The rights and obligations given by the Archives Act 1983, Freedom of Information Act 1982 and the Privacy Act 1988 are of particular relevance. Access to information allows scrutiny of the operations of government and accountability through openness. However this legislation applies only to information held in the public sector. In the new era of the private sector delivering services under contract to government, this article asks if information access rights will be lost with the resultant loss of government accountability.

This is a refereed article.

Introduction

This is the information age. Never before have such large quantities of information been able to be brought together, manipulated and distributed quickly all over the world. We are living in a global village where the ability to access information will be the main determinant of whether we are rich or poor. A just and civil society will ensure that this 'oil on which society runs'¹ is not locked away and accessible only to a privileged few.

In Australia, as elsewhere, information is increasingly central to the ability of people to participate in the democratic government of the country and to gain access to services and benefits available in both the government and private sector.² Information must be accessible to citizens so that they may exercise their rights, discharge their responsibilities and share in the benefits which society brings. A democracy requires that the government be accountable to the people on whose behalf it governs. In this article I will explore whether in this new era of outsourcing of the delivery of government services, there is a danger that government accountability will be reduced through the inability of citizens to access information relating to those services.

If the institutions of representative and responsible government are to operate effectively and as the Constitution intended, the business of government must be examinable and the subject of scrutiny, debate and ultimate accountability at the ballot box [...] Before they cast an effective vote at election time, [the electors] must have access to information, ideas and arguments which are necessary to make an informed judgment as to how they have been governed and as to what policies are in the interests of themselves, their communities and the nation.³

I will use a hypothetical 'real life' situation to demonstrate what happens when information is lost or citizens no longer have a legally enforceable right of access to information directly. The importance of such a right cannot be overstated leading as it does to an inability to properly participate in debates about policy formulation or to call government to account. My hypothetical is a story about who has the information, who wants it and who gets it. Our players in the hypothetical are two recipients of a

government service, a taxpayer, a consumer support group, a business, a student, a government agency and a Member of Parliament. Each one of these has an expectation that certain information will be available to them when they need it. But will it be available if it is not held by government but by the private sector? We will see that our players do not seek the information out of idle curiosity but for a reasonable and socially acceptable purpose; although in a democracy a member of the public should not be required to justify why they want to access something they own.⁴

Contracting out the delivery of government services

The Commonwealth Government has a policy of contracting out the delivery of government services. It has done this, amongst other reasons, because it believes it will provide competition for government providers of the service and result in efficiencies, a lower cost to government and better service to the public. In evidence to the Senate Finance and Public Administration References Committee which has been inquiring into *Contracting out of Government Services*, Dr. Sylvie Trosa, Assistant Secretary, Performance Improvement Group of the then Department of Finance, said:

The Department of Finance believes that contracting out is a valuable tool to improve the performance of the public sector and the value the taxpayer receives. But it is only one tool amongst other tools such as benchmarking, re-engineering and purchaser-provider arrangements. It is certainly not an end in itself. The aim is to achieve value for money in the provision of service for the community, and sometimes it is the resources available outside the public sector which can deliver best on this aim. That is, the community can sometimes have its services delivered at a better quality and at a lower price by the private sector.⁵

Concern has been expressed in the media that this policy may not live up to its promises. For example, not everyone would agree that contracting out will result in greater choice and lower price, i.e. better value for money. The University of New South Wales Public Sector Research Centre in its submission to the Senate Finance and Public Administration References Committee, described a United Kingdom study which found that net cost savings of the

UK's competitive tendering programme were 50% lower than had been estimated at the start of the programme in 1992 and that no worthwhile savings were gained on projects worth less than 500,000 pounds (\$A1,400,000). In addition, 29% of users surveyed believed service quality had got worse and 32% believed it had stayed the same. Only 34% believed it had improved.⁶

It has been estimated that in Australia, once contracting out has been fully implemented, the Commonwealth through its departments, authorities and enterprises, will contract out at least \$8 billion annually exclusive of construction.⁷ Concerns have been expressed as to the level of accountability which the Australian public will receive when these activities of government move from the public sector to the private sector:

What appears to be happening is that administrative law is being pushed out of the public sphere by re-labeling public activities. [...] This re-labeling is done by the expedient of using the mechanism of contract to fulfill public purposes. The rhetoric of contract, in particular 'freedom of contract', is then employed to insulate the government from scrutiny. When this freedom is combined with the use of contract for the ordering and control of public resources, the synthesis becomes dangerous.⁸

Most people would agree that, as these are public services which are being delivered and which are being paid for by the taxpayer, the government must remain accountable for the efficient, effective and fair delivery of the services. This is certainly the view taken by senior executive service officers of at least two Commonwealth departments:

... for us, contracting out is not privatisation. It is just another mode of delivering services, which means that the purchaser - in this case the government - remains accountable and cannot use contracting out to avoid management or political accountability. As contracting out is another mode of service delivery, citizens can reasonably expect to continue to enjoy an appropriate level of service quality and safeguards when services are contracted out.⁹

Underpinning these documents and the policies they derive from is a fundamental commitment to accountability. Accountability for

outcomes does not diminish as a result of a decision to contract out government services. The Joint Committee of Public Accounts in its report *Keeping the Customer Satisfied* concluded that the commercialisation process in departments of state had enhanced rather than detracted from accountability. It has been the driving force behind improvements in efficiency, effectiveness, accountability and commercial performance. Competition has secured long-term performance improvements.¹⁰

wherever public monies flow, the requirement for public accountability will follow. No matter how enthusiastically the private sector focus on clients is embraced, when public money is involved, the so called *clients* will never be clients in the private sector meaning of the word, they will remain citizens, with legislative entitlements [...] Decisions relating to these entitlements are thereby often reviewable and are ones for which the public sector agency, regardless of the manner or extent of its outsourcing, always remains accountable to the legislature.¹¹

Accountability in the public sector: the Commonwealth legal regime

There are several different kinds of accountability available in the public sector. These forms of accountability were mostly introduced by Commonwealth legislation during the 1970s and 1980s and comprise: *Ombudsman Act 1976*, *Administrative Appeals Tribunal Act 1975*, *Administrative Decisions (Judicial Review) Act 1977*, *Freedom of Information Act 1982*, *Privacy Act 1988* and *Archives Act 1983*.

The *Administrative Appeals Tribunal Act 1975* and the *Administrative Decisions (Judicial Review) Act 1977* are for the most part concerned with accountability through external review of decisions and conduct of Commonwealth agencies. The remaining Acts enhance accountability through transparency and access to information about the workings of government agencies. This article deals with the latter form of accountability in an era of outsourcing and examines the issue of access to particular information when it is in the possession of a government agency and when it is in the possession of a private sector business.¹² In most instances the ownership of the information

will not be a material issue.

The legal position is that accountability will remain with the government agency which has the responsibility for delivering the service. However, warnings have been sounded that problems may arise where the government agency and the contracted deliverer do not share the same objective or adhere to the same processes.

Accountability problems arise where the principal and the agent do not share the same objectives. As the level of discretion provided to the agent increases, the opportunity to diverge from the principal's interests increases. The challenge for the principal is to design and implement mechanisms or incentives to induce the agent to act in the interest of the principal, rather than pursue its own interests.¹³

In her 1995-96 Annual Report the then Commonwealth Ombudsman, Phillipa Smith, expressed the following concerns:

as a direct result of these new contractual arrangements, the Ombudsman's office has been receiving a new range of complaints from suppliers of contracted services and the consumers of those services [...] which raised a range of issues including:

- the inability of consumers to recover losses due to the actions of contracted service providers;
- stand offs where the victim (client) is told to 'prove it' or take legal action before the situation is resolved;
- buckpassing of responsibility between the various parties (the department, contractor and/or insurer); [...and]
- the absence of accessible and effective dispute resolution procedures.¹⁴

In a previous annual report the Ombudsman had noted the problems which arise with accountability because it is difficult to allocate precise responsibilities in a contract. She explained this in the context of a contract by Australia Post to deliver the mail:

Commercial contracts may not spell out obligations to the detail of delivering mail without kicking dogs and driving over letter boxes, obviously they do not. In this case, once the buck passing starts in a contractual dispute, one party is obsessed with searching out loopholes while the other side is hell bent on the search for a noose to hang the other side; it is a grubby business and the principle of good service and fair play seem to go out the window.¹⁵

Freedom of Information legislation throughout Australia enshrines and protects three basic principles of a free and democratic government, namely openness, accountability and responsibility. [...it] enables people to have access to documents used by decision-makers and will in practicable terms, produce a higher level of accountability and provide a greater opportunity for the public to participate in policy making and government itself.¹⁶

Setting the scene

I start by asking who might want access to the records created and why need there be accountability? I have done this through a linked set of hypothetical situations. There is no suggestion that all in the private sector or the public sector would act in the way discussed. Because there is no current case law, the situations described in this paper are hypothetical i.e. illustrative of the possible obstacles which citizens may encounter when seeking information held or created by a less principled private sector contractor. This is contrasted quite starkly with the position of two ethical public sector agencies which are subject directly to the government's information access laws namely the *Ombudsman Act 1976*, *Freedom of Information Act 1982* (FOI Act), *Privacy Act 1988* and *Archives Act 1983*. The importance of the citizen who wishes to exercise their democratic rights in being able to obtain access to information is self evident.

The players

Jack and Jill - the job seekers

Jack and Jill are two friends in their early twenties who met at the waiting

rooms of the speech therapist they each attended for help with a bad stutter which made oral communication difficult for them on occasion. Jack and Jill had both been unemployed for in excess of one year. They have recently attended Centrelink¹⁷ where they have been job screened for access to the Job Network. Jill was placed in classification 'flex 2'¹⁸ but Jack was classified as 'flex 3' because in addition to his long term unemployment and his stutter, he informed Centrelink that when he was fifteen he stole a car, was convicted and served three months in a juvenile detention centre. Both Jack and Jill are given a list of Job Network members including four private sector members and Employment National the public sector employment agency.

Jack decides to go to one of the private sector employment agencies called 'Jobs R Us' where he is seen by an assistant manager (a broker) who tells Jack he will 'look after him and assist him to find a job'. Jack signs an activities agreement that he will accept one of the first three jobs offered to him within his capabilities. In accordance with its contract with the Commonwealth, 'Jobs R Us' will receive an amount of \$1500 upon Jack's signing up with them, a further \$1500 when Jack has been employed by the same employer for thirteen weeks and a further \$1200 when he reaches 26 weeks in that employment. Jack's stutter was quite pronounced during the discussions with the broker because of his nervousness. He is sent for an interview with a division of Many Parts Pty. Ltd. which distributes video tapes. He declines the job when he finds out that minimum award rates would be paid and he would be distributing X rated movies.

He returns to 'Jobs R Us' and they then send him to another division of Many Parts Pty. Ltd. which has a job for a cleaner in a battery hen factory. The wages are minimum award rates. He refuses the job fearing the proximity to feathers might cause an allergic reaction. Also he does not approve of battery hen egg production. He returns to 'Jobs R Us' who send him to another company called 'Who Knows' which sells encyclopedias to the public. He is reluctant to go for the job because of his stutter but is told by his case manager at 'Jobs R Us' that, if he doesn't take this job, he will be off their books and they will report him as failing the search for work test. Jack is most unhappy but takes the job which pays a small salary and commission on sales. At the end of the first month Jack has earned only a little more than he would have earned had he stayed on Newstart allowance.

He works a further three months but is not happy in the job because of his stutter and the stress it brings on. His earnings remain low and he decides to quit even if it means he may be in trouble with Centrelink.

Jack's friend Jill decides to go to Employment National the public sector Commonwealth Government agency. She is 'signed onto the books' as a flex two and a broker is assigned to help her. A short while later after undertaking a course on communication and the latest uses of the Internet together with help on polishing up her job skills resume, Jill is placed in a job with a company called 'Just the Ticket' selling tickets over the Internet for sporting and cultural events. She really enjoys the job.

Jack is upset about his treatment by 'Jobs R Us' and recalls overhearing a telephone conversation his boss was having one day which made him suspect that there could be a close relationship between 'Jobs R Us', 'Many Parts Pty. Ltd.' and 'Who Knows'. He wonders whether 'Jobs R Us' was set up to provide cheap labour to 'Many Parts Pty. Ltd.' and 'Who Knows' in areas where it is difficult to get employees to stay for more than a few weeks. At the same time the group through 'Jobs R Us' would receive many hundreds, even thousands of dollars for placing people like Jack in a 'permanent' job. Jack wants to know why he was offered only those jobs and what is the relationship, if any, between the three companies.

A taxpayer wants to know how her tax dollar is spent

Jack tells his mother about what has happened. Jack's mother is concerned about how her taxes are being spent. She is particularly concerned that 'Jobs R Us', 'Many Parts Pty. Ltd.' and 'Who Knows' may be exploiting the system to receive government payments for employing people they would have had to recruit in the normal course of business. She wants to know whether her tax dollar is being spent by the private sector Job Network member in the search for work for the long term unemployed or whether it is really a windfall going into the coffers of a related group of companies.

Jack's mother rings her local Member of Parliament, Senator Smith, who is a member of the opposition party and spokesperson on social security matters. He is most interested in Jack's story and says he will do all he can to bring the right people to account. He says he is particularly

keen to ensure that the taxpayers' money is being properly spent, that there has been no roting of the system and there is proper monitoring of the programme.

Information is the currency that we all require to participate in life and governance of our society. The greater the access we have to information, the greater will be the responsiveness of our government to community needs, wants, ideas and creativity. Alternatively, the greater the restrictions that are placed on access, the greater the feeling of powerlessness and alienation.¹⁹

A consumer support group becomes involved

Jack is pleased that Jill got a good job and, in discussion with her, raises the possibility that he was not offered other kinds of jobs because of his stutter. Jill who is a member of 'Stand up for Stutterers' a non-government organisation whose functions include to press for a fair go in the workplace for stutterers, raises this at the next monthly meeting. A resolution is passed to investigate the matter with the aim of ascertaining whether the Commonwealth contractor for delivery of these services is making all proper attempts to place people with disabilities in suitable employment.

The job seekers, Jack and Jill, want information about themselves

Jill decides she would like to know just what information about her is held on the Centrelink file. She has no particular need to know this – she is just interested to know.²⁰

Article 17 of the International Covenant on Civil and Political Rights (ICCPR) to which Australia has acceded, supports an individual's right to have access to one's own personal information and to have it amended if it is incorrect. Article 19(2) guarantees freedom of speech which expressly includes freedom to seek information.

Wilf – the unsuccessful tenderer for a job network contract

Jill's father Wilf is a retired teacher who lives in a small country town about twenty kilometres from Canberra. In February 1998, in response to a request

for tenders advertised by the Department of Education, Employment, Training and Youth Affairs (DEETYA),²¹ he had put in a tender for an employment services contract to become a Job Network member. When putting in his tender he was told by a DEETYA officer that it was 'in the bag' because he was the only applicant from that town. He immediately set about buying an expensive computerised records management system, rented an office, fitted it out and got ready to see his first job-seeker. He funded this expenditure by obtaining a mortgage over the family home.

To his dismay, when the contracts were announced in May 1998, he did not receive one. No other employment office opened in town and he was thinking of trying to find out why he had been unsuccessful. Then one day recently he saw a panel van parked outside the Post Office. It had a fold down counter at the side closest to the kerb and had a sign painted on it reading 'Jobs R Us mobile office'. So when Jill told him Jack's story, he decided definitely to try to find out why 'Jobs R Us' had been accepted and he had been rejected.

Bill – the Ph.D. student

Jack has a friend Bill who wants to study for a Ph.D. After hearing Jack's story, Bill decides to write his thesis on patterns of Commonwealth Government assistance to the long term unemployed since the Second World War. He would like to do a longitudinal study which would look at all forms of assistance including that provided through private sector employment agencies. His study would also critically assess government policies during that period.

Mary the government officer responsible for the outsourced programme

Mary is the head of the Employment Programmes Division of the Department of Education, Employment, Training and Youth Affairs (DEETYA). She is responsible for letting employment services contracts, ensuring compliance, monitoring and reporting to the Government on the effectiveness and efficiency of the programme. She is concerned as to what obligations DEETYA has to the public both directly and indirectly in terms of accountability and access to information relating to the programme. She is aware that she will need to rely on information from and records created

by private sector Job Network members as well as those from Employment National. She would like to know to whom she could be held accountable and how.

All of these people look to the law to help them obtain the information they need to answer their questions. What does the law provide? Taking each of our players in turn, let us explore their rights and responsibilities. The reader may judge whether the results meet the standard required in a democracy about to enter the twenty-first century.

The results

Jill wants to know what is on her file

A few days later in her lunch hour, Jill visits the office of Centrelink. She asks if she can see her file. The officer returns a few minutes later and hands her the file saying she must stay at the counter to read it as he must supervise her access. Other than that, there is no impediment to her access to the file and no charge is levied.²² She finds nothing inaccurate, irrelevant or untoward on the file and returns it to the officer, thanking him. Jill has exercised an important democratic right - to know (and therefore, to an extent, to control) the spread and use of personal information about herself.

Jack wants to know why he failed to get a decent job

Jack goes to 'Jobs R Us' and asks to see the broker who was assigned to him. He is required by the receptionist to make an appointment because 'the broker is always very busy seeing clients and organising courses and appointments for job interviews'. He obtains an appointment in a week's time. Arriving at the appointed time, Jack puts his three questions to the broker, one at a time. He receives the following replies:

Q. Why was I offered only these jobs and no others?

A. These were the only jobs available at the time for a person with your skills and speech impediment.

Q. What jobs were offered to other similar applicants by 'Jobs R Us'?

A. I can't tell you that. It is a matter of client confidentiality – a private matter between 'Jobs R Us' and those people.

Q. What is the relationship between 'Jobs R Us', 'Many Parts Pty. Ltd.' and 'Who Knows'?

A. That is none of your business. The information is commercial-in-confidence.

Jack then asks to see the file on himself which 'Jobs R Us' holds on him but is told 'this is not a library' and is ushered out of the office. He feels quite despondent but perks up when told by a friend that failure to provide him with access is a breach of the *Privacy Act*²³ and that he can complain to the Privacy Commissioner if he doesn't get access. He rings the Privacy Commissioner's office in Sydney and explains his problem. The officer is sympathetic but explains that the *Privacy Act* does not extend to 'Jobs R Us' which is in the private sector.²⁴ She suggests Jack put in an FOI request to DEETYA which may be able to get a copy of his file from 'Jobs R Us' under DEETYA's contract with them. She doubted that he would be able to get the other information he wanted and noted that 'Jobs R Us' is not subject to the FOI Act so he could not put in an FOI request to them.²⁵

The *Freedom of Information Act* and the *Privacy Act* apply generally only in the public sector.²⁶ Each of these pieces of legislation upholds the public interest in individuals being able to obtain access to information about themselves.²⁷ In regard to information held by the private sector an individual must rely on the 'grace and favour' of the particular business to obtain access to information about themselves. Attempts to extend this right of access to banks have not been successful.²⁸ The Administrative Review Council/Australian Law Reform Commission's *Report on Open Government* (1995) concluded that there should be no general extension of FOI to the private sector. The reasoning was that different principles of accountability apply in the public and private sectors. However it recommended that it should be extended wherever a legislative scheme is established under which contractors provide services to the public on behalf of the Government.²⁹

Jack is pretty disheartened by all this but he doesn't give up. He puts in an FOI request to DEETYA asking to 'see my file'. The DEETYA FOI Contact Officer telephones 'Jobs R Us' and asks for Jack's file to be sent to him. The 'Jobs R Us' broker initially refuses saying that it is their file not DEETYA's. However, when it is pointed out that the contract between DEETYA and 'Jobs R Us' allows DEETYA to demand immediate possession of the file of any job seeker sent by Centrelink, the broker acquiesces.³⁰ A short time later the broker telephones to say that the records relating to Jack have been destroyed as 'it all happened months ago'.

Jack has a problem. He can't get access to records about himself. If he had a separate contract himself with 'Jobs R Us' in which it was agreed that he would be given access to all records about himself or if 'Jobs R Us' had agreed to use their best endeavours to find him a job, then he could take court action to enforce the contract and use discovery and inspection procedures to see much of his file.³¹ However, there is a question as to whether there would be the necessary consideration to make the contract enforceable. Also a court action would cost thousands of dollars and could take several years to be finalised.

Access to documents held by a contractor will be depend to a significant extent on the government agency enforcing its contract with the service provider and the latter's willingness to abide by the same. There is no direct contractual relationship between the job seeker and the Job Network member which would enable the job seeker to directly compel the Job Network member to provide access. More importantly, there is the possibility of loss or destruction of records upon a network member ceasing trading for any reason or moving into another line of business where the former records are no longer needed. Access to information particularly in the long term, will depend on agencies ensuring compliance by the service provider with the contract. The impact of this remains to be seen.

DEETYA discovers there is a problem

DEETYA is most concerned about the destruction of these records. DEETYA's concern comes from the knowledge that without records it will

be unable to provide the accountability which DEETYA and the Minister will most probably be called upon to provide. In its submission to the Parliamentary Inquiry into Contracting out of Government Services, the Public Sector Research Centre said:

the second area of potentially diminished accountability is in relation to access to information and records kept by contractors. Since Ministers remain accountable for contracted services, they must have sufficient information to answer Parliamentary queries. Information must also be available to service users and public authorities like the Ombudsman in the event of consumer complaints. Records of service standards and complaint handling are required. Government Equal Employment Opportunity (EEO) policies may also require recordkeeping on employee training and demographic profiles. The keeping of adequate records by contractors and the considerations of availability should be standard clauses in contracts.³²

The contract between DEETYA and 'Jobs R Us' provides that the ownership of records created in the course of delivering these services on behalf of the Commonwealth vests in the Commonwealth. They are Commonwealth records within the meaning of the *Archives Act 1983*.³³

Section 24 of the *Archives Act 1983* provides that a person shall not destroy or otherwise dispose of a Commonwealth record. Penalty: \$2,000. A record may be destroyed or disposed of as required by any law, with the permission of the Archives, in accordance with a practice or procedure approved by the Archives or in accordance with a normal administrative practice.

The DEETYA officer ponders whether 'Jobs R Us' is complying with the guidelines laid down by the National Archives of Australia in relation to creation, storage and disposal of the records they are creating as a result of the contract.³⁴ She knows that it is essential that the proper records be created and kept to support the business of DEETYA and to account to government and the public. She is also aware that less than 5% of records have continuing value beyond thirty years and of the need to sentence records regularly. If DEETYA has no records as evidence of its business of

delivering government services to people like Jack notwithstanding that its contract with 'Jobs R Us' provides that all records in relation to job seekers must be kept and handed over to DEETYA when required, it will not be able to discharge its accountability to the public.

Stand up for Stutterers wants social justice for the disadvantaged.

The President of 'Stand up for Stutterers' telephones 'Jobs R Us' and says she is making a general enquiry as to what policies they have in place to ensure that people with disabilities, particularly people with a pronounced stutter, are given a fair deal i.e. that they are offered a fair range of jobs not just those requiring little oral communication. She is told that the company complies with its obligations under the *Disability Discrimination Act 1992* i.e. that a person with a disability is not treated less favourably than a person without a disability unless the disability prevents the person from carrying out the inherent requirements of the employment.³⁵

However, when the President starts to ask for written information about how many people with pronounced stutters 'Jobs R Us' has helped and what kind of jobs they referred them to compared to people without a disability, the broker refuses to comply saying it would be a breach of their clients' privacy to divulge this information. The President reports back to the meeting and to Jill saying that the only way the matter can be taken forward is for Jack to make a complaint to the Disability Discrimination Commissioner. Jill says she believes that Jack would be loath to do this without any proof that there was discrimination. He would be nervous about making a complaint and worried he would be labeled a troublemaker. 'Jobs R Us' would be sure to tell the other Job Network members and no one would help him find a job then. Also she fears he has complaint fatigue. 'Standup for Stutterers' is disappointed it cannot assure Jack or any of its other members that they will not be unlawfully discriminated against by this Job Network member.

Senator Smith wants to call the Government to account.

Senator Smith is a member of Senate Estimates Committee A which

scrutinises the estimates of expenditure for DEETYA. He decides that at the next meeting of the Committee in February 1999, he will put several questions to the DEETYA officers appearing before the Committee. He will demand that all documents which throw light on these matters and the documents relating to Jack's dealings with Centrelink and 'Jobs R Us' be given to the Committee. Senator Smith is strongly of the view that the contracting out of delivery of government services does not diminish the responsibility of the relevant Minister, the department or agency to be fully accountable to Parliament and the people for the delivery of those services. He was a member of the Senate Finance and Public Administration References Committee which has been inquiring into *Contracting out of Government Services* since November 1996. He is aware that in the Committee's second report published in May 1998 it noted the concerns of many who gave evidence or made submissions to the Inquiry that:

Contracting out inevitably involves some reduction in accountability through the removal of direct departmental and ministerial control over the day-to-day actions of contractors and their staff. Indeed, the removal of such control is essential to the rationale of contracting out because the main increases in efficiency come from the greater freedom allowed to contracting providers. Accountability is also likely to be reduced through the reduced availability of citizen redress under such instruments as the Ombudsman and FOI.³⁶

Subject to some exceptions not relevant here, a House of Parliament and any duly authorised Committee of that House of Parliament has full power to compel production of documents and to demand information from witnesses summoned before it. A person who refuses to comply with such lawful demands can be declared by that House of Parliament accordingly to be in breach of the privileges of Parliament and may be imprisoned for up to six months or fined up to \$5000.00.

Senator Smith knows the only way he will be able to get specific information on delivery of services by the private sector, is indirectly through the public sector agency responsible for that government

programme, in this case DEETYA. He knows that he can invoke the power of the Senate Estimates Committee to demand information from government officials even where it might, in another forum, be able to be withheld. He thinks rightly or wrongly that some officers might seek to avoid answering difficult or potentially embarrassing questions by claiming *privacy* or *commercial-in-confidence*, hoping to ward off the Committee's questioning - cause it to not press for the information.³⁷ Sometimes he wishes this were the United States of America where there seems to be a more robust approach to disclosing commercial information in the case of contracts with the government.³⁸ In any event, as the decisions to award the contracts were taken in May 1998, he wonders how much commercial confidentiality remains.

Senator Smith recalls a case before the Victorian Administrative Appeals Tribunal, *Re Thwaites and Metropolitan Ambulance Service* (1996) 9 VAR 427, where Galvin DP noted that the outsourcing initiative in question was of such public significance that it must be seen to give rise to a 'high level of entitlement of the public to be well informed as to the circumstances'.³⁹ The Deputy President commented that:

Commercial undertakings and business entities when negotiating with government agents and statutorily established bodies such as MAS [Metropolitan Ambulance Service] in circumstances of the kind involved in this matter or in circumstances of an equivalent order, must anticipate a greater degree of public scrutiny and the likelihood that by resort to the [FOI] Act, information provided to them or by them might be required to be released to the public.⁴⁰

Wilf wants to sue

Wilf consults his local solicitor to find out whether he can take action against DEETYA and the Government to recover the money he spent setting up an office as a result of assurances he had received from the DEETYA officer when lodging his tender for a contract. His solicitor thinks he may have a case for suing the Commonwealth and DEETYA for damages for negligent misrepresentation applying the *Shaddock* principles⁴¹ because in the solicitor's assessment he had incurred expenditure in reasonable reliance

upon the advice given to him 'that it was in the bag'.

However before proceedings are commenced, the solicitor advises Wilf to put an FOI request to DEETYA as he may well find information which he will be able to use to support his claim. In his FOI request Wilf asks for access to all documents in DEETYA's possession concerning the Government's policy, the request for tenders, the evaluation of tenders received and the decision to grant a contract for Job Network delivery services in that town.⁴²

In his FOI request, Wilf notes that there is a strong public interest in transparency of government and in the public being able to scrutinise the actions taken by DEETYA in implementing the Government's policy of contracting out these services. He also believes that citizens who are required to abide by the policies of government should be entitled to full information on the reasons for those policies so they can make their own assessment of whether they are good or bad policies.⁴³ Wilf is confident of receiving much of the information sought. DEETYA may well decide that in view of the serious public interest in this initiative, it would not be unreasonable or contrary to the public interest to disclose most of the information about the development of this policy, the processes and information relating to the successful tenderer.

Public interest grounds directed to the issue of accountability include:

- (i) government accountability for the proper administration of public monies;
- (ii) that consultants and contractors are engaged under a fair and proper tendering system and without apparent or real favouritism;
- (iii) that regulations were complied with;
- (iv) the evaluation of claims of commercial efficiency made by Ministers;
- (v) participation and informed debate about contracting out of services; and
- (vi) assessment of whether there was value for money and clearing the air.⁴⁴

Bill wants to publish and his work not to perish

In preparing his application to undertake a doctoral thesis Bill goes to the National Archives of Australia to find out what material is available to him on his chosen topic. He obtains a copy of *A Guide to the Commonwealth Record Series (CRS) System* and is told that he may see all relevant documents which are at least thirty years old subject only to any information which is exempt for national security reasons or unreasonable disclosure of personal affairs. He is also told about the finding aids available at the National Archives' offices throughout Australia. He is delighted to learn that the main finding aid is a publicly available on-line data base called *Records Information Service System (RINSE)*. Searching is free and on-line help information available.

Bill reflects upon how good it is that the National Archives exists to ensure that those records created by all the different government departments, statutory authorities and business enterprises, which have continuing value, are conserved and preserved for future generations of Australians like himself to access.⁴⁵ Then he realises that from now on there may no longer be this surety. If the services are going to be delivered outside of government by private businesses, what will happen to the records they make? In thirty or fifty years time will a researcher like himself be able to obtain the records needed to update the results of Bill's intended study or will it not be possible because there are no records or the records are incomplete. The particular Job Network members may have gone out of business, changed the nature of their businesses or got rid of the old records. Even if they still hold their records, tracking them down may be nigh on impossible as, over a fifty year period, there would be so many and varied providers from the big employment agencies to the sole trader.

Bill asks the National Archives of Australia what they are doing to prevent this dreadful thing from happening. Bill is assured that the guidelines issued by them, if followed by DEETYA, will ensure that proper records are created, conserved and preserved to provide evidence of these activities of government notwithstanding that they are delivered by non-government bodies. Bill is somewhat reassured but worries that with the large reduction

in staffing of government departments, this might not be something which will be given a high priority, rather the view may be one of 'risk management'. After all 'the private sector is often espoused as the holy grail in terms of management and the one which the public sector should emulate'⁴⁶ and archival practices are not something which occur naturally to small business owners. Bill is concerned that a legacy of the Government's outsourcing policies may be the loss of valuable records so that in years to come Australians will not be able to know their own history. He hopes that Commonwealth agencies will obey the National Archives' general disposal authority on the subject.⁴⁷ Bill has a problem. His proposed study may not be able to be replicated in future.

The National Archives' guidelines entitled *Records Issues for Outsourcing* (July 1998) set out agencies' responsibilities for recordkeeping in outsourced services arrangements as follows (p18):

To ensure the Commonwealth's interests are protected, contracts should:

- ascribe ownership, either to the Commonwealth or the contractor, as appropriate;
- prescribe minimum standards of recordkeeping by the contractor for Commonwealth records consistent with those of the contracting agency;
- prescribe requirements to ensure that the records are not inappropriately used or disclosed by the contractor;
- protect the security of the records;
- provide a mechanism for access (and amendment or correction) by the public to records, if appropriate; and
- ensure that any subcontractors are subject to the same level of compliance with these requirements.

Mary wants to do her job well.

Mary is aware that, as a Commonwealth Government department, DEETYA

is subject to the Federal Government's legislation providing accountability through information access:

- The *Freedom of Information Act* means that FOI requests could be received for any or all documents about this programme and its policies;⁴⁸
- The *Privacy Act* will oblige DEETYA to allow individuals access to all personal information about themselves which DEETYA holds, including those unemployed people who have used the programme;⁴⁹
- The *Archives Act* requires the creation and preservation of records about the programme and regulates their disposal;⁵⁰ and
- The *Ombudsman Act* will permit the Ombudsman to call for files, enter DEETYA premises and inquire into the manner in which the programme has and is being carried out.⁵¹

Mary also turns her mind to the list of questions which the Secretariat to the Committee has told her will be put to her by Senator Smith at the Senate Estimates Committee hearings. The questions are:

1. What checks are done prior to awarding a contract to ascertain that potential Job Network members are genuine employment agencies, able to do the job of finding work for the long term unemployed and not using it for their own or related companies' recruitment whilst pocketing thousands of dollars of taxpayers' money?
2. What mechanisms are in place to ensure that private employment agencies within the Job Network are delivering services on behalf of the Commonwealth in a proper, efficient, cost effective and fair manner?
3. What information concerning the delivery of these services is collected, analysed and reported and how is this done?
4. Has the government's policy of introducing competition between Employment National and various private employment agencies resulted in a better deal for the long term unemployed?

Will she have to answer all of these questions? What information would she have to collect to be able to answer? What would she have to do to answer Senate Smith's last question?

The short answer to the first question is *probably yes*. Subject to some exceptions not relevant here, a House of Parliament and any duly authorised Committee of that House has full power to compel production of documents and to demand information from witnesses summoned before it. A person who refuses to comply with such lawful demands can be declared by that House of Parliament to be in breach of the privileges of Parliament and may be imprisoned for up to six months or fined up to \$5000.00.⁵²

However, the Parliament has on several occasions indicated that it will abide by the spirit of the *Freedom of Information Act 1982* where this is possible. Although the grounds of exemption available under the *Freedom of Information Act 1982* do *not* provide grounds for refusing to produce documents or to answer questions when required to do so by a House of Parliament or its duly authorised Committee, the fact that the information concerned would be exempt, if contained in documents to which access was requested under the *Freedom of Information Act*, may persuade the Committee not to press the question or to deal with the question in a closed hearing.

The answer to the second and third questions must be *whatever is needed to be able to answer the question*. If the checks aren't done to ascertain related businesses and the complaint mechanisms in regard to the private service deliverer aren't operating efficiently, Mary has a problem because it will be obvious that the programme and the contracts entered into by private sector Job Network members are deficient in their ability to provide accountability. As a prudent public sector risk manager, she will anticipate that senators like Senator Smith will remember the private sector corporate failures of the '80s and not wish to see them duplicated in the public sector. She must expect that senators will 'be placing any outsourced responsibilities under a scrutiny regime of electron microscope intensity'⁵³. Should any part of the programme fail, the fact that DEETYA is not the deliverer, will not save

her. DEETYA is still responsible and accountable to the Parliament and to the public.

Mary has a problem if the 'related businesses' checks were not done, if 'Jobs R Us' are improperly destroying records which belong to the Commonwealth or if DEETYA does not have the means to acquire the necessary information to be able to answer Senator Smith's questions.

Conclusion

The Government has made clear statements that contracting out the delivery of government services does not remove its duty to be accountable to the people on whose behalf it governs. The delivery of government services by using private sector contractors, is to provide choice and lower prices through competition resulting in a cheaper more efficient service. However there is an issue as to whether there will be sufficient access to information created by service deliverers in the private sector. These records in the Commonwealth public sector have been subject to access under the *Archives Act* and the *Freedom of Information Act* for over seventeen years. The *Privacy Act* has operated for ten years.

In this article I have given an extreme example of what may occur when information is held in the private sector. Private contractors by and large will abide by the terms of the contract and if they wish to obtain further contracts for delivery of services will not act in the way described. Nevertheless, there is scope for these things to occur. The possibility that information may be lost or not accessible because private contractors are not subject directly, should be guarded against. It is important to ensure that future generations of Australians are able to judge the effectiveness of government policies by gaining access to information about those policies and their implementation.

Access to information aids accountability to the people through scrutiny of the operation of outsourced government functions. There is a need to ensure that the information necessary to allow such scrutiny is collected and retained otherwise the cost of outsourcing may outweigh its benefits.

Endnotes

- ¹ Paul Chadwick, then Director Communications Law Centre Melbourne, at FOI Practitioners forum, Melbourne, March 1994.
- ² As was said in the Jones Committee Report:
Information is essential to enable Australians to participate fully in society, access available services and entitlements, particularly government services and entitlements, act on opportunities, and make informed decisions which shape their lives. Therefore, essential information must be accessible to all as a factor in promoting social justice in Australia. From the House of Representatives, Standing Committee for Long Term Strategies, *Australia as an Information Society: Grasping New Paradigms: Report*, Canberra (A.C.T.), Australian Govt. Publishing Service, c. 1991, p. 39.
- ³ The Political Broadcasts case, *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 66 ALJR 695 *per* McHugh J at p. 743
- ⁴ In the Political Broadcasts case, the Chief Justice of the High Court of Australia Mason CJ, said at p. 703 that the 'very concept of representative government and representative democracy signifies government by the people through their elected representatives. Translated into constitutional terms, it denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives'.
- ⁵ Australia, Parliament, Official Hansard Report, Finance and Public Administration References Committee, *Contracting out of Government Services*, 3 April 1997, p. 26, paragraph 6.
- ⁶ *Ibid.*, Submission 22A dated 22 July 1997, p. 809
- ⁷ Australia, Industry Commission, *Competitive Tendering and Contracting by Public Sector Agencies*, 1996, AGPS, Melbourne, Chapter A2.2.1.
- ⁸ Nicholas Seddon, *Government Contracts: Federal, State and Local*, Federation Press, Leichhardt, N.S.W, 1995, p. 15. See also J. Alford and D. O'Neill (eds), *The Contract State Public Management and the Kennell Government*, Centre for Applied Social Research, Deakin University, 1994, p. 128; Jonathon Boston (ed) *The State Under Contract*, Bridget William Books Ltd., Wellington, New Zealand, 1995, p. 38; Peter Bayne, 'Recent Developments in Administrative Law', Paper presented at AIC Administrative Law Conference, Sydney 28-29 August 1995. As noted in Australian Law Reform Commission (ALRC) Report 77 *Open government: A Review of the Federal Freedom of Information Act 1982*, Canberra, 1995, p. 198.
- ⁹ Evidence of Dr Sylvie, Trosa Assistant Secretary Performance Improvement Group Department of Finance, in Official Hansard Report of Proceedings Finance and Public Administration References Committee, *Contracting out of Government Services*, *op. cit.*, p. 27,

paragraph 2.

- ¹⁰ Evidence of Mr Brendan Godfrey, Deputy Secretary Department of Administrative Services in Official Hansard Report of Proceedings Finance and Public Administration References Committee, *Contracting out of Government Services*, *op.cit.*, dated 4 April 1997, p. 158.
- ¹¹ Cleaver Elliot, 'Balancing Risk Management with Accountability', *Administrative Review*, No. 40, Nov. 1997, p. 5. Cleaver Elliot is Clerk Assistant (Committees), Department of the Senate.
- ¹² At Appendix 1 is a table setting out the position in regard to rights under these pieces of legislation, where the information is held by a private sector contractor and when it is held by the Commonwealth Government or one of its agencies.
- ¹³ *Competitive Tendering and Contracting by Public Sector Agencies*, *op. cit.*, p. 82, Chapter B1.2
- ¹⁴ Commonwealth Ombudsman, *Annual Report 1995-96*, AGPS, Canberra, pp. 9-10
- ¹⁵ Commonwealth Ombudsman, *Annual Report 1994-95*, AGPS, Canberra, p. 33
Competitive Tendering and Contracting by Public Sector Agencies, *op. cit.*, p. 88
- ¹⁶ Second reading speech of Denver Beanland, then Queensland Attorney-General, when introducing the Queensland Freedom of Information legislation in December 1991.
- ¹⁷ The *Commonwealth Services Delivery Agency Act 1997* (CSDA Act) Section 6 establishes the Commonwealth Services Delivery Agency to provide Commonwealth services and to perform various other functions (Sections 7 and 8 of the CSDA Act). The Commonwealth Services Delivery Agency is known by its business name, CentreLink, which is prescribed as a 'protected name' under regulation 4 of the Commonwealth Services Delivery Agency Regulations 1997.
- ¹⁸ Job seekers who have been unemployed for a long term, i.e. in excess of 12 months, are classified by Centrelink before being referred to a Job Network member. Flex 1 applies to jobseekers who are 'job ready' needing little or no assistance before being able to be employed; flex 2 applies to jobseekers who require assistance such as to undertake training programmes, assistance with curriculum vitae, counselling etc.; jobseekers classified as flex 3 will require intensive help and have been identified as having a physical, mental or social disability such as quadriplegia, schizophrenia or having served a lengthy prison term. The Government sets the amount it will pay Job Network members for placement of a flex 3 jobseeker. The amounts it pays for flex 1 and flex 2 varies depending upon what amount each particular successful tenderer said they would accept for placing a jobseeker in these classes. Only flex 3 jobseekers attract an upfront payment. In the case of the other two classes, payment is made to the Job Network member once the jobseeker has been successfully employed.
- ¹⁹ Commonwealth Ombudsman, *Annual Report 1994-95*, *op.cit.*, p. 33.
- ²⁰ Section 14, *Privacy Act 1988* contains a set of information privacy principles (IPPs) which

place obligations upon Commonwealth agencies. IPP 6 obliges an agency to provide an individual access to their own personal information unless a law allows otherwise. IPP 7 obliges the agency to amend personal information if it is inaccurate, out of date, misleading or not relevant.

- ²¹ Following the federal election in October 1998 at which the Government was returned to office, there has been a re-shuffle of federal departments with the result that the responsibility for employment has moved to the new Department of Employment, Workplace Relations and Small Business. The staff and the records from the employment divisions of DEETYA (now DETYA) have moved to the new department.
- ²² This form of standard access without requiring an FOI application is quite common in Commonwealth agencies where there are large numbers of requests for the requester's own personal information. Agencies with high usage rates of *standard access* include Department of Defence, Centrelink, Department of Social Security, DEETYA and Department of Immigration and Multicultural Affairs.
- ²³ *Privacy Act 1988*, Section 13 and Information Privacy Principle 6 impose an obligation upon agencies to allow an individual access to records of their own personal information unless refusal is authorised or required by law.
- ²⁴ In February 1998 the Privacy Commissioner issued a draft code of conduct for privacy in the private sector entitled *National Principles for the Fair Handling of Personal Information*. However fears have been voiced that it will not be effective without sanctions for non-compliance. See article describing concerns of the Australian Consumers Association and the Law Council of Australia reported in *Australian Privacy Reporter*, No. 24, March 1998.
- ²⁵ In a press release of 3 February 1998 the Government announced an intention to seek amendment to the *Freedom of Information Act 1982* to deem documents in the possession of contracted service deliverers to be in the possession of the contracting Commonwealth government agency. However this will only extend to documents containing personal information about the party and documents which the contract between them provides for the agency to have an immediate right of access. It is expected that an amending bill will be introduced in the spring sittings of the Federal Parliament.
- ²⁶ The Government introduced a bill to amend the *Privacy Act 1988* into the Parliament during the autumn 1998 sittings. It lapsed with the calling of the recent Federal election. The bill which is expected to be re-introduced shortly will extend the *Privacy Act* to records of private sector contractors delivering government services.
- ²⁷ This right to obtain access to information about oneself is subject to specific exemptions designed to prevent real harm to government and those who deal with government. Many exemptions are subject to an overriding balancing public interest test. The *Privacy Act*

places obligations on public sector agencies to collect, store, use and disclose personal information about individuals, in a fair way.

²⁸ A recommendation of Parliament of the Commonwealth of Australia, the House of Representatives Standing Committee on Finance and Public Administration, the 'Martin Committee Report', *A Pocket Full of Change: Banking and Deregulation. Conclusions and Recommendations*, Canberra, AGPS, c. 1991 was that customers be permitted access to their own files held by their bank. This recommendation was not adopted by the banking industry and does not appear in its voluntary code of conduct.

²⁹ *Open Government: a Review of the Federal Freedom of Information Act 1982, op. cit.*, Paragraph 15.13

³⁰ There is some doubt as to whether the FOI Act extends to documents which are not physically in the possession of the Commonwealth agency to which the request is made even though there might be an immediate right to obtain possession as noted here. See *Sullivan and DIST* (1996) 23 AAR 59 (D381) and *Treelectric Pty Ltd and Energy Research and Development Corporation* (unreported AAT decision of 15 May 1997) in which the AAT was of the opinion that constructive possession was not envisaged by the term *document of an agency* because the words *created or received in the agency* operated as words of limitation restricting it to documents which are or have been in the agency's physical possession. If this is correct law (which is not universally accepted), in situations where there are no written contracts and the principal/ agent relationship is relied upon, *Freedom of Information Act* will not be able to be called in aid to require production of any documents of contracted service deliverers. There are many instances where no formal contract is entered into between the Commonwealth agency and the service deliverer e.g. private solicitors acting for government departments.

³¹ All relevant records are required to be produced in court proceedings or arbitration as part of pleadings between parties in dispute. This is known as *discovery and inspection* and is designed to limit the issues between the parties at the hearing.

³² Public Sector Research Centre Submission to the *Inquiry into Contracting out of Government Services; op. cit.*, Submission number 22 at p. 258.

³³ The term *Commonwealth record* is defined in s.3(1) of the *Archives Act 1983* to mean a record that is the property of the Commonwealth or of a Commonwealth institution. *Commonwealth institution* is defined to include departments, statutory authorities, Commonwealth controlled corporations and associations.

³⁴ The *Archives Act 1983* establishes the Australian Archives within the Department of Communications and the Arts. The Australian Archives operates under the name of the National Archives of Australia. The Act gives the National Archives of Australia the responsibility for conserving and preserving archival resources of the Commonwealth

and for making available Commonwealth records in the open access period, that is, records which are at least thirty years old.

In addition to providing public access, the other important function of the National Archives is to 'assist agencies in the efficient organisation and maintenance of their records' (s. 5). The National Archives has recently issued a policy on electronic messaging and guidelines on the impact of the *Evidence Act 1995* on Commonwealth Recordkeeping (9 April 1998) and agencies' responsibilities for recordkeeping in outsourced services arrangements (July 1998). These are part of the development of standards for recordkeeping in Commonwealth Government agencies.

³⁵ Under the *Disability Discrimination Act 1992* less favourable treatment means that the person is disadvantaged and is not given the same opportunity or choices as a person without a disability.

³⁶ Senate Finance and Public Administration References Committee, *Contracting out of Government Services* Second Report May 1998, Chapter 4, p. 1: from the submission of Professor Richard Mulgan, Vol. 3, p. 598.

³⁷ The guidelines for official witnesses before federal parliamentary committees, which consider the question of public interest immunity and its scope, rely in part on the exempt provisions of the FOI Act, though the guidelines are at pains to stress that the provisions of that Act have no actual application to parliamentary inquiries but 'are merely a general guide to the grounds on which a parliamentary inquiry may be asked not to press for particular information'. *Ibid*, Chapter 5, p. 1.

³⁸ The Committee was told that US state government contracts are generally available for public scrutiny once the contract is signed. *Ibid*, Chapter 5.

³⁹ *Ibid*, p. 477

⁴⁰ *Ibid*.

⁴¹ *L. Shaddock & Associates v The Council of the City of Parramatta* 150 CLR 225 (1981)

⁴² The *Freedom of Information Act 1982* (the FOI Act) creates a legally enforceable right of public access to documents in the possession of Commonwealth Ministers, departments, statutory authorities, most government business enterprises and other Commonwealth agencies. The FOI Act applies to documents (defined very broadly) in the possession of an agency. In order to prevent access under the FOI Act to commercial information of 'Jobs R Us', DEETYA must show that disclosure would be an unreasonable disclosure of business affairs (s43 FOI Act). This involves a balancing of the public interest factors in favour of disclosure against the public interest factors in non-disclosure. The factors in favour of disclosure would include:

- there is serious interest by community - not just curiosity;
- the information will make a valuable contribution to the public debate on an issue; and
- the right of the public to scrutinise the actions and procedures of a government

department to ascertain whether these government services are being efficiently and effectively delivered.

Factors in favour of non-disclosure would include:

- need to preserve confidentiality having regard to the subject matter and the circumstances of communications; or
- disclosure could be reasonably expected to have an adverse effect on the company's business interests by eg disclosing its profit margins to its competitors.

⁴³ The following reasons for allowing public access to government held information are pertinent:

- participation: the public must be informed if it is to play the part required of it in a democratic system (i.e. to judge the policies of a government and its agencies); and
- accountability: public access to official information is essential if the public is to scrutinise government agency actions.

⁴⁴ *Re Thwaites and Department of Premier and Cabinet* (DDB Needham case), unreported VIC AAT decision 21 January 1994.

⁴⁵ The *Archives Act 1983* is concerned with preservation and access to Commonwealth records. Commonwealth agencies are obliged by the Act to retain all records of their activities unless disposal of particular records is specifically authorised by the National Archives or as part of a normal administrative practice. A Commonwealth record is defined in the Act to include 'a record that is property of the Commonwealth or of a Commonwealth institution'.

Commonwealth records include those that are the property of a Commonwealth institution. A Commonwealth institution is defined to mean, among other things, 'an authority of the Commonwealth' and Commonwealth controlled corporations and associations which covers most government business enterprises.

Whether or not GBEs are subject to the *Archives Act* is determined by how they are established. To be excluded a Commonwealth controlled corporation or unincorporated business must be expressly declared to be excluded under the *Archives Act*.

⁴⁶ Elliot, 'Balancing Risk Management with Accountability', *op. cit.*, p. 5.

⁴⁷ GDA 25 issued under Section 24 (2) (b) of the *Archives Act 1983* authorises arrangements for the disposal of Commonwealth records (including those created by a contracted service deliverer and ownership vested in the Commonwealth) to be destroyed only on the following terms and conditions:

- ensure that the contractor does not destroy or otherwise dispose of records without the express permission of the Agency (in accordance with Records Disposal Authorities used by the NAA);
- recover all Commonwealth records at the completion of termination of the contract, or at any other reasonable time;

- ensure that the records are appropriately managed and maintained;
- ensure that the security of the records is protected;
- ensure that the personal information is protected consistent with the provisions of the *Privacy Act 1988*;
- ensure that unauthorised disclosure of information is prevented, in accordance with the provisions of the *Crimes Act 1914* and any legislation relevant to the Agency;
- ensure that the contractor provides reasonable access to the records by the Commonwealth and its authorised agents;
- ensure that the use of the records by the contract is limited to legitimate purposes under the terms of the outsourcing arrangements.

Destruction or disposal in breach of GDA 25 is an offence carrying a penalty of a fine of \$2000.

⁴⁸ Under the *Freedom of Information Act 1982* Commonwealth agencies are required to provide access to documents in their possession unless the documents sought are within an exception or exemption specified in the legislation. Access to *all* documents in the possession of an agency is not possible as agencies must be able to protect the legitimate interests of government and the private and business affairs of persons and organisations in respect of whom information is held.

⁴⁹ See endnote 23.

⁵⁰ See endnote 34.

⁵¹ The Ombudsman is established under the *Ombudsman Act 1975* and is empowered to investigate (informally and in private) complaints about administrative actions of Commonwealth departments, most statutory authorities and government business enterprises (known as 'agencies'). After investigation of the complaint, if the Ombudsman thinks it is necessary the Ombudsman may recommend to the agency that it take particular action on the matter. If necessary, the Ombudsman may report directly to the Prime Minister and the Parliament.

The Ombudsman can require production of files and can compel people to answer questions or produce documents in the course of a formal enquiry even where legal professional privilege could apply or where the answer would incriminate the witness. The Ombudsman can make recommendations that actions or decisions that have been complained about be changed or that ex-gratia compensation be paid, but cannot actually change a decision. The Ombudsman makes no charge for services.

⁵² Section 49 of the Commonwealth Constitution gives each House of Parliament, its members and its committees the powers, privileges and immunities of the House of Commons, its members and committees as they stood at the time of the establishment of the

Commonwealth (i.e. 1 January 1901).

Parliament has modified the privileges of the House of Representatives and the Senate by the enactment of the *Parliamentary Privileges Act 1987* which provides for this offence.

⁵³ Elliot, 'Balancing Risk Management with Accountability', *op. cit.*, p. 5.

APPENDIX 1

Delivery of Commonwealth Government Services

Administrative law rights and remedies for service recipients and other members of the public

When The Government Delivers The Service	When the Contractor Delivers The Service
Complaints can be made to the Commonwealth Ombudsman about decisions or actions or practices and procedures which are unlawful, oppressive or unreasonable in all the circumstances.	Complaints can be made to the Ombudsman about the Government agency that manages the contract but not about the actions of the contractor.
<p>If a person wants information about a service and it is not provided, a formal request can be made for the information under the Freedom of Information Act 1983 (Cth).</p> <p>Government documents relating to commercial activities may be exempt from disclosure under the Act (see Part II and Part III of Schedule 2 to the Freedom of Information Act).</p>	<p>A formal request for information under the Freedom of Information Act will only cover information, like the contract, that the Government possesses because the Act does not apply to documents that the contractor might have.</p> <p>Even if the Government has relevant documents in its possession, access may be refused if they relate to the business affairs of the contractor (this includes documents that contain trade secrets or any other information having a commercial value that would be useless if they were disclosed).</p>
If the Government is keeping information about someone that person can use the Freedom of Information Act to get access to that information and can have it corrected if the information is incomplete, incorrect, out of date or misleading.	The Freedom of Information Act does not apply to a contractor so a service recipient has no right to find out what information the contractor has about the recipient or to get it corrected.
Anyone can complain to the Privacy Commissioner if they are concerned about how the Government collects and handles personal information and there are Information Privacy Principles which set out how the Government is to treat this information and the circumstances in which agencies can pass the information to someone else.	A person cannot complain to the Privacy Commissioner about how a contractor collects and handles personal information.
Where the action complained about is a decision authorised by legislation, the complainant may be able to seek review of	Applications for internal or administrative review cannot be made.

the decision on its merits by first, internal review and next by a Commonwealth review tribunal or the Ombudsman. Each tribunal only has jurisdiction to review decisions where legislation specifies that review of those decisions is available.	
Other forms of review of Government action, including requests for statements of reasons for decisions under the Administrative Decisions (Judicial Review) Act 1977, apply only to Commonwealth actions.	The Administrative Decisions (Judicial Review) Act 1977 does not apply to some decisions made under contracts.

*table taken from Sue Bromley, 'The Contracting out of Government Services' *Admin. Review*, No 48, May 1997.