This thesis is my own original work.

Kanwal Puri
This thesis deals with the legal nature of government contracts in Australia. It deals with the law relating to and governing federal contracts. The scope of this body of law is broad and somewhat complex. It includes several aspects of constitutional law relating to the structure and operation of the government as well as a substantial amount of law that might normally be categorised as sales or contract law.

Contracting for supplies and services is only one of the several means by which the government can satisfy its needs. The government can perform the work itself, the supplies can be requisitioned or the right of eminent domain can be invoked. These alternate techniques have all been used at one time or another, especially during periods of crisis or emergency. Under normal circumstances, however, the government has chosen to fulfil the vast majority of its needs by contracting for them - the method most consistent with a private enterprise economy.

One means of analysing this government contracting process is to consider the relative position and bargaining power of the government and its contractors. Does the government represent such a large segment of the total demand for a product that it dominates the market by controlling the demand?
Conversely, are some suppliers in the position of controlling the entire output of a product? The Australian Government deals contractually with almost every part of the private economy, from major companies to small businesses and such non-profit institutions as universities and research organisations. Hence the parties that supply goods and services to the government are, in one sense, as diverse as the entire economy. On the other hand, there is a large group of contractors, e.g. in the aerospace field, which are almost totally devoted to government work.

The Australian Government is also just as diverse as the industries with which it deals. All Commonwealth Government Departments (27 in number at present) and most Commonwealth statutory authorities conduct significant procurement programmes. Generally these departments and authorities have been assigned the responsibility for fulfilling all or a major portion of the government's need in a given area. As a result, they have adopted procurement techniques, procedures and standard forms especially designed for their particular objectives. Some uniformity of policy has been effected through the designation of the Office of Purchasing Division in the Department of Administrative Services which acts as the central purchasing organisation in some areas of government purchasing.
Since the field of government contracts is one of growing importance in the relationship of governments to individuals, an attempt is made here to analyse the legal nature of such contracts. All but chapters I and VIII in this thesis have formed the basis of six seminars I gave in my Department during 1976 and 1977. Part of chapter IV formed the basis of a paper which I delivered at a Seminar sponsored jointly by Department of Law and Institute of Purchasing and Supply Management (IPSM). This paper has been published in the IPSM's official journal "Australian Purchasing and Supply" (January 1978).

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KEY TO ABBREVIATIONS

A. Atlantic Reporter (United States)
A. 2d Atlantic Reporter, Second Series
A.B.A.J. American Bar Association Journal
A.C. Appeal Cases
Adelaide L. Rev. Adelaide Law Review
A.I.R. All India Reporter
Akron L. Rev. Akron Law Review
A.L.J. Australian Law Journal
A.L.J.R. Australian Law Journal Reports
All E.R. All England Reports
A.L.R. Argus Law Reports
Am. Econ. Rev. American Economic Review
Am. J. of Comp. L. American Journal of Comparative Law
Am. Soc. Rev. American Sociology Review
Am. Univ. L. Rev. American University Law Review
Australian Purchasing and Supply
B.C. Ind. & Comm. L. Rev. Boston College Industrial and Commercial Law Review
Burr. Burrow's Reports, King's Bench
Bus. Law. Business Lawyer, The (United States)
C.A. Court of Appeal
Cal. California Reporter (United States)
Cal. 2d California Reporter, Second Series
Camb. L. J. Cambridge Law Journal
Ch. Chancery
C.L.R. Commonwealth Law Reports
Cmdnd. Command Papers (United Kingdom)
Colum. L. Rev. Columbia Law Review
Cornell L. Q. Cornell Law Quarterly

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<td>M.P.</td>
<td>Madhya Pradesh (India)</td>
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<td>M.U.L.R.</td>
<td>Melbourne University Law Review</td>
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<td>McGill L. J.</td>
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<td>N.E.</td>
<td>North Eastern Reporter (United States)</td>
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<td>N.J.</td>
<td>New Jersey Reports</td>
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<td>Ohio State Law Journal</td>
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<td>P.</td>
<td>Pacific Reporter (United States)</td>
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<td>Pa.</td>
<td>Pennsylvania State Reports</td>
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<td>Public Admin. Rev.</td>
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<td>Q.B.</td>
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<td>S.A.S.R.</td>
<td>South Australian State Reports</td>
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<td>South. Calif. L. Rev.</td>
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CHAPTER I

INTRODUCTION

1. General

Contracts have been indispensable tools for carrying on business amongst private parties; now they have become almost equally important in conducting the affairs of government. Construction of public works, procurement of defence materials, and vital research and development are performed to a substantial extent under the terms of contracts entered into between government and private persons or organisations. The requirements of government are extensive and wide ranging; the principal method by which they are met is through procurement.\(^1\) The government has to purchase stores right from 'brooms to aeroplanes'; from day to day minor office requirements such as pens, paper clips, paper, paper products, wood products,

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\(^1\) The term 'procurement' has a wide connotation embracing the whole process of acquisition of goods and services from the development and definition of a requirement through to warehousing and issue for use. Often it seems to be used as a simple equivalent for all government contracting and that is the way it has been used here. For an elaborate definition of 'procurement', see s.3, Purchasing Commission Bill 1975. (The Bill was rejected by the Senate and thus never became an Act). See also, Turpin, Government Contracts (1972) 267 [hereinafter referred to as Turpin]; Government Procurement Policy Report by Committee of Inquiry, P.P.No.124 of 1975, xiii [Also known as Scott Committee Report]; Whelan and Pasley, Federal Government Contracts, Cases and Materials (New York 1975) 6; Enderby, "Purchasing as a Function of Government" (June 1974) Australian Purchasing and Supply 11.
furniture, toiletries and other materials, to great quantities of goods of every description ranging from battleships to motor vehicles, computers, aircraft, space satellites, sophisticated electronic equipment for communications on air, land and sea and weapons systems. Government also requires many types of services such as construction or repair of buildings, highways, bridges and airfields, the execution of programmes of research and development, the designing of equipment, the writing of computer programmes, and consultancy and project management services.

Government is huge and hugely rich and its contracts are enormous. The greatest consumer and most powerful customer in Australia is the Commonwealth itself. It buys in such volume that goods have to be stored and drawn upon when needed. The Commonwealth Government has to supply the standard specified needs of materials and services which are regularly issued to, and used by, government departments, schools, hospitals, police, defence forces, harbour facilities, water and sewerage, gas and electricity, and many other public community needs. Contract is not, however, the only method by which government may obtain its requirements. Some of the goods and services are also provided by the government's own factories, dockyards, workshops and research establishments. But most of the government's requirements are met by contracts whereby rights and duties are created not by the exercise of powers that are peculiarly
2. Reasons for Studying Government Contracts

Because practically all functions of government depend, in some measure, on contracts for their continued operation, the sheer size of the government's organisational structure means that a tremendous power for good or ill is wielded by the purchasing system. Whilst funds are budgeted for functions such as defence, telecommunications, road construction, public works, health, etc., the translation of these budgets into specific governmental actions and accomplishments is to a significant extent through procurement. The effectiveness of government expenditure in meeting its objectives depends, therefore, in no small way, on the efficiency of the procurement function. Procurement is an integral part of the business of government. It has a very wide impact on the Australian government's important departments of Treasury (since taxpayer's money is spent), Administrative Services and Defence (for, the security of the country is largely dependent upon the best procurement of ammunition),\(^2\) Postal and Telecommunications (which enters contracts for the purchase

\(^{1}\)Turpin, op. cit. at 88, 260; Campbell, "Federal Contract Law" (1970) 44 A.L.J. 580.

\(^{2}\)Cf. Millar, Australia's Defence (2nd ed. 1969) 145: "Some 20 percent of all defence equipment made in Australia is produced by the Commonwealth Department of Supply, and 80 percent under contract to it."
of communications materials), Construction (with responsibility for the planning, execution and maintenance of Commonwealth Government works), Transport, as well as many other government departments. Thus not only does the cost of purchased equipment, stores, etc., make a heavy impact on the budget, but many important government policies and objectives could not be carried out unless procurement did its job.

Government contracts play a catalytic and pacing role in bringing government-developed standards and products into practical commercial use. These range from automobile safety standards and fire-resistant materials to solid-state computer components. Entire segments of industry have been spawned by technological break-throughs and spin-offs from government procurements for electronics, metallurgy, fuels, and lubricants. It was recently remarked that Australian manufacturing to a large extent depended for its existence on government contracts.\(^1\) The magnitude of government orders allows industry to plan for larger volumes, more sophisticated methods, better equipment and cost reduction. It provides leverage which is used as an instrument for achieving national, social and economic objectives that do not pertain directly to deliverable goods and services. For example, procurement is used to assure equal employment opportunities, improve wages and conditions of employment, and

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\(^1\)C.P.D. (Senate) 20 August 1975, Vol. 65 at 83.
channel employment and business opportunities into labour surplus areas. Even ecological considerations add new dimensions to the purchasing job where the function is used as an instrument of corporate efforts in anti-pollution drives. It would not be unlikely that what a supplier does to the environment can be a factor of his acceptability to receive an order. Volume production puts industry in a better position to enter into the export market. It also encourages industry's research and development and the desire to keep up with overseas competitors. Government contracts can play a part in other ways too, as for example, by the promotion of local industry where necessary. Government can discriminate in favour of private industry as against government establishments, or, again, in favour of local industry as against overseas, or in favour of concerns which are domestically owned as against those owned by foreign interests.

Government purchasing can also be the source of facts to predict the future. Through its suppliers, government can collect basic information on new technologies, new methods and new ideas. In brief, the magnitude of the outlays involved, the important programme needs dependent on procurement, and the impact of procurement policies on the private sector underline the importance of making certain that procurement operations are carried out as effectively and economically as possible. It is significant that the first recommendation noted by the Scott Committee recommends that "the Australian Government
takes an early opportunity to announce its intention to upgrade its procurement operations to a degree commensurate with the importance of such policies, the total amount of money involved therein and the wide spread sections of the community thereby affected".\(^1\)

3. **Economic Significance**

   From the standpoint of its size in terms of Australian government expenditures, the study of government contracts might be reckoned a worthwhile thing. Accurate figures on exact dollar amounts spent on government contracts are, however, hard to come by, but the total figure is vast indeed.\(^2\)

   The Purchasing Division in the Department of Administrative Services has recently estimated government expenditure on procurement by Commonwealth purchasing agencies during 1975-1976 at $3,000 million, with a total number of contracts arranged during that year as exceeding 35,000.\(^3\) Pointing to the importance of procurement in Australia, the Scott Committee said that in money terms procurement by government bodies

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\(^1\) *Scott Committee Report, op. cit.* para. 9.1.

\(^2\) The Scott Committee was disappointed that Australia's procurement statistics were either not available or, where available, were not in a suitable form to allow the types of examination which the Committee would have liked to make.

\(^3\) *Government Purchasing Arrangements* (Draft Policy Booklet), Purchasing Division, Department of Administrative Services, Canberra, May 1977.
played a most important part in the expenditure of governments.\footnote{Scott Committee Report paras. 6.9 to 6.21.}

The statistics given in Tables 1 and 2 below have been collected from various sources to point to the economic significance of the Australian government's procurement function.

\footnote{Scott Committee Report paras. 6.9 to 6.21.}

2 The impact of government contracts can also be seen from the following figures: In its report for the year 1974-1975, the Department of Manufacturing Industry published the following figures as value of purchasing during 1970-1975 (this department took over the procurement function from the Department of Supply in 1974. Its Contracts Branch was later transferred to the Office of Purchasing Commission on 1 July 1975, which is now called Purchasing Division, Department of Administrative Services):

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<td>1970-71</td>
<td>$180 m.</td>
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<td>1971-72</td>
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<td>1972-73</td>
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<td>1973-74</td>
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<td>1974-75</td>
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In the pre-war period (1913-1914) the annual value of departmental requirements for the Commonwealth was approximately £2.5 million, see for details, Report from the Joint Committee for Public Accounts upon stores and supplies for Commonwealth Requirements, P.P. No. 319 of 1914-15-16; Commonwealth's financial commitments for procurement of stores and materials during 1957-1958 was approximately £100 million, see for the break-up, Scott Committee Report, para. 2.24, and see, Forty-Eighth Report of the Parliamentary Joint Committee of Public Accounts, P.P. No. 58 of 1960 for 1960 estimates. For detailed statistics regarding defence procurement spending from 1950-1951 to 1968-69, see Bellany and Richardson, Australian Defence Procurement (1970). (This is the first study ever undertaken of the policies of Australian governments towards the acquisition of weapons for the defence forces). For 1970-1971 figures on defence procurement, see Snedden, "Dollar Purchasing Power" (March 1972) 19 (11) Australian Purchasing 14.
**TABLE 1**

**AUSTRALIAN GOVERNMENT EXPENDITURE ON PROCUREMENT ($ million)**

<table>
<thead>
<tr>
<th>Description</th>
<th>1972-73</th>
<th>1973-74</th>
<th>1974-75</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Gross national expenditure&lt;sup&gt;a&lt;/sup&gt;</td>
<td>40,194</td>
<td>50,400</td>
<td>58,618</td>
</tr>
<tr>
<td>(2) Total public sector expenditure&lt;sup&gt;a&lt;/sup&gt;</td>
<td>8,907</td>
<td>10,718</td>
<td>14,383</td>
</tr>
<tr>
<td>(3) Total public sector expenditure as a percentage of (1) above&lt;sup&gt;a&lt;/sup&gt;</td>
<td>22.6%</td>
<td>21.3%</td>
<td>24.5%</td>
</tr>
<tr>
<td>(4) Australian Government (including statutory authorities) public sector expenditure out of (2) above&lt;sup&gt;a&lt;/sup&gt;</td>
<td>3,187</td>
<td>3,865</td>
<td>4,933</td>
</tr>
<tr>
<td>(5) State and Local authorities public sector expenditure out of (2) above&lt;sup&gt;a&lt;/sup&gt;</td>
<td>5,720</td>
<td>6,853</td>
<td>9,450</td>
</tr>
<tr>
<td>(6) Australian Government public sector expenditure as a percentage of (2) above&lt;sup&gt;a&lt;/sup&gt;</td>
<td>35.8%</td>
<td>36.1%</td>
<td>34.3%</td>
</tr>
<tr>
<td>(7) Total Government (Commonwealth and States) procurement&lt;sup&gt;b&lt;/sup&gt;</td>
<td>5,841</td>
<td>6,868</td>
<td>9,372</td>
</tr>
<tr>
<td>(8) Total Purchases of Materials, goods and services by Australian Government Authorities (including Budget and Non-Budget sector outlays)&lt;sup&gt;c&lt;/sup&gt;</td>
<td>2,028</td>
<td>2,299</td>
<td>3,072</td>
</tr>
<tr>
<td>(9) Total expenditure on procurement by States and local governments&lt;sup&gt;d&lt;/sup&gt;</td>
<td>3,813</td>
<td>4,569</td>
<td>6,300</td>
</tr>
</tbody>
</table>

<sup>1</sup>The figures for 1972-73 represent a revision of Scott Committee Report Tables and the revised estimates have been taken from Australian National Accounts.

**Sources:**

(a) Compiled with the assistance of the publications of Purchasing Division, Department of Administrative Services, 17 November 1975 (Minute Paper); National Income and Expenditure Statement and Australian National Accounts.

(b) Compiled with the assistance of the publications of Purchasing Division, Department of Administrative Services, 20 November 1975 and October 1976; Australian Bureau of Statistics (ABS) and Quarterly Estimates of National Income and Expenditure.

(c) Australian Government Statistician, October 1976.

(d) Purchasing Division, Department of Administrative Services, 20 November 1975 (Minute Paper).
TABLE 2

ESTIMATED PURCHASES BY AUSTRALIAN GOVERNMENT AUTHORITIES OF MATERIALS, GOODS AND SERVICES, 1971-72 to 1975-76

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$m</td>
<td>$m</td>
<td>$m</td>
<td>$m</td>
<td>$m</td>
</tr>
<tr>
<td>Final Consumption Expenditure</td>
<td>977</td>
<td>1032</td>
<td>1087</td>
<td>1438</td>
<td>1500</td>
</tr>
<tr>
<td>Expenditure on Fixed Assets</td>
<td>589</td>
<td>530</td>
<td>659</td>
<td>928</td>
<td>1000</td>
</tr>
<tr>
<td>Gross Working Expenses of Public Trading Enterprises</td>
<td>471</td>
<td>466</td>
<td>553</td>
<td>706</td>
<td>500</td>
</tr>
<tr>
<td>Total Purchases of Materials, Goods and Services</td>
<td>2037$^2$</td>
<td>2028</td>
<td>2299</td>
<td>3072</td>
<td>3000$^2$</td>
</tr>
</tbody>
</table>

Represented by:

| Purchases from Local Sources                            | 1879    | 1872    | 2072    | 2992    | 3544    |
| Purchases from Imported Sources                         | 158     | 158     | 228     | 128     | 156     |
| Ratio of Internal to External Sources of Supply $^{3:1}$ | 12:1    | 9:1     | 23:1    | 23:1    |

Imports:

| Imports of sophisticated equipment and military stores   | 106     | 113     | 198     | 76      | 98      |
| Imports of Works of Art                                  | -       | -       | 3       | 6       | 8       |
| Imports of other Items                                    | 52      | 45      | 27      | 46      | 50      |
| Ratio of Internal to External Sources of 'Other Items' Purchases | 32:1    | 42:1    | 77:1    | 65:1    | 71:1    |

---

1 Includes Budget and Non-Budget Sector outlays.

2 Revised estimates - Purchasing Division (Canberra, May 1977)

3 Sophisticated equipment and military stores includes ADP, telephon telegraphic equipment, electrical circuit machinery, tanks, air­craft, aircraft parts, bombs, missiles, weapons and other stores.

Source: Compiled by Purchasing Division, Department of Administrative Services and the Australian Bureau of Statistics. October 1976.
The United States Government, which is the biggest purchaser of goods and services in the whole world, spent during fiscal year 1972 $57.48 billions on procurement by executive agencies.¹ This amount represented about one-fourth of the United States Government budget, particularly when combined with the estimated $39.1 billion expended through Federal grants.²

Procurement expenditures are thought to generate some three times their amount through the "multiplier" effect (secondary and related consumer spending). Thousands of government activities are involved in acquiring products and services or supporting programmes that affect a large population. The impact of government procurement on the nation's economic and social well-being is more far-reaching than even these figures suggest. The

¹See Report of the Commission on Government Procurement (1972) Vol.1, 154-55 [hereinafter referred to as Report of the C.G.P.]. In the United Kingdom, the total expenditure of the Procurement Executive (Ministry of Defence), which is only one of the departments of the central government involved in procurement activity, was in excess of £1000 millions in 1971: Turpin and Whelan (eds.), The London Transcript - A Comparative Look at Public Contracting in the United States and the United Kingdom (1973) Part I at 30. In Canada, on the other hand, contracts were let for a contract value of approximately Can.$1000 millions during 1972: Scott Committee Report para. 7.6.

²Report of the C.G.P., ibid. "Every 40 seconds of every working day the Department of Defense enters into a contract action valued at $10,000 or more" (a statement made by an Assistant Secretary of Defense, Installations and Logistics (U.S.)): London Transcript, op. cit., Part II at 3.
award of a major contract can stimulate the growth of certain regions and industries; and the failure of a large government contractor may plunge sizeable areas into economic hardship.

4. A Fourfold Classification of Government Contracts

Government contracts are affected by a wide range of public needs having to serve some complex economic activities. As a result government contracts reveal various specific conceptual differences from private contracts. Most areas of dissimilarity between government contracts and private commercial contracts involve mandatory clauses which are inserted into the government contract and which a contractor must accept if he chooses to do business with the government. There is therefore an absence of real negotiations in government contracts. However, one obvious dissimilarity derives from the nature of one of the contracting parties. This is the immunity of the sovereign to suit by the contractor. The doctrine of sovereign immunity has the effect of limiting the contractor's legal remedy for breach of contract by the government to such situations and to such forums as the government chooses. The parties to a

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1 The 'private' contract itself has undergone many changes. See Jeff, "Contract as Thing" (1970) 19 Amer. Univ. L. Rev. 131, 137-144, and articles cited therein.

2 This aspect of government procurement is discussed in chapters III and IV.

3 Chapter II deals with constitutional aspects of government contracts.
private contract need not contend with such a defence. Other crucial examples of differences between government and private contracts are the government's unilateral right to terminate, to constrict, to alter, vary or change the quality, quantity or character of goods and services contracted for in the contract; the administrative resolution of disputes; and the existence of an element of public accountability in government purchasing since public money is spent. As already stated, today's government contract is more than a procurement device: it is also an instrument through which the government executes socio-economic policies such as minimum wages, fair employment practices and small business aid. As a result, a contractor who elects to deal with the government must be prepared to undertake larger responsibilities, turning even "square corners".1

Because government contracts reveal a number of conceptual differences (as we shall see in detail later),2 the following chapters will try to identify and develop a fourfold categorisation

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1 In Rock Island A. & L.R. Co. v. United States (1920) 254 U.S. 141, 143, Justice Holmes warned that persons must "turn square corners when dealing with the Government".

At one end of the spectrum we shall identify government contracts as in every respect similar to private commercial contracts. At the other end of the spectrum we shall see government contracts becoming increasingly unlike private contracts and increasingly similar to what might be called public 'arrangements' i.e. arrangements not so much for the procurement of supplies as for the fulfilment of certain national, social, economic and political objectives of government. Between these extremities, we shall find other variants of government contracts: on the one hand, 'contracts of adhesion' which still resemble some private contracts; on the other hand, research and development contracts which are far different from private contracts but which still have some elements to be identified as 'contracts'.

5. **Scheme of the Thesis**

In organising the material, an endeavour has been made to provide a balanced coverage of most aspects of government contracts. The thesis has been divided into eight chapters. Each chapter has been further divided into sections containing relevant materials selected to give a rounded view of the present state of the legal topic covered by the chapter. It will be noted that chapter II of the thesis is the most extensive - reflecting the substantial number of legal problems that arise during formation of government contracts. This chapter is, therefore, designed to deal with the general considerations
involved in government contract formation with its various rules and procedures. The simple government contracts and the adhesion contracts are discussed in chapter III. In addition, chapter IV deals with the various standard terms which apply to government contracts. The 'Contrat Administratif' or the French administrative contract is discussed in a separate chapter, chapter V. The discussion of research and development contracts is left for chapter VI, while chapter VII forms the subject matter of planning agreements. The final chapter, chapter VIII, contains the conclusions emerging from the above-mentioned chapters and attempts to suggest possible solutions to the various problems that have arisen in practice. Although the main emphasis in the discussion is on the Australian government contract, the developments in the United Kingdom, United States and India have also been noted, wherever appropriate.
AUSTRALIAN GOVERNMENT CONTRACTS:
GENERAL CONSIDERATIONS

1. Historical Development of Australian Government Contracts Process

(i) General

A few general observations may be made before tracing the historical development of some of the important principles and procedures which govern government contracts today. One, the Australian government contract process has developed in a piecemeal fashion. Two, no single department or body has been fully in charge of the procurement activity that involves so much money and so many people, and has such important economic implications. The result is that different departments had (and still have) markedly different procedures and forms, and this has hindered uniform development of various contracting principles. As will be seen, some principles of Australian Government procurement have undergone a spasmodic and haphazard development; as yet no complete comprehensive manual of rules and conditions has been issued as a guide to all departments. Thus departments have been guided by Treasury Regulations and

1 "The Commonwealth at present may be said to have no recognised system of purchase, supply, and distribution of stores applicable to Departments as a whole": Report from the Joint Committee of Public Accounts upon Stores and Supplies for Commonwealth Requirements P.P. No. 319, 501 (1914-1915-1916).
Directions on the one hand and a plethora of various Government decisions, taken at various times, on the other.

A study of the history of Australian Government purchasing also reveals that, in the past, authority and responsibility, if not separated, have been at least confused and indistinct.

Furthermore there have been few real systematic reviews of Government procurement.\textsuperscript{1} The Scott Committee strongly felt that

\begin{itemize}
\item[1.] The following is the list of inquiries made so far in relation to Australian Government Contracts. With the exception of the Scott Committee, none of these inquiry committees was devoted exclusively to an in-depth review of the effectiveness of the whole Australian procurement function, but passed judgment on some isolated factors. These Committees, in chronological order, have been;

3. Report of the Royal Commission Regarding the Contract or Contracts with Abbco Bread Co. Pty Ltd. for the Supply of Bread to the Department of the Army, and other matters, P.P. No. 38 of 1940-1941.
\end{itemize}
procurement had not previously had what would appear to be its rightful recognition within the government structure.\(^1\)

(ii) Public Tendering

A central feature of the Commonwealth purchasing procedure since the beginning of Federation has been the tendering system designed to give all interested suppliers an opportunity to submit offers, and to enable the purchasing authority to weigh the merits of various products offered, in the light of their relative prices. It was, however, soon recognised that for many small purchases or urgent purchases, the open tender system was neither necessary nor appropriate. In 1902, under the first Treasury Regulations (now called Finance Regulations) (deriving their force from the provisions of the Audit Act 1901), exemption from the public tender procedure was given in respect of goods costing under £100 - which marks the beginning of the system of various levels of 'thresholds' for calling of tenders, written quotations, etc.\(^2\) Exemptions (which later on came to be called 'Certificates of Inexpediency')\(^3\) from tender procedures were granted in those cases where the calling of public tenders was impracticable or inexpedient. The Joint Committee of Public

\(^1\)Scott Committee Report para. 9.3.
\(^2\)Finance Regulation 52. By 1923 the exemption from tenders was lifted from £100 to £200. See Scott Committee Report para. 2.12.
\(^3\)Finance Regulation 52AA.
Accounts, which was the first body ever appointed to look into the various contracting systems prevalent at that time in the Commonwealth Departments, recommended in its Report in 1916 that the tenders be invited throughout the Commonwealth for the procurement of supplies by the Commonwealth Central Supply Board, the creation of which was also recommended by the Committee. Again, in 1953 the Inter-Departmental Committee observed that the tender system had proved over many years to be the fairest and generally the most economical method of obtaining Commonwealth supplies and enjoyed the full confidence of the business community. The Committee recommended against any variation of that system of procurement in any material respect.

The whole question of public tenders was again reviewed by the two Committees of Public Accounts in 1959 and 1960. The Committee recommended that the basic tenets upon which Government procurement procedures should be formulated should be that, as a general proposition, all who wish to participate in government business be given an opportunity to do so within reasonable limits. The Committee accepted the conclusion of the Working Party that a trades list procedure on the lines of the system

1P.P. No. 319 of 1914-1915-1916.
2Report No. 1 of Inter-Departmental Committee paras. 8 and 9.
3Forty-Second and Forty-Eighth Reports: P.P. No. 60 of 1959 and P.P. No. 58 of 1960, respectively.
4P.P. No. 60 of 1959 para. 24.
5The Working Party was constituted pursuant to Recommendation 31, Chapter VII P.P. No. 60 of 1959. Its Report is to be found in Appendix No. 2, P.P. No. 58 of 1960.
adopted by the United Kingdom government was not generally suitable for application in Australia but that a modified form of trades list procedure, combined with invitation to tender by advertisement above a specified monetary limit provided a suitable procurement system for the Commonwealth Government. The Committee also recommended that the monetary limit in Treasury Regulation 52 be increased from £200 to £500, provided certain conditions were fulfilled.

Public tendering, though still remaining the predominant method of procurement, was gradually found not to be the most appropriate in all situations. It was found uneconomical to prepare technical specifications or print large numbers of invitations to tender, when only one or two of a particular item were required. To cater for some of the difficulties and different circumstances which made the tender system at times, if not unworkable, at least rather unsuitable, methods were devised under which the tender system need not be used. One method was to enhance the amount of the "threshold" and another, more frequent, to grant "certificates of inexpediency". Public interest was also found to be not served when departments were faced with the problem of price fixing and collusive tendering. It was found that some potential tenderers were deterred from making a lower offer than that offered by organisations tendering collusively for fear of being "disciplined" by their

1 P.P. No. 58 of 1960, 15. See also The Report of the Working Party, paras. 19 et seq.
2 Ibid.
rivals. To meet this situation, various methods were recommended and enforced from time to time.¹

While subscribing to a competitive procurement system with public tendering as a basic feature, the Australian Governments have adhered for a long time to a general principle that the lowest suitable tender should be accepted and that some clear justification is needed to depart from this approach. In accordance with this basic guideline (and in support of it) the basis of Australian Government procurement policy has been explicitly stated long since, as being to obtain the 'best value for money spent', and it has generally been accepted that this objective can be attained through the open tender system. The other important elements which have guided government procurement are, that, as a general proposition, all should be given the right to participate in government contracts, that procurement procedures should be beyond reproach and that Government should have a reputation for fair dealing.²

Another point in the historical development of the Australian contracting process is the policy of the government to place manufacturers in all States on an equal footing by inviting tenders on the basis of free on board, free on rail or into store, capital city, State of manufacture. Procurement has


thus been used as a means of disguised subsidy for suppliers who are more distant from the point of use. According to the Scott Committee, such a practice was followed in defence purchasing as far back as 1917.\(^1\) The Inter-Departmental Committee on Procurement Policies and Procedures 1960-1961, considered the question of inclusion of freight in tenders in relation to opportunities for suppliers in different States to supply government requirements but recommended that no change needed to be made in procedures.\(^2\)

(iii) **Post Award Policy**

The origin of public disclosure of tenders can be traced back to colonial regulations. The requirement to gazette information concerning contracts entered into by an Australian Colony first occurred in New South Wales in 1823. The Regulations regarding the Commonwealth's contracts have been influenced mainly by the rules obtaining in the Colony of Victoria at Federation. That Colony's "General Regulations Respecting Public Moneys" used the expression "an abstract", in 1857, in requiring that all contracts entered into on behalf of the Government of Victoria be published in the Government "Gazette". Since its inception in 1902, Treasury Regulation 53 has retained this principle of publishing "an abstract".

\(^1\)Scott Committee Report para. 2.10.
\(^2\)Id. paras. 2.23 and 2.25. Regarding government's policy for 'overseas purchasing' see Scott Committee Report paras. 3.53, 3.54; Notes on Australian Industry Participation in Overseas Defence Procurement (December 1972); Report of the Defence Legal Services Committee of Review para.186 (November 1971); Bellamy and Richardson, Australian Defence Procurement (1970)26.
The prime purpose of notification of contracts arranged in the Government Gazettes has been public disclosure of government contracts. It has been believed to add to the general confidence in the fair application of the rules and procedures governing government procurement and to prevent any tendency towards, or suggestion of, departmental favouritism to certain tenderers.

Regulation 53 has undergone various amendments since its inception in 1902. In its Forty-Eighth Report to Treasury Regulation 52, the Public Accounts Committee re-affirmed the principle of public disclosure and recommended that all contracts let at the value in excess of £200 should be notified in the Commonwealth Gazette irrespective of whether an inexpediency certificate was issued, selected quotations sought, or an Order-in-Council obtained or public tenders invited. In its Seventy-Seventh Report (1965), the Parliamentary Joint Committee of Public Accounts endorsed this view while dealing with Regulation 53 threadbare. It specifically went into the question of desirability or otherwise of disclosing a successful tenderer's unit prices. In that connection, the Committee took note of the following views of the Attorney-General's Department and expressed its agreement

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1 For a chronological record of these changes between 1902 and 1961 with amendments to the relevant Treasury Directions see Appendices 2 and 3, Seventy-Seventh Report of the Joint Committee of Public Accounts, P.P. No. 251 of 1964-65.

2 P.P. No. 58 of 1960, 15.
with the legal position. The Attorney-General's Department had stated:¹

There is no general rule of law that tenders submitted to any person calling for tenders are to be treated as confidential. There may be particular customs applicable in particular trades in this regard, but I do not know of any specific example. A person who submits a tender may do so on condition that it is maintained confidentially by the person to whom it is submitted. In that case I believe the sanction for failure to observe the confidence is a business sanction and not a legal sanction. If the person to whom the tender is given does not maintain the confidence reposed in him by the tenderer then that tenderer may not tender again.

The Joint Committee though agreeing that, in a competitive market, disclosure of the unit prices of a contract considerably assisted competitive contracting and promoted public confidence in departmental tendering by removing any suspicion of patronage on the part of contracting agencies, yet said that there were substantial administrative reasons for not publishing unit prices in the Gazette. It pointed out that a large volume of detail would be required to gazette the unit prices. The Committee however added that in order to maintain the principle of fullest possible disclosure of contracts, an unsuccessful tenderer may obtain further details of the successful tenderer and the reasons for the non-acceptance of its tender by writing to the purchasing authority. Thus the Committee recommended that the disclosure of unit prices might be made to the interested parties, upon request, and subsequent to gazettal.² The Committee also recommended

¹P.P. No. 251 of 1964-1965 para.108. See also Scott Committee Report paras. 2.35, 2.36.
²P.P. No. 251 para.115. See also para.111.
the adoption of a uniform method of presentation of "Contracts Arranged" in the Gazette, \(^1\) since it found that a marked lack of uniformity existed among Departments and Authorities in regard to the amount of detail of contracts arranged published in the Gazette under Regulation 53. The Scott Committee in 1974 went a step further by recommending that, subject only to such special cases as the Minister responsible for purchasing might authorise, the results of all tenders when finally decided should be available to all tenderers together with the reasons for the awarding of the contract. \(^2\)

2. **Organisational Developments and Present Australian Purchasing Authorities**

(i) **General**

While rules and regulations establish the goals and the framework within which government contracts are made, the most important factor in carrying them out is the calibre of the work force. The actions of the purchasing departments have a major impact on the effectiveness with which about one-third of the Commonwealth budget is spent. Every year thousands of separate transactions varying from a five-dollar purchase to actions committing millions of dollars take place in this process.

\(^1\) Id. para.115. See also para.103.

The importance of the organisational structure in the procurement process is therefore apparent. The following discussion is an indication of the structure and functions of various Australian Government procurement authorities as they exist today. Emphasis has been laid on the organisational developments and the present set-up of five of the largest executive agencies and departments of the Australian Government which have been heavily involved in the acquisition process.

Traditionally, each Australian Government department has had responsibility for purchasing its own requirements. The exception has been the Defence Department, for which the Department of Supply has had basic procurement responsibility. Two striking features in historical development of the organisational structure of Australian purchasing are noticeable. One, the increasing number of procurement agencies, independent of each other and with no single central purchasing body to co-ordinate the procurement of Government requirements. This fragmentation has inevitably led to unnecessary competition between departments, duplication of staff and effort, and a great measure of waste and inefficiency. Two, the frequent structural changes of the authority responsible for purchasing. To take only one example, until 1969 policy control of the then Commonwealth Stores, Supply and Tender Board (C.S.S.T.B.) was provided from within the

1Scott Committee Report paras. 8.2 - 8.6.
Treasury, while the executive work of the Board was handled by staff of the Postmaster-General's Department (with salaries and expenses reimbursed annually by Treasury). In 1970 it was placed within the then newly-established Australian Government Publishing Service (A.G.P.S.) which brought together a number of common services previously provided elsewhere (printing, publishing, advertising, etc.). The A.G.P.S. was transferred in 1971 to the Department of the Environment, Aborigines and the Arts. In December 1972 the A.G.P.S. was moved again, this time to the newly-created Department of the Media. ¹ In January 1974 the Commonwealth Stores, Supply and Tender Board (C.S.S.T.B.) was renamed 'The Australian Government Stores and Tender Board' (A.G.S.T.B.).² The Department of the Media continued to provide the services of the chairman and the secretary of the A.G.S.T.B. until 1 August 1975, when the Office of the Australian Purchasing Commission, within the Department of Services and Property, took over the functions of the Board.³ The name of the Department of Services and Property, which was formed in December 1972 and had taken over some of the functions of the Department of the Interior and the Department of Works, has since been changed to the

¹ *Department of the Media - Report of Activities* (for the period ended 30 June 1973) 18.


Department of Administrative Services. The name 'Office of the Australian Government Purchasing Commission' has recently been changed to 'Purchasing Division', Department of Administrative Services.

(ii) Department of Supply

The Department of Supply has been the earliest and most important Department of the Australian Government to be involved in procurement of supplies, particularly for defence purposes. It has had a chequered history and its structure, functions and even name have frequently been changed. It has played a leading role in the creation of procurement work-force for Australia since Federation. The Defence Legal Services Committee of Review paid a rich tribute to the Department when it said:

Turning first to the question of Australian procurement - the situation here appears to the Committee to be fairly satisfactory because the Department of Supply is

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1Australian Government Gazette No.S200, 7 October 1975. See also Gazette No.S104, 6 June 1975; S128, 1 July 1975; S262, 22 December 1975 and S175, 5 October 1976.

2See generally Department of Supply Handbook (An Account of the Purposes, Structure and Functions of the Department) 30 September 1955; Department of Supply: Activities and Developments (Yearly Reports from 1959 to 1974).

3The value of purchases by the Department of Supply for 1970-1975 (for the Department of Defence, Departmental establishments and other Government Departments but excluding contracts placed on the Government factories) has been as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>1970-71</td>
<td>$180 million</td>
</tr>
<tr>
<td>1971-72</td>
<td>$203 million</td>
</tr>
<tr>
<td>1972-73</td>
<td>$188 million</td>
</tr>
<tr>
<td>1973-74</td>
<td>$183 million</td>
</tr>
<tr>
<td>1974-75</td>
<td>$182 million</td>
</tr>
</tbody>
</table>

(Source: Report, Manufacturing Industry 1975: Activities and Developments 1974-75, Department of Manufacturing Industry, (A.G.P.S. Canberra 1975, 29)).
solely responsible for procurement .... Officers of the Department are skilled in contract matters, and indeed they have acquired a deal of expertise in the legal aspects of procurement. ¹

The Department of Supply and Development was established in June 1939, by the Supply and Development Act 1939. ² The origin of the Department goes back to the early stages of the 1914-18 war when a contract and supply organisation was created within the Department of Defence to handle the unprecedented demand for supplies required for Australian forces being sent overseas. ³ The Defence Contract and Supply Board was the main-

¹ The Report of the Defence Legal Services Committee of Review (November 1971) 72 et seq.

² The Supply and Development Act, 1939-1973 gave to the Department of Supply responsibility for (inter alia): (1) the provision of supply of war material (section 5(1)(a)); (2) the acquisition, maintenance and disposal of stocks of goods in connection with defence (section 5(1)(d)); (3) the investigation and development of Australian sources of supply of goods ... (section 5(1)(e)(ii)); (4) research, design and development in relation to war material (section 5(1)(f)). The Supply and Development Regulations, under the Act, set out the organisational basis on which the Department was to operate. Regulation 29(1) stated that "There shall be a Contract Board...." Regulation 33(1) provided that "The Contract Board shall be charged with the duty of arranging for the performance of services and the purchase of supplies including food stuffs for the Naval, Military and Air Forces and for the Department...." See also, Enderby, "Purchasing as a Function of Government" (June 1974) Australian Purchasing 11-15. It may be noted that the Defence Force Re-Organisation Act 1975 (No. 96 of 1975) has repealed provisions of the Supply and Development Act 1939-1973 (now cited as the Supply and Development Act 1939-1975) relating to purchase of supplies and research and development in connection with defence (see ss. 97-102 and Schedule 4 of the Defence Force Re-Organisation Act 1975).

spring of the new organisation, which functioned successfully throughout the war years. In the years following the war, defence supplies were obtained on an increasing scale from Australian sources and the supply organisation was broadened progressively to meet the expanding requirements. Important production and supply units brought into being were the Munitions Supply Board, the Factory Board (including the Commonwealth Munitions and Clothing Factories), the Contract Board and the Principal Supply Officers' Committee. In 1939, these production and supply units, together with the petroleum supply and distribution activities of the Defence Committee were transferred from the Defence Department to form the nucleus of the newly created Department of Supply and Development. Since its establishment it has undergone frequent structural and functional changes. To state the most important: In 1942 the Department's title was altered to that of Department of Supply and Shipping. From 1948 to 1950 it was again the Department of Supply and Development. On 17 March 1950, the Department of Supply and Development was abolished and a new Department of Supply was created. More recently, on June 11, 1974, the Department of Supply was merged with the Department of Secondary Industry to

\[1\] For a good historical account, see the Handbook, An account of the Purposes, Structure and Functions of the Department (30 September 1955) Department of Supply, 6-8.
form the new Department of Manufacturing Industry.¹ But the function of supply and procurement of goods and services, including munitions and aircraft for defence was transferred to the Department of Manufacturing Industry only for a short period (12 June 1974 - 30 June 1975).² With the establishment of the Office of the Purchasing Commission on 1 July 1975, under the Department of Services and Property, the function of procurement was vested in the latter Department.³ By an Administrative Arrangement Order, dated 1 July 1975, it was declared that the Department of Services and Property (formed in December 1972) would, *inter alia*, deal with these matters, namely, Australian Government purchasing policy, procurement and purchase of goods and services, as required for Australian Government purposes, maintenance of stocks of any such goods, disposal of surplus goods, etc.⁴ The name of this Department

¹Australian Government Gazette No.48B, 12 June 1974. The Department of Supply does not exist now. Section 98 of the Defence Force Re-Organisation Act 1975 has, by an amendment in section 4 of the Supply and Development Act, omitted from the definition of "the Department" the words "Supply" and substituted the words "Manufacturing Industry".

²Most of the functions of the former Department of Supply were relocated on 1 July 1975. For the activities of the Department of Manufacturing Industry with regard to procurement during the year, see the Report, Manufacturing Industry 1975: Activities and Developments 1974-75, Department of Manufacturing Industry, (A.G.P.S. Canberra 1975) 4, 28-29.


⁴But see Australian Government Gazette No. S220, 30 October 1975 when by an Administrative Arrangement Order, all these functions were re-vested with the Department of Manufacturing Industry. However, soon with the change of Government the procurement function came back to the Department of Administrative Services (see Australian Government Gazette No. S233, 14 November 1975).
was changed to the Department of Administrative Services on 7 October 1975.\(^1\) By an Administrative Arrangement Order of 22 December 1975 the item relating to 'Australian Government purchasing policy' was omitted from the list of principal matters dealt with by the Department of Administrative Services.\(^2\) The functions of the Department of Administrative Services have recently been expanded by an Administrative Arrangement Order, dated 5 October 1976.\(^3\)

The stores and services contracted for by the Department of Supply and its successors cover a very wide spectrum, from food stuffs to weapons systems. The Department has been involved in sophisticated contractual arrangements, such as sale of the Ikara anti-submarine missile overseas, purchase of Macchi training aircraft, contract for Mirage aircraft, F-111 and Chinook helicopter purchases etc.\(^4\) The Department has also

\(^1\) Australian Government Gazette No. S200, 7 October 1975.
\(^2\) Australian Government Gazette No. S262, 22 December 1975. It may be noted here that matters dealt with by the Department of the Special Minister of State were passed on to the Department of Services and Property with regard to 'Australian Purchasing Policy', by an Administrative Arrangement Order published in the Australian Government Gazette S104, 6 June 1975.
\(^3\) The Australian Government Gazette No. S175, 5 October 1976, provides that the Department of Administrative Services will deal, inter alia, with the following matters: Procurement and purchase of goods and services, as required, for Commonwealth Government purposes; maintenance of stocks of any such goods; disposal of surplus goods; acquisition, leasing and disposal of land and property, in Australia and overseas, and arranging for the construction of buildings overseas, for Commonwealth Government purposes, etc.
acted as the purchasing authority for a large number of other Government Departments which do not have their own contracting units, e.g. the Department of Minerals and Energy, Health, Science, Department of Foreign Affairs, Customs and Excise etc.

(iii) Australian Government Stores and Tender Board (A.G.S.T.B.)

A second major purchasing authority is vested in the A.G.S.T.B. The historical development of the A.G.S.T.B. (previously the Commonwealth Stores Supply and Tender Board - C.S.S.T.B.) and the complexity of the administrative changes involved, has been stated in the previous pages. Its functions and responsibilities, like that of the erstwhile Department of Supply, are now being carried on by the Purchasing Division, Department of Administrative Services. The Board's main responsibility is to purchase stores, including office machines, in general use ('common use' items) throughout Government Departments. Contracts are arranged by the Board for the requirements of a single department or the bulk requirements of a number of departments. It carries out this function in either of two ways.

The value of contracts arranged by the A.G.S.T.B. during 1972-1975 is as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>1972-73</td>
<td>$23.5 million</td>
</tr>
<tr>
<td>1973-74</td>
<td>$60 million</td>
</tr>
<tr>
<td>1974-75</td>
<td>$99 million</td>
</tr>
</tbody>
</table>

First for the vast majority of items, estimates of forward usage are obtained from all departments; these estimates are collated and offers are sought for supply of the total estimated requirements during a specified period. The tender documents indicate the estimated requirements, in each major location so that tenderers may offer for only a portion of the requirements, if they like. The A.G.S.T.B. selects the lowest suitable tender and arranges a contract for the supply of the requirements of Australian Government Departments during the specified period. The actual quantities ordered by the individual consignees (Departments) may be greater or lesser than the estimated quantities indicated in the tender. A contract of this type is called a 'period' or 'term' or 'rate' contract. The Board issues a circular to ordering officers in all departments, advising all details of the contract. Secondly, for a small number of 'common use' items such as stationery, office requisites, office machines, general house-keeping items such as cleaning materials, repair and services etc., the A.G.S.T.B. collects the estimates as above, obtains offers and places its order for the total quantity. Individual departments then obtain their requirements by requisitions on the A.G.S.T.B. The Board, in addition, examines proposals which involve the issue of a "Certificate of Inexpediency" which will dispense with the invitation of public tenders, for the supply of stores for government departments, which do not have authority to issue
"Certificates of Inexpediency".

The overlapping of functions of the Department of Supply, charged with the purchase of defence requirements and the requirements of its own establishments under statutory authority, and of the A.G.S.T.B., with the responsibility for the purchase of stores in common use for all departments under the Treasury Regulations, no longer exists, since the activities of both are now being carried on by the Purchasing Division, Department of Administrative Services.

(iv) Department of Construction

This Department was established by the Administrative Arrangement Order on 22 December 1975, and the erstwhile Department of Housing and Construction was abolished. The new Department of Construction has authority in relation to 'works' activities involving (1) planning, execution and maintenance of Commonwealth Government works and (2) design and maintenance of furniture, furnishings and fittings for the Commonwealth Government.

The Department of Construction is the largest works organisation in Australia as planning, execution and maintenance

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1 Certificates of Inexpediency are issued by the A.G.S.T.B. under Finance Regulation 52AA(2) as a delegated authority of the Secretary to the Department of Finance. The total value of proposals for which Certificates were granted to June 1976 came to $8.6 million: Table 14 Statistical Report No.6 Purchasing Division.


Another department which now shares some of the functions of the earlier Department of Housing and Construction is the Department of Environment, Housing and Community Development.

3 Australian Government Gazette No. S175, 5 October 1976.
authority for the Commonwealth Government. The Department arranges construction of buildings on behalf of other Commonwealth Departments and statutory bodies. Contracts are arranged to provide best value for money spent, and except in special circumstances, following the invitation of public tenders. No comparable organisation covers such a wide range of operations from small everyday maintenance tasks to the design and construction of multi-million dollar projects. Important national works planned and executed by the Department vary in scope and diversity from major airports to large office blocks, roads, dams, telephone exchanges, laboratories, mountain cable-ways, power stations, hospitals and other community amenities, hydro-electric schemes, water supplies, satellite and deep space tracking stations, wharves and bridges, defence establishments, to mention the obvious ones. The Department of Construction conforms with any specific policies originating from the Office of the Purchasing Commission within the Department of Administrative Services, wherever appropriate.

1 Works expenditure during 1970-1974 is given below:
   1970-1971 ... $308.3 million
   1971-1972 ... $326.8 million
   1972-1973 ... $333.3 million
   1973-1974 ... $376.9 million
(Source: Scott Committee Report para. 3.40).


3 Ibid.
(v) The Postal and Telecommunications Department

On 30 June 1975, commitments in respect of contracts let for the supply of materials by the Postal and Telecommunications Department amounted to approximately $239 million ($200 million in 1973-74). Of this amount it is estimated that $226 million ($187.6 million in 1973-74) relates to telecommunication work.\(^1\) The above mentioned figures provide an overall indication of the extent of the Department's procurement activity. The Department, earlier called the Postmaster-General's Department, has the following functions to perform: Postal, telegraphic, telephonic, and other like services.\(^2\)

(vi) Purchasing Division (earlier known as the Office of the Purchasing Commission) within the Department of Administrative Services

In the absence of an official central purchase organisation, the Purchasing Division of the Department of Administrative Services is functioning as a central procurement agency for almost all of the Australian Government Departments for the arranging of contracts for the purchase of defence supplies, 'common use' items and a wide range of other goods and services.\(^3\) The Department is also the sole purchaser of real property for

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\(^1\) Annual Report for the year 1974-75. Postmaster-General's Department, P.P. No.13 of 1976, 50.

\(^2\) Australian Government Gazette No. S175, 5 October 1976. For details, see Scott Committee Report paras. 3.61 - 3.69.

\(^3\) C.P.D. (H. of R.) Weekly Hansard No.12, 4 June 1976 (Minister's reply to a question upon notice), 3112.
use by the Commonwealth Government Departments. Much has already been said about its establishment and functions. The Purchasing Division is already performing the function of Australia's two most important procuring agencies viz., Department of Supply and the Australian Government Stores and Tender Board.

There are a number of government departments which largely have a policy-making role and a comparatively limited demand for special purchases (with the important exception of the Department of Science which has reasonably significant requirements of 'special' items for its civil space research programs, meteorological and Antarctic activities) and the Purchasing Division is largely carrying on the procurement for them. There are at least 28 government commissions, authorities and agencies such as Trans-Australia Airlines, Qantas Airways Ltd., the Australian National Line, the Overseas Telecommunications Commission, the Atomic Energy Commission, Australian Postal Commission, C.S.I.R.O., Commonwealth Bank etc. and these statutory bodies also sometimes use the expert services of the Purchasing Division. However, it should be stated that most of these instrumentalities have established their own Tender Boards under the parent Acts and most of the purchasing is being carried on through their respective Tender Boards.

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1 Id. at 3090.
2 See supra.
3. **Australian Government Contract Law**

(i) **Liability of the Commonwealth in Contract**

The Constitution of Australia contains no specific provisions for contracting, but it is trite law that the implied power of the executive to enter into contracts is inherent in the concept of sovereignty. The Constitution, however, does empower the Parliament of the Commonwealth under section 78 to make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power. So by enacting a law, the Parliament may remove any immunity from suit, say in contract, which the Commonwealth might otherwise enjoy. In fact, the Commonwealth Parliament did exercise this power.

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2 The Commonwealth of Australia Constitution Act, 1900.

3 In the United States also, the Constitution contains no provisions for contracting but the power has never been denied, see e.g. United States v. Tingey (1831) 39 U.S. 114.
soon after the passing of the Constitution, by enacting, first a temporary Act in 1902 called the Claims Against the Commonwealth Act 1902, and then replacing it by the Judiciary Act in 1903. That Judiciary Act (now entitled the Judiciary Act 1903-1973) is still in force and it determines, *inter alia*, the liability of the Commonwealth or a State in contract; section 56 of the Act, for instance, expressly recognises the liability of the Commonwealth as a juristic person to actions in contract or tort and thus removes the Commonwealth's immunity from suits by private persons.¹

It is sometimes argued, however, that the Commonwealth's liability in contract (as well as in tort) is derived from s.75 of the Constitution and not from the provisions of the Judiciary Act.² Section 75 of the Constitution provides, "In all matters ... (iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party: ... the High Court shall have original jurisdiction". In *The Commonwealth v. New South Wales*³ Isaacs, Rich and Starke, JJ. thought that s.75 of the Constitution was the source of substantive liability


³(1923) 32 C.L.R.200.
of the Commonwealth; if, they argued, liability depended wholly on federal legislation under s. 78 of the Constitution, the Commonwealth Parliament could enact a statute making the States liable to the Commonwealth, but refusing "a reciprocal liability".\(^1\) Another view which has been advanced is that the liability must rest upon statute and the provisions of Part IX of the Judiciary Act amount to statutory imposition of liability for contract (and tort too) upon the Crown in right of the Commonwealth and, within the limits of subject matter to which Federal jurisdiction is conferred, in right of the States also. Dixon J in two later cases \textit{viz.} \textit{Musgrave v. The Commonwealth}\(^2\) and \textit{Werrin v. The Commonwealth}\(^3\) expressed disagreement with the views of Isaacs, Rich and Starke, JJ. In the first case, his Honour feared that

If it be true that the Constitution imposes the liability, possibly the consequence may follow that the law governing the responsibility of the Commonwealth for civil wrong as indeed for liability \textit{ex contractu} also became fixed as at the establishment of the Commonwealth.\(^4\)

In the second case, Dixon J observed:

It is, of course, true that the words "matters" [in s.75 of the Constitution] includes actions of contract as well as actions of tort, and logically it should follow that sec. 75 has the same operation in relation to liability \textit{ex contractu}. If sec. 75, a constitutional provision, operates as a source of liability, it is not easy

\(^1\) \textit{Id.} 214. Higgins J., however, expressed himself against such an opinion, see \textit{id.} 217.
\(^2\) (1937) 57 C.L.R. 514.
\(^3\) (1938) 59 C.L.R. 150.
\(^4\) \textit{Musgrave v. The Commonwealth} (1937) 57 C.L.R. 514, 547.
to see how parliamentary legislation could extinguish, qualify, or limit the liability thence arising .... It is, therefore, possible to argue that the reasoning on which their Honours' judgment proceeds involves the consequence that the delictual and contractual liability of the Commonwealth as well as, within Federal jurisdiction, of the States is imposed by sec. 75 of the Constitution and cannot be discharged, barred or otherwise affected by any law of the Parliament, as for example by an Act indemnifying the Crown.

He concluded that s.75 could not be the source of substantive liability, but it simply made the Commonwealth subject to the jurisdiction of the High Court. This line of thinking was favoured in Asiatic Steam Navigation Co. Ltd. v. The Commonwealth, though the Court did not find it necessary to determine the point.

It may therefore be submitted that s.75 confers only a jurisdiction, and not a right of action where no right of action existed before; that it does not extend the category of cases in which the Commonwealth, or a State may be sued, but merely enables certain suits, which might otherwise have been brought in some other court, to be brought in the High Court; and that the provisions of the Judiciary Act operate to impose substantive liability upon the Commonwealth. Actually, s.78 of the Constitution, which

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1 Werrin v. The Commonwealth (1938) 59 C.L.R. 150, 166.
2 Id. 167. Rich J said "I do not think that anything which was said in The Commonwealth v. New South Wales was intended to mean that sec. 75 of the Constitution produced the effect of establishing as constitutional rights incapable of legislative control causes of action to which subjects might become entitled under the general law against either Commonwealth or State." Id. 161.
3 (1957) 96 C.L.R. 397, 423.
gives the Federal Parliament power to make laws conferring rights of proceeding against the Commonwealth or a State, further goes on to show that the founders did not intend to lay down substantive liability of the Crown in any of the provisions of the Constitution.

The next question that arises then is which provision/s of the Judiciary Act 1903 impose substantive liability. Part IX of the Act is headed: "Suits by and against the Commonwealth and the States". Section 56 states (as far as relevant) that a person making a claim against the Commonwealth, whether in contract or in tort, may in respect of the claim bring a suit against the Commonwealth (a) in the High Court; (b) in the Supreme Court of the State or Territory in which the claim arose; or (c) in any other court of competent jurisdiction of the State or Territory in which the claim arose. The next section is s.64 which reads (as material for our purpose here):

In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.

Further ss.79 and 80 of the Act which fall under Part XI "Supplementary Provisions" deal with "Application of Laws".

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1 Sections 56-67.

Section 79 enunciates:

The laws of each State, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all courts exercising federal jurisdiction in that State in all cases to which they are applicable.

Section 80 states:

So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law of England as modified by the Constitution and by the statute law in force in the State in which the court in which the jurisdiction is exercised is held, shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal liability.

To appreciate the applicability of the above-mentioned sections of the Judiciary Act in the context of a dispute relating to a Commonwealth contract, let us take an illustration. Suppose A, a resident of New South Wales, has a dispute with the Commonwealth in contract. The first question is where and in what court A may file a suit. As stated earlier, under s.75 of the Constitution, the High Court would have original jurisdiction since it is a matter in which the Commonwealth is a party.\(^1\) A may, however, instead file a suit against the Commonwealth, under s.56 of the Judiciary Act, in the Supreme Court of New South Wales, because that is the State in which the claim has arisen\(^2\) or in any other court of competent jurisdiction in

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1 Section 75 (iii) of the Constitution
2 Section 56 (l)(b) of the Judiciary Act.
New South Wales.¹ Let us suppose that A chooses to file the suit in the High Court and the High Court is at that particular time, sitting at Melbourne, Victoria. The question then is, what law should apply to this dispute on a government contract - whether Federal government contract law (if any) or Federal contract law generally (if any) or the State government contract law (if any), or State contract law generally (if any), or if there is no Federal or State contract law, the common law of England as modified by the Constitution and by the State statute law. The next question is: in case the State law is applicable, then which State's law should apply - the State law of New South Wales, where the claim has arisen or the State law of Victoria, where the High Court is sitting.

The answer to the first question, i.e. what law should apply, is to be found in ss.79 and 80 of the Judiciary Act 1903 - 1973. A court trying an action by or against the Commonwealth is exercising Federal jurisdiction. Any court exercising federal jurisdiction in a State is directed by ss.79 and 80 to apply the law of that State unless it is inconsistent with the Constitution or the matter in hand is regulated by Commonwealth law. Hence, in the absence of a contrary Constitutional provision or Commonwealth legislation, an action against the Commonwealth in contract may be decided by reference to rules of State law.² An objection

¹Section 56 (1)(c) of the Judiciary Act.
²Howard, Australian Federal Constitutional Law (2nd ed. 1972) 111. The author, it is surprising to note, does not consider the effect of s.64 of the Judiciary Act.
may, however, be raised here that as a matter of constitutional law, States have no power to bind the Crown in right of the Commonwealth. To that, the answer in the words of Professor Campbell is:

State laws which do not, under the rules of the State legal system, apply to the Commonwealth, may be made to apply to the Commonwealth by federal legislation. Section 64 of the Judiciary Act is such a provision. When read in conjunction with ss.79 and 80, what this means is that for the purpose of determining the appli­cability of State law to Commonwealth contracts, the fact that one party is the Commonwealth is usually to be ignored.

Regarding the second question (i.e. which State's law is to apply, as in our example, the State law of New South Wales or of Victoria), the answer is that the State law of New South Wales should apply, and not of Victoria because (as implicit in s.56 of the Judiciary Act) the law of that State will apply where the claim arises, and it is immaterial for the purposes of determining the jurisdiction of the High Court where it held its sitting at a particular time.

(ii) The scope of s.64 of the Judiciary Act

The general rule at common law is that the Crown is not bound by a statute unless expressly named or bound by necessary implication. Section 64 of the Judiciary Act, it is submitted, does not dispel that rule for the construction of statutes. What it states is simply that in case the Crown is expressly made bound by a statute, or by necessary implication, it could be considered to be bound, then rights of the parties in a dispute (between Crown in right of the Commonwealth or in right of State and a subject) will be the same as in a suit between subject and subject. The plain meaning of the words used in s.64 is, that in a suit, say in contract, between Government and a private party, the law applicable will be the same as governing contractual relations between private parties. Differing views, however, have been expressed on the question whether s.64 is directed to procedural matters or operates so as to confer substantive rights on the parties. According to Hogg, the application of a State statute to Commonwealth-subject disputes might not be constitutionally valid, but for s.64 of the Judiciary Act. He further states that "the rights of parties" to which s.64 refers include

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1 For the historical background of s.64, see Maquire v. Simpson op.cit. at 2-6 (per Barwick CJ).
3 The cases in which it has been held that the rights referred to by s.64 are rights of a purely procedural kind are: The Commonwealth v. Baume (1905) 2 C.L.R.405, 418 (per O'Connor J); Griffin v. South Australia (1924) 35 C.L.R. 200, 204 (per Isaacs J).
4 Hogg, op.cit. at 432-34. See also Maquire v. Simpson at 2 (per Barwick CJ)
substantive as well as procedural rights, and cites with approval the following controversial dictum, of Kitto J (though obiter) in the case of Asiatic Steam Navigation Co Ltd v. The Commonwealth:

[T]he rights referred to in s.64 include the substantive rights to be given effect to in the suit ....[I]t follows that s.64 must be interpreted as taking up and enacting, as the law to be applied in every suit to which the Commonwealth or a State is a party, the whole body of the law, statutory or not, by which the rights of the parties would be governed if the Commonwealth or State were a subject instead of being the Crown.  

Hogg places reliance on the Privy Council judgment in Farnell v. Bowman, stating that in several cases the State statutes have been held applicable to the Commonwealth (by the operation of s.64) which would not have applied to the Commonwealth of their own force. He also considers that

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1 Id. at 433 citing (1957) 96 C.L.R. 397, 427.
2 (1887) 12 A.C. 643, 650. In Farnell v. Bowman, the main question was whether, under the provisions of the New South Wales Act 39 Vict.No.38 (the provisions of which were similar to ss.56 and 64 of the Judiciary Act), the Government Colony was liable to be sued in an action of tort. The claim of the plaintiff, respondent in appeal, was that the Government by their servant broke and entered the lands of the plaintiff situated in the colony, and lit fires thereon, and thereby burned down and destroyed the grass, trees and fences of the plaintiff on the said lands. The Judicial Committee held in favour of the plaintiff and dismissed the appeal. Sir Barnes Peacock, who spoke for the Council, observed: "Justice requires that the subject should have relief against the Colonial Governments for torts as well as in cases of breach of contract or the detention of property wrongfully seized in the hands of the Crown. And when it is found that the Act uses words sufficient to embrace new remedies, it is hard to see why full effect should be denied to them" (at 649). The case has been cited in support of the argument that s.64 includes substantive rights: see e.g., Asiatic Steam Navigation case at 427 (Kitto J); Downs v. Williams (1971) 45 A.L.J.R. 576 at 591 (Gibbs J); Maguire v. Simpson, op. cit. at 5.
the judgment in the *Asiatic Steam Navigation* case\(^1\) holds "that even a statute which is expressed as not to apply to the Commonwealth is made applicable by s.64"\(^2\). Hogg thus seems to reach two conclusions: first, that the effect of s.64 of the Judiciary Act is to make applicable to the Commonwealth the State statutes, which would not of their own force apply to the Commonwealth, because they are incapable to doing so as a matter of constitutional law; and secondly, that the effect of s.64 is to apply to the Commonwealth a statute, notwithstanding the express or implied exclusion of the Commonwealth from the binding operation of a particular enactment. Regarding the first, it is submitted that, that is the correct interpretation of s.64 read with ss.79 and 80 of the Judiciary Act. Regarding the second, it is submitted that the judgment in the *Asiatic Steam Navigation* case does not hold that s.64 enacts that the law to be applied in every suit to which the Commonwealth (or a State) is a party will be the same by which the rights of the private parties are governed, notwithstanding an express or implied exclusion of the Commonwealth (or a State) from the binding operation of a particular enactment. That is actually the *obiter dictum* of Kitto J in that case, which was not supported by the other members of the Court. It is further submitted that for the purposes of the *Asiatic Steam Navigation* case s.64 was not relevant and whatever

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\(^1\)(1957) 96 C.L.R. 397.

\(^2\)Hogg, *op.cit.* at 433.
interpretation of the section is held, the decision will be the same. In that case the Commonwealth sought to limit its liability for damages under s.503 of the Merchant Shipping Act 1894 but the appellants sought to exclude the Commonwealth from the application of s.503 because of s.741 of the same Act. The appellants had suffered loss because of the collision of their ship with the ship of the Commonwealth, caused by the negligence of the latter. Section 503, so far as material, provided in general terms that the owners of a ship, British or foreign, shall (if certain conditions were fulfilled) not be liable for damage caused by that ship to another ship or her cargo beyond an amount exceeding £8 per ton of the ship's tonnage. Section 741 of the Act provided that, "This Act shall not, except where specially provided, apply to ships belonging to Her Majesty". The Commonwealth argued that s.503 would apply because of s.80 of a later Act, viz. the Merchant Shipping Act 1906 which provided:

Her Majesty may by Order in Council make regulations with respect to the manner in which Government ships may be registered as British ships for the purpose of the Merchant Shipping Acts, and those Acts, subject to any exceptions and modifications which may be made by Order in Council, either generally or as respects any special class of Government ships, shall apply to Government ships registered in accordance with those regulations as if they were registered in manner provided by those Acts.

An Order in Council was later made in 1924 relating to Government ships of the Commonwealth. The High Court unanimously held that the effect of s.80 of the 1906 Act was, in certain circumstances, to render the earlier Act applicable in the case of
Government ships and, to the extent therein provided, that section over-rode the provisions of s.741 of the 1894 Act. Thus the Commonwealth was allowed to avail of the limitation of liability provisions given in s.503.

The High Court, however, did refer to s.64 of the Judiciary Act. The joint judgment of Dixon CJ, McTiernan and Williams JJ, pointed out that there has been a difference of opinion as to the scope of s.64 of the Judiciary Act which sometimes has been treated as limited to questions of procedure and at other times as extending in itself to the substantive law governing the liability put in suit, but these differences of opinions were found of no relevance to the case. Fullagar J said that

[T]he effect of s.64 is not to make applicable either in favour of the Commonwealth or against it, a statute the express terms of which exclude the Crown. For the purposes of suits to which the Commonwealth is a party the general law as between subject and subject is to apply. But this general enactment cannot be regarded as derogating from any special enactment which by its own terms is made either applicable or inapplicable to the Commonwealth.

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3See at 424.
Although the statement by Fullagar J was made in the context of the case, it may be submitted that it can have general application. His Honour's views are, however, diametrically opposed to the dictum of Kitto J. Menzies J in *The Commonwealth v. Anderson* also expressed his doubts about the correctness of views held by Kitto J in the *Asiatic Steam Navigation* case.

It is submitted that s.64 of the Judiciary Act extends in itself to the substantive law governing the liability put in suit. In addition, it deprives the Commonwealth, when it is a litigant, of the privileges that by the common law the Crown had in proceedings between it and a subject. However,

1. Fullagar J's example at 424 makes the position very clear. To quote: "The position may perhaps be tested by supposing that the Commonwealth sues in ejectment the tenant of land owned by it, and the defendant relies on State legislation which restricts the rights of landlords to eject tenants. That legislation does not, and in my opinion as a matter of constitutional law could not, bind the Commonwealth. Could it possibly be said that the effect of s.64 was to place the Commonwealth in its ejectment action in the position of a subject in respect of the legislation". See also *Downs v. Williams* (1971) 45 A.L.J.R. 576, 579, where Menzies J cited with approval the above example.
2. (1960) 105 C.L.R. 303, 317-18. In *Anderson* case it was held that the provisions of Part III of the Landlord and Tenant (Amendment) Act 1948-58 (N.S.W.), which are expressed not to bind the Commonwealth, are not called into operation by s.64 of the Judiciary Act so as to prevent the Supreme Court of New South Wales from entertaining an action in ejectment brought by the Commonwealth against an overholding tenant.
4. See Windeyer J at 318 in *Anderson* case.
if a Commonwealth (or a State) law tends to exclude it from the binding operation of a particular enactment, it may further be submitted that, s.64 cannot have the effect of making it applicable to the Commonwealth (or the State). This is so, because if it is a later Federal statute which excludes the Commonwealth from the binding operation of an earlier enactment, then according to a settled canon of construction of statutes, the later statute would prevail notwithstanding s.64 of the Judiciary Act.1 And if it is a State statute which excludes the State from the applicability of a State Act, s.64 of the Judiciary Act cannot make that law applicable to the State because the Commonwealth has no power to legislate on the domestic matters of the State.2

In the Anderson case Dixon CJ observed:

It is perhaps not unimportant to bear in mind that it is the rights of parties as in a suit between subject and subject, not the law, that are to apply as nearly as may be.3

In Downs v. Williams,4 McTiernan J cited with approval the above stated observation of Dixon CJ and added:

In such a case as this therefore it is only after it has been ascertained that a statutory duty is imposed on the Crown that the rights between the parties are determined by the general law applicable as between subject and subject.

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1It may be noted that the High Court decision in Maguire v. Simpson (discussed below) did not involve a situation in which the Court had to decide whether s.64 would, in federal jurisdiction, override as against a State the operation of later State laws expressly excluding the State from particular obligations or liabilities. But see, Mason J's remarks at p.30 of the judgment.

2Howard, op.cit. at 27. See generally, Sawer, "State Statutes and the Commonwealth" (1961) 1 Univ. of Tas. L. Rev.580.

3At 310.

In *Downs v. Williams*, the plaintiff-respondent, who sustained personal injuries at a place occupied by the Crown, sued the Government of New South Wales (whom the defendant-appellant represented) in damages for conduct contrary to certain provisions of the Factories, Shops and Industry Act 1962 (N.S.W.) which dealt with fencing of dangerous machinery. The Government's contention was that the impugned Act did not in express terms bind the Crown and that there were no words in the Act which clearly implied the intention that the Crown should be bound by it. But the plaintiff relied upon ss. 3 and 4 of the Claims Against the Government and Crown Suits Act 1912 (N.S.W.) (sections similar to s.64 of the Judiciary Act) as imposing liability on the Government. The question that came before the High Court was: whether the plaintiff should succeed notwithstanding that the Industry Act, by which the statutory duty was imposed, did not reveal an intention to bind the Crown, if it was found that he would have been entitled to maintain an action for damages caused by a breach of statutory duty if the premises had been occupied by a private individual. The Court held by a majority (Windeyer and Gibbs JJ dissenting) that the Government was not liable to pay damages because the Industry Act did not bind the Crown. Menzies J cited with approval the views of Fullagar J expressed in *Asiatic Steam Navigation* case and

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1 Fullagar J at 424.
I do not accept the view, for instance, that sections such as those under consideration, and s.64 itself, take up and enact, as the law to be applied in every case where a government is a party, provisions of statutory law which do not, upon their own terms, apply to a government.

McTiernan J lent support to Dixon CJ's observations in Anderson case cited above and added:

In such a case as this therefore it is only after it has been ascertained that a statutory duty is imposed on the Crown that the rights between the parties are determined by the general law applicable as between subject and subject.

In the recent decision in Maquire and Ors. v. Simpson and Ors. (unreported) handed down on 5 December 1977, the High Court held that the rights of the parties to which s.64 of the Judiciary Act referred were substantive and not merely procedural rights. The High Court has further held that s.64 had an ambulatory operation and that the section was capable of including legislative changes made in

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1At 578-79 (Downs v. Williams).
2See supra.
3Downs v. Williams, op.cit. at 577. Gibbs J said: "If a statute which governs the rights of the parties in an action between subject and subject has been enacted subsequent to the Claims Against the Government and Crown Suits Act 1912, and expressly provides that it shall not apply to the Crown, this provision in the later statute must prevail over the general provisions of the earlier statute with which it is inconsistent". (at 592).
4Maquire v. Simpson, op.cit. at 5-6 (per Barwick CJ), at 9 (per Gibbs J), at 28 (per Mason J), at 33 (per Jacobs J), at 35 (per Murphy J). Stephen J, however, did not find it necessary to decide whether s.64 applied only to matters of procedure or extended also to substantive law, see at 21-22, 25.
the law after that section was enacted.\textsuperscript{1} The facts in the Maguire case were: The Commonwealth Trading Bank of Australia was owed certain money (\$5,325.17) on current account by a partnership firm. The last dealing in the partnership bank account was entered on 15 February 1966. Shortly thereafter the main assets of the partnership were sold and the net proceeds of sale (\$9,832) were deposited into court, pending determination of claims to the fund by interested parties. In proceedings in the Supreme Court of New South Wales, the Bank claimed to participate as an unsecured creditor notwithstanding that more than six years had passed since its debt became due. In reply to the plaintiff's argument that the Bank's claim was time-barred under ss.14(1) and 63(1) of the Limitation Act 1969 (N.S.W.), the Bank asserted, \textit{inter alia}, that the Limitation Act did not validly apply to the Bank since the legislature of New South Wales had no power to render the Act binding on the Commonwealth. The matter having been removed into the High Court, the Court observed that the basic question to be decided in the case was whether the provisions of the Limitation Act 1969 (N.S.W.) were rendered applicable by virtue of s.64 of the Judiciary Act.\textsuperscript{2}

The High Court, as stated already, held that s.64 was the

\textsuperscript{1}Id. at 18 (\textit{per} Gibbs J), at 24 (\textit{per} Stephen J), at 25 (\textit{per} Mason J) and at 35 (\textit{per} Murphy J).

\textsuperscript{2}It may be noted that the High Court held that the Bank, for the purposes of the suit, stood in the position of the Crown, see \textit{id.} at 27-28. It may further be noted that the provisions of the Limitation Act did reveal an intention that the Act shall bind the Crown in right of the Commonwealth and the State (ss.10(1), 11(1)). See \textit{id.} at 7 and 30.
source of authority of a State court to apply the provisions of the Limitation Act (N.S.W.) to a suit by the Bank to recover a debt due to it. Gibbs J said:

The effect of s.64 ... is that the Limitation Act, which is to be applied in the proceedings by virtue of s.79 [of the Judiciary Act], is rendered applicable to the Commonwealth as though it were a subject, and therefore binds the Bank. The Limitation Act is so applied by force of Commonwealth law, and not by its own force as a State law ...[s.]64 is not in terms limited to rights of a procedural kind and no reason exists to imply a limitation of that kind in a remedial provision expressed in the broad terms of s.64.1

Accordingly, the High Court held that the Bank's claim was time-barred under the provisions of the Limitation Act 1969 (N.S.W.) and hence it could not recover the balance of the current account.

(iii) Commonwealth's Legislative Power Regarding Government Contracts

Not only does the Constitution of Australia contain no section for government contracts, but there is no single entry in s.51 (enumerating the legislative powers of the Parliament) on which the power to legislate with respect of Commonwealth contracts may clearly be founded. Several possible constitutional bases for legislation have been suggested.2 At best the power

1 Id. at 9. It is, however, pertinent to note that Stephen J. suggested that s.64 required "careful scrutiny by those concerned with law reform into potentialities of the section with a view to its amendment, so that the already existing doubts as to its operation may be resolved and difficulties as yet to be encountered may be avoided". (id. at 25)

2 Campbell, "Federal Contract Law", op.cit. at 585-86.

Campbell, however, concludes that the Commonwealth's contracting power "is not inhibited by the restraints which the Constitution imposes on federal law-making". (at 580). See also by the same author, "Commonwealth Contracts" (1970) 44 A.L.J. 14, 23.
to legislate with regard to contracts may be derived from cl. (xxxix) of s. 51 which empowers the Commonwealth Parliament to make laws with respect to -

Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

Section 61 of the Constitution ¹ deals with the executive power of the Commonwealth and since the power to enter into contracts is inherent in the concept of sovereignty, that power can be said to be an executive power with respect to which the Parliament of the Commonwealth may legislate under cl. (xxxix) of s. 51 of the Constitution. ² Similarly, power to legislate with respect

¹Section 61 reads: "The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth".

²For a treatment of the case law on the question of Commonwealth's contracting power and the limitations on that power, see Campbell, "Commonwealth Contracts" 44 A.L.J.14. Campbell's summary of the position is worthy of citation: "The judicial opinions ... generally point to the conclusion that to be valid, a contract by the Crown in right of the Commonwealth must be one that parliament could, if it has not done so already, validly authorise. For an Act of the federal parliament to be valid, it must be a law with respect to one or other of the enumerated subjects of federal legislative power. Among the legislative powers of the Commonwealth is the power to make laws with respect to any matter incidental to powers vested by the Constitution in the Government of the Commonwealth (s.51(XXXIX)), meaning in this context the executive government. Thus if the executive power of the Commonwealth referred to in s.61 includes power to contract, without restriction on the nature or terms of the contract, a federal Act authorising a Commonwealth contract must always be a valid law, and a Commonwealth agreement can never be impugned on the ground of unconstitutionality." (Id. at 22-23).
to contracts may be said to arise from matters incidental to the execution of the power vested by s.78 of the Constitution in the Parliament to make laws with respect to causes of actions and remedies against the Commonwealth. The constitutional basis for law-making with respect to contracts may also be found as incidental to the subject-matter of various clauses of s.51 itself. For example, since the power of the Parliament with respect to cl.(V) viz., "Postal, telegraphic, telephonic, and other like services" may be said to include the power with respect to matters incidental to the execution of that power, the Parliament may enact laws dealing with contracts for the procurement of supplies and services for telegraphic, telephonic, etc. purposes. In a like manner, the power under cl.(VI) regarding the naval and military and defence of the Commonwealth etc. may be said to include the power of the Parliament to legislate with respect to supplies for defence. The existence of the Audit Act 1901-1975 and the Supply and Development Act 1939-1975 on the statute book of Government, which have provisions dealing with government contracts are examples of exercise of such a power by the Parliament of the Commonwealth.

(iv) Limitations upon Executive Government's Contracting Power

At one time it was considered that the executive power of the Commonwealth in s.61 of the Constitution was confined to the execution and maintenance of the Constitution and laws of the Commonwealth. But now it is established beyond doubt that the executive power of the Commonwealth under s.61 is not to be construed as being so restricted in content, and that it extends beyond the execution and maintenance of the Constitution and laws of the Commonwealth, and includes, for example, prerogative powers. It has also been established in a recent pronouncement of the High Court in the Seas and Submerged Lands case that the exercise of prerogative power is not dependent upon the authority of statute. Declarations of war, and the making of treaties, for example, are executive acts which the Governor-General may perform quite independently of any legislation.


2 This view was taken in The Commonwealth v. Colonial Combing, Spinning and Weaving Co Ltd (the Wooltops case) (1922) 31 C.L.R. 421, at 453-54 (per Higgins J), at 431-32 (per Knox CJ and G. Duffy J).

3 Barton v. The Commonwealth (1974) 3 A.L.R. 70, at 75-77 (per Barwick CJ), at 79 (per McTiernan and Menzies JJ), at 86-87 (per Mason J) and at 92-93 (per Jacobs J). See also Richardson, op. cit. at 55, 57.

4 New South Wales v. The Commonwealth (1975) 8 A.L.R. 1

The power of the executive government of the Commonwealth to enter into a contract is, however, not a prerogative power, but is an exercise of the executive power of the Commonwealth.\(^1\) In *LeMesurier v. Connor*,\(^2\) Isaacs J observed that the content of the executive power is not exhaustively defined by s.61 and its specific limits have to be determined *aliunde*.\(^3\) It is now well-established that the executive power of the Commonwealth also extends to the Crown's capacity as a person to enter into contractual relations with subjects.\(^4\) In *New South Wales v. Bardolph*, Evatt J observed:

> [T]he general capacity of the Crown to enter into a contract should be regarded from the same point of view as the capacity of the King would be by the Courts of common law. No doubt the King had special powers, privileges, immunities and prerogatives. But he never seems to have been regarded as being less powerful to enter into contracts than one of his subjects.\(^5\)

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\(^1\)Richardson, *op.cit.* 76. The author points out that the power of the Crown to enter into a contract is not a prerogative power because the latter (as defined in *Halsbury's Laws of England* (4th ed.1974) Vol.8,583) refers only to those things in respect of which the Sovereign enjoys pre-eminence over and above all other persons by virtue of the common law, but out of its ordinary course, in right of her regal dignity, and comprehends all the special dignities, liberties, privileges, powers and royalties allowed by the common law to the Crown in England (See *id.* 57 n.19, and 76). See also Lumb and Ryan, *op.cit.* at 228.

\(^2\) (1929) 42 C.L.R. 481.

\(^3\) *Id.* at 514.

\(^4\) Richardson, *op.cit.* at 55.

\(^5\) (1934) 52 C.L.R. 455 at 474-75.
The High Court in the A.A.P. case has extended the scope of executive power by stating that there is an implied executive power of the Commonwealth to engage in activities appropriate to a national government. Mason J thus observed:

"There is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss.51 (xxxix) and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation."

(a) Restrictive view of the scope of s.61 of the Constitution

Opinions have, however, been divided on the effect of s.61 of the Constitution on the scope of the power of the Commonwealth to enter into contracts. At common law there is no general principle denying the Crown capacity or competence to contract in the absence of a statutory authority. But it has been argued that the effect of s.61 is to supersede the Crown's common law

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1 Victoria v. The Commonwealth (1975) 7 A.L.R. 277. The case concerned appropriation of moneys (amounting to several millions of dollars) for a community-based social service programme called The Australian Assistance Plan, under which moneys could be expended on various types of social services or social welfare benefits which were not within the four corners of the Commonwealth Social Services powers (e.g., s.51(xxiii) and s.51(xxiiiA). The High Court by a majority of 4-3 upheld the validity of the appropriation. For a discussion of the case, see Sawer, Federation Under Strain, Australia 1972-1975 (1977) 17, 68; Lumb and Ryan, op.cit.193-94 and 290-91; Richardson, op.cit. 66, 67 and 76.

2 (1975) 7 A.L.R. 277, 327. See also Richardson, op.cit. at 76.

authority to contract and thereby make it necessary for authority to be supplied by an Act of Parliament. This limited view of the Crown's power to enter into contracts seems to stem mainly from the following cases. In the Wooltops case, the facts were that under the War Precautions (Wool) Regulations 1916 and the War Precaution (Sheepskins) Regulations 1916, the Executive had purported to enter into an agreement with a company under which consent was given to the company to sell wooltops in return for a share in the profits of the transaction or on the basis that the business of manufacturing wooltops would be carried on by the company as agent for the Commonwealth in consideration of the

1 (1927) Royal Commission on the Constitution of the Commonwealth. Report of Proceedings and Minutes of Evidence, 781. Commonwealth v. Colonial Combing, Spinning and Weaving Co Ltd (Wooltops case) (1922) 31 C.L.R. 421, 431, 432, 441; Commonwealth v. Colonial Ammunition Co Ltd (1924) 34 C.L.R. 198, 224; The Commonwealth v. The Australian Commonwealth Shipping Board (1926) 39 C.L.R. 1, 9, 10. In New South Wales v. Bardolph (1934) 52 C.L.R. 455, the High Court held that statutory authority was not necessary to enable the Crown to enter into a contract "in the ordinary course of administering a recognised part of the government of the State". (at 508 per Dixon J., see also at 474 (Evatt J), 496 (Rich J)). The result of this holding that a contract not of that description would not be binding unless Parliament had authorised it to be made, has been criticised by Campbell in "Commonwealth Contracts" (1970) 44 A.L.J. 14, 15. See also Attorney General (Vic) v. The Commonwealth (1934) 52 C.L.R. 533, 562; Australian Woollen Mills Pty Ltd v. The Commonwealth (1954) 92 C.L.R. 424, 461. The better view seems to be that s.61 of the Constitution does not exclude the operation of the common law as far as it relates to the capacity of the Crown to enter into contracts. For a contrary view, see Lumb and Ryan, The Constitution of the Commonwealth of Australia Annotated (2nd ed. 1977) 299.

2 (1922) 31 C.L.R. 421.
company receiving an annual sum from the Commonwealth. It was accepted that the regulation in question did not confer power on the Commonwealth to enter into such an arrangement. It therefore had to be determined whether the contract was in execution of or in maintenance of any provision in the Constitution. The Court gave a negative answer: no power was to be found in the Constitution to authorise such an arrangement, nor did the subject matter of the contract fall within the area of responsibility of a Commonwealth department under s.64.1

In Commonwealth v. Australian Commonwealth Shipping Board2 it was held that a contract to sell to a municipal council steam turbo-alternators was not authorised by the executive power. Such a subject matter did not fall within the Commonwealth defence power.3 It was held by the High Court in this case that the Australian Commonwealth Shipping Board, established under the Commonwealth Shipping Act 1923, had no power to enter into an agreement either because the Act did not confer power on the Board to enter into the agreement or, if it did, the Act was beyond the power conferred upon the Commonwealth Parliament by the Constitution.

1 See also Commonwealth v. Colonial Ammunition Co Ltd (1924) 34 C.L.R. 198, 224.
2 (1926) 39 C.L.R. 1.
3 Id. at 9, 10.
In Australian Alliance Assurance Co Ltd v. Goodwyn, The Insurance Commissioner,¹ Shand J stated that purely trading or business enterprises can only be undertaken by the State with legislative sanction, and that onerous contracts undertaken by the Executive Government, or their accredited agents (especially those undertake [sic] not for exigencies of State, but solely for purposes of commercial enterprise), are incompetent to bind the State unless and until they are validated by Act of Parliament.

Again in New South Wales v. Bardolph² the High Court seems to have suggested that excepting contracts entered into "in the ordinary or necessary course of Government administration", statutory authority must exist for every contract.³

The last two decisions referred to above related to contracting by the Crown in right of States. At Commonwealth level, in Attorney-General (Victoria) v. The Commonwealth (Clothing Factory case), Rich J said he was not prepared to accede to the argument that, without legislative power, the Commonwealth Executive can enter into business operations simply because it is a juristic entity, and in conducting business is not exercising governmental power over the subject.⁴

²(1934) 52 C.L.R. 455.
³Id. at 474 (per Evatt J). See also at 496 (per Rich J), and 502-3 (per Starke J) and 508 (per Dixon J).
⁴(1934) 52 C.L.R. 533 at 562.
Further in *Australia Woollen Mills Pty Ltd v. The Commonwealth*\(^1\) the High Court seems to have expressed a similar view. In that case the Court unanimously dismissed an action brought by the Australian Woollen Mills against the Commonwealth for recovery of money due under a contract to pay a subsidy. The Court held that no binding contract was constituted because there was no intention to create contractual relations. The Court therefore "excluded from consideration" questions of general constitutional law, but still went on to remind that "if there was an intention on the part of the Government to assume a legal obligation, one would certainly have expected statutory authority to be sought".\(^2\)

Again in *Re K.L. Tractors Ltd.*\(^3\) a creditor of K.L. Tractors Ltd., which was being wound up on the petition of the Commonwealth, applied for an order that the proof of debt lodged by the Commonwealth should be expunged on the ground that it was not within the constitutional powers of the Commonwealth for it to make or perform the contracts, upon which its debt was based. It was argued that the contracts for the sale and delivery by the Commonwealth to the company of tractor parts were outside the legal competence of the Executive Government of the Commonwealth in that neither the defence nor any other power authorised at the material times the production of machinery parts for civilian use under commercial contracts.

\(^1\)(1954) 92 C.L.R. 424
\(^2\)Id. at 461 (the Court consisted of Dixon CJ, Williams, Webb, Fullagar and Kitto JJ). For an analysis of the case see, Lücke, "The Intention to Create Legal Relations" (1970) 3 Adelaide L. Rev. 419-420, 425.
\(^3\)(1961) 106 C.L.R. 118.
In a joint judgment Dixon CJ, McTiernan and Kitto JJ observed that since the claim of the Commonwealth was for goods sold and delivered and the company having accepted and taken benefit of them, the question whether the Commonwealth in supplying those goods exceeded the limits of its constitutional powers, was unnecessary to decide.\(^1\) Windeyer J in a separate, though concurring, judgment said:

> It is not, in my view, necessary to decide here whether ... the Commonwealth might have been restrained or prohibited from engaging in or appropriating moneys for the activities that it was contended were beyond its constitutional powers because foreign, so it was said, to any function that it could properly undertake.\(^2\)

The Court in dismissing the summons of the creditor, held that the whole of the debt submitted for proof by the Commonwealth be paid in priority to all other debts.

(b) Other view

On the other hand, Professor Campbell holds an opposite view.\(^3\) The two High Court opinions (viz. the Clothing Factory case and the Australian Woollen Mills case), according to the author, "echo views" of the Royal Commission on the Constitution of 1928-29, views which seem

\(^1\)Id. at 334.

\(^2\)Id. at 338. The High Court also made observations upon the application of the doctrine of ultra vires in constitutional and company law. See at id. 335 and 337-38. See also Lumb, "Contractual Relations between Government and Citizen" (1962) 35 A.L.J. 45.

to have been "based on the Wooltops case" - a case which (the author points out) neither reveals, nor on its facts required any concluded "decision on the broader question of whether all or some Commonwealth contracts require statutory backing". The dictum (in New South Wales v. Bardolph) that the capacity of the Crown to enter into contracts without statutory authority is limited to contracts "in the ordinary course of administering a recognised part of the government", is criticised by the author on the basis that "such a view is bound to create difficulties for the courts in the absence of clear legal distinctions", to adjudge whether or not a contract was made in the ordinary or necessary course of government administration. Furthermore, it would cause hardship for the contractors for they would have to know for sure in advance about the constitutionality of each and every contract they enter into with government. But if, on the other hand (the author points out), the Commonwealth's contracting capacity is considered to be existing independently of a statute, the Parliament may still, if it so desires, enact laws regulating or restricting the Commonwealth's power to

1 Id. 4 and 5-6. For a discussion of Wooltops case, see also Campbell op.cit. (1970) 44 A.L.J. at 17.
2 (1934) 52 C.L.R. 455 at 508 (Dixon J).
3 Id. at 7 (citing South Australia v. The Commonwealth (1942) 65 C.L.R. 373, 423)
contract or may lay down mandatory requirements regarding
the manner in which that authority is to be exercised.\(^1\) A
contract made contrary to legislation limiting executive
authority to contract would, of course, be invalid.\(^2\) In an
extreme case, Parliament may even refuse to appropriate money
if the Commonwealth ventures to enter contracts which, though
legal, may not be proper, for the contractual obligation to
pay Crown moneys cannot constitutionally be fulfilled until
the Parliament appropriates the requisite funds.\(^3\)

In the light of the foregoing discussion, it is submitted
that the capacity of the Commonwealth to enter into contracts
is not subject to specific prior parliamentary approval or
prior appropriation of funds. The better opinion appears
to be that held by Professor Campbell that s.61 of the
Constitution does not exclude the operation of the common
law as far as it relates to the capacity of the Crown to
enter into contracts. The author rightly doubts "whether
in practice the executive does in fact restrict its

\(^1\) Ibid. Richardson, op. cit. at 73 observes that
the view, that the Crown has no power to enter into contracts
except under statutory authority, is now obsolete.

\(^2\) Campbell, Id. at 15-16 (citing The Commonwealth v. Colonial
Ammunition Co. Ltd. (1924) 34 C.L.R. 198; Commercial Cable Co.

\(^3\) Sections 81 and 83 of the Constitution. See also the
Australian Assistance Plan case (1975) 7 A.L.R. 277; Auckland
Harbour Board v. R. [1924] A.C. 318 (money paid without
appropriation is recoverable by the Commonwealth).
contracting to contracts authorised by statute and contracts in the course of performing well recognised functions of government".1

Reference must here be made to Professor Sawer's penetrating observation in his recent work,2 where he points out that because the general question of the scope of the Commonwealth executive powers has usually arisen in the context of relations with the States, the courts have taken a common approach regarding the Commonwealth's executive powers vis-à-vis State powers and federal executive powers generally.3 "Similarly", the author further states, "in the few earlier cases concerning Commonwealth activities of a business or at least economic character, some doubts expressed concerning the power of the Crown in right of the Commonwealth to carry on such activities have been expressed in contexts where the business was located in a State or States, and the decisions do not clearly differentiate between the federal constitutional difficulty and the broader difficulty arising from possible restrictions on the capacity of the Crown, i.e. the government, to make business contracts."4

1 Campbell, "Australian Government Contracts" op.cit. at 7.
3 Id. at 67-68.
4 Id. at 68.
Commenting upon the Connor loan affair, Professor Sawer states that it did not, however, raise any "federal constitutional problem". But could an objection be raised against the raising of government loans, on the ground, as suggested in Wooltops and Colonial Ammunition cases, that "the executive may not make contracts involving the provisions of public funds save with the authority of parliament"? The authority to raise the said loan, the author points out, had been given under the executive power of the Commonwealth and it did not have any parliamentary authorisation. Dismissing that objection, the author states:

"[T]he better view is that there is no constitutional doctrine requiring either specific prior parliamentary approval or prior appropriation for the validity of a loan raised by the authority of the supreme executive power". Regarding Crown contracts involving expenditure of public moneys, the author observes that after the High Court's judgment in New South Wales v. Bardolph, the position is that "the Crown has a general

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1 Mr R.F.X. Connor, the Minister for Minerals and Energy (as he then was) under the Whitlam Government was appointed by the Federal Executive Council in December 1974 as an agent of the Commonwealth to borrow from overseas a sum in the currency of the U.S.A. 'not exceeding the equivalent of four thousand million dollars'. For a detailed analysis, see Sawer, op.cit. ch.5.
2 Op.cit. at 68.
3 (1922) 31 C.L.R. 198.
4 (1924) 34 C.L.R. 198.
5 Sawer, op.cit. at 69.
6 Ibid.
7 Id. at 70 [italics author's].
8 (1934) 52 C.L.R. 455.
capacity to contract, proportioned in a federal setting to the subject-competence of the governmental unit in question, and this includes capacity to promise that public funds will become available for making payments; if such an agreement is made, and there is default in payment by the government, the creditor can obtain judgment from a court, ordering payment under the various modern statutes which make the Crown liable to judicial proceedings."

The executive power of the Crown to enter into a contract is, however, not an unlimited power. In a number of cases, the courts have stated that executive power is subordinate to legislative power and that Parliament can control the exercise of the power. Thus in the A.A.P. case, Jacobs J stated:

The Parliament is sovereign over the Executive and whatever is within the competence of the Executive under section 61, including or as well as the exercise of the prerogative within the area of the prerogative attached to the Government of Australia, may be the subject of legislation of the Australian Parliament.

Again, a contract by the executive government, to be valid, must be one that the Commonwealth Parliament could, if it has not already done so, validly authorise. For an Act of the Parliament to be valid, it must be a law with respect to one or

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1 Sawer, op.cit. at 71 [emphasis author's].
3 Id. at 334. See also New South Wales v. The Commonwealth (the Seas and Submerged Lands case) (1975) 8 A.L.R. 1, 9; Richardson, op.cit. at 66-67.
other of the enumerated subjects stated in thirty-nine (39) clauses of the Constitution. It will be recalled that in their joint judgment, Knox CJ., Gavan Duffy, Rich and Starke JJ in The Commonwealth v. Australian Commonwealth Shipping Board stated:

The Parliament has only such power as is expressly or by necessary implication vested in it by the Constitution. There is no power which enables the Parliament or the Executive Government to set up manufacturing or engineering businesses for general commercial purposes.

According to Professor Richardson, the capacity of the executive government (or a statutory authority, as in the Shipping Board case) "is restricted by the limited purposes for which the Commonwealth was established". The author then goes on to conclude that

[i]f such legislative powers as defence, section 51(vi), and trade and commerce, section 51(i), referred to in the Shipping Board case as possible sources of authority, were insufficient to support the making of a contract, there was no other source of constitutional power on which the Commonwealth could place reliance. Just as an agreement entered into by the directors of a company, formed under the Companies Act of a State, may be ultra vires the memorandum and articles of association, so an agreement entered into by the executive government may be ultra vires the powers conferred upon it under section 61 of the Constitution.

In Australian Assistance Plan case, Mason J (who was in the minority on the decision in the case) said:

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1 (1926) 39 C.L.R. 1, 9.
Although the ambit of the power [in s.61] is not otherwise defined by Ch.II it is evident that in scope it is not unlimited and that its content does not reach beyond the area of responsibilities allocated to the Commonwealth by the Constitution, responsibilities which are ascertainable from the distribution of legislative powers, effected by the Constitution itself and the character and status of the Commonwealth as a national government. The provisions of s.61 taken in conjunction with the federal character of the Constitution and the distribution of powers between the Commonwealth and the States make any other conclusion unacceptable.

There are two other limitations, viz. the power of the Executive Government to fetter the exercise of administrative discretion; and legislation appropriation, which we now discuss in turn.

(c) The doctrine of executive necessity

According to a well-known doctrine, the doctrine of executive necessity, the Crown is incapable of so contracting as to fetter its future executive discretion. In aid of this proposition the Amphitrite case is usually invoked. Here the facts were that during the first world war the British Government had assured the owners of a Swedish ship that if


the ship carried sixty per cent "approved goods" to a British port, she would be given a clearance (required by all foreign ships) to enable her to leave the country. In reliance on this assurance the ship sailed to Britain and was duly given a clearance. The assurance was renewed with respect to a second voyage, and the ship again sailed to Britain. On this occasion however, the British Government denied the ship a clearance. The owners petitioned the Crown for damages for breach of contract. Rowlatt J dismissed the petition on the ground that there was no enforceable contract between the Crown and the shipowners, stating:

All I have got to say is whether there was an enforceable contract, and I am of opinion that there was not. No doubt the Government can bind itself through its officers by a commercial contract and if it does so it must perform it like anybody else or pay damages for the breach. But this was not a commercial contract; it was an arrangement whereby the Government purported to give an assurance as to what its executive action would be in the future in relation to a particular ship .... And that is to my mind, not a contract for the breach of which damage can be sued for in a Court of law.¹

Two conclusions can be derived from this statement; first, that *The Amphitrite* was not a case dealing with a commercial contract;

¹ *The Amphitrite*, id. at 503.
but had it been so on the facts, the Government would have been bound to pay damages for its breach; and second, that The Amphitrite was not a case of a contract at all: it was merely "an assurance" given by the Crown which amounted to no more than "an expression of intention to act in a particular way in a certain event". Viewed in this way, it is clear that the case is an authority only for the proposition that the Crown cannot be prevented from an appropriate exercise of the defence power in time of war by an undertaking previously given by the Crown.

The Amphitrite has, however, been interpreted to establish that the Crown may not enter into a contract which would "fetter its future executive action". What this doctrine implies is that the Crown may breach its contracts with impunity if at a future moment it finds such contracts inconvenient or their performance undesirable. The Amphitrite, believed to be establishing such a law, has been severely criticised. Turpin, for example, has observed:

A principle that struck down every contract by which the future executive action of the Crown was impeded would be a serious hindrance to the government in its contracting activities. Especially likely to offend

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2 See per Bright J in Director of Posts and Telegraphs v. Abbott (1974)22E.L.R. S.A. Sup. Ct. 157, 168, where his Honour also observes that The Amphitrite did not deal with a contractual situation.
3 See Hogg, op.cit. at 155, and the authorities cited there.
against the principle would be contracts for the disposal of government property, e.g. an unwanted factory or aircraft carrier, for by such contracts the Crown limits or destroys its future freedom of action with regard to the property to be disposed of .... [T]his view does not take account of those major procurement contracts that involve a commitment of capital resources, facilities and skilled effort on the part of the government in the course of performance; such a contract, if binding, clearly places limits upon the government's freedom of action - in particular, to apply these resources to other purposes.  

At the present time, when contracts worth thousands of dollars are entered into every day and many or most of the governmental functions are performed by private contractors, any principle which gives the Government the protection of the doctrine of executive necessity, obviously destroys the credit of Government. It is not denied that situations can arise when the Government exercising its undoubted national responsibilities, may find it necessary to rescind certain contracts; what cannot be admitted is that a contractor should be made to bear the brunt of such administrative exigencies. As Hogg has put it:

[The Crown occasionally has to break a contract in the public interest. When it does break a contract, however, it should pay damages to the injured party, assessed in the ordinary way .... In order to preserve its freedom of action only one immunity is needed by the Crown, and that is immunity from the remedies of specific performance and injunction, which really would fetter its future executive action.]

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2 Op. cit. 155. The author adds that if payment of damages is not considered feasible by Government, "then a deliberate decision to expropriate private rights should be made and implemented by parliament, if necessary by retrospective legislation, and the government should take the political consequences."
In a recent case in Director of Posts and Telegraphs v. Abbott,\(^1\) one of the arguments made before the Court was that the Government was not bound because of an implied term in the contract that it was not to fetter the future exercise of executive discretion. In other words, the suggestion was that even if there was a binding contract between the Government and the respondent, the Government could avoid performance in the public interest. Though this question was here academic (as the Court found on the facts that there was no contract for the installation of a telephone connection between the respondent and the Postmaster General's Office, the sales clerk who dealt with the respondent having no actual or ostensible authority to contract on behalf of the Postmaster General), Bright J nevertheless observed:

I take it that when the Crown is entrusted in any capacity with a discretion it can exercise it no matter what ministry or ministers may be involved. So if the Postmaster-General has granted a lease of a telephone service clearly the Crown can terminate the service either by acquisition of the building or, at least in time of war, under the defence power to prevent breaches of security, or pursuant to any one or more of a number of prerogative or statutory powers. But that is not to say that the Crown has in all cases an unlimited and unlimitable discretion, when it has entered into a contract, to refuse performance.\(^2\)


\(^2\)Director of Posts and Telegraphs v. Abbott, op. cit. at 167. (My italics).
This approach is similar to that advocated by Professor Richardson\textsuperscript{1} and is indicated in the following lines written by the author:

If the subject matter of the Crown's commitment involves a restraint on the exercise of discretionary powers which are purely governmental in character, a court may readily hold that there is no intention to create legal rights and obligations. If such an agreement should specifically state that it is intended to give rise to contractual rights and obligations, in the present state of authorities, it would be open to the Court to hold that the arrangement is so far removed from the ordinary subject matters of contract that the Crown cannot legally bind itself. Otherwise, however, at least where the Crown is by contract binding itself to do or not to do only things which any ordinary person might bind himself to do or not to do, as, for example, entering into a contract to purchase goods over a period of time, there is no reason why the Crown should not be capable of affecting the substance of its discretion to deal freely with such matters during the term of the contract.\textsuperscript{2}

The Crown's right to terminate a contract in the public interest is not denied, but the crucial question is whether the Crown should not be made liable to pay damages for a breach, or at least pay some 'compensation' like a private party, in every case it refuses to perform its promise.\textsuperscript{3} Of course to speak of the Government's liability in damages is to ignore the realities of current Government practice whereby the standard


\textsuperscript{2}Id. at 80.

\textsuperscript{3} Hogg, op. cit. at 155; see also Mitchell, The Contracts of Public Authorities (1954) 288.
conditions empower the Government to determine the contract at any time by giving to the contractor written notice and then indemnifying the contractor only to the extent of expenditure reasonably incurred. But perhaps these conditions represent a sort of tacit admission that the Government would otherwise be liable for unjustified breach.

(d) Legislative appropriations

Another suggested limitation on the Commonwealth's contractual capacity relates to the parliamentary appropriation of funds. At one time it was thought that provisions of funds by Parliament was a condition precedent to the validity of government contracts. This view was rejected in New South Wales v. Bardolph and since that judgment, the law has been, as Professor Campbell puts it:

[When the Crown enters into a contract under which it agrees to pay money, the validity of the contract is in no way affected by the fact that when the agreement was made, Parliament had not voted moneys to enable the commitment to be met. In other words, the absence of appropriation does not affect the Crown's contractual obligation, but only the enforceability of a judgment debt.]

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1 These conditions are sometimes called as "Break" or "Termination for Convenience" clauses. For a detailed discussion of the working of these conditions, see infra, ch. IV.


3 (1934) 52 C.L.R. 455.

4 Campbell, "Private claims on Public Funds" (1969) 3 Univ. of Tas. L. Rev. 138, 139 (citing New South Wales v. Bardolph).
In that case an action was brought in the High Court by Bardolph against the State of New South Wales in which he claimed a certain sum due to him as payment for advertisements in the plaintiff's newspaper circulating in New South Wales. The Government pleaded, inter alia, that it incurred no liability since no money for this purpose had been appropriated by Parliament, nor sanctioned by any legislative enactment. The High Court held that the Crown in right of the Government of New South Wales was bound to pay.  

Dixon J, who discussed the case-law in great detail, remarked:

The prior provision of funds by Parliament is not a condition preliminary to the obligation of the contract. If it were so, performance on the part of the subject could not be exacted nor could he, if he did perform, establish a disputed claim to an amount of money under his contract until actual disbursement of the money in dispute was authorised by Parliament.... It would defeat the very object of such provisions as those contained in the Judiciary Act, if, before the Courts could pass upon the validity in other respects of the subject's claim against the Crown, it were necessary that Parliament should vote the moneys to satisfy it.

The view that provision of funds by Parliament is a condition precedent to the validity of government contracts, according to Turpin, has been the result of placing a wrong construction upon the decision in Churchward v. The Queen.  

1 "There is no doubt that this decision applies to contracts involving public money made by the Crown in right of the Commonwealth, i.e. by the authority of the Governor-General in Council." Sawer, Federalism Under Strain, Australia 1972-1975 (1977) 71.  

2 (1934) 52 C.L.R. 455, 510. In the United States, it may be noted, a different rule obtains. There the executive departments and agencies of the Federal Government are not permitted, unless specially authorised by law, to make contracts in advance of appropriations.  


4 (1865) L.R. 1 Q.B. 173.
The author holds that the appropriation of funds is not relevant to the validity of contracts and adds:

Clearly, to hold approval of estimates and appropriation to be necessary for the making of a valid contract, as opposed to payment under a contract, would be to distort the purpose of Estimates and, worse, to impose a serious limitation upon the contractual powers of the government.¹

It is submitted that a rule that requires that no commitment to expenditure should be undertaken, and in particular no contract made which imposes liability upon the government for the payment of money, until funds have been appropriated by Parliament, would hardly be workable.

(v) Government's Contracting Authority under the Audit Act

Though in Australia, government contracting is not subject to intrinsic limitations, it must nevertheless conform to the procedures and requirements under the Audit Act 1901-1975.² Section 71(1) of the Act is the most important section relating to government purchasing.³ This empowers the Governor-General to make regulations for and in relation to -

... (d) the execution of works and the supply of services for or by the Commonwealth, (e) the purchase of chattels and other property for or by the Commonwealth, and (f) the custody, issue, sale or other

¹Turpin, op. cit. at 25; contra Street, Government Liability: A Comparative Study (1953) 84-85, 92.
²The citation of the Audit Act 1901-1973 was amended by Postal and Telecommunications Commissions (Transitional Provisions) Act 1975 (section 38 and Schedule 3).
³Other sections of the Act relevant to government purchasing are sections 63 and 63A.
disposal and writing off of stores and other property of the Commonwealth, and the proper accounting for, and stocktaking of, those stores and that property.

In pursuance of the power given to him under s.71(1) of the Act, the Governor-General has made Regulations earlier known as "Treasury Regulations" but now called the "Finance Regulations"\(^1\) which lay down the principles and procedures to be followed by all Departments entering into government contracts within Australia or overseas.\(^2\) While most of the provisions of the Finance Regulations are in the nature of general financial rules of the Government, regs. 4, 46, 47, 48, 49, 50, 51, 52A, 52AA, 52B and 53 prescribe procedures to be followed in relation to all government contracts — whether for works, stores or services. These contracts are treated in the Regulations as contracts for supplies and sub-reg. 4(1) states:

'Supplies' means supplies that are to be executed, furnished or performed for or by the Commonwealth, and includes works, stores and services that are to be so executed, furnished or performed.

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\(^1\)The citation was changed from the "Treasury Regulations" to the "Finance Regulations" by Statutory Rules 1976, No.260 (7 December 1976) and thus hereinafter the "Treasury Regulations" are cited as "Finance Regulations" in the discussion. The Finance Regulations, in force under the Audit Act, 1901-1975, comprise Statutory Rules 1942, No. 523, as amended by Statutory Rules 1943, No.32; 1953, No.3; 1959, No.9; 1961, Nos.77 and 122; 1964, No.21; 1965, Nos.32 and 169; 1966, No.176; 1968, No.87; 1972, No.31; 1974, No.129; 1975, No.156; and 1976, Nos.91 and 260

\(^2\)See reg.5A. It may be noted here that the Audit Act and Finance Regulations are not applicable to some statutory bodies like Australian National Resources, Australian National Line, Qantas, T.A.A., Australian Postal Commission, C.S.I.R.O., Australian Telecom. Commission, etc. They may, however, procure goods and services through the Purchasing Division, Department of Administrative Services and A.G.S.T.B.
The provisions of the Finance Regulations dealing with obtaining of supplies, may be divided for convenience into three groups as under: (a) Preparation of a requisition for supplies; (b) Mode of obtaining supplies; and (c) Publication of provisions of certain contracts.

(a) **Preparation of a requisition for supplies**¹

Every officer requiring supplies has to prepare a requisition for supplies.² It should relate only to supplies that are necessary for the proper conduct of the public service.³ The supplies required should be clearly described and, where appropriate and practicable, the quantity of the supplies and the estimated rate should also be specified.⁴ A requisition has to be prepared in accordance with the prescribed form⁵ in all cases except where supplies are to be obtained from or through the Department of Construction. In the latter case it has to be in the form determined by the Minister of State for Construction.⁶

Before a requisition is approved by one of the authorities prescribed under reg.49,⁷ the appropriate Authorising Officer issues

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¹See regs. 46-50.  
²Sub-regulation 46(1).  
³Id. para.(a).  
⁴Id. para.(c).  
⁵Form 11, The Schedule to the Finance Regulations.  
⁶Sub- paras. (i) and (ii) of reg.46(1)(b).  
⁷Regulation 49 states the names of authorities empowered to approve a requisition as follows: (a) for those supplies for which the appropriation of funds is "under the control of a Department of the Parliament", - the President of the Senate or the Speaker of the House of Representatives or both or an officer appointed by either or both, as the case may be; (b) for those supplies for which the appropriation of funds is under the control of Department of Construction - the Minister of State for Construction and (c) in any other case - the Minister of State of the Department in which the requisition originated.
a certificate that funds are available for the purpose of the requisition. Regulation 50 prescribes the procedure under which expenditure may be incurred for small-value purchases in cases of emergency, without first complying with the procedure stated above provided the amount of expenditure incurred does not exceed the maximum fixed by the Treasurer or $50, as the case may be. Only after the approval of a requisition is the Department concerned ready for procuring the supplies and entering into a contract.

(b) Mode of obtaining supplies

The general principle governing government procurement is stated under reg. 52 which prescribes that for all government contracts for supplies, beyond the monetary limit

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1See sub-reg.47(1). It may be noted that a different procedure is prescribed for requisitions of the Department of Construction (see reg.48). The certificate of the Authorising Officer regarding the availability of funds is also not necessary if the case falls under sub-reg.47(2).

2For the procedure relating to small purchases, see a recent publication, Small Purchases Handbook (13 April 1977) Purchasing Division, Department of Administrative Services. See generally, McGlynn (PMG, Supply Branch) "Small Value Orders" (October 1972) Australian Purchasing.

3See regs. 51, 52, 52A, 52AA and 52B.
of $5,000\textsuperscript{1} and subject to reg.52AA shall be entered into by public invitation of tenders. Besides enumerating five special situations under which public invitation of tenders may be entered into, regulation 51 as amended by Statutory Rules 1975, No.156 in its present form reads:

\textbf{51.} Subject to any Act making provisions with respect to contracts for supplies and to regulation 52AA of these Regulations, where -

(a) any supplies the estimated cost of which exceeds one hundred dollars;

(b) there is no existing contract between the Commonwealth and the supplier under which the supplies so required can be obtained; and

(c) the supplies are not obtained under a contract between a State and a supplier, representative quotations for the supplies shall, whenever possible, be obtained unless tenders are publicly invited.

(2) [Repealed]

(3) Where the estimated cost of any supplies exceeds one hundred dollars but does not exceed two hundred and fifty dollars, a quotation obtained under this regulation in respect of the supplies may be oral or in writing, but, in the case of an oral quotation, the details of the quotation shall be recorded in the appropriate Departmental file.

(4) Where the estimated cost of any supplies exceeds two hundred and fifty dollars, each quotation obtained under this regulation in respect of those supplies shall be in writing.

\textsuperscript{1} The threshold for invitation of public tenders was raised from $1,000 to $5,000 by an amendment made by Statutory Rules 1975, No.156. The amount was probably raised following the recommendation made by the Scott Committee, see Recommendation 10, paras. 9.92 - 9.100. Regulation 51 as amended by Statutory Rules 1975, No.156 in its present form reads:
dispensed with, sub-reg. 52AA(2) makes provision for the issuance of 'Certificates of Inexpediency' in the following manner:

Where the Secretary certifies that compliance with regulation 51 ... is, having regard to the nature of the supplies and to the established practices in a profession, business, trade or industry connected with the supply of supplies of that kind, impracticable or inexpedient, regulation 51 of these Regulations or the last preceding regulation, as the case may be, does not apply to the supplies of that kind.

Sub-regulation 52AA(4) further empowers the Secretary, or an officer authorised by him, to exempt the prescribed kinds of supplies from the operation of regs. 51 and 52 by reason of the urgency with which those particular supplies are required and because the procurement of those supplies by public tender, is impracticable or inexpedient.

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1 The five cases to which reg. 51 is made inapplicable are enumerated in 52AA(1). They are: (a) supplies the expenditure on which is authorised by the Governor-General; (b) supplies to be obtained under an existing contract between a supplier and the Commonwealth or a State; (c) supplies to be obtained from the Australian Government Publishing Service, the Commonwealth Printing Office, a State Government Printing Office, Commonwealth factories, Commonwealth workshops, Commonwealth stores or Commonwealth dockyards; (d) supplies that by their nature can be obtained only from a State Government Department, an authority of a State or Territory or a municipal or other local governing body; (e) supplies of radioactive isotopes for medical purposes to be obtained by the Commonwealth X-ray and Radium Laboratory of the Department of Health from the Australian Atomic Energy Commission.

2 Sub-regulation 52AA(4) applies to supplies enumerated in sub-reg. 52AA(3). They are: (a) metals for use in the manufacture, by or on behalf of the Commonwealth, of coins, medals, medallions, plaques, and other like objects at a mint; (b) supplies relating to the defence of the Commonwealth; (c) supplies for the Department of Construction; (d) supplies obtained by or on behalf of the Administrator of the Territory of Christmas Island in connection with the administration of the Territory; and (e) supplies approved, or to be obtained, by the A.G.S.T.B. or by a Tender Board of a Department.
By whatever manner a contractor is selected - whether by competitive tender under reg.52 or by inviting quotations under reg.51 or by negotiations under 52AA, the Chief Officer\(^1\) or an officer authorised by him, issues a Purchase Order in accordance with Form 13\(^2\) in respect of supplies specified in the requisition.\(^3\)

(c) **Publication of provisions of certain contracts**

Sub-regulation 53(1) requires publication in the Australian Government Gazette of 'a summary of the provisions of the contract' for contracts for supplies not less than one thousand dollars.\(^4\) Certain exceptions are set out in sub-reg. 53(2). Sub-regulation 53(3) enables information relating to contracts, in addition to that published in the Gazette, to be disclosed.\(^5\) The present practice of Government is to publish each week in the Australian Government Gazette in its General issues the following information\(^6\): (1) "Tenders Invited" which contains notices regarding invitation of tenders under the name of the Department purchasing the goods or services along with a

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\(^1\) For the definition of "Chief Officer" see sub-reg.4(1), as amended by Statutory Rules 1974, No.129.

\(^2\) See the Schedule to the Finance Regulations.

\(^3\) Regulation 52A. Regulation 52B states the duties of Certifying Officers in relation to requisitions.

\(^4\) The amount of Four hundred dollars was raised to One thousand dollars by an amendment by Statutory Rules 1975, No.156.

\(^5\) For the history of reg.53 and specifically on the desirability or otherwise of disclosing a successful tenderer's unit price, see Seventy-Seventh Report, Joint Committee of Public Accounts, P.P. No.251 of 1964-65. See also the discussion regarding Post-Award Policy, *supra*; Scott Committee Report paras. 2.35, 2.36; 4.67 - 4.71 and 10.92 - 10.95.

\(^6\) Finance Instructions 31/33 - 34.
brief description, closing date of Tenders and the addresses of places where the interested tenderers might obtain the forms, specifications, etc. for the purpose of quoting their prices;

(2) "Contracts Arranged" which contains the list of all Purchase Orders issued by each Department of the Commonwealth Government along with the tender reference number, description of supplies, the total value of the contract, the name of the contractor, the place where the contract is entered into and the duration of the contract, where appropriate.

(vi) Directions issued under the Finance Regulations

Section 71(2) of the Audit Act 1901-1975, provides that the regulations may authorise the Secretary to the Department of the Treasury\(^1\) to give directions to persons subject to the provisions of the Act "for or in relation to any of the matters referred to in paragraphs (a) to (f) inclusive of the last preceding sub-section".\(^2\) The regulations may also authorise a prescribed officer of a Department to give directions to officers of, or persons employed in, that Department.\(^3\) The directions should, of course, be not inconsistent with the Audit Act or any other Act or with any regulations issued under the Audit Act or any other Act. The regulations may also provide that a contra-

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\(^1\)Now the Secretary to the Department of Finance: Statutory Rules 1976 No.260.

\(^2\)The matters which relate to government contracts have been stated, supra.

\(^3\)Section 71(2)(b) of the Audit Act.
vention of a direction so given may be deemed to be a breach of the regulations.¹

Such authorisation to give directions is provided by the Finance Regulation 127A, which in substance repeats the terms of s.71(2) of the Audit Act. After the amendment of the Treasury Regulations by Statutory Rules 1976, No.260, the Secretary to the Department of Finance is authorised to give directions under reg.127A, but any directions that were in force before that date and given by the Secretary to the Department of the Treasury, continue to be in force.² The Directions given by the Secretary to the Treasury are contained in a Manual issued pursuant to s.16 of the Audit Act and Treasury Regulation 127A. Treasury Directions ss.31 and 32 contain directions (relating to government contracts) which explain, inter alia, the objectives of the relevant regulations.³ Treasury (Overseas Accounts) Directions Nos. 11, 12 and 13 prescribe the standard procedures for the obtaining of supplies overseas.

(vii) Are the Regulations and Directions legally enforceable?

It is interesting to find out whether the regulations and directions, so far as they are material to government contracts,

¹Section 71(2)(c).
³A copy of the up-to-date relevant sections of the Audit Act and a copy of the major Finance Regulations and Directions mentioned above are included as Appendix.
can be enforced at the instance of a contractor in the court of law, if a breach is established?\(^1\) Or are they merely for internal consumption of the Government Departments? If an accounting officer\(^2\) or a person subject to the provisions of the Audit Act commits any breach of the Regulations (or Directions, since a contravention of a Direction is deemed to be a breach of a Regulation\(^3\)), reg.133 authorises the Treasurer to impose a penalty not exceeding Ten dollars upon that accounting officer or person.\(^4\) Regulations 131, 131A and 132 also deal with the duties of officers to acquaint themselves with the regulations and directions, to make them accessible to certain officers and to ensure their compliance. None of these provisions make any mention of the rights of contractors.

But if, for example, a Purchase Order is issued under reg. 52A in contravention of say, reg.52, without an invitation of tenders (although the cost of the contract exceeds $5,000, 'certificate of inexpediency' has not been issued, and the case does not fall within sub-reg.52AA(1)), what avenues are open for other contractor/s to challenge the ultra vires contract? A similar question arises regarding the legality

\(^1\)The question has not arisen so far, but its possibility cannot be ruled out.

\(^2\)For the definition of "accounting officer", see the Audit Act 1901-1975, section 2.

\(^3\)Sub-regulation 127A(3) of the Finance Regulations and s.71(2)(c) of the Audit Act 1901-1975.

\(^4\)Such an authority to impose penalty is conferred by s.71(4) of the Audit Act.
of the various standard conditions, to be found in the
General Conditions of Government Contracts; we shall
consider them further in a later chapter.¹

4. Government Contracts - Are they enforceable if not
   in writing?

   Although Finance Regulations and Directions deal extensively
with the formation of government contracts, the creation of a
contractual relationship is still largely determined by common
law principles. In the past these principles have been derived
primarily from case law. Although in some areas like the sale
of goods, legislation has emerged as a source of legal principles
for application to government contract, yet the rules and
decisions governing contract formation and contract performance
are to be found in the common law of contracts.²

   Specific contract formation procedures followed by the
Government may vary depending upon the procurement technique
being utilised and the individual circumstances of each
procurement action.³ However, the common law rules of offer
and acceptance form the foundation of the government contract
formation process.

¹See infra chapter IV.
²For a detailed analysis of U.S. case-law, see Note, "The
   Application of Common-Law Contract Principles in the Court
³"Procurement of Supplies is effected through some 150
   purchasing agencies of the Commonwealth": see Gilmour,
   "Government Purchasing Arrangements" (May 1977) (unpublished
   manuscript) Purchasing Division, Department of Administrative
   Services, Canberra.
When procurement is conducted by formal advertising, the Government's Invitation for Bids (IFB) is a request for offers, the prospective contractor's bid constitutes the offer, and the Government's Purchase Order (issued in accordance with Form 13, Finance Regulations)\(^1\) is the acceptance. The IFB, the bid and the Purchase Order are always written documents. In negotiated procurement, offers are solicited by Requests for Proposals (RFP) or Requests for Quotations (RFQ) and when negotiations conclude with an agreement, the Government reduces the agreement to writing in an integrated document and sends it to the contractor for execution. Upon his signature and return it becomes the offer. Finance Regulation 52A requires that after obtaining approval from the Approving Authority (the Minister or one of his delegates or the relevant

\[^1\]Finance Regulation 52A reads as follows:

1. When -
   (a) an Authorising Officer has -
      (i) certified that funds are available for the purpose of a Requisition; or
      (ii) given a certificate of a kind referred to in paragraph (a) of sub-regulation (2) of regulation 47 of these Regulations by virtue of which a certificate whether funds are available for the purpose of a Requisition is not required; and
   (b) the Requisition has been approved after submission for approval under regulation 49 of these Regulations.

   the appropriate Chief Officer, or an officer authorised for the purpose by the appropriate Chief Officer, shall issue a Purchase Order in accordance with Form 13 in respect of the supplies specified in the Requisition.

2. Unless the Treasurer otherwise approves, Purchase Orders shall be prepared in triplicate and shall be numbered consecutively.

3. A Purchase Order shall not be issued except in accordance with the Requisition as approved.
tender board) for the acceptance of a tender/quotation, the next step to be taken to complete the legal requirement is to furnish a form of acceptance to the successful tenderer. This Purchase Order, which inescapably has to be in writing, is sometimes called a Contract Acceptance and Purchase Order (commonly referred to by its acronymic, "CAPO"). CAPO is the basic contractual document which contains all the terms and conditions of a Commonwealth contract for supplies.

Normally, therefore, government contracts are entered into in writing. But the question is: will a government contract be enforceable if it is not reduced into writing in the manner prescribed by the Finance Regulations? But first, what is the law governing private contracts? Are they required to be put in writing?

Very briefly, the common law did not require a contract to be in any particular form as a condition of its validity or enforceability. By statute, however, certain contracts had to be evidenced in writing, as by the Statute of Frauds, ss.4 and 17. The Statute was received in Australia as part of the common law of England. Section 4 under one guise or

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1. This is the present practice in the Purchasing Division of the Department of Administrative Services, which is the Commonwealth's biggest procurement agency.
another is still the law in the Australian Capital Territory and in all the States with the exception of Western Australia.\textsuperscript{1}

By its Law Reform (Statute of Frauds) Act 1962, Western Australia has partly followed in the footsteps of the U.K. and has repealed the provisions of s.4 with regard to special promises of executors and administrators, agreements in consideration of marriage and agreements not to be performed within one year of the making thereof.

The law governing the sale of goods in Australia is based on the English Sale of Goods Act of 1893, the various States having enacted legislation identical with the parent Act. In all the Australian States, s.17 has been repealed but re-enacted in the Sale of Goods Acts.\textsuperscript{2} Section 9 of the Sale of Goods Act 1923-1953 (N.S.W.) (in other States the provision is identical), for example, imposes a requirement of form in the case of a contract for the sale of goods of the value of $20 or upwards.

\textsuperscript{1}E.g. for contracts for sales of lands, etc. see: Statute of Frauds 1677, s.4 (A.C.T. and W.A.); Conveyancing Act 1919 s.54A (N.S.W.); Statute of Frauds 1972 s.5 (Q.); Law of Property Act 1936, s.26(1) (S.A.); Conveyancing and Law of Property Act 1884 s.36 (Tas.); and Instruments Act 1958, s.126 (Vic.). For liability of executors and administrators, see: Statute of Frauds 1677, s.4 (A.C.T., N.S.W. and S.A.); Statute of Frauds and Limitations Act 1867, s.5 (Q.); Mercantile Law Act 1935, s.6 (Tas.) and Instruments Act 1958, s.126 (Vic.). See generally, Roebuck, \textit{op.cit.} 112-32.

Such a contract is unenforceable unless the buyer accepts part of the goods so sold and actually receives the same or gives something in earnest to bind the contract or in part payment, or unless a note or memorandum in writing of the contract is made and signed by the party to be charged.¹ In the U.K. however, s.4 of the Sale of Goods Act 1893, which re-enacted s.17 of the Statute of Frauds was repealed by the Law Reform (Enforcement of Contracts) Act 1954 (U.K.) s.2. So far the only Australian State to follow the lead thus given is Queensland.²

No statute makes the Statute of Frauds (or its re-enacted provision) applicable to government contracts. But since, in the absence of a contrary statutory rule or regulation, the rules governing formation of government contracts are frequently based on the legal principles of the common law of contracts, it may be assumed that government contracts are also required to be put in writing in such cases where private contracts are. As far back as 1924, the Victorian Court (Mann J) held in The King v. Hay³ that Crown contracts for sale of goods must be in writing to be enforceable. In a suit by the Crown for

¹ As to how far can a contract caught by s.9 be altered verbally and what legal effect would such an alteration have, see Sutton, The Law of Sale of Goods in Australia and New Zealand (2nd ed. 1974) 74-77.

² Statute of Frauds 1972 (Q.) s.3. Western Australia's Law Reform (Statute of Frauds) Act 1962 has, however, left s.4 of the Sale of Goods Act 1895 intact.

recovery of £90, the price of certain stacks of hay sold to the defendant under an oral agreement, the defendant, inter alia, argued that since the contract sued on was a contract for the sale of goods of the value of £10 or upwards, the requirements of the Statute of Frauds were not complied with, and the said contract was therefore not enforceable by action. The Court holding that "the Crown was bound by the provisions of sec.9 of the Goods Act", gave judgment for the defendant.

In a recent case in Coogee Esplanade Surf Motel Pty. Ltd. v. Commonwealth of Australia, (a case, unfortunately, unreported) one of the questions involved was whether a government contract made orally could be enforced? The facts were: the appellant sought against the Commonwealth an order for specific performance of an alleged oral contract to buy the Coogee Bay Motel and certain furniture and furnishings therein for $700,000. The oral contract was alleged to have been made on the telephone on 4 June 1975 by the Under-Secretary of the Department of Services and Property (the present Department of Administrative Services) on behalf of the Commonwealth and the appellant. This telephone conversation was alleged to be the subject of a written memorandum provided by a letter

\[1\text{Id. at 101.}\]

\[2\text{Unreported, see [1976] A.C.L.D. 233 [Court of Appeal, Supreme Court of New South Wales, C.A. No.368 of 1975, 16 March 1976].}\]
dated 6 June 1975, signed by the Chief Property Officer for New South Wales of the above Department. The Commonwealth contended, *inter alia*, that any such contract to come into existence must be wholly in writing, signed by the party to be charged, and contain a recognition or admission of the existence of a contract.

The trial court (Needham J) found that although an oral agreement for the sale and purchase of the motel was made on 4 June 1975 between the Under Secretary of the relevant Department and the appellant, "[w]ithout writing it would, of course, be unenforceable".¹ It was found, however, that the letter of 6 June 1975 constituted a sufficient memorandum of the contract. But on another ground, namely, that the Under Secretary had no authority to make a contract for the purchase of the motel building for the Commonwealth, the court dismissed the summons.

The Court of Appeal, however, did not think that an oral contract was, *per se*, unenforceable. Moffitt J found that the facts showed there was no intention to enter into an oral contract and that

... the fact that the exercise of the power to contract was administered by set procedures carried out by other departmental officers and was being so administered on 4th June, was a very powerful circumstance, making most difficult an inferred verbal contract.²

¹No. 1821 of 1975 (3 December 1975) at 12, The Supreme Court of New South Wales, Equity Division.
²Court of Appeal, *op.cit.* 10. See also at 12-13. (*per* Moffitt and Glass JJ, Hutley J dissenting).
He added

One would expect the most positive indications, if not direct words, to conclude there was a sudden change of procedure to a verbal contract to buy for $700,000.¹

He also held that the letter of 6 June did not purport to be a memorandum of any oral agreement.²

Hutley J, who delivered a dissenting opinion, however, went a step further and expressly stated that there was nothing irregular in an informal contract between the Commonwealth and the appellant.³ He said:

No evidence was given as to what were the regular methods of contracts adopted by the Commonwealth and without express evidence that the powers of the Commonwealth officers were limited to contracting in a particular manner, I would not assume that any such limitation existed. In the case of a permanent head, unless limited by statute or regulation, he can make his own rules as to how he runs his department and how it will operate.⁴

His Honour, however, also found that the letter dated 6 June 1975 satisfied s.54A of the Conveyancing Act 1919 (N.S.W.), which required that contracts for sale etc. of land must be in writing.

It appears from the foregoing that there is no general principle of law which requires that Commonwealth contracts must be made in writing. But if a statute or a regulation expressly prescribes that certain contracts should be put in writing, then of course, they must be made in that manner to be enforceable.

In private contracts as noted above, the statutory laws of each State do prescribe writing for contracts of sale of goods, sale

¹Ibid.
²Id. at 17-19.
³Hutley J, op. cit. at 7.
⁴Id. at 6.
of land etc., and certain other contracts. The same principle seems to apply to government contracts in such cases.¹

Suggestions have however been made that the requirement of writing in private contracts, particularly sale of goods, is not very desirable. Professor Roebuck, for example, has strongly suggested that the requirement of written evidence is unnecessary in the present times and should be abolished by legislation.²

In the author's own words:

The Australian States should ... repeal the section of the Sale of Goods Acts which requires contracts for the sale of goods of the value of twenty dollars and upwards to be evidenced in writing. This has been done with entirely beneficent consequences in England and New Zealand.³

The view that the requirement of writing in contracts is superfluous, has been held by other authorities too.⁴

While in private contracts, the requirement of writing rightly seems unnecessary in the present state of affairs, in government contracts, it is submitted, the requirement of a written contract protects both government and a private contractor from the possibility of fraud or misinterpretation by the other. More

¹This does raise a constitutional issue as to whether the State laws can on their own force apply to the Commonwealth. This matter has been discussed in the previous section.


³Id. 127. At 131, the author observes that "the legislation requiring written evidence has little to support it, and causes more harm than good".

importantly, a writing requirement in government contracts may help to protect the taxpayer's dollar from being pillaged by the presentment of claims of the most extraordinary character if allowed to be sustained by parol evidence, which can always be produced to any required extent. It may also avoid favouritism in awards and thus prevent fraud. Thus, written contracts safeguard the government from being saddled with liability for perhaps secretive contracts. It may also be mentioned in passing that the rule that government contracts must be in writing has a similar aim to that of the rule that public contracts in sums exceeding some specified minimum, must be generally awarded by competitive tender.

A number of other reasons justify a policy favouring written agreements in government contracts, as against private contracts, such as the public accountability and public audit of government contracts, existence of numerous terms and conditions, involvement of a body of officials which might not consist of the same individuals all the time, avoidance of frivolous and vexatious litigation against an already busy administration. Needless to add that the requirement of writing makes things easier for both parties.

It may however be argued that since hundreds of government officials daily enter into a variety of contracts, often of a petty nature, the requirement of writing would make its compliance in practical terms extremely inconvenient from the administrative point of view. It may further be argued, citing in support the recent Coogee Surf Motel case\footnote{Unreported. Court of Appeal, Supreme Court of New South Wales, C.A. No. 368 of 1975, 16 March 1976.} that a strict compliance with such
a rule would jeopardise the interests of unsuspecting and unwary parties entering into contracts with government officials.

Aside from the fact the preceding arguments seem to constitute a conclusion that oral contracts will not lead to inconvenience and hardships, the absence of case-law (except for the two cases discussed above) in the last 50 years in Australia, belies those arguments. Even in these two cases, the rule requiring writing, it is submitted, seems to have done no mischief to the private parties. In the first case, viz. The King v. Hay,\(^1\) it may be recalled, the Court gave judgment against the Crown and in the second, *Coogee Surf Motel* case, the Court of Appeal's ultimate decision was based upon its conclusion that there was no intention to enter into legal relationship between the parties.\(^2\)

It may further be mentioned that both in India and (after the judgment in *The United States v. American Renaissance Lines, Inc.*\(^3\)) in the United States, government contracts are not enforceable if not in writing. In India, government contracts are required to be made in accordance with art.299 of the Constitution.\(^4\) That article

\(^{1}\)[1924] V.L.R.97.

\(^{2}\)Op.cit. at 17-19 (per Moffitt J). It may, however, be submitted that the decision of the Court of Appeal is wrong. The facts of the case clearly show that there was an intention to enter into a contractual relationship and that intention culminated in the writing of the memorandum dated 6 June 1975.


so far as relevant for our purpose, reads as follows:

Contracts - (1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise.¹

In a number of cases, the Supreme Court of India has held that a government contract to be valid under art.299(1) has to be in writing.² Thus in State of Bihar v. Karam Chand Thapar Brothers Ltd,³ the Supreme Court held that three conditions had to be satisfied before a binding contract against the Government could arise, namely, (i) the contract must be expressed to be made by the President or the Governor, (ii) it must be executed in writing, and (iii) the execution should be by such persons and in such manner as the President or the Governor might direct or authorise.

The requirement of writing does not, however, mean that there should always be a formal legal document between the government and the other contracting parties for the purpose. In Union of India v. A.L. Rallia Ram,⁴ for example, the Court held

¹The Constitution of India, 1950.
²Some of the cases on this question arose under s.175(3) of the Government of India Act 1935, which was succeeded by art.299(1) of the Constitution. What was said in these cases with respect to s.175(3), applies with equal force to art.299(1) because of the parallel phraseology. Any reference to s.175(3) in the text has therefore been omitted for convenience sake.
that so long as all the requirements of art. 299(1) of the Constitution were fulfilled and were clear from the correspondence, the article did not necessarily require the execution of any formal document. A tender for purchase of goods in pursuance of an invitation issued by, and acceptance in writing which is expressed to be made in the name of, the President or the Governor and executed on his behalf by a person authorised for the purpose would conform to the requirements.¹

In the United Kingdom, on the other hand, government contracts are not generally required to be made in writing. No special formalities are required for their formation or enforceability, but general legal provisions imposing formal requirements do have application to government contracts. Thus the formality of writing prescribed by s.40 of the Law of Property Act 1925 in respect of contracts for the sale or other disposition of land or any interest in land applies to government contracts.² Contracts for the sale of goods (apart from certain transactions of hire-purchase) are not subject to formal requirements.

¹For another judicial pronouncement, where all the earlier authorities are discussed, see K.P. Chowdhary v. State of Madhya Pradesh [1966] 3 S.C.R. 919. See generally, Ponnuswami and Puri, op.cit. where reference is made to the case-law on the subject. See also, Jain and Jain, Principles of Administrative Law (1971) 458-64.

²Section 208(3) of the Law of Property Act 1925 provides, with qualifications, that the Act shall bind the Crown.
In the United States, until the case in American Renaissance Lines, it is interesting to note, there was little question but that if all of the elements of a contract were present, both the government and private contractors could enforce oral agreements made between them, even though those agreements were not later reduced to writing. However, in the above-stated case, the Circuit Court of Appeals for the District of Columbia Circuit held that a portion of the Appropriations Act of 1955 which required written evidence of contractual agreements before the funds to pay that agreement could be recorded as an obligation of the United States constituted a statute of frauds, and any government contract not in writing was thus void and unenforceable. The facts in American Renaissance Lines case were: in response to a general invitation for bids, the Commodity Credit Corporation (a government corporation) and American Renaissance Lines, Inc. [hereinafter "ARL"] entered into an oral agreement regarding the carriage of large amounts of foodstuffs from the United States to South Vietnam. Before any written


2 In Penn-Ohio Steel Corp. v. United States (1965) 354 F. 2d 254, the court indicated that a state's "statute of frauds" would not be applied to a federal government contract since federal law was applicable. See also Escote Mfg. Co. v. United States (1959) 169 F. Supp. 483; United States v. Swift & Co. (1926) 270 U.S. 124; America Smelting & Refining Co. v. United States (1922) 259 U.S. 75; United States v. Purcell Envelope Co. (1919) 249 U.S. 313 (a contract not formally executed and signed is binding).

contract had been signed, ARL repudiated the oral agreement and refused performance. The failure of the agreement caused the government additional storage, handling and shipping costs of approximately $40,000, for the recovery of which sum a suit was filed by the United States. The court stated that government contracts were required to be in writing before they could be enforced and therefore denied enforcement to the United States of the oral agreement.¹

In the light of the foregoing discussion and the wording of the Australian Finance Regulation 52A, it does not appear unlikely that Australian courts would also not enforce contracts which were not reduced to writing.²

5. Apparent Authority and Estoppel

In the United States, since the case in Whiteside v. United States,² the accepted view has been that there is no doctrine of apparent authority in government contracts; the principle is that in order to bind the government, the government agent upon whose acts suit is brought must have had actual

¹The court cited with approval the decision of the Supreme Court in Clark v. United States (1877) 95 U.S. 539. The decision in American Renaissance Lines has, however, been severely criticised: see Patten, "Government Contracts - Are They Enforceable If Not in Writing" (1975) 7 Public Contract Law 232.

²It is submitted that reg. 52A is concerned with the following two matters: (i) procedural, viz. the certification of availability of funds; the approval of requisitions; and preparation of purchase orders in triplicate and (ii) mandatory, viz. the issuance of purchase orders in writing (in accordance with Form 13). While the contractors cannot possibly have any control or information about the compliance with the (i) above; they can always be sure of compliance with the writing requirement stated in (ii) above. It therefore seems that a court would consider the cumulative effect of reg.52A and the requirement of writing in private contracts to be that that the Statute of Frauds applied to government contracts, just as it did to private contracts. See also infra 256 et seq
³(1876) 93 U.S. 247.
authority. What follows from this is of course the concomitant principle that the government may not be estopped by the action or representation of an agent not within the scope of his actual authority. The law is stated thus:

If ... any such person acts outside the scope of the authority actually held by him the United States is not estopped to deny his unauthorised or misleading representations, commitments, or acts, because those who deal with a Government agent, officer, or employee are deemed to have notice of the limitations on his authority, and also because even though a private individual might be estopped, the public should not suffer for the act or representations of a single

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1 In Federal Crop Insurance Corp. v. Merrill (1947) 68 S.Ct. 1, Mr Justice Frankfurter observed (what has become an oft-quoted statement): "It is too late in the day to urge that the Government is just another private litigant, for purposes of charging it with liability .... Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." (Id. at 3.)

Government agent, especially when the representation in question would encourage an act proscribed by law.¹

In India too, the burden of ascertaining authority limitations is on the person or firm contracting with the government. It is equally well established there that the Government may not be estopped by the unauthorised acts of its agents. These principles of estoppel and apparent authority are the direct outcome of the wording in art.299(1) of the Indian Constitution.²

Article 299(1) prescribes, inter alia, that government contracts shall be executed only by such persons who are authorised for the purpose. The object of this requirement is to prevent depletion of public funds by clandestine contracts made by any and every public servant. The Supreme Court in State of Bihar v. K.C. Thapar³ held that the authority to execute a contract on behalf of the government need not always be granted by rules expressly formulated in that behalf, or by formal notifications, or by special orders; authority may validly be given in respect of a particular contract or contracts by the President or the Governor to an officer other than the one notified under the


rules. Article 299(1) of the Constitution does not prescribe any particular mode in which authority must be conferred: authorisation may, for example, be conferred _ad hoc_ on any person. In another case, _Mulamchand v. State of Madhya Pradesh_, the Supreme Court took the view that a contract not conforming with art.299(1) could not be ratified and an "estoppel" could not be raised against the government. The Court stated that art.299(1) had not been enacted for the sake of mere form and the formalities of the article could not be dispensed with. The article is aimed at preventing the state from being saddled with liability for unauthorised contracts and preventing the waste of taxpayer's money being drained into improper channels by virtue of such unauthorised contracts, and therefore is in the public interest.

It should, however, be pointed out that the rigours of this rule regarding the limited authority of government agents, have been mitigated to some extent by the application of ss.65 and 70 of the Indian Contract Act 1872. But still in some

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1. _A.I.R. 1968 S.C. 1218._

2. Section 65 of the Indian Contract Act 1872 reads: "When an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received."

3. See Ponnuswami & Puri, _op.cit._ 568.

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(carried on to p. 109)
cases an unwary party contracting with the government finds that this limitation of estoppel and apparent authority works injustice.  

In the United Kingdom, on the other hand, the consensus of opinion amongst legal writers and judicial authorities seems to be that the government can be bound by estoppel and a contractor can rely upon estoppel in seeking to establish a contract with the government. 2 Another principle follows from this: that a contractor may rely upon the apparent authority of an agent of the government. It is submitted that this extension from the rule (that government can be estopped by the unauthorised acts of its agents) is necessary and logical. It would be meaningless to hold on the one hand that an agent can bind the government by his own representation of his authority, thus raising an "estoppel" against the government, and then hold on the other hand that he may not bind the government directly unless he has

(footnote 3 contd. from p. 108)

1 See e.g. Hansraj Gupta & Co v. Union of India A.I.R. 1973 S.C. 2724.

actual authority. As Turpin has stated:

This principle [of apparent authority] which ... is closely related to estoppel, holds a principal liable to a third party to whom he has by words or conduct represented that the agent has authority to contract on his behalf. On principle, and since the Crown can be bound by estoppel, it should be possible to rely upon the doctrine of apparent authority against the Crown.¹

An estoppel may be relied upon both in establishing that a contract was in fact made and in overcoming the defence of an absence of authority on the part of the government's agent to make a binding contract. But, it is submitted, in the latter case (where a contractor seeks to repel a defence of want of authority), he might find it easier to rely on the twin doctrine of apparent authority, which, as one author has stated "in the sphere of contract coincides to a large extent with estoppel, but is not trammelled by certain technical limitations of the latter principle".² The doctrine of apparent authority is easier to invoke because of a key difference which exists between apparent authority and estoppel as a ground for binding a party to a contract. The former binds the principal to the contract whether or not there has been detrimental reliance by the other party, for if an agent is found to have apparent authority, that is sufficient to raise a true contract. In the

¹Government Contracts (1972) at 34.
²Turpin, op. cit. 32.
case of estoppel, however, the factor of detrimental reliance is ordinarily required to be shown.

Reference may here be made to a recent judgment of the Canadian Supreme Court where the Court has held that the principles of agency relating to apparent or ostensible authority apply to an agent of the Crown. In Verreault (J.E.) & Fils Ltée. v. A.-G. for Quebec¹, the plaintiff-builder filed a suit for damages for a breach of a construction contract against the defendant-Crown (the Province of Quebec). The Crown contended that no enforceable contract existed between the parties since the Minister entering into it had not been authorised by an Order-in-Council or by express legislation. It was further contended that the doctrine of apparent authority was not applicable against the Crown. The impugned contract had been entered into on 7 June 1960 for the construction of a nursing home for senior citizens by a Minister of the Crown. But due to a change in government as a result of the 1970 elections, the new government instructed the plaintiff to stop work. The trial court held for the plaintiff but the Quebec Court of Appeal reversed that decision. On appeal, the Supreme Court of Canada held that the Crown was in breach of contract and the plaintiff was awarded $40,000 damages for loss of profits. The Supreme Court found that the contract was valid notwithstanding that it was

¹(1975) 5 National Reporter 271.
not authorised by an order-in-council or by express legislation. The Court stated that a contract made by an agent of the Crown acting within the scope of his apparent or ostensible authority is valid and binds the Crown.

It is submitted that in Australia the law regarding the applicability of the doctrines of apparent authority and estoppel against the government is the same as in the United Kingdom and Canada. A contract made by a purchasing official acting within the scope of his apparent authority is a valid contract by the government. The common law principles of agency, therefore, apply in respect of government contracts.

Where, however, the authority of contracting officials is regulated by an Act of Parliament, a contract will not bind the government unless made by an authorised agent. The legislation may, for example, nominate and thereby delimit the class of persons who are authorised to enter into contracts on government's behalf or lay down a certain procedure according to which contracts must be made by the agents of government in order to bind the government. In such cases, a strict compliance with statutory provisions is mandatory and an agent not complying with them cannot bind the principal i.e. the government.

In practice, however, authority to contract on the government's behalf is not conferred by legislation but by, what are often called, General Financial Rules of the Government and by appropriate departmental regulations, rules, notifications or delegations. It is common for internal delegations to set out,
for example, monetary powers of purchase officers to make purchases of supplies, execute and sign contracts, the procedure to be adopted by the agents in the placing of contracts, the types of contracts to be employed, the terms on which contracts are to be concluded and the situations in which the approval of a higher official is to be obtained.

There is no Commonwealth legislation as to who may approve contracts. It is generally accepted that the Minister of each Department has an implied power to approve contracts. Where a department places a request on one of the Commonwealth's purchasing authorities, the relevant Minister for contract approval is that Minister having responsibility to Parliament for that agency. In the case of Purchasing Division, for example, it is the Minister for Administrative Services. It is administratively sound therefore to seek appropriate measures of delegation to approve contracts from the relevant Minister. Again, in the case of Purchasing Division, the Permanent Head of the Department has an unlimited delegation from the Minister to approve contracts. The Minister, by instrument in writing, has also delegated his authority to arrange contracts down the

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1 It may, however, be noted that an approval by a Minister or his delegate to incur expenditure on supplies is required under Finance Regulation 49. See also Finance Regulations 46-53 and Finance Directions Section 31/1-55 and Section 32/24-51. The question whether Finance Regulations and Directions have the force and effect of law is discussed in chapter IV.

administrative line, with the threshold level varied in relation to the status of an officer in each area of contracting. Purchases of goods or services within the limit of funds approved for the purpose are arranged by delegates with authorities ranging from $250,000 right down to $5,000 and below.\(^1\)

It is submitted that a contractor dealing with the government is not deemed to have notice of the limitations (imposed by the internal delegations) upon the agent's authority. If, therefore, the government has by words or conduct represented that the agent has authority to contract on its behalf, a binding contract will be formed between the contractor and the government on the principle of apparent authority, notwithstanding that the agent exceeded the limits of actual authority. As Professor Campbell has stated:

> If that authority has been defined, the definition may be by internal rules, delegations and understandings which are not published to the world at large, and about which contractors may not even bother to enquire.\(^2\)

Besides, as Turpin points out, for the contractor it is very difficult and sometimes even impossible to find out whether the agent or officer in question has in fact the authority he appears to have "except by direct and possibly embarrassing inquiry of the officer's superiors".\(^3\)

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3. Turpin, Government Contracts (1972) 34.
6. Methods and Types of Government Contracting

There is a very definite interrelationship between the forces operating during the course of contract formation and the difficulties met during contract performance. In some cases, the factors considered in the contract process become the decisive factors in the settlement of disputes that arise during performance of the contract. Conversely, much of the work of the parties during contract making is aimed at avoiding difficulties from arising during contract performance. This section is devoted to the discussion of the specific techniques used in government procurement to form a binding contract.

(i) Methods of Procurement

The procedure by which the government solicits offers, establishes terms and conditions, and selects a contractor is the heart of the procurement process. The basic methods of government procurement include: (a) formal advertising; (b) competitive negotiations, and (c) negotiations with a sole-source.¹ One of these three forms must be decided prior to contractor solicitation and selection.

(a) Formal advertising

It denotes a sealed-bid technique of obtaining offers from

several competitors. The public invitation of tenders (also known as open tender system) ensures open competition among all suppliers who believe they can comply with the government specifications. The principle, that anyone who can perform the supply or service is entitled to participate in government business, reduces opportunities for graft, corruption and the dispensing of favours. The rules of this open tender system are designed to forbid "private" bargaining and to encourage open disclosure upon award. The government derives the advantage of being able to obtain the best value for money by placing orders on a supplier who quotes the lowest rates.

The basic prerequisites of formal advertising are: (1) a complete, adequate, and realistic specification that dictates a common baseline of technical features and contract terms; (2) two or more suppliers eager to obtain government business; (3) the selection of the successful tenderer mainly on the basis of price and (4) availability of sufficient time with the government to prepare the requisite specifications and drawings and to carry out the administrative work resulting from the invitation of tenders. Formal advertising is an excellent method of government procurement.

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2 An invitation for bid (IFB) is used to solicit competitive sealed bids.
3 The objectivity and openness of formal advertising commends its use whenever market conditions are appropriate. For a detailed description of advantages of public tendering as a method of procurement, see Scott Committee Report paras. 4.17 - 4.18. In Australia, the Department of Construction is adopting a new method of contracting called "integrated contracts" in its construction contracts, see id. 4.55 - 4.57.
purchasing when these criteria are met. When any of these essentials cannot be satisfied, it is a completely ineffective method of procurement.

(a) The mechanics of formal advertising

Once the contracting officer has determined that the procurement is susceptible to formal advertising, the next step is to issue a tender notice in the prescribed form, stating in sufficient detail the description of supplies to enable the tenderers to quote their lowest rates. Complete invitations are circulated as widely as possible, in order to obtain maximum competition. There are various ways of soliciting offers, the principal method being the mailing of tender notices to the registered tenderers on the lists of the purchasing authorities. The tender forms can be obtained by other suppliers too on request. Other methods of soliciting offers include the displaying of copies of the invitation at the 'Notice-Boards' of the purchasing office; publishing brief announcements of proposed purchases in the Government Gazette and in trade journals; and by advertising in newspapers.

The invitation to tender sets forth the terms and conditions and

1 In the United States, there is almost a Congressional folklore that the cure to procurement ills lies in the award of contracts on a formal advertising basis. It may be noted the U.S. Report of the Commission on Government Procurement endorsed a preference for formal advertising wherever practical, see Report of the C.G.P. Vol. I, 20 (Recommendation 3).

2 These criteria have been likened to a four-legged stool. Remove one leg and the stool is ineffective; see Whelan and Pasley, op. cit. 178.

3 Snedden, "Dollar Purchasing Power" (March 1972) 19 (11) Australian Purchasing 14, 15; Garland "The Department of Supply as a Purchasing Authority" (September 1972) 20 (5) Australian Purchasing 21, 22.
the laws, regulations and directions, to which the intending tenderer must agree to abide and be bound by them. Sometimes, reference is also made to the "General Conditions" or "Standard Conditions of Government Contracts" which are available separately on application.

Each invitation to tender contains a specific place, date and hour for the closing of tenders. Sufficient time is given between the notice of invitation and the closing date so that the interested suppliers get enough time to calculate their rates and submit their quotations even from distant places. Late tenders are not accepted. Tenders are not publicly opened but enough safeguards (in the words of purchasing personnel in the Purchasing Division, Department of Administrative Services, Canberra) are laid down in the procedure to avoid any mischief. ¹

The tenderers are required to state the duration for which their quotations are valid for acceptance and the government may either accept the offer before that date or ask for an extension. Except in the case of a

¹ In the United States and India (unlike Australia and the U.K.), all tenders are publicly opened. The tenders are opened in the presence of representatives of firms, which have actually submitted the quotations. The Officer opening the sealed bids reads out the following particulars from each tender for the information of the representatives attending the opening: the name of the firm; article/nomenclature of the store; quantity offered; price including the unit of price and point of delivery and conditions stipulated by the firm. Each tender is numbered serially, initialled, dated on the front page and the price, delivery terms, etc. are circled and initialled in the presence of firms' representatives. The author has himself attended to tender openings several times in the office of the central purchasing organisation (DCS&D), Government of India, and strongly recommends the adoption of this system in Australia.
mistake in quotation alleged and conclusively proved - in accordance with a most detailed procedure - no tenderer is permitted to alter his rates. Since the notice inviting offers is only an invitation to treat and not an offer, the government is not legally bound to accept any offer, even the lowest. Similarly, the tenderers who make quotations in response to government's invitation, are not bound by any legal contract unless and until the government accepts their offer. It follows that they may withdraw their offer before the acceptance by government and any condition in the contract forbidding them to withdraw the offers, is not valid in law for lack of consideration.¹

After the opening of tenders, the contracting officer evaluates the valid offers (unsigned and incomplete offers are automatically rejected) by determining whether the offers are

¹In the United States, bids are irrevocable. For a criticism, see Stelzenmuller, "Formation of Government Contracts - Application of Common Law Principles" (1955) 40 Cornell L.Q. 238, 239-47. But see Pasley, "Formation of Government Contracts.... A Reply" (1955) 40 Cornell L.Q. 518-31. See also Turpin, op. cit. 135. It may be noted here that in the United Kingdom (see e.g., HC Deb. v. 756 c.528) and India, a person who makes an offer to government is entitled to withdraw his offer or tender before its acceptance is intimated to him. In India, see e.g., Rajendra Kumar Verma v. State of M.P. A.I.R. 1972 M.P. 131, Ponnuwami and Puri, Cases and Materials on Contracts [Including Government Contracts] (1974) 63-64.
in accordance with the specifications and whether the offeror has expressed his willingness to abide by the general conditions of contract. As a general rule, the lowest offer is accepted provided it is found to have been made by a 'responsible' tenderer. This means that the prospective contractor is a manufacturer or regular dealer in the supplies sought; that he has adequate financial resources, that he can comply with delivery schedule; that he has a satisfactory record of prior performance and integrity and is otherwise qualified and eligible to receive an award under applicable laws and regulations. In determining the lowest quotation, account is taken of factors such as offered discounts, price escalation provisions, terms of delivery (F.O.B., F.O.R., ex-works or any other), and the like. Award of a contract is thus finally made to the lowest responsible bidder who survives all of the above evaluation, whose bid conforms to the essential provisions of the invitation to tender, and whose price is found to be fair and reasonable. These and other rules discourage a buyer's inclination to unfairly favour award to one contractor over another.

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1 The Government is not legally bound to accept the lowest or any tender, see Frost, "Plant Contracts - the Case for Rationalisation" (Aug/Sept 1974) Australian Purchasing 24.

2 This is necessarily a quite general description of formal advertising procedures. It is in fact a substantial and complex process involving considerable administrative expense. Each step of the process breaks down into a myriad of further considerations and problems. See generally, Gilmour, "Government Purchasing Arrangements" (May 1977) (Unpublished Manuscript) Purchasing Division, Department of Administrative Services, Canberra.
Private business also often practises invitation of tenders for greatest efficiency but it is not referred to as "formal advertising". The private industrial organisations use a sealed-bid technique in which they "advertise" a procurement to potential suppliers and sometimes the offers are invited through newspaper advertisements. However, the private organisations do not broadcast their solicitation of offers as widely as does the government, nor do they foreclose the possibility of having discussions with an offerer before awarding him a contract (as the government generally does when it applies "formal advertising" method of procurement). The main difference between government and private business practice is that government must always procure under "open tender" policy subject to public audit and scrutiny in accordance with proper legislative Acts and Regulations, whereas private organisations are not subject to these controls.  

(b) Competitive negotiations

The open tender system is most suitable for markets which are highly competitive consisting mainly of small-scale suppliers producing fairly simple standard commodities and where price is an all-important factor in awarding contracts. But in market situations with fewer and larger firms, complex commodities sophisticated specifications, where price is no longer the sole

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1 See Pole, "Standards in Purchasing by Government" (1972) 19 (10) Australian Purchasing 32.
criterion for selection, the open public tender procedure is less appropriate. When the government buys supplies or items where there are specifications, the selection of contractors is made on the basis of price. But when there are no specifications and there are several technical approaches to the problem (as in research and development procurement or the development of a new weapon system), it is not easy to make a selection through formal advertising. Formal advertising is rarely, if ever, appropriate for research and development contracting and is almost never used. The common baseline specifications essential for formal advertising not only are lacking in research and development procurement, they generally are not desirable. Innovation and creativity, which are the key features of research and development, would be dissipated if specifications for uniform products were prescribed. In such situations, where technical superiority is the most important determining factor, the competitive negotiations method of procurement is adopted which permits contracting agencies greater latitude in the selection of contractors than is allowed for by formal advertising procedures. It also gives a great deal more flexibility since different types of contracts can be used in negotiated procurement, whereas the formally advertised procurement necessarily results in some form of fixed-price

1Very frequently this is misunderstood, and it is often suggested that negotiation means the lack of competition. This is not correct, because many times competitive negotiation is far more intense than the competition in formal advertising.
contract. The requirements of the government are widely publicised for competition and all potential contenders are invited to participate. The government usually does not rely on the prices initially submitted by tenderers because the comparability between initial offers is generally insufficient to judge the relative merits of the quotations. The contracting authorities ordinarily conduct discussions or bargaining with the tenderers in the course of entering into a fixed-price contract with the one with the best terms. In awarding cost-type contracts, the government's emphasis is on technical competence, not price "guess-timates".

The technique of negotiation thus affords the best opportunities to obtain the most effective competition available by discussions with competitors for the purpose of more precisely defining achievable requirements, or otherwise obtaining sufficient comparability between offers, in order to reach a common understanding of the specifications. But it is not as safe a method as formal advertising because, the easy access to the contracting officers by the tenderers and the subjective judgment of the contracting officer which weighs quality and other factors against price, may sometimes, lead to semblance of

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1A request for proposal (RFP) is used, which describes the agency's needs and invites contractors to submit proposals stating how they would fulfil the needs if awarded a contract.

favouritism, patronage or personal preference in the selection of suppliers.¹

Sometimes, government procures supplies by a combination of the methods of public tendering and negotiation. This is called "two-stage tendering".² In this process, which is often used for large or complex engineering works, where the cost of preparing the bids is staggering, a public invitation is issued but initially only the tender prices and a limited amount of technical data are called for, the tendering period being quite short. Such questions as what experience a company had had in similar lines, what organisation will perform the work, to whom will it report, the key people who will do the work, facilities and plant capacity available, and so forth, are asked. These initial bids are quickly evaluated and a short list of two or three selected, who are then given appropriate briefing to complete the detailed information required. Since the number of competing tenderers is small, the discussions are less cumbersome and more fruitful. The order is placed then on the tenderer found most suitable.³ The "two-stage tendering" system usually takes

¹It is not suggested that public tendering has all the merits and no shortcomings. For the disadvantages of formal advertising, see Scott Committee Report para. 4.22.

²In the United States, this method is called a "two-phase proposal".

³For a discussion of "two-stage tendering" and other methods, see Frost, "Plant Contracts - the Case for Rationalisation Part II" (Oct/Nov 1974) Australian Purchasing 25. See also Garland, "The Department of Supply as a Purchasing Authority" (Sept. 1972) 20(5) Australian Purchasing 21.
a little longer but saves companies work and expense as well as saves government effort in evaluation. This system is also followed where considerable time is involved in preparing and evaluating tenders, or where projects are not sufficiently well defined to prepare an adequate specification for public tender purposes. Again, where extensive testing of samples is essential, the resultant delays make open tendering impracticable. In these cases, a public invitation is issued to potential suppliers to submit samples for testing. As requirements subsequently arise, those firms whose samples have been approved are then invited to tender.

Still another approach is to ask for a design study competition (usually in development contracts). The two or three winners of the design competition are paid for the designs, with a ceiling placed on what the government will pay towards the design. The company which submits the best design is then chosen as the contractor for the hardware development. Since the government has paid for the designs, any ideas presented are considered the property of the government and may be used in the final contract work specification.

The use of formal advertising has, however, rapidly declined in government procurement in the recent years and more and more contracts are entered into by using competitive negotiation or sole-source method instead. The main reasons have been the urgency and demands of modern war preparedness, national domestic priorities, compelling government to meet its needs by advancing
the state of technology rather than by purchasing items "off the shelf", and the difficulties (apart from expenses) involved in producing specifications to procure items beyond the existing state of technology.

(c) **Sole-source procurement**

Sole-source or non-competitive method of procurement of supplies is used by government in cases of emergency, lack of reasonable competitive source, standardisation, etc. The Scott Committee on Government Procurement Policy received submissions from several defence systems contractors which lent support to sole-source procurement. They argued that because of the limited size of the Australian market for specialised defence equipment, sole-sources should be established with reasonable assurance of continuity of work in the field concerned, and furthermore, the procurement of such equipment through tendering resulted in fragmentation of capacity with the result that no firm could secure a viable level of workload.¹

Although sole-source procurement is supposed to be the exception of an exception (since competitive negotiation is itself an exception of formal advertising, rather than the rule), it actually accounts for a substantial dollar volume of government contracting, going as high as 60 percent of total government contracting.

¹Scott Committee Report, paras. 9.73, 4.46.
authorities purchases. The reason for this apparent anomaly is of course that the big, complex, expensive contracts for the design, development, and construction of defence materials and other rapidly advancing technological inventions, do not often lend themselves to the sealed bid procedure of competitive negotiations.

(ii) Types of Government Contracts

Selection of the type of contract best designed to fulfil a procurement goal varies according to the type of procurement involved (for example, research and development, major systems, commercial products, and construction) and according to the degree

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1 It is learnt from reliable government sources that in 1975-1976 about 40 percent (in value) and 16 percent (in number) of contracts were awarded to one source. These estimates exclude Defence and Transport purchases overseas which could bring the value of sole source to 60 percent.

2 But see Schairer, "The Role of Competition in Aeronautics" (March 1969) The Aeronautical Journal 195, 207 (Fifty-Seventh Wilbur and Orville Wright Memorial Lecture of the Royal Aeronautical Society, London, England), where the author states in conclusion: "There seems to be a feeling that competition is expensive and cannot be afforded .... This desire to restrict competition is not limited to Western Europe. This disease can also be found thriving in Washington, D.C. Many economists and politicians will stand up and make strong speeches about how America is great because of its freedom of enterprise and competition. Many of these same economists, bureaucrats and politicians will return to their daily work and engage in actions which are highly in restraint of competition, and usually on the assumption that a competition costs money - and lots of money - and that we can no longer afford competition. It seems to me that in most circumstances they could not be further from the real truth".

3 "Type" is here a term used to cover contracts classified by the method of contractor reimbursement. This is also said to be a classification of government contracts by "kind". There is another classification, viz. by the objects for which they are made e.g., contracts for supplies, contracts for construction, contracts for services, research and development contracts, contracts for disposal, contracts relating to real property etc. Such contracts, classified by the objects for which they are made, are discussed in later chapters.
of risk involved and the amount of profit incentive offered for achieving the government's objectives. The most acceptable framework for contract pricing seems to be one based on the contractor's costs in producing whatever is called for by the contract and, in most cases, on some allowance for profit. To provide for costs and profits in contract terms, various ways are used. At one end of the spectrum is the fixed-price contract in which the contractor agrees to deliver the supplies or services for a pre-determined price which includes profit. At the other end is the cost-plus fixed fee contract (CPFF), in which the contractor is reimbursed for his allowable costs and the profit is fixed in the form of a specified fee at the time when the contract is made. In between the spectrum there are several variants of the CPFF including the incentive contracts. Selection of contract type is also influenced by factors such as the financial liability of government, the adequacy of cost information furnished by the contractor, the nature of the work, associated risks, and current market conditions. There is a relation between the amount of cost uncertainty present in a given situation and the type of contract. By using a right type of contract, government can apply the proper degree of incentive for a contractor to control costs and still avoid excessive or contingency pricing.

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1 A detailed discussion of the various types of contracts, particularly the cost-type contract, is to be found in chapter VI infra.
(a) **Fixed-price contract**

A fixed-price contract is a contract for a specific output at a price which is fixed before contract is placed. The price may be fixed in terms of units of output, or as a total (lump sum) which will cover the whole output. The point is that the contractor *undertakes* to perform for that price (subject to certain built-in provisions for price modification, such as "alterations" or "variations" clauses, which we will see later). If he reduces his costs, he makes more profit, if he increases his costs his profit is reduced and perhaps eliminated. The risk is his. Fixed-price contracts are always used in formal advertising, but this feature is not peculiar to that method of procurement; they are used as well in many negotiated procurements. The fixed-price contract offers many advantages "and some hazards" for the parties to the contract. From the supplier's point of view, it provides maximum incentive to perform effectively. The government in turn gets two main advantages; ease of contract administration and certainty on price. But a supplier's search for extra profit might lead him to cut quality. As an alternative, the government by agreeing to the insertion of "variation", "escalation" or "redetermination" clauses in the contract and thus assuming liability for inflationary increases, can enable a supplier to offer a price containing no contingency for inflation.
(b) **Cost-type contracts**

Cost-type contracts often involve markets quite dissimilar to those in which fixed-price contracts take place. The end items may be of such magnitude and exhibit so many unknowns that initially no one can draw specifications that realistically dictate a common technical baseline for all offerors; nor can the parties agree to fixed-price contracts which provide for reliable price comparisons of common baseline products. The acquisition of major systems usually is characterised by these features. Another example is the research and development contract where again the offers are not expected to exhibit a broad baseline of comparable features because the government deliberately asks rival R & D sellers to focus on innovative and individualistic approaches. Moreover the performance of these contracts usually involves such risks that use of a fixed-price contract is not feasible. Cost-type or cost-plus contracts are, therefore, arranged where the tasks cannot be specified precisely enough for fixed-price contracting. In most of such cases, the government is now seeking to make increasing use of incentive fee systems.\(^2\) The government sometimes contracts for a product or for management skills (usually from industry) while owning the facilities used to produce the

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\(^1\) A detailed discussion of such contracts follows in chapter VI, infra.

\(^2\) For the Australian Government Department of Supply practices, see Garland, "The Department of Supply as a Purchasing Authority" (Sept. 1972) 20(5) Australian Purchasing 21.
product or service. Such facilities are known as Government-owned, Contractor-operated (GOCO) facilities and are neither pure in-house nor pure private sector activities.\(^1\)

7. **Buy-Australian Policy**

It is basic government procurement policy to obtain "best value for money". Normally, best value for money means accepting the lowest suitable tender, that is, the lowest tender which meets the requirement specified and other criteria such as known performance and capacity of the contractor, the adequacy of after-sales service and support, etc. This policy, therefore, lays emphasis on the public policy of minimising expenditure of tax revenues. The pursuit of social and economic objectives (such as to provide preference for domestic materials over foreign materials, to prohibit members of Parliament to have any direct or indirect pecuniary interest in any government contract, to prescribe minimum wages, hours, age, and working conditions, to place fair portion of government purchases with small business concerns or with depressed industry or region, to provide preference to concerns performing in areas of concentrated unemployment or underemployment etc.) through the procurement process often contradicts this basic policy to attain the "best value for money spent". Below we discuss only one such important policy \textit{viz.}, the Buy-Australian policy and

\(^1\)GOCO is still not very common in Australia. They are, however, used in the U.S., see \textit{Report of the C.G.P.} Vol. 1, 66.
related measures which give procurement preference to domestic producers in many cases and exclude lower prices from foreign producers or those possible Australian-based producers with overseas ownership.¹

A study of the procurement procedures of Commonwealth purchasing authorities over many years reveals little uniformity or continuity of policy in the matter of preference to goods of Australian manufacture. But there is one policy to which all government purchasing authorities have adhered to date, namely, that in comparing tenders for imported goods with those for Australian-made goods, there is added in the tender price for imported goods the amount of any duty and primage which would apply if the goods were being imported commercially and not by the Commonwealth, as well as the cost of freight and insurance for the imported goods.² No duty is actually paid on such imports since goods imported by the Commonwealth and not intended for sale by the Commonwealth or imported in the national interest

¹The discussion regarding the use of government purchasing power as an instrument to achieve various other economic, social and national objectives, is to be found in chapter IV, infra.

²For the history of preference policy in relation to contracts arranged by Commonwealth and State government purchasing authorities, see, Report No. 1 of Inter-Departmental Committee on Preference to Australian-made goods in relation to tenders for Commonwealth Government Supplies (Melbourne, 20 November 1953) [hereinafter referred to as "Inter-Department Committee Report 1953"]. See also the Scott Committee Report paras. 2.22, 2.23, 2.26 to 2.30 and 2.43. See generally, Weekes, "Australian Government Policy on Tariffs" (December/January 1972-1973) 20 (8/9) Australian Purchasing 16, 20.
enter duty-free under Item 1 of the Second Schedule of the Customs Tariff. This procedure ensures that Australian manufacturers receive the protection which the Customs Tariff is intended to give them *viz.*, the protection in regard to government purchases which is available to them from the Customs Tariff in regard to purchases by the private sector.¹ This policy of applying a national tariff to all tenders involving imported goods has been re-affirmed by a recent announcement of government purchasing policy.²

¹See *Inter-Departmental Committee Report 1953*, op. cit. para.35. See also Snedden, "Dollar Purchasing Power" (March 1972) 19(11) Australian Purchasing 14, 16.

²Press Statement, *Government Purchasing Policy* 1 October 1976. Reference should, however, be made here to what Lloyd in his pioneering study, *Non-Tariff Distortions of Australian Trade* (Canberra, 1973) [hereinafter cited 'Lloyd'] has stated about the rule of notional duty in government purchasing:

"The plausible argument that actual or potential sales of goods to the government should receive the same levels of protection as sales of the same goods to the private sector, which gives rise to the notional duty pricing rule, is not in fact a sound argument when there are widely varying levels of protection throughout the economy which distort the patterns of resource allocation and consumption. Essentially what happens if the notional pricing rule is followed is that the rule removes any possibility of divergence between rates of protection for a commodity when sold to the public sector or private sector but it extends the wide variation among effective rates of protection through the Tariff and the distortions this causes into the area of the government purchases". (at 184). Lloyd thus recommends that for government imports, the best policy from a long-term point of view in which the economy converges to a situation with few distortions is that the present system of notional duty be ended and no actual or notional duties be applied to government imports. (at 209). See also id. 77-78. But see, Millar, *Australia's Defence* (2nd ed. 1969) 146. The latest trend is visible from Prime Minister's comment made in an interview on television on 15 November 1977: "... we are going to buy Australian unless there are overriding reasons to the contrary and any Department or authority would have to argue very hard to get an authority to buy overseas at the present time ...".
The government has, however, often gone further than merely providing tariff protection to the Australian industry. Such measures, other than tariffs, imposed by the government, which restrain or distort free international trade by discriminating between locally-produced and imported goods, have been called 'non-tariff distortions'. The case for preference to Australian-made goods in the procurement of government supplies over and above that provided by tariff has been rested partly on the government's settled policy of protection to indigenous industry, and partly on the need to build up and maintain manufacturing capacity essential in time of emergency. In 1953, the Government appointed an inter-departmental Committee to examine the question of preference as between tenders involving Australian-made goods and tenders involving imported goods for supply to the Commonwealth and to report as to policy and procedures for adoption by Government Departments. The recommendations of the Committee were accepted by the Government in toto and in 1954 guidelines were developed to provide adequate preference to goods which were officially determined to be of direct defence significance.

1 All developed countries practise some form of discrimination against foreign suppliers in the purchase of goods by the government sector. For surveys of policies in some other countries, see Government Purchasing Regulations and Procedures of OECD Member Countries (Paris 1976, Organisation for Economic Co-Operation and Development); Scott Committee Report paras. 7.18 - 7.20 (Canada), paras. 7.32 - 7.34 (U.S.) and para. 7.45 (U.K.).

2 Lloyd, op. cit. at 3 and chapter 5 "Purchasing Policies of the Commonwealth Government".
or where there was a need to ensure continuity of certain supplies in the event of emergency. Furthermore, discretion was given to departments to purchase Australian goods where the price was only slightly higher than the overseas tender, to cope with special circumstances.¹

Another inter-departmental examination of procurement policies and procedures took place in 1960-1961 and the question of preferences (apart from tariff protection) was again thrashed out.² This Committee recommended against any 'non-tariff distortions' and stated that the basic aim of government purchasing policy should be to obtain the best value for money spent. In implementing its findings, however, the government made an important proviso that a tender from an Australian manufacturer which was not the lowest suitable could be accepted, if the production of the goods in Australia was considered by the appropriate authority to be essential for national security; or where the requirements were for a particular government department or instrumentality and the responsible Minister considered that there would be long-term savings or assurance of continuity of supply by placing the order on a local supplier.³ Elaborate

¹Inter-Departmental Committee Report 1953, op. cit. para. 57. See also Scott Committee Report para. 2.22.

²The Report of the Inter-Departmental Committee 1960-1961 which covered various aspects of procurement, besides preferences, has not been published by Government.

³Scott Committee Report para. 2.27.
procedures were also laid down by the government to be followed by departments to discriminate among tenders, inter alia, on the basis of goods with low or high percentage of Australian content.\(^1\)

This procedure operated in the following manner until December 1972: all cases where the price tendered for the local product was more than an overseas tender price (after the inclusion of the notional duty), and the adjusted value of imports was $15,000 or more, an additional inquiry was required. The basic details of the local and overseas tenders were circulated among the "Advising Departments" which comprised the Departments of Trade and Industry, Treasury, Labour and National Service and, in case of dumping, the Department of Customs and Excise. If one of these departments raised an objection to the letting of the contract overseas on the grounds of unemployment in the area of the local tenderer, or the desired development of Australian production of some goods, or dumping, the matter was referred to the Cabinet Committee on Government Purchasing Policy for a final decision.\(^2\)

\(^1\)Id. paras. 2.29 and 2.30.

\(^2\)Scott Committee Report paras. 4.36 – 4.39. See also C.P.D. (Senate) 1969, 520 (Minister of Supply explaining the procedure). It is pertinent to note here that about 50 cases were considered each year by the "Advising Departments" and that very few were decided in favour of the Australian supplier (Submission of the Department of Supply to the Scott Committee, see para. 4.40). One common complaint against the working of this procedure has been that it has operated in a secretive fashion, see The Australian Financial Review (4 October 1976) 2; Lloyd, op. cit. at 214–215; Bellany and Richardson, Australian Defence Procurement (1970) 2. See generally, Spigelman, Secrecy, Political Censorship in Australia (1972).
A movement towards a restrictive 'Buy-Australian' policy in government contracts was heralded when in December 1972, the incoming Labor Government directed "that Australian Government contracts should be awarded to an Australian-owned company in cases where Australian and overseas-owned firms submit tenders which meet specifications and are equal in respect of price and availability". The purchasing authorities were directed to prefer firms with Australian ownership and control if their tenders met specifications and were equal in price and continuity of supply even though such firms had no satisfactory past performance vis-à-vis subsidiaries of foreign companies producing in Australia or foreign suppliers.

In a recent statement on Commonwealth Government purchasing, the present government has reaffirmed the general policy of obtaining "best value for money" subject to tariff protection (notional duty) and the discretionary preference outlined below. The government has indicated that all Commonwealth departments and non-departmental authorities are to ensure that Australian firms are given reasonable opportunity to bid for all requirements which are within local capabilities. In order to do this,

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1 Press Statement No. 23, Preference to Australian Suppliers 17 December 1972. See also Scott Committee Report paras. 10.30 - 10.41.

2 It is learnt from reliable government sources that under this policy only in one case was a contract awarded to an Australian supplier in preference to a foreign supplier. For a criticism of this policy, see Lloyd, op. cit. 219; Scott Committee Report para. 4.45.

3 Press Statement "Government Purchasing Policy" 1 October 1976; Press Release "Australian-Made Goods" 26 October 1977 (Issued by the Minister for Industry and Commerce with a theme 'Put Australia First').
it has been stated that care should be taken to avoid the unnecessary use of specifications, tender conditions and procedures, etc., which could have the practical effect of precluding local participation. Decisions as to whether or not "discretionary preference" over and above tariff duty should be accorded to Australian-made goods in particular cases, are now taken by a Sub-Committee of Ministers chaired by the Minister of Administrative Services. The Sub-Committee is assisted and serviced by "Advising Department" machinery made up of the Department of Administrative Services, Industry and Commerce, Business and Consumer Affairs, Employment and Industrial Relations, Treasury, Defence (in so far as questions of strategic significance and/or national security or independence arise), and the Department responsible for the purchasing proposed. The Sub-Committee is responsible for deciding cases of "discretionary preference" involving purchases of $15,000 or more. The factors which the Ministerial Committee supposedly takes into account in deciding whether government orders should be placed locally or overseas are whether purchases from Australian sources would assist a depressed industry or area within Australia, or enable the establishment, development or retention of industrial or technological capabilities required for national security or independence.

These new arrangements have in principle revived the "Advising Department" system of granting preference to local
goods which operated from 1961 to 1972.1 As a consequence of government's declaration of new policy, the following procedure is being followed in all government purchases: tender schedules require tenderers to state the country of origin of the goods offered and, where applicable, levels of Australian content. For this purpose the Australian content, expressed as a percentage, is the difference between the Australian supplier's ex-works nett cost and into works cost (excluding duty) of any imported element. Where the prices (after inclusion of notional duty) of a suitable offer of imported goods (including goods of differing Australian content) is $15,000 or more (current threshold level for consideration), and acceptable higher-priced Australian-made goods are also on offer, details of the competing tenders are forwarded for local-preference consideration by the group of Advising Departments. Where the adjusted price of the acceptable imported product is below $15,000, the basic principle of "best value for money" is observed; however, proposed contracts below $15,000 are required to be referred if particular circumstances (e.g. repetitive or cumulative purchases of the same or similar products) warrant that action. Upon receipt of the necessary

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1 Under the present system, however, Ministers responsible for purchasing do not have independent discretion, unlike during 1961-1972. It may also be noted that now the Minister of Administrative Services, as Chairman of the Sub-Committee, is empowered to decide those "discretionary preference" cases which he may not consider fit for reference to the Sub-Committee.
details from purchasing authorities the Department of Administrative Services arranges for the Advising Departments to consider whether there is a case for the purchase of the higher-priced Australian-made goods on either of the grounds stated above.

Apart from the argument that procurement is an inappropriate and expensive avenue for the pursuit of social and economic policy objectives of the government, the existing procedure of according preference to domestic products has been stated to be unsatisfactory. The Scott Committee on Government Procurement Policy which reviewed the then existing system of preference viz., the Advising Department system, recommended for its abolition. It observed (the same criticism would apply to the present system because of its close resemblance): "The system is clearly cumbersome and time-consuming and, from this viewpoint alone, it seems desirable to examine alternative methods for considering cases in regard to local preference .... It is an 'honour' system in that there is no check on whether or not all appropriate cases are referred to Advising Departments". ¹

¹Scott Committee Report para. 10.47. See also paras. 10.48 - 10.51. In Lloyd, Non-Tariff Distortions of Australian Trade (1973) it is observed: "Of all the non-tariff measures examined in this study the area of the purchasing policies of the Commonwealth is perhaps the area about which the least is known. The government is generally secretive about its purchases and purchasing policies and reveals as little as possible". (at 68).
No mention has been made as to what extent of pricing preference would be granted to local tenderers. Furthermore, no definitions of "depressed industry", "national security" or "independence" have been offered. Since there is no public opening of tenders and all bids cannot be inspected by the public after the contract is awarded, the public and potential suppliers have no way of knowing the extent of preference to the local contractor.

8. Australian Defence Procurement and 'Offsets' Programme

The main concern in Australia over government procurement policies has been the defence procurement, particularly overseas defence procurement. The underlying policy of the Australian

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1 It has often been suggested that the Government should adopt a fixed margin of preference (over and above any tariff duties and primage) for all goods of Australian manufacture. Even before the introduction of the present system, there was a proposal by the Minister of Industry and Commerce, Senator Cotton, for an automatic 10 percent pricing preference to be given to Australian tenderers facing overseas competition for government contracts. The proposal was, however, not accepted. See, The Australian Financial Review (4 October 1976) 2. See also, the Scott Committee Report paras. 10.57 - 10.63; The Age (2 October 1976) 3, 27. Note, however, that the Industries Assistance Commission has strongly recommended certain short and long-term levels of preference to the local industry in the defence procurement. See Industries Assistance Commission Report on Aerospace Industry, P.P. No. 34 of 1976, 40-43.

2 See generally Millar, Australia's Defence (2nd ed. 1969). At 156, the author states: "With defence the main single item in the federal budget .... someone needs to look more closely than is now done at whether the country is getting value for money in defence procurement both overseas and at home; whether defence expenditure is suitably related to national development and to social benefit; whether Australian defence industries are feather-bedded, or hostages to alien national interests - and so on". (emphasis in the original omitted here).
Government in regard to the procurement of defence material is to obtain the greatest possible proportion of services requirements from within Australia, whenever economically or technically feasible and when it sustains or increases the country's total defence capability. The statistics in the following Table give some indication of the main features of Australian defence procurement in relation to procurement overseas.

1 For example, of the 1,300 odd aircraft acquired by the RAAF since 1946, over 900 have been produced by Australian industry. See the Paper by Eltringham (of the Department of Defence) on "Basic Issues of Defence Procurement" at the Symposium on Defence Policy and Procurement (held under the joint auspices of the Australian National University and the University of Sydney on 23 April 1971) [hereinafter cited as Defence Policy and Procurement].

2 The data is incomplete and have had to be pieced together from a number of different sources, viz. C.P.D. (H. of R.) (1968) 3285; C.P.D. (H. of R.) (1971) 200; Value of Contracts placed for Defence Purchases 1969/70 to 1974/75, Purchasing Division, Department of Administrative Services (13 October 1975); Defence Reports 1972, 1973, 1974, 1975 and 1976 (A.G.P.S.); Bellamy and Richardson, Australian Defence Procurement (Canberra 1970) 3-5.
<table>
<thead>
<tr>
<th>Year</th>
<th>(1) Total expenditure on Defence ($A millions)</th>
<th>(2) Total procurement on Defence+ ($A millions)</th>
<th>(3) Procurement as a percentage of (1)</th>
<th>(4) Defence overseas procurement ($A millions)</th>
<th>(5) Overseas procurement as a percentage of (2)</th>
</tr>
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<tr>
<td>1958-59</td>
<td>380.7</td>
<td>114.2</td>
<td>30</td>
<td>39.0</td>
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<tr>
<td>1959-60</td>
<td>389.6</td>
<td>113.0</td>
<td>29</td>
<td>46.0</td>
<td>39</td>
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<tr>
<td>1960-61</td>
<td>401.3</td>
<td>112.9</td>
<td>28</td>
<td>53.2</td>
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<tr>
<td>1961-62</td>
<td>409.4</td>
<td>115.7</td>
<td>28</td>
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<td>29</td>
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<tr>
<td>1963-64</td>
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<td>1968-69</td>
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<td>1975-76</td>
<td>1943.3</td>
<td>N.A.</td>
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<tr>
<td>1976-77</td>
<td>2255.5*</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

+ Total includes spending on Research and Development

* Estimated
The principal government efforts to encourage the indigenous defence industry in recent years have been the attempts to increase the manufacture of equipment under "offsets", "sub-contracts" and "co-production" orders accompanying overseas contracts. The practice of seeking "offsets"\(^1\) to government contracts with foreign suppliers is quite common in transactions involving defence equipment and large civil aircraft between industrialised countries. Before the introduction of "offsets" programme in the late sixties, the Australian defence and other industrial capacity was maintained through licensed production of overseas-designed equipment. But soon the increasing sophistication and cost of defence equipment, the inability of Australia's industry to keep pace with all advances in technology on a world front, the high cost of development and manufacture of systems and the relatively smaller quantities required, which often precluded local participation on economic grounds, made that approach unrealistic.\(^2\) To meet that situation, in 1968-69

\(^1\) Offsets involve sub-contract work on a product that is normally purchased by the Government. In a broad sense the term "offsets" denotes seeking trade, technological or industry work-load benefits through the negotiation of reciprocal sales by the equipment purchaser to the seller. At the simplest level, it is difficult to distinguish the "offsets" programme from the barter trade. See Scott Committee Report para.4.73.

\(^2\) For example, the aircraft industry in Australia, which relies almost solely on defence work for its existence and its stability, experienced a rapid rundown in its defence workload in the early seventies. This decline arose because of the completion of the Mirage programme, the tailing off of the Macchi and the lack of an immediate service requirement for aircraft suitable for Australian production: Eltringham, "Basic Issues of Defence Procurement" 2, Defence Policy and Procurement, op. cit.
the Government spelled out a new approach aimed at encouraging greater local procurement and Australian participation through sub-contracting in overseas weapons projects (this was called the "Fairhall doctrine", after the name of the then Defence Minister, Sir Allen Fairhall, who initiated it). The new approach, especially with regard to the use of defence contracts as an incentive to raise the technological and managerial level of Australian industry, was designed to boost the local industrial capacity by greater liaison with industry in the formulation of equipment plans and to seek "offsets" arrangements for major overseas procurement purchases. It was envisaged that Australian companies might secure, by negotiation with overseas companies and governments on a sub-contract basis, selected research and development and production work on equipment being purchased for use in Australia, or on other equipment of similar technological character. Thus Australian Government purchasing power was to be used to negotiate reciprocal benefits for Australian industry. In 1970 the government announced the establishment of...
of a "Standing Interdepartmental Committee" to co-ordinate the implementation of the Australian Industry Participation (AIP) or "offsets" programme. The Standing Committee remains in operation and comprises senior officers of the Department of Administrative Services, Department of Defence, Department of Industry and Commerce and the Department of Productivity. It also co-opts the services of the Department of Transport, where appropriate.

An advisory committee called "Industry Committee for the Development of Offsets to Overseas Procurement", operating under the Department of Productivity and comprising up to twelve leading Australian businessmen renders advice to the government on the operation of the "offsets" programme.

By inserting offset clauses into its contracts with overseas contractors, the Australian Government has been, since 1970, trying to encourage local industrial participation. The rough order of offset sought is 30 percent of the purchase value of defence purchases. Offset policy has great advantages. Besides providing a substantial workload during a period of low capacity utilisation, offset work exposes the local industry to overseas management and production techniques and can lead to improvement in the productivity and general cost-consciousness of the local industry.

Recently, in February 1977, the government has introduced a new document titled "Notes on Australian Industry Participation
in Overseas Procurement" in which it has stated its aims and objectives with regard to "offsets" for the guidance of prospective overseas suppliers. The Australian Industry Participation (AIP) programme is designed to secure workload, within the constraint of practicability for long-term support of the equipment being purchased, broaden the capabilities of industries of strategic significance to Australia in order to provide in-depth defence supply capability and stimulate technological advancement in key Australian industries. The government has pointed out that factors such as the willingness of the overseas supplier to involve Australian industry in the contract, the technical worth and the financial value of the proposal, will be significant in deciding the award of the contract. In pursuance of this policy, overseas tenderers are now required to provide separately priced proposals for Australian Industry Participation in every project for which they are invited to tender their prices. The government generally seeks an AIP commitment of at least 30 percent of the value of any contract placed with the overseas contractor. This commitment is achieved by either direct involvement in the manufacture of the equipment being bought or by some other acceptable arrangement.

1"Commonwealth of Australia, Notes on Australian Industry Participation in Overseas Procurement" (February 1977), Australian Unclassified. This document supersedes "Notes on Australian Industry Participation in Overseas Defence Procurement" December 1972.

2 Ibid.

3 For the various types of arrangements, see below.
In any case, the successful tenderer is held responsible for ensuring that the AIP target is achieved within a timescale not exceeding beyond 5 years from the final equipment delivery date stated in the contract.

Various forms by which Australian Industry Participation could take place, are suggested to the overseas contractors in this document, e.g. a part-production arrangement (manufacturing in Australia of some of the spares or assemblies or parts of the equipment being procured); collaborative arrangement (participation of Australian industry in the project through the conceptual design, development and production stages);¹ a co-production arrangement (manufacture in Australia of additional quantities of these parts, spares etc. for sale to other customers of the overseas contractor);² or an arrangement under which the overseas contractor undertakes to purchase Australian products of defence or technological significance to Australia, in return for the Australian contract. The process of obtaining worthwhile "offsets" proposals from overseas contractors, is a matter of purchasing

¹A collaborative arrangement involves the formation of a multinational consortium to design, develop and manufacture a complex product. Work is allocated between the partners on the basis of particular skills possessed by certain industries and the size of each country's order for the final product. See generally, Industries Assistance Commission Report on Aerospace Industry, P.P. No. 34 of 1976 at 36.

²Co-production differs from collaborative arrangement in that design and development work has already been done by the overseas prime contractor. Unlike a collaborative project, co-production normally involves the local industry becoming a sub-contractor to the overseas manufacturer, without any risk-bearing or profit-sharing.
strategy; and the evaluation of such proposals, in common with other factors as the performance, maintenance support, benefits to Australian defence industry etc., is a matter of judgment based on the particular circumstances of each case.¹

In announcing its purchasing policy, the present Australian Government has not only reaffirmed but expressed an intention to further develop its "offsets" policy under which Australian industry would be enabled to obtain work as "offsets" against the government's major overseas contracts. The total value of orders placed in Australian industry as a result of the government's offsets programme and other reciprocal purchasing arrangements was approximately $115 million at 30 June 1976.² This obviously is a very significant achievement in the procurement policy of the Australian government. The programme has made a

¹The Scott Committee suggested that the threshold for examination of equipment purchasing proposals from the "offset" view-point should be about $A2 million mark with provision for examination of smaller projects in specified fields where appropriate, see Scott Committee Report paras. 10.74 - 10.81.

valuable contribution to improved productivity and management practices and to the upgrading of technology, particularly in Australian defence industry.¹

¹Press Statement, Government Purchasing Policy 1 October 1976. On the other hand, the offsets programme is criticised because: "Defence offsets provide great scope for an inefficient local firm to get a contract for the sole reason that the overseas supplier has Canberra's gun at his head", The Age (2 October 1976) 27. To an economist it appears that "the idea of offset and co-production agreements ... is a misguided mercantilist notion. It is the pattern and level of aggregate imports which is important. Any attempt to use substantial import purchases as a bargaining method to extract offsetting bilateral orders for Australian goods is likely to encourage the production of high-cost goods that are protected from the normal competition with imported goods by the nature of these agreements. If some local production of defence equipment is desirable on defence grounds it is unlikely that the pattern of production that may be negotiated with other countries as offset or co-production orders is that best suited to the defence needs and production capabilities of the country". Lloyd, op. cit. 74. However, it needs to be stated that it is vital to the security of the country that all high usage rate spares and stores be manufactured in Australia - even if economics are not particularly good. The country is only then independent of the political whims of overseas nations, long supply lines etc.
GOVERNMENT CONTRACTS AS CONTRACTS OF ADHESION

1. Introduction

It is familiar doctrine that government has a dual capacity - as a government taking action binding on all citizens and as a party to a private contract - as a superior and as an equal. The traditional view, as expressed in cases and commentaries, has been that, when the government steps down from its position of sovereignty and enters the domain of commerce, it subjects itself to the same laws that govern the contracts between individuals. Traditionally the cases also state that the rights of the parties under a government contract are to be determined by the application of the same principles as if the contract were between private parties. The courts occasionally state that the contractor must

1 Friedmann, Law in a Changing Society (2nd ed. 1972) 130, 405 [hereinafter cited as Friedmann].


3 "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals". Lynch v. United States (1934) 292 U.S. 571, 579. This is the general rule followed by the Anglo-American courts. For some of the leading American cases on this point see United States v. Standard Rice Co. (1944) 323 U.S. 106, 111; United States v. Edwards (1960) 285 F. 2d 109, 112; Reading Steel Casting Co. v. United States (1924) 268 U.S. 186, 188; Smoot's case (1872) 82 U.S. 36, 45.
turn the same square corners as required of the government.\textsuperscript{1}

Indeed the view that private contract law also applies to government-supplier relations has enjoyed wide acceptance.\textsuperscript{2}

This is, however, much too undiscriminating a view, and more recently contract law has come to be treated as a special field of its own and it is now generally appreciated that private contract law is not an adequate instrument to regulate the relationship between government and its suppliers, particularly when government procurement contracts are also utilised as instruments to attain national goals generally considered as socially desirable.\textsuperscript{3}

\textsuperscript{1}E.g. The Austin Co. v. United States (1963) 314 F. 2d 518, 520-21.

\textsuperscript{2}Turpin, Government Contracts (1972) 98 [hereinafter cited as Turpin].

\textsuperscript{3}See The London Transcript, op. cit. Part I at 1, where it is pointed out "Government may be said (particularly by courts) to contract on the same footing as anyone else but the Governments themselves seem to have developed so many special rules and detailed clauses to ensure and safeguard Government rights that even a first time reader is aware that he is not looking at an agreement reached by bargaining at the sacramental arms length". (emphasis in original). See also Whelan, "A Government Contractor's Remedies: Claims and Counter Claims" (1956) 42 Va. L. Rev. 301; Note, "Developments in the Law - Remedies against the United States and its Officials" (1957) 70 Harv. L. Rev. 827, 884, 885; Speck, "Enforcement of Non Discrimination Requirements for Government Contract Work" (1963) 63 Colum. L. Rev. 243; Van Cleve, "The Use of Federal Procurement to Achieve National Goals" [1961] Wis. L. Rev. 566; Pasley, op. cit. at 846; Symposium, "Compulsory Contracts" (1943) 43 Colum. L. Rev. 565-752. See for a good account of this aspect of government contracts, Turpin, op. cit. chapter 9, 'Procurement as an Instrument of Policy'. In the White Paper of 1967, "Public Purchasing and Industrial Efficiency", the British Government firmly declared an intention to harness the power of the public purse to the pursuit of national objectives.
Thus the myth of government descending to the market place and negotiating like any other private concern is being slowly exploded. The businessman doing business with the government, or the lawyer who advises him, soon discovers that a government contract is quite distinct from its private counterpart. In some respects the concept of 'freedom of contract', a concept which pervades the law of contract, seems unrealistic when applied to a government contract. The businessman confronted with a host of lengthy documents containing innumerable general conditions and standard clauses, which, he soon discovers, are not subject to bargaining and which, therefore, he often neither reads nor understands, might doubt that any "meeting of minds" has taken place. Furthermore, the government contractor finds that, in addition to the standard clauses, he is bound by a host of statutes and, to an undetermined extent, and regardless of the desires of the contracting parties, by the provisions of official regulations and directives. Therefore, the areas of negotiation are becoming more and more restricted.

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1 See generally Baur, "Differences between Commercial Contracts and Government Contracts" (1968-69) 2 Public Contract L. J. 5; Doke, "Contract Formation, Remedies, and Special Problems" id. at 12.

2 Turpin, Op. cit. states at 103: "The government standard form has often an additional authority in that its use is enjoined by established government contracting principles".
and clauses in a government contract are on a take-it-or-leave-it basis; there is no freedom of choice.\(^1\)

Government contracts therefore seem to reflect a power relationship, and not a consensual agreement between equals.\(^2\)

A frank recognition of this power relationship leads to the conclusion that government contracts, just as insurance contracts, are contracts of adhesion.\(^3\)

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\(^1\)The fact that many of the standard clauses are drafted in consultation with the business community does not inject any real consent into the contract. But see Turpin, \textit{op. cit.} stating at 90-91: "Consultation with representatives or organisations of contractors on forms and conditions of contract can be seen as a characteristic feature of modern procurement practice in this country".

\(^2\)Miller, "Government Contracts and Social Control: A Preliminary Inquiry" (1955) 41 Va. L. Rev. 27, 57.

\(^3\)Patterson, "The Delivery of a Life Insurance Policy" (1919) 33 Harv. L. Rev. 198, 222 and "The Interpretation and Construction of Contracts" (1964) 64 Colum. L. Rev. 833. Patterson remarks: "Government contracts are frequently contracts of adhesion. The general terms of the contract are drafted by officials and staff employees and the same form-contract is offered to all persons" (at 863). See also Pasley, "The Nondiscrimination Clause in Government Contracts" (1957) 43 Va. L. Rev. 837, 847 where the author remarks: "To begin with, a government contract is a contract of adhesion, that is to say, a contract with standard terms and conditions, prepared by one party and offered to the other on a take-it-or-leave-it basis. The consensual element is reduced to a minimum .... Obviously, principles of general contract law, based on theories of freedom of contract, can have little application to such a clause". (Quoted also by Friedmann in \textit{Law in a Changing Society} \textit{op. cit.} at 404; see Pasley again "The Interpretation of Government Contracts: A Plea for Better Understanding" (1956) 25 Fordham L. Rev. 211, 213 where he comments: "There is no question that the Government contract, with rare exceptions, is a "contract of adhesion", that is, a standard form, prepared by one party and required of the other, designed to fit a wide variety of situations by the filling in of appropriate blanks or the annexing of detailed technical specifications, and with very little opportunity for variation. Such contracts of adhesion have become common in private dealings. The insurance contract is a long-standing illustration". The same conclusion has been reached by some

(carried on to p.155)
If a government contract is frequently a contract of adhesion, so are many ordinary commercial transactions. Today, an active consumer enters scores of contracts without in any real sense agreeing to the terms that are imposed upon him. As one author has put it, standard form contracts probably account for more than ninety-nine percent of all the contracts now made.\(^1\) The traditional bargain model no longer describes the greatest bulk of transactions presently treated as "contracts" by the legislature and judiciary.\(^2\) The contract has ceased to be a matter of dicker, bargain by bargain, and item by item, and has become a matter of mass production of bargains, with the background (apart from price, quantity and the like) filled in.

(Footnote 3 continued from p. 154)
other authors, see e.g. Miller, "Administration by Contract: A New Concern for the Administrative Lawyer" (1961) 36 N.Y. Univ. L. Rev. 957, 966 where the author remarks: "The government contract, a type of 'consensual' agreement in which predominant power rests with the government, differs markedly from the classical conception of contract. It is a product of adherence to prescribed terms rather than of arm's length bargaining"; Cuneo & Crowell, "Impossibility of Performance; Assumption of Risk or Act of Submission?" (1964) 29 Law and Contemp. Prob. 531, 549; Baur, "Differences between Commercial Contracts and Government Contracts" (1968-69) 2 Public Contract L.J. 5, 8; Dygert, "Implied Warranties in Government Contracts" (1971) 53 Military L. Rev. 39. But see Frenzen, "The Administrative Contract in the United States" (1968-69) 37 Geo. Wash. L. Rev. 270, 279 for a contrary view: "It would be wrong, however, to extend indiscriminately the concept of adhesion contract, with all its connotations of improper use of superior economic power, to the government contracts area" [hereinafter cited as Frenzen].

\(^1\) Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power" (1971) 84 Harv. L. Rev. 529 [hereinafter cited as Slawson].

not by the general law but by the standard clauses and terms, prepared often by one of the parties only.⁠¹ In the advanced industrial society of modern times, the economic apparatus is no longer focused on the particular tastes and the particular desires of individuals, but is based on mass production and mass distribution. This kind of production and distribution has by necessity become more and more standardised; and this standardisation has its counterpart in standardised forms for dealing with the customers. Thus, still using the word contract, the word has become hyphenated.⁠²

Thus far, there are no dissimilarities between government and ordinary commercial contracts. However, in the sphere of government contracts there have been other developments also. Not only are government contracts, more often than not, contracts of adhesion but they are gradually transforming into

¹Llewellyn, Book Review of Prausnitz, The Standardization of Commercial Contracts in English and Continental Law (1939) 52 Harv. L.Rev. 700 [hereinafter cited as Llewellyn, Book Review]. ⁡²Lenhoff, "Contracts of Adhesion and the Freedom of Contract: A Comparative Study in the Light of American and Foreign Law" (1961-62)36 Tulane L. Rev. 481 [hereinafter cited as Lenhoff]. See generally, Lücke's Review of Loeber's book on Government Contracts published in (1970) 3 Modern Law and Society (Section II) pp. 157-159. At p.158, the reviewer observes: "...Loeber's perhaps most important finding is that the contract is no longer a phenomenon based on party autonomy and productive of a kind of private law between the parties, but has become an instrument in the hands of the State for the imposition of private rights and duties and also for the promotion of social welfare and economic co-operation: ... . This new understanding of contract is implicit in Soviet legal literature and legislative practice and is also gaining ground in Western countries".
administrative contracts and furthermore into planning agreements. These aspects will be studied in later chapters; for the moment an examination will be made of the various aspects of standardised adhesion contracts, which, for better or for worse, are here to stay in the field of government contracts.¹

2. Adhesion Contracts

(i) Definition

Raymond Saleilles, a French jurist, who at the turn of the century prepared a study of a part of the new German Civil Code, invented the term "contrat d'adhésion". The study, published in 1901, stated:

Doubtless, there are contracts and contracts, and we are in reality far from that unity of contractual type assumed by the law. Eventually the law must, indeed, yield to the shading and differences that have emerged from social relations. There are pretended contracts that have only the name, the juridical construction of which remains yet to be made. For these, in any event, the rules of individual interpretation should undergo important modifications,

¹Dyger in his article "Implied Warranties in Government Contracts" (1971) 53 Military L. Rev. 39, states that there is an atmosphere of adhesion contracts in government contracting: "Because of the very volume of its procurement, it is not subject to the normal controls exercised by a system of competition. Contract provisions are not subject to negotiation in any real sense. The government dictates the terms of its contracts largely free from influence by the contractors who are dependent upon it for large portions of their business and who, in many cases, are dependent on such business for their very existence."
if only that one might call them, for lack of a better term, contracts of adhesion, those in which a single will is exclusively predominant, acting as a unilateral will which dictates its law, no longer to an individual, but to an indeterminate collectivity, and which in advance undertakes unilaterally, subject to the adhesion of those who would wish to accept the law of the contract and to take advantage of the engagements imposed on themselves.¹

Saleilles refers to the collective labour contracts of big industries, transportation contracts of big railroad companies and "all those contracts which, as the Romans said, resemble a law much more than a meeting of minds", ² as examples of contracts

¹ Saleilles, De La Déclaration de Volonté (1901) §89 at 229-30 (translation by Patterson, "The Interpretation and Construction of Contracts" (1964) 64 Colum. L.Rev. 833 at 856). This term was apparently introduced into the Anglo-American law for the first time by Patterson, "The Delivery of a Life Insurance Policy" (1919) 33 Harv. L.Rev. 198, 222: vide Kessler, "Contracts of Adhesion - Some Thoughts about Freedom of Contract" (1943) 43 Colum. L.Rev. 629, 633 f.n.11. See also Patterson "Compulsory Contracts in the Crystal Ball" (1943) 43 Colum. L.Rev. 731. For a similar usage of the term in international law, see Oppenheim, International Law Vol. I §§532, 533. On the origin of the term, see Steven v. Fidelity & Casualty Co. (1962) 58 Cal. 2d 862, 882 (Tobriner J.). See also Henningsen v. Bloomfield Motors, Inc. (1960) 161 A. 2d 69, 86; Siegelman v. Cunard White Star (1955) 221 F. 2d 189, 206; Ehrenzweig, "Adhesion Contracts in the Conflict of Laws" (1953) 53 Colum. L.Rev. 1072, 1075.

² Id. at 230 (English translation from Siegelman v. Cunard White Star (1955) 221 F. 2d 189, 206). In France, the need for the distinct treatment of such contracts was recognised by the legislature as early as 1757, when marine insurance contracts deviating from the general law were required to be handwritten rather than printed.
of adhesion. These contracts, he points out, have the characteristics of a legislative enactment and hence should be interpreted "in the interests of the collectivity to which they are addressed ... in the sense called for by both good faith and the economic relations involved".\(^1\) According to Amos and Walton, the term contrat d'adhésion is employed "to denote contracts in which the conditions are fixed by one of the parties in advance. The contract, which frequently will contain many conditions, may either be accepted or rejected but its conditions are not open to discussion."\(^2\) The boundaries of an appropriate definition of the term are thus marked by two factors: (1) imposition on, and unalterability by, the signing party submitting to terms, fixed in advance by the other party, either in ignorance or out of necessity, and (2) the inequality

\(^1\)Ibid.

of the parties' bargaining position. The terms may be fair or

For other definitions of "adhesion contracts" see, Lenhoff, op.cit. at 481 where the author states that the name contract of adhesion indicates that the legal transaction is not formulated as a result of the give-and-take of bargaining where the desires of one party are balanced by those of the other. The customer by entering in the transaction, has to "adhere" to the terms prescribed by the enterprise - for only a very few items may be open to his determination; Ehrenzweig defines contracts of adhesion as agreements in which one party's participation consists in his 'adherence', unwilling and often unknowing, to a document drafted unilaterally and insisted upon by what is usually a powerful enterprise: "Adhesion Contracts in the Conflict of Laws" (1953) 53 Colum. L.Rev. 1072, 1075. Kessler in his article "Contracts of Adhesion - Some Thoughts about Freedom of Contract" (1943) 43 Colum. L.Rev. 629 states at 632: "Standard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all. Thus standardized contracts are frequently contracts of adhesion; they are à prendre ou à laisser". Another author explains "The 'adhesion' contract is a standardized or form agreement that is drafted unilaterally by a dominant party and then presented to a weaker party as the only acceptable instrument. The latter's participation in the resultant bargain consists in his mere adherence": Shuchman, "Consumer Credit by Adhesion Contract" (1962) 35 Temple L. Q. 125 at 128-9. See also Wilson, "Freedom of Contract and Adhesion Contracts" (1965) 14 Int'l & Comp. L. Q. 172, 175-76, 181; Slawson, op.cit. at 549, 554; Silberberg, "The Meaning of Standard Form Contracts" (1967) 7-8 Rhodesian L. J. 158, 160 [hereinafter cited as Silberberg]. "The term 'adhesion contract' expresses an implicit hostility toward the more powerful of two contracting parties in a situation where that party has 'imposed' its will through the use of standard form contracts": Frenzen, op.cit. at 279; Hippel, "The Control of Exemption Clauses - A Comparative Study" (1967) 16 Int'l & Comp. L. Q. 591. According to Kahn-Freund, the "standard contracts" are contracts "the terms of which do not result from a 'give and take', a bargaining between parties, but are fixed in advance, and brought into operation by an act of formal assent." Kahn-Freund, The Law of Carriage by Inland Transport (4th ed. 1965) 215 [hereinafter cited as Kahn-Freund].
unfair. They may be all the conditions of the contract or some of them, for it would not affect the mischief if the supplier will negotiate on some conditions whilst leaving others in the category of "non-negotiable". To these the following factors may be added for the sake of completeness: (1) the monopolistic position or at least the great economic power of the offeror, (2) the continuing and general nature of the offer, (3) a wide-spread demand for the goods or services offered, and (4) the use of standard forms, the stipulations of which serve mostly the interests of the offeror and the reading, let alone the understanding of which, presents difficulties to the offeree.

1 Bright, "Contracts of Adhesion and Exemption Clauses" (1967) 41 A.L.J. 261, 262 [hereinafter cited as Bright].

2 In the author's possession is a Pan American clipper cargo waybill, dated 23 July 1975, in which the terms and limitations refer to the governing rules of the Warsaw Convention of 1929 and its amending Hague Protocol - certainly not informative for the ordinary layman or lawyer. See also Derby Cables, Ltd v. Frederick Oldridge, Ltd [1959] 2 Lloyd's Rep. 140, where in a lighterage contract entered into between the shippers and lighter-owners for carriage of coils of copper wire from wharf at Hull to a steamship, a claim by the shippers was made alleging short delivery at the steamship of 20 coils out of a consignment of 1744 coils sent by lorry to wharf. The lighter-owners contended, inter alia, that they were exempted from liability by the terms of the contract. Winn J said of the contractual conditions which were printed on the back of the contract that the text was "legible only by eyes with an acuity unlikely to be enjoyed by an individual possessing sufficient maturity of mind to understand it" and that it was "verbose, tautologous and obscure" (at 149). An excellent illustration of the difficulties in reading such conditions appears in the facsimile reproduction of a Cunard Line steamship ticket that cannot be deciphered unless using a microscope: see Siegelman v. Cunard White Star (1955) 221 F. 2d 189. This was the first case in which an American court used the term "adhesion contract". Another interesting case is New Prague Flouring Mill Co v. Spears (1922) 189 N.W. 815, in which the court found that the terms containing 4,000 words were squeezed on a single sheet of paper.
The concept of adhesion contract has been described by use of a wide variety of expressions, all of which have the same meaning. It has been referred to simply as a "standard contract", or a "standardized contract", or a "form contract", or "contract by imposition", or "imposed" or "imposed standard contract", or a "block contract", or "general conditions".

(ii) Distinctions between Adhesion Contracts and Standard Form Contracts

At this juncture, it will be pertinent to state the differences (if there are any) between adhesion contracts and standard form contracts or standardised mass contracts. Most

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1 Friedmann, *op. cit.* chapter 4.
2 Kessler, "Contracts of Adhesion - Some Thoughts about Freedom of Contract" (1943) 43 Colum. L. Rev. 629, 632 [hereinafter cited as Kessler].
4 Slawson, *op. cit.* at 529, 556.
scholars have used these terms interchangeably,¹ but there are some who have endeavoured to draw a distinction between them.² In commercial practice the term "standard form contract" is used in two different meanings. It denotes model contract forms and contracts of adhesion. These two meanings are by no means identical. A model contract form is a specimen form to which the lawyer or businessman will turn when charged with the duty of drafting a contract and which will be altered and adapted to meet the situation in hand. A contract of adhesion is a form proposed (rather imposed) by one of the contracting parties to the other as the definitive form of the contract which is intended to be unalterable except in trifling and unimportant detail;


²See e.g. Schmitthoff, "The Unification or Harmonisation of Law by Means of Standard Contracts and General Conditions" (1968) 17 Int'l & Comp. L.Q. 551; Silberberg, op. cit. 171; Slawson, op. cit. at 549-50; Duncan, "Adhesion Contracts: A Twentieth Century Problem for a Nineteenth Century Code" (1974) 34 Louisiana L. Rev. 1081. [hereinafter cited as Duncan].
the party to whom this type of contract is offered may "take-it-or-leave-it" but cannot negotiate its terms and conditions. Model contracts sometimes expressly provide that the parties shall insert and complete supplementary clauses or an appendix and hardly make sense without such exercise of the parties' discretion, but contracts of adhesion are imposed by one of the parties upon the other. Model contracts are economically innocuous; they are used between parties of equal bargaining power and, in the course of the negotiations, are frequently amended in order to achieve a balance of economic interest between the negotiating parties. Contracts of adhesion raise in some instances the suspicion that the imposing party, commanding a position of monopoly or superior bargaining power, might misuse its economic strength (which it often does) at the expense of the other, economically weaker party.

Since the average standard form contract tends to develop into an adhesion contract, the difference does not seem to be of importance in the present terms of reference. Another point may also be noted here. There is a feeling among some scholars that since a contract is composed of standard terms and therefore not "dickered", it is adhesive. Legitimacy is thought to derive from the act of bargaining. A contract that contains both standard terms and terms that were "dickered" is therefore thought to be fully enforceable only with respect to the latter. It is submitted that this is an erroneous conclusion.
Slawson's following comments expose the fallacy:

One reads these accounts of the legitimacy which only "dickering" can provide with a sense of unreality. Where do the authors suppose that this "dickering" occurs? Have they ever heard customers in a department store "dicker" terms of sale with the clerks? Or anyone "dickering" with an insurance agent over the terms in a policy? .... Nor in the past has the validity of contracts ever been thought to depend upon their having been "dickered" .... It is not an absence of an opportunity to dicker, but a narrowing of choice which coerces, and a sufficient range of choice to make a contract non adhesive is present if an individual has the ability to choose among a variety of materially different standard forms, although he may be powerless to change any of them by "dickering". ¹

Nowadays there are fewer and fewer contracts in the private business world, and in the sphere of government contracting, where both parties have discretion or opportunity to talk to each other on an equal footing, where one party may say "Well, I won't agree to that position", and the other one says "Well, what about such and such instead?" That is why neither the scholars of law nor the judges draw a distinction between contracts of adhesion and standard form model contracts. ² It is

¹ Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power" (1971) 84 Harv. L. Rev. 529 at 553.
² But see Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale [1966] 2 All E.R. 61. Lord Reid in the course of the judgment implicitly recognises the distinction between contracts of adhesion and model contracts when he says (at 76):

Exemption clauses differ greatly in many respects. Probably the most objectionable are found in complex standard conditions which are now so common. In the ordinary way the customer has no time to read them, he would probably not understand them. And if he did understand and object to any of them, he would generally be told he could take it or leave it.... At the other extreme is the case where parties are beginning on terms of equality and a stringent exemption clause is accepted for a quid pro quo or other good reason.
submitted that the standardised mass contract is a genus and an one of adhesion contract\its species. But with the passage of time and due to the revolutionary changes in the economic sphere, the species has eaten up the genus and almost all contracts now tend to be in the adhesion form. Contracts which once used to be a matter of dicker, bargain by bargain, and item by item, gave place to the standard model contracts because of an increase in the demand and supply of goods and services. But even they could not withstand the pressures of mass production and distribution and soon made an exit giving place to adhesion contracts. In other words the movement has been from a simple bargain type of contract to adhesion form via standard contract.

Bargaining is now a thing of the past. Almost invariably, the parties are not economically equal. There is mass production of goods. The contracts often involve huge quantities, particularly the government ones. And it is easier to find a counsel or a small group who can draft a technically skilful form for a million contracts than to find a million men each of whom can draft one satisfactory contract.

To sum up, a contract of adhesion includes every contract, whether simple or under seal and whether contained in one or more documents, one of the parties to which (generally called the adhering party\footnote{Or the "servient" party, the expression used by Wright, "Opposition of Law to Business Usages" (1926) 26 Colum. L. Rev. 917, 930; Cohen, "Property and Sovereignty" (1927) 13 Cornell L.Q. 8; and Frenzen, "The Administrative Contract in the United States" (1968-69) 37 Geo. Wash. L. Rev. 270, 274.}) habitually makes contracts of the same type in a particular form and is allowed little, if any, variation
from that form. In such transactions the bargaining power of the parties is unequal: on the one side there is the ordinary individual and on the other, a monopoly or powerful organisation with desirable goods or services to supply and if it is a government body wishing to procure goods or services, it (i.e. the government) luring the contractor with good regular business. The choice between not making a contract or making it on the only terms available is no choice at all and docile adherence to the pre-determined terms, a meek signature "on the dotted line", is the general rule. The potential customer/supplier/contractor has the choice either of the 'freedom to adhere' to the set form or not. The printed document which sets out the standard conditions never sees the red, green and purple ink beloved of the conveyancer when negotiating his terms.¹

(iii) Advantages and Disadvantages

Preoccupation with the evils of adhesion contracts from the point of view of the offeree must not allow their admitted virtues to be overlooked.\(^1\) By saving time and trouble in bargaining, simplifying internal administration and facilitating planning they reduce administrative costs to an extent which must benefit both parties. They have, it is said, a lulling effect induced by the knowledge that one is signing "what everyone else has signed".\(^2\) They allow for automation in the processing of transactions resulting in greater savings of time, effort and cost.\(^3\) They also reduce risk to a calculable quantity and have the potential, if drawn up in an enlightened manner, of...

\(^1\) For the advantages of adhesion contracts see Kessler, \textit{op. cit.} at 631. Attention may be drawn to the following by Kessler: "Standardized contracts have thus become an important means of excluding or controlling the 'irrational factor' in litigation. In this respect they are a true reflection of the spirit of our time with its hostility to irrational factors in the judicial process, and they belong in the same category as codifications and restatements" (at 632); Llewellyn, Book Review, \textit{op. cit.} at 701; Friedmann, \textit{op. cit.} at 131; Slawson, \textit{op. cit.} at 552; Jorgensen, "Contract as Form" (1966) 10 Scandinavian Studies in Law 99, 106-108; Lando, \textit{op. cit.} at 129-130; Egan, "Standard Contracts" [1968] J. of Bus. L. 204, 206-7; Wright, "Opposition of Law to Business Usages" (1926) 26 Colum. L. Rev. 917, 930 n.17; Shepherd, "Contracts in a Prosperity Year" (1954) 6 Stanford L. Rev. 208, 212; Macaulay, "Non-Contractual Relations in Business: A Preliminary Study" (1963) 28 Am. Soc. Rev. 55, 58.

\(^2\) Shuchman, \textit{op. cit.} at 131.

\(^3\) Id. at 128 quoting Demogue, \textit{Analysis of Fundamental Notions}, (Modern Legal Philosophy Series 1916) VII, §262 at 471. Demogue suggests that the more general basis for form or block contracts is the application of the "law of least effort", that an economy of time makes it easier for individuals to act and thereby to create wealth.
becoming "a wise code governing intra- or extra-trade relations of a business group".¹ "Standardized relationships favour security, simplify inter-group relationships, and may well offer machinery for producing more to distribute and for its more effective distribution. They may be needed as an adjustment to the technical phases of mass production and mass marketing".² The skill and experience of specialised legal draftsmen is made available to the entire personnel of a large business. Judicial interpretation, if reasonably consistent, supplements the work of standardising contracts and accelerates the trend towards conformity. One authoritative decision on a doubtful point may shed just the light needed for thousands of future such transactions.³

¹Llewellyn, "The Effect of Legal Institutions upon Economics" (1925) 15 Am. Econ. Rev. 665, 673. See also Silberberg, "The Economics of Standard Contracts" (1968) 8 Rhodesian L. J. 89, 90-91.
²Llewellyn, "What Price Contract? - An Essay in Perspective" (1931) 40 Yale L. J. 704 at 717. See further at 731 where the author remarks: "Standardized contracts in and of themselves partake of the general nature of machine-production. They materially ease and cheapen selling and distribution. They are easy to make, file, check and fill".
³Cf. Llewellyn, "What Price Contract? - An Essay in Perspective" (1931) 40 Yale L. J. 704, 731: "Finally, from the angle of the individual enterprise, they make the experience and planning power of the high executive available to cheaper help; and available forthwith, without waiting through a painful training period".
"Economy, certainty and adaptability are the three outstanding virtues of the standard contract". ¹ It has also been suggested that "[b]y standardizing contracts, a law increases that real security which is a necessary basis of initiatives and tolerable risks".² Stressing the economic function of adhesion contracts, Kessler and Gilmore have observed:

Uniformity of terms is a cost reduction factor. Form contracts reflecting past experience, the skill and foresight of executives and counsel with regard to future contingencies, are of assistance to less experienced personnel in the making of contracts, the handling of performance, and the adjustment of claims.³

Notwithstanding the various forms of economy resulting from such practice, in fact, all the legal advantages of adhesion contracts accrue to the dominant party only. Always coiled in power is its abuse; and contractual power is no exception.⁴ Natural self-interest soon leads to the inclusion in such contracts of protection extending beyond the realm of legitimate interests. Hence the emergence and proliferation of the "exclusion of liability"⁵ clauses which have now occupied so

¹Grunfeld, op. cit. 24 Modern L. Rev. at 64.
²Cohen, Law and the Social Order (1933) 106.
³Kessler and Gilmore, Contracts, Cases & Materials (2nd ed. 1970) 11
⁴See e.g. Turpin, op. cit. at 103 "The abuses that are associated with standard contracts [are] - unintelligibility, concealment of crucial provisions in dense thickets of verbiage, unfair and oppressive conditions and so on...."
⁵Synonymous phrases are, "exception clause", "exemption clause", "exemptive clause", "exculpatory clause", "exempting clause", "exclusion clause", "non-warranty clause".
much of the courts' time for over a century. Obviously, adhesion contracts affect both freedom and equality of bargaining, except where the members of a trade consciously pursue the policy of considering the interests of both the potential parties to the contract or where groups of approximately equal strength confront each other. But this is seldom the case in government contracts. Not infrequently the weaker party to a prospective government contract even agrees in advance not to retract his offer while the offeree reserves for himself the power to accept or refuse; or he submits to terms or change of

1 For a detailed treatment of such cases in the context of adhesion concept see, Meyer, "Contracts of Adhesion and the Doctrine of Fundamental Breach" (1964) 50 Va. L. Rev. 1178 [hereinafter cited as Meyer].

2 This is a controversial point. In the United States, it was held in Refining Associates v. United States (1953) 109 F. Supp. 259 that when bids are invited pursuant to the formal advertising procedure, a bidder is said to be unable to withdraw his bid (unless for mistake) after the time set for the opening of bids. See also Turpin and Whelan (eds.), The London Transcript, A Comparative Look at Public Contracting in the United States and the United Kingdom (1973) Part I, 9. But in Australia, a tender may be withdrawn by a contractor before its acceptance by the government. One wonders, however, if the bidder has the right of withdrawal in all cases, after the bids have been opened and known, would it not lead to great inconvenience to government and innumerable frauds by the withdrawing party. See also ch. II at 119, supra.
terms which will be communicated to him later. Adhesion terms thus invariably detract from common-law rights: by inserting purely economic clauses, operational clauses, or by limiting or excluding liability, by making a government agency the sole judge of whether it is justified in terminating a contract because of altered circumstances,¹ for example. According to Lord Denning they are "nothing less than a legislative code imposed by the one party on the other - and sanctioned under the guise of freedom of contract".² It is a form of contract "which, in the measure of the importance of the particular deal in the other party's life, amounts to the exercise of unofficial government of some by others, via private law".³

¹See chapter IV, infra.
²Lord Denning, "The Way of an Iconoclast [1959-60] The Journal of the Society of Public Teachers of Law 77, 84. For a similar view, see Langrod, "Administrative Contracts" (1955) 4 Am. J. of Comp. L. 325. At 332 the author has stated: "Thus, the 'civil' contract itself is far from having kept its original doctrinal 'purity' and evolves steadily toward a 'quasi-statutory form"; Lloyd, The Idea of Law 219. See also the following authorities: Llewellyn, Book Review op. cit. at 702; Kessler, op. cit. at 632; Jorgensen, "Contract as Form" (1966) 10 Scandinavian Studies in Law 99, 108.
³Llewellyn, "What Price Contract ..." op.cit. at 731.
(iv) **Treatment of Adhesion Contracts**

(a) **Legislation**

The law of many countries as to the validity of adhesion contracts seems to be in a state of confusion and uncertainty.

There is as yet (with the exception of the Israeli Standard and the West Germany's Regulation of Standard Terms Act, 1976), no statute dealing exclusively with the adhesion contracts in the common-law or civil-law jurisdictions.\(^1\)

In the absence of specific statutory regulation on adhesion contracts, England follows the general tendency of protecting the economically weaker party through legislation to control some particular kind of abuse. Examples of such "spasmodic"

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\(^1\) In the United States, there is §2-302 of the Uniform Commercial Code dealing with unconscionable contracts or terms. See for discussion Bolgar, *op. cit.* at 70, 73-76 and Kessler and Gilmore, *op. cit.* at 465-66 where further references can also be found on the subject of unconscionability. The Italian Civil Code of 1942 has specific code articles (Articles 1341 and 1342) relating to standard conditions and one-sided clauses. For the text, English translation and discussion, see Duncan, "Adhesion Contracts: A Twentieth Century Problem for a Nineteenth Century Code" (1974) 34 Louisiana L. Rev. 1081, 1088-91. For the French, German, Austrian, Belgian and Italian law on adhesion contracts see Wilson, "Freedom of Contract and Adhesion Contracts" (1965) 14 Int'l & Comp. L.Q. 172. For the law in Israel, see Lando, *op. cit.* See further for an interesting consideration of the Italian provisions: Gorla, "Standard Conditions and Form Contracts in Italian Law" (1962) 11 Am. J. of Comp. L. 1; see also Bachrach, "The 'Contract of Adhesion' Doctrine in Franco-Belgian Law" [1956] ABA Sect. Int'l & Comp. L. Proc. 119; Lenhoff, "Contrats d'Adhésion in German and Austrian Law" [1956] ABA Sect. Int'l & Comp. L. Proc. 121.
legislative intervention,¹ affecting in particular the validity

¹Cheshire and Fifoot, Law of Contract (7th ed. 1969) 111-112. There is a lot of piecemeal legislation: employment and transport, in particular, have attracted statutory regulation of contract: in the former, for example, the Truck Acts, 1831-96, the Solicitors Act, 1932, s.60(2); in the latter, the Carriers Act, 1840, s.4; Railway and Canal Traffic Act, 1854, s.7; Railways Act, 1921, ss.42-45; Carriage of Goods by Sea Act, 1924; Carriage by Air Act, 1932; British Road Traffic Act, 1960; British Transport Act, 1962; British Transport Commission (Passenger Charges) Scheme, 1954, paras. 32-33. Again in financing, there are the Moneylenders Act, 1927, s.6; and the Building Societies Act, 1939, s.14; in property holding, the Agricultural Holdings Act, 1948; and Agriculture Act, 1958; and the Rent Acts; in hire-purchase, the English Hire Purchase Acts, 1965 and the Hire-Purchase (Advertisements) Act, 1967; in business organisation, the Partnership Act, 1890; and current Companies Act. The above list is by no means exhaustive. It is impossible to set out within a reasonable compass every Act of Parliament which restricts the freedom of the economically superior party designing a form of contract. Such legislation takes many patterns: some of them make the insertion of certain clauses illegal or ineffective or both; some make compulsory the insertion of certain clauses; some make compulsory the adoption of a certain form of contract; some provide that certain clauses shall be deemed to have been incorporated or adopted unless they have been expressly or impliedly negatived; some provide that certain clauses shall not be incorporated in a contract unless special steps are taken to bring them to the attention of the other party; and some others simply require that certain steps shall be taken to bring to the notice of the other party certain clauses of the contract or provisions of statutes relating to it. For legislative implementation of the same way of thinking in the United States see e.g. Truth in Lending Act of 1968 [82 Stat. 146 (1968)]. For a most comprehensive work dealing with legislation relating to transport by railway, inland waterway, road vehicle and aircraft in the United Kingdom, see Kahn-Freund, The Law of Carriage by Inland Transport (4th ed. 1965). For the relevant case-law and legislation restricting the carrier's power to limit its liability, see a good account given by the author 218 et seq. For examples of statutory regulation of adhesion contracts in India, see Ramaseshan, "Adhesion Contracts and the Indian Law of Contract" (1975) 17 Journal of Indian Law Institute 237, 244-246.
of restrictive terms, are the Consumer Credit Act 1974, Road Traffic Act 1960, the Transport Acts 1962-1968 and the Hire Purchase Act 1965, all of which include provisions avoiding clauses which restrict or negative the drafting party's liability.\(^1\)

If we compare these rules with those of the English Sale of Goods Act 1893, we find an almost complete turn-about in legislative policy. Whereas the Sale of Goods Act provides\(^2\) that any right, duty, or liability, which would arise under a contract of sale by implication of law may be negatived or varied by express agreement, the new rules either prohibit the validity of such agreements, or severely restrict the power of the parties to contract-out.\(^3\)

(b) **Judicial response**\(^4\)

In the absence of separate statutory rules dealing with government contracts, the courts have so far applied the general principles of the ordinary contract law to government contracts. Since, however, government-contractor disputes are more frequently settled without recourse to courts (as they go to arbitration or

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\(^2\)Section 55.

\(^3\)Cf. Hire-Purchase Act, 1965, s.18(3).

to some other administrative body), the courts have had very few opportunities to apply the rules of contract law to government contracts. In the area of private contract, on the other hand, courts have gradually created a series of independent rules which now do exert extensive but still imperfect control\(^1\) over standardised contracts or contracts of adhesion.\(^2\) In the exercise of their chief function to dispense justice, the courts have always been anxious to protect the weaker party in situations that manifestly point to the stronger party's "covetous passion for undue lucre",\(^3\) and have drawn in this endeavour on the principles

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\(^1\)Most of the authors in their writings on "Adhesion Contracts" have criticised the judicial response to this vital matter: see e.g. Llewellyn, Book Review \textit{op. cit.}. See also Kessler, \textit{op. cit.} at 637. "[T]he majority of judges have striven, in however haphazard a way, to mitigate at least some particularly blatant consequences of the early theory. If they have not achieved very much, this is to some extent due to judicial conservatism, but to a far greater extent, to the organic weakness of judicial-law reform": Friedmann, \textit{op. cit.} at 125. Lenhoff, \textit{op. cit.} at 486 remarks: "But the trouble is that American courts shy away from statutory analogy so that, in the absence of a specific statute, no remedy is available". Kahn-Freund dealing with the law of carriage, states: "In this respect the common law as developed by the courts in this country failed to respond to the reality of the situation, and, in the name of "freedom of contract" helped to establish what was in fact (though not in law) a private legislative power to which the carrier's customers had to submit". (\textit{op. cit.} at 214).


\(^3\)Earl of Chesterfield \textit{v. Jansseen}(1750) 2 Ves. Sen. 125, 128; 28 E.R. 82, 84.
of contract law. Since under the contract law the validity of contracts depends on freedom of consent, the courts have invalidated contracts, or contractual clauses, which manifestly reveal defects of consent. They have invoked absence of knowledge, absence of choice, bargaining inadequacy, gross imposition, undue influence, duress, equitable "surprise", unfair advantage, the non est factum rule etc.\(^1\) to deny validity to these unequal contracts. By a process of strict construction against the dominant party, the courts have been excluding such onerous clauses where the document did not appear to be contractual in nature,\(^2\) where the offeree's attention was not adequately drawn to the conditions,\(^3\) or where notice of them was given after

\(^1\) For a treatment of the leading Australian and English cases, see Roebuck, \textit{op. cit.} 162-219. See also, Evans v. Llewellyn (1787) 29 E.R. 1191 (surprise and undue advantage); Wood v. Abrey (1818) 56 E.R. 558 (want of advice); Fry v. Lane (1888) 40 Ch.D. 312 (unconscionable bargain); O'Rorke v. Bollingbrooke (1877) 26 W.R. 239 (H.L.) (knowledge and consent); Lowe v. Lombank [1960] 1 All E.R. 611 (hire-purchase). For early American cases see New Jersey Steam Navigation Co. v. Merchants Bank (1848) 6 Howard 344; Dorr v. New Jersey Steam Navigation Co. (1850) 4 Sandford 136; Bissell v. New York Central R.R. (1869) 25 N.Y. 442; Railroad Co. v. Lockwood (1874) 84 U.S. (17 Wall.) 357. See further Patterson, "The Interpretation and Construction of Contracts" (1964) 64 Colum. L. Rev. 833, 858 and the cases cited therein.


the contract was concluded.¹ More recently the doctrine of
fundamental breach has been evolved in an attempt to deal with
the problem at a more basic level.²

In the early stages of the development of the law on this
point, traditional concepts of the law concerning freely
bargained individual contracts were applied to adhesion contracts.
"Consent" was construed by using the device of "objective
expectations" which the acceptance of such a form was regarded
as carrying with it. Thus, the approach was the idea of an
implied consent; later, however, the courts adopted the approach
of 'construction'. Handicapped by the axiom that courts can
only interpret but cannot make contracts for the parties, they
have used the old roundabout method of construing ambiguity.

¹Olley v. Marlborough Court Ltd [1949] 1 K.B. 532 (C.A.) (notice
displayed in the bedroom of the hotel). In a Note, "Exemption
Clauses - Contractual and Tortious Liability" (1954) 17 Modern
L. Rev. 155, Gower collects a number of devices used by
the courts to enable a finding of liability. Also see
generally Coote, Exception Clauses (1964); Eörsi, "The Validity
of Clauses Excluding or Limiting Liability" (1975) 23 Am. J. of
 Comp. L. 215, 221 et seg.

²Treitel, Law of Contract (1975) 144, 159; see also Reynolds,
"Warranty, Condition and Fundamental Term" (1963) 79 L.Q. Rev.
534, 546; Kahn-Freund, op. cit. at 217, 234 et seg. See
generally on the doctrine, Cheshire and Fifoot, Law of Contract
(2nd Aust. ed. 1969 by Starke and Higgins) 213 et seg.; Coote,
"The Rise and Fall of Fundamental Breach" (1966-67) 40 A.L.J.
336; Ramaseshan, "Fundamental Obligation and the Indian Law of
Contract" (1968) 10 Journal of Indian Law Institute 331; Allan,
"The Scope of Contract" (1967-68) 41 A.L.J. 274, 283. See also
Suisse Atlantique Société d'Armement Maritime S.A. v. N.V.
where there is none, construing language into patently not meaning what the language is patently trying to say, and interpreting onerous terms into a well-meaning meaninglessness. But these techniques, "since they purport to construe, and do not really construe,... seriously embarrass later efforts at true construction".\(^1\) If at any time an adhesion contract imposed by a big organisation is construed adversely to it by the courts, it is an easy matter for the contract to be redesigned.\(^2\)

\(^1\) Llewellyn, Book Review, *op. cit.* at 702, 703. It is interesting to note what Llewellyn wrote in 1931 in his article, "What Price Contract? - An Essay in Perspective" 40 Yale L.J. 704: "Such 'construction' kills security in transactions, if 'security' means predictability of actions at law. No man is safe when language is to be read in the teeth of its intent. Nor is even the party who is being protected safe; this side of final judgement, in having got what he thinks he has bought (the 'life insurance as a commodity' suggestion). For such 'construction' often enough defeats itself. It begins by admitting power in the parties (in the dominant party) to make their dicker as they wish. Sooner or later that admission will be taken seriously; sooner or later men will be held to the very type of thing which prior courts have conceived as too outrageous to be admitted as intent. Meantime the greater bargainer, defeated once and again, recurs to the attack. After each case he can redraft and fight again. A single victory, if achieved, has good chance of being permanent". (id. at 732-734).

\(^2\) Roebuck, *op. cit.* at 209. See also Smith J's remarks in *Woodgate v. Great Western Ry. Co* (1884) 51 L.T. 826, 832; *Huddleston B. in McCartan v. Noth-Eastern Ry. Co* (1885) 54 L.J. Q.B. 441, 443. Agger in his article, "Unconscionable Contracts Under the Uniform Commercial Code" (1966) 4 Am. Business L. Rev. 127, 147, has said: "By distorting the construction of contract language, the courts have merely encouraged the draftsmen to become more skilled in phrasing a substitute. If one adaptation fails when subsequently tested by litigation, an infinite number of revisions still remain untried".
The exact position on this point is portrayed with great clarity by Professor Roebuck:

Much confusion has been imported into this part of the law by unnecessarily categorizing terms in an attempt to escape the efforts of the draftsmen of exclusion clauses. If a clause excludes all liability for breach of implied terms, a court may evade it by finding that an express term has been broken. If the clause excludes liability for breach of all conditions and warranties, express or implied, then why not invent a "fundamental term" which is something bigger than and different from conditions and warranties? Such are the clumsy stratagems made necessary when judges try to do justice with a set of legal principles which is cruder than contemporary morality.¹

3. **Government Contracts**

(i) **Government as a Superior Party**

One of the major causes which is responsible for a transformation in the function and substance of contract in this century is the tremendous expansion of the welfare and social-service functions of the State in all common-law jurisdictions which has led to a vast increase of contracts where government departments are on one side, and a private business on the other. The government is usually superior - intellectually, psychologically and economically - in terms of bargaining power when it contracts.² Thus it may draft the

²Over the years a serious imbalance has developed between the government and its contractors and one of the factors contributing to that imbalance is that "[t]he government, by and large, dictates the terms and conditions in contracts", see "Symposium on Government Procurement: Comments on the Procurement Commission's Dispute Remedies and Award Protest Recommendations" (1974) 42 Geo. Wash. L. Rev. 222, 229.
contract to its best advantage, giving the adhering or the servient party no chance to bargain. The government, offering contracts, is the biggest, strongest and richest contracting side because of its sovereign powers, privileges and immunities and there is no comparison to its contractual authority in the private sector, more so since it has no competition in certain fields like weapons, ammunition, space requirements, etc. As is often the case in a commercial contract that the terms are dictated by the dominant party and are one-sided and unreasonable, so is it true of a government contract with regard to the imposition and unreasonableness of the contractual terms. In any government contract, the weaker party is the contractor and since it is a contract of adhesion, there is little or no negotiation or give-and-take regarding the type of contract. There is no assumption of risk but a submission to terms dictated. Government contract is thus something more than the traditional consensual transaction between private individuals. As already noted, the traditional idea of contract is fast becoming extinct in commercial transactions, and it is submitted that with the phenomenal increase of government business, the extinction of those much respected doctrines like freedom of contract and

Bethlehem Steel Corporation was the largest ship-building company in the world, but still the U.S. Supreme Court in United States v. Bethlehem Steel Corporation (1942) 315 U.S. 289, (per Frankfurter J dissenting) considered (though tacitly) the United States Government to be a stronger contracting party. See also Miller, "Government Contracts and Social Control: A Preliminary Inquiry" (1955) 41 Va. L. Rev. 27, 49 stating: "The attempt to equate the Federal Government as a purchaser with any private individual or firm will not hold water".
equality of bargaining is being accelerated. In government contracts we find that the conditions which are imposed are on a take-it-or-leave-it basis, and give only an illusory freedom of choice to business concerns. So far as the conditions imposing social and economic policies are concerned, no bargaining takes place; the contract clauses embodying those policies are prescribed and printed in advance, becoming standard "boiler-plate" in the contractual document.

To a large extent, therefore, the government contract is an instrument of power relationship, and only vaguely resembles the consensual agreement extolled by Maine and relied upon by Adam Smith. This distinctive character of government contract law stems primarily from the peculiar forms of contract which are decreed by the government in olympian style. The final word is that of the government. Little, if anything, is left to the quid pro quo of bargaining. The decision of the contractor is that of accepting the conditions imposed, or of not accepting them and giving up the contract entirely. Change them, bargain over them, he cannot.

Only once has the government argued before a court that it was the weaker, helpless party to a contract and that, therefore, economic duress was imposed on it. This was in _United States v. Bethlehem Steel Corporation_, 2 which although not involving an

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1 As stated in the earlier pages, bargaining over the terms of adhesion contracts between private individuals is also not possible, generally speaking. Examples are legion, including conditions on transportation tickets and agreements by public utilities, insurance, and agreements by public utilities to furnish services.

2 (1942) 315 U.S. 289.
adhesion contract, is nevertheless relevant because it illustrates the rationale of the doctrine so forcefully. The Court remarked:

> Although there are many cases in which an individual has claimed to be a victim of duress in dealings with government ... this, so far as we know, is the first instance in which government has claimed to be a victim of duress in dealings with an individual.¹

The dispute in this case was between Bethlehem Shipbuilding Corporation Ltd., and the United States Government about the amount of profits claimed by Bethlehem under thirteen war-time contracts for building ships. The contracts were negotiated and executed in 1917 and 1918, when the warfare made it necessary for the United States to build the greatest possible number of ships in the shortest possible time. Efforts on the part of the government to obtain a lump sum contract from Bethlehem were unsuccessful. Bethlehem insisted on cost-plus-fixed-fee contracts which also included bonus-for-saving clauses amounting to 50 percent of the difference between actual and estimated costs. To accelerate production and to avoid the responsibility for commandeering the plant, the negotiators for the government acquiesced and placed upon them the contract. The government paid Bethlehem in addition to the actual cost of building the ships which came to $109,000,000, a fixed fee of $11 million and bonuses to the tune of about $8 million, but refused to pay the balance amounting to $5 million. It brought

¹Op. cit. at 300.
a suit in equity for an accounting and for a refund of amounts paid in excess of a just and reasonable compensation, claiming fraud and economic duress. The court by a majority refused to espouse the doctrine on the ground that the government had had other bargaining weapons including compulsion and requisitioning, but Justice Frankfurter in his powerful dissent wrote:

But is there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequality and injustice? Does any principle in our law have more universal application than the doctrine that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other?

He further emphasised that the law was not so primitive that it sanctioned every injustice except brute force and downright fraud. He quoted Lord Chancellor Northington's classic remark,

And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them,

implying that that observation was applicable to government too.

The absence of real negotiations in undertaking a government contract has an important corollary, and this is that the contractor is handed a sizeable wad of fine small print or "boiler plate" as it is often called. Much of this is written up in

1 Id. at 326.
something called "General Provisions" and, this is put together in a very small print. The result is that the contractor tends to look at it and say "Well, this looks like an awful lot of fine print and I don't think I would ever get round to reading it". But it is not so simple and innocuous. There are some hidden meanings lurking in them; as has been put by one of the leading American authorities on government contracts:

[W]hen we come to Government contracts, the man entering into a Government contract literally lands, like a man coming down in a parachute, in a foreign country of new and exotic remedies that require a high degree of specialized knowledge.¹

And, if a dispute should arise between the contractor and the government, he will discover that he has already bound himself to let representatives of the government decide the dispute and so has entrusted his rights to the fairness and impartiality of the adverse party.² This unfettered authority of one party to a contract is certainly a departure from practice in the traditional contract setting.


² See the remarks made by Zelling (President of the Law Council of Australia) in Bright, "Contracts of Adhesion and Exemption Clauses" (1967) 41 A.L.J. 261, 272: "Any of us who are familiar with building contracts with the Crown, in particular, know that not only do they have exemption clauses in them, but they have clauses which make the Crown very largely judge in its own cause".
The businessman seeking government contracts has thus only an illusory freedom of choice. To the extent that his economic health, and in some cases even existence, depends on receiving either government contracts or sub-contracts from other government contractors, he has no feasible alternative but to submit to the attachment of conditions having no relation to the buying and selling process. For him it is a matter of survival in the business. If he refuses to sign a contract containing the clauses written by the government, the remedy is of course a prophylactic one: denial of a contract. There is a natural reluctance to offend powerful public officials who are in a position to exercise important discretionary functions in the future. And government does take advantage of its superior position by imposing its will on all who contract with it. Obviously, therefore, principles of general contract law, based on theories of freedom of contract, can have little application to government's standard forms.

(ii) Relevance of Private Contract Case-Law to Government's Adhesion Contracts

Bethlehem was an exceptional case where the government claimed to be an inferior party. In more than ninety-nine percent of all contracts, government is a dominant party and imposes

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1There is a growing number of industries and firms which have become almost totally dependent on government for the sale of their products e.g. defence and space-related enterprises.
its terms on the other party. The question then is: are the courts to invalidate such contracts, where the government dictates the contractual terms and the other party has no alternative but to submit, on the grounds of coercion, or duress, or lack of freedom, or inequality of bargaining or on any other ground? In the private contracts, as we have seen above, the courts have, though hesitatingly, covertly and inconsistently, tried to protect the weaker party through various means *viz.*, by invoking 'construction'; by finding ambiguities and then adopting the meaning more favourable to the adherer; by interpreting the contract to mean what a reasonable buyer would expect it to mean, and thus protecting the weaker party's expectations at the expense of the stronger's; by invoking the concept of "disguised contract" to protect the unwary adherer; by denying enforcement on the grounds that they were "inequitable" or "unconscionable" or by interpreting contracts to help 'what seemed to them the more deserving side', and by various other ways and means discussed in the earlier part of this chapter. Should the same approach be followed *vis-à-vis* government contracts?¹ This may be done if government contracts are similar to commercial contracts. Whether and to what extent is the similarity present, has been debated for a long time and the consensus seems to be that government contracts are definitely different from contracts between private parties.

¹This question will be dealt with elaborately in the next chapter (ch. IV, *infra*), but here an attempt is being made to present the private contract case-law developments in comparable situations.
No doubt, government contracts, like their commercial counterparts, are adhesion contracts, but as it would have already appeared, they are adhesion contracts to a far greater degree than commercial contracts. In commercial contracts, we are generally concerned with the "boilerplate" clauses of the seller who is often more resourceful and economically superior. But, in most government contracts, we have the government as the purchaser of stores and services and the seller as the 'adhering party'. The "exemption clauses" in question are thus not those of the seller, which are and have been the bone of contention in commercial contracts. Here the small print is designed to protect the purchaser. Government contracts are different from ordinary contracts of adhesion in still another way. In ticket cases, for example, the small print is handed over to the other party simultaneously when the contract is made, but in government contracts the standard terms are made known to the contractor much in advance, e.g. when quotation is invited. It follows that some of the devices which the courts usually employ in ticket and other cases, (e.g. attention insufficiently drawn, meaning not explained, nature of the document not clear, etc.) to protect the 'adhering party' to the adhesion contract might not be justifiably applied to government contracts.
Again, in making its contracts the government has, very broadly speaking, not a single goal but a hierarchy of goals. It will be unrealistic to equate it with an ordinary buyer or seller. The agreements often seek to do much more than simply procure supplies and services. Thus a government contract is not just a "business" contract, it is a pursuit of social or economic objectives too. As stated by Turpin, it would be remarkable if any government were to carry out its procurement wholly without regard to the incidental effects of its purchasing activity upon the structure and health of industry, upon employment, and upon the economy as a whole. In this as in other fields the decisions of government can be expected to be political decisions, which take account of the ulterior social and economic consequences of alternative courses of action. government contracts thus often include other objectives of the government than getting stores and services with the object of getting 'value for money'. They, for instance, often provide that the prevailing rate of wages shall be paid by the contractors; that fair labour practices be adhered to strictly; and that in hiring and firing, the contractors must not discriminate on the basis of race,

1 Turpin, Government Contracts (1972) chapter 9.
religion or national origin. In this respect, therefore, government contracts appear as quasi-administrative or regulatory instruments which can be used, within the restricted field of procurement, in support of legislation or as an alternative means of implementing policy.¹

These are only a few of the differences between government contracts and private contracts; others are stated in chapters II, IV and VI. Nevertheless, there seems to be no reason why the government authority should not meet the necessary test of fairness and that the authority be properly exercised. Considerations, of course, will differ here. The courts would understandably be aware of a legitimate public interest in the superiority of the government.² The courts, hopefully, would give due weight to the government's social, economic and other policies while adjudicating upon the adhesion contracts. Although the government, as all powerful organisations, employs individuals who may abuse their authority, courts may

¹Turpin, op. cit. at 254.
²Strikingly, there is no Australian statute which declares public policies applicable to government contracts. But in the United States, it is not so. Cf. Whelan, "Public Contracts of the United Kingdom Government: A Comparative Survey and Introduction" (1964) 32 Geo. Wash. L. Rev. 82, 86-87.
legitimately examine such situations and give appropriate relief. Some authorities have suggested that the legislature should step in and regulate all adhesion contracts. But it is submitted that that may not solve the problem fully either in private or government contracts. As suggested in the next chapter, the courts, by adopting the unconscionability concept would have sufficient capability to handle government adhesion contracts. In this manner their long experience with adhesion contracts in the private commercial world will be best utilised.

Even in private contracts the courts have, by and large, not permitted themselves to be used as instruments of inequity and injustice. They have not enforced transactions in which the relative positions of the parties have been such that one has unconscionably taken advantage of the necessities


of the other. They have attempted to deal with lop-sided...

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1 See, e.g. Pinnock Bros. v. Lewis & Peat, Ltd. [1923] 1 K.B. 690; Smeaton Hanscomb & Co. Ltd. v. Sassoon & Setty, Son & Co. (No.1) [1953] 2 All E.R. 1471; Karsales (Harrow), Ltd. v. Wallis [1956] 2 All E.R. 866; Yeoman Credit, Ltd. v. Apps [1961] 2 All E.R. 281; Astley Industrial Trust, Ltd. v. Grimley [1963] 2 All E.R. 33; Charterhouse Credit Co. Ltd. v. Tolly [1963] 2 All E.R. 432 are some of the English cases. For the leading cases in the United States see, e.g. Henningsen v. Bloomfield Motors Inc. (1960) 32 N.J. 358, 161 A. 2d 69. The facts were: H purchased a new Plymouth sedan from Bloomfield Motors and gave it to his wife, the co-plaintiff, as a present. The automobile was manufactured by the defendant, Chrysler Corporation, and sold by it to the other defendant, Bloomfield Motors, a retail dealer. When he purchased the car, H signed a purchase order without reading two paragraphs in fine print (six-point script). Included in this fine print was a clause which provided that the manufacturer and the dealer gave no warranties, express or implied, except that they would make good at the factory any parts which became defective within 90 days of delivery, or before the car had been driven 4,000 miles, whichever event should occur first.

Mrs H was badly injured and the car demolished when driving the car 10 days after it had been delivered. The steering mechanism failed and the car turned into a wall.

An action for personal injuries based on negligence and breach of the implied warranty of merchantability was brought against the seller and the manufacturer. The Supreme Court of New Jersey held that the defence, based on the standard disclaimer clause in the standardised contract did not lie. This Court openly declared that a disclaimer of warranties included in a standardised mass form is void on public policy grounds. See also Ellsworth Dobbs, Inc. v. Johnson (1967) 236 A. 2d 843; Unico v. Owen (1967) 232 A.2d 405; Willard Van Dyke Productions v. Eastman Kodak Co. (1963) 189 N.E. 2d 693; Gray v. Zurich Insurance Co. (1966) 419 P. 2d 168; Gerhardt v. Continental Insurance Co. (1966) 225 A.2d 328; Klar v. H. Parcel Room, Inc. (1947) 73 N.E. 2d 912; Williams v. Walker-Thomas Furniture Co. (1965) 350 F. 2d 445 ("add-on" provision clause) and a number of more cases cited in Dewey, "Freedom of Contract: Is it Still Relevant?" (1970) 31 Ohio State L.J. 724. While the Henningsen case has commanded much judicial attention, it was not followed in Marshall v. Murray Oldsmobile Co. (1967) 207 Va. 972, 154 S.E. 2d 140. It is submitted that this case can easily be distinguished from Henningsen (surprisingly, the Supreme Court in Virginia has not done so) on various points: (1) No personal injuries were received in this case as opposed to Henningsen wherein Mrs H was badly injured; (2) the vehicle developed minor defects which were repaired by the sellers free of charge.
contracts mainly in two ways. First, by evolving the *contra proferentem* rule: in case of doubt the clause must be construed against the party which drafted the contract. Its most familiar application has been in insurance contracts. Secondly, there has been a much more far reaching approach in recent years involving the concept of fundamental breach. Still there are cases which, as Llewellyn has said, make "justice shiver and shake".

*L'Estrange v. Graucob* is perhaps the best example. In that case,

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(footnote 1 continued from p. 192)

under the terms of the "New Car Warranty" and even when finally (thrice the car broke down and was repaired) the vehicle was returned to the sellers and the contract was rescinded by the purchaser, the sellers found only a minor defect which was repaired at a cost of $12.00; (3) when the vehicle was returned, it had been driven 8,331 miles by the purchaser; (4) the "New Car Warranty" protected the car for 12 months or 12,000 miles as against 90 days or 4,000 miles in Henningsen; (5) the exclusionary provisions in the warranty were not in fine print and were not stated separately from the express warranty whereas in *Henningsen* they were printed in six-point script and were referred to the back of the purchase order.


2 Llewellyn, Book Review *op. cit.* at 702. For a glaring example, where a court in India held an exemption clause good and valid, which excluded all liability, even for negligence, of the government-run airline, see *Indian Airlines v. Madhuri Chowdhuri* A.I.R. 1965 Calcutta 252, discussed in Ponnuswami and Puri, *Cases and Materials on Contracts [Including Government Contracts]* (1974) 104-109.

a company was engaged in selling automatic cigarette machines to small shopkeepers by instalment payments. Miss L'Estrange bought such a machine and was asked to sign a long form which included a large number of clauses in small print, one of which said that "any express or implied condition, statement or warranty, statutory or otherwise, is hereby excluded." The machine having become unworkable a few days after delivery, the buyer sued for return of the instalments paid on the theory that the machine was unfit for the purpose for which it was bought. The company claimed that the agreement in writing excluded all implied warranties of reasonable fitness. The Divisional Court (Scrutton and Maugham, L.JJ.) reversing a judgment of the County Court, gave judgment for the company. In disposing of the buyer's contention that she was not bound by the terms of the agreement since she had not read the document and, therefore, knew nothing of its contents, the Court held that the buyer, having signed the agreement and having been induced to do so by fraud and misrepresentation, was bound by its terms, and cannot be heard to say that she is not bound by the document because she did not read it.¹

CHAPTER IV

STANDARD TERMS OF GOVERNMENT CONTRACTS IN AUSTRALIA, UNITED STATES, UNITED KINGDOM AND INDIA

1. General

Contracts have been compared to private statutes as between contracting parties. Perhaps in no case is this analogy more true than in the case of government contracts. Invariably government contracts are executed on standard forms which are subject to "standard terms"\(^1\) prescribed by government. If anyone wishes to contract with the government, he can do so on these fixed pre-written standard terms only; no alterations are generally made. From these standard terms, the individual contractor is no more able to depart in his bid for government contracts than an individual applicant for insurance can modify the standard terms of insurance contracts, or the passenger of an ocean liner or an aeroplane or for that matter the passenger of a Canberra ACTION bus can modify the conditions of transportation. These standard terms, in effect, acknowledge the overriding rights of government as a buyer and bring into the limelight what we may call the adhesion nature of government contracts.

The standard terms comprise complicated and voluminous contract clauses purporting to protect the government's interest

\(^1\)"Standard terms" is only one of the various descriptive terms used to indicate the same thing. The other terms used are "general conditions", "standard conditions", "boiler plate clauses", "clauseology" or just "conditions of contract".

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in virtually every conceivable situation. According to Whelan and Pasley in their recent work, "A consequence of this clauseology (as these clauses in bulk are often called) is that contractors are ill-advised, indeed, if they do not rely on an attorney familiar with such complex and sometimes imprecise semantics". As long ago as 1953, Street remarked:

Indeed, may one not say that if the government only contracts on these terms, then, even though the terms have not the form of delegated legislation, nevertheless it is, indirectly, a recognition of a separate body of governmental contract law? The English lawyer today cannot advise his client solely by reference to the statutes, statutory instruments and law reports .... There has sprung up what one writer has called administrative quasi-legislation.

This phenomenon of administrative rules having the force of law has been noted by other authorities too. A contemporary authority on government contracts in the United Kingdom, Colin Turpin, drawing attention to their quasi-regulatory effect, writes: "The terms of standard contract forms, transcending as they do the limits of individual contracts and constituting in effect a set of detailed model regulations for government's

2 Street, Governmental Liability: A Comparative Study (1953) 100 [citing Note, (1944) 60 L.Q.R. 127].
3 See Friedmann, Law in a Changing Society (2nd ed. 1972) 129. Friedmann has called it an exercise of quasi-judicial power in the context of private contracts. The position is not different in government contracts.
4 Turpin, Government Contracts (1972) 72-73 (citing Lloyd).
relation with industry in the field of procurement, are accordingly of great importance". \(^1\) Lord Denning in one of his judgments remarked that the standard terms have "come to resemble a legislative code". \(^2\) The underlying theme of this chapter is that, in government contracts, the standard terms are of paramount importance in determining the rights and duties of the parties.

Standard terms are inserted in government contracts as a matter of course or by compulsion of statute or regulation. Their main purpose is that the taxpayer's dollar is spent effectively and economically in meeting the civil and defence procurement needs without unnecessary duplication or overlapping of functions, that the best possible terms on purchases are obtained, that there is some degree of uniformity in the treatment of contractors, that whenever necessary the government's property entrusted to a contractor is safeguarded, that government is not put to uncertain or indefinite liability in its contracts and that, whenever necessary, government may have the power to terminate the contract at any time. The contract clauses used by government are variously drafted. Most of them are the products of long years of development. The complexity and length of many clauses represent the cumulative result of responses to decisions of courts and administrative

\(^1\) Id. at 264.

bodies. Sometimes, the government consults the representatives of industry also in drafting or modifying the clauses.¹

The magnitude of the government's outlays for procurement creates opportunities for implementing selected national policies. The opportunities lie in the disciplining effect which the government can exert on its contractors. Thus, a distinct and growing set of terms is to be found in government contracts which is designed to achieve certain national, social and economic objectives of government and which has no direct commercial relevance to the procurement activity of the government. The government requires, for example, that suppliers maintain fair employment practices,² provide safe and healthy working conditions,³ pay fair wages,⁴ refrain from polluting the air and water,⁵ give preference to national products in their purchases,⁶ place fair portion of sub-contracts to small business concerns,⁷ labor surplus area concerns,⁸ and minority business

¹It may be noted that in the United States, §4 of the Administrative Procedure Act (5 U.S.C. §553) [1970] as amended [Supp. IV, 1974] which establishes procedures designed to achieve public participation in government rulemaking, exempts from public notice and comment, inter alia, rules that involve a matter relating to public contracts [see id. §553 (a)(1), (2)].
²E.g. Australia: Conditions 23-26, Form 'A' and cl. 42, Form W70; U.S.A. Articles 16, 17, 18, Standard Form 32 (Supply Contract) and Article 25, Standard Form 23A (Construction Contract); U.K.: SCs 16, 17 and 36, GC/Stores/1, SC 17, GC/Works/1; India: Clause 19, P.W.D. Form No. 7 (Works Contract). For an explanation of the various forms, see section 2 of this chapter.
³Ibid.⁴Ibid.
⁵E.g. U.K. SC 18, GC/Works/1; U.S.A.: FPR §1-1.2302-2.
⁶E.g. U.S.A.: Articles 14 and 24, Standard Forms 32 & 23A respectively.
⁷E.g. U.S.A.: Articles 21 and 29, Standard Forms 32 & 23A respectively.
⁸E.g. U.S.A.: Article 22, Standard Form 32.
concerns,¹ and promote the rehabilitation of prisoners² and the severely handicapped.³ The large dollar figure involved (A$3713 million⁴ for total purchases of materials, goods and services in 1975-76), makes the procurement process appear to be an attractive vehicle for achieving social and economic goals. The procurement process also draws attention because its flexible regulatory system makes it readily adaptable to the implementation of diverse policies.

The government contract is thus not only a formal document calling for the furnishing of supplies and services, but also a vehicle for the implementation of public or administrative policies. It is increasingly becoming clear from the insertion of a large number of such standard terms that the procurement power has become a powerful mechanism for the enforcement of many public policies.⁵

¹E.g. U.S.A.: Article 23, Standard Form 32 and Article 30, Standard Form 23A.
²E.g. U.S.A.: FPR §50-250; ASPR §12-1102.
⁴Purchasing Division, Department of Administrative Services, October 1976.
⁵See Miller, "Administration by Contract: A New Concern for the Administrative Lawyer" (1961) 36 N.Y. Univ. L. Rev. 957.
Most of the standard terms found in government contracts are unknown in private business. The closest parallel among private contracts seem to be insurance and financing contracts, which also are now generally regulated by statutes. Perhaps it is not too much to say that some of the standard terms in government contracts may not be legally valid, if private contract law standards are applied to them. However, before dealing with this question and with the content of the standard terms and their legal validity, we may first describe the framework of the standard terms of government contracts in Australia, United States, United Kingdom and India.

2. Framework of Standard Terms

A. AUSTRALIA

The standard terms generally applicable to Australian government contracts are the "General Conditions of Contracts arranged by the Commonwealth for supply of goods and services" (Contract Form "A") and "General Conditions of Contract" for construction ('works') contracts (Form W70). In addition to those two sets of standard terms, the Australian Government Stores and Tender Board (A.G.S.T.B) prescribes its own standard terms which are contained in "General Conditions of Tender and

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1. July 1975 edition. There are 41 standard terms, divided into two parts. While Conditions 1 to 34 (excepting 29 and 30, which do not apply to period contracts) apply to all contracts, Conditions 35 to 41 apply only to period contracts.

Very often the government also includes certain other terms in its contracts in the form of 'Special Conditions' to suit specific cases. The 'Special Conditions', apart from stating the administrative arrangements regarding a particular contract, specifications and drawings, quality assurance, production plan, delivery terms etc., also sometimes include very important clauses such as "Termination by the Commonwealth", "Variation of Contract" etc. Numerous public authorities in the Commonwealth and all the State Governments have their own printed forms containing the standard terms of contracts. In New South Wales, for example, the State Government uses the following two forms: "General Conditions of Contract, Public Works Department, New South Wales" and "General Conditions of Contracts for Stores and Services", State Contracts Control Board.

In Australia, the authority to prescribe the standard terms for government contracts is presently not to be found in a statute or regulation. Before the amendment of the Supply and Development Act 1939-1973 (now Supply and Development Act 1939-1975) by the Defence Force Re-Organisations Act 1975 (No. 96 of 1975), it could be said that the source of authority to, inter alia, prescribe standard terms for defence contracts, was derived from s.5(1)(d) of the Act which gave the Department

1 September 1968 edition with 29 Conditions in it.
of Supply responsibility for "the acquisition, maintenance and disposal of stocks of goods in connection with defence."

But now since para.(d) of sub.s.(l) of s.5 has been repealed\(^1\) by the Defence Force Re-Organisation Act 1975, the legal authority seems to be derived from the prerogative powers of the Crown, exercised by the Governor-General in Council. The Executive Branch of the Australian Government is thus an hierarchical organisation of delegated powers vested in Ministers of each Department of Government from time to time by the Administrative Arrangement Orders, issued by the Governor-General, acting with the advice of the Executive Council. The Ministers, in turn, delegate powers to the various heads in their departments for good and efficient administration. The standard terms for government contracts are drafted by senior government officials concerned with purchasing, with the help of the legal officers of the Deputy Crown Solicitor's office within the Attorney-General's Department. Some of the standard terms owe their existence to the drafting by the Central Contracts Board, which has now become

\(^1\)Section 99(1), id.
The present delegation of powers is enumerated under an Administrative Arrangement Order of 5 October 1976, according to which the two major procurement agencies in Australia, viz. the Department of Administrative Services and the Department of Construction, are assigned the matters relating to procurement of goods and services and execution of construction contracts, for Commonwealth Government purposes, respectively.

The contract activities of the Australian Government departments which enter into procurement contracts are, on the one hand, subject to extensive Finance Regulations and Finance Directions (formerly called Treasury Regulations and Treasury Directions), and on the other, governed by standard terms. Whereas the larger part of Finance regulations and directions are intended to apply only to the officers and employees who conduct affairs of the government, the same cannot be said about the corpus of the standard terms, which appear to be intended to apply directly to contractors. With every

1 Section 27 of the Supply and Development Act gives power to the Governor-General to make regulations. In pursuance of that section, Supply and Development Regulations were made which, inter alia, led to the establishment of a Contract Board with necessary powers to make defence contracts. On 1 July 1975, the Governor-General, acting under sub.s. (2) of s.5 of the Supply and Development Act 1939-73, varied the matters to be administered by the Department by omitting the matter specified in para.5(1) (d) (Australian Government Gazette No. S128, 1 July 1975). Later on, the Defence Force Re-Organisation Act 1975, repealed para. (d) of sub.s. (1) of s.5 (by s.99). But the government seems to have forgotten to repeal the Division 3 (Regulations 29-37) of the Supply and Development Regulations which were prescribed for carrying out the Department of Supply's function relating to procurement (specified under erstwhile para. 5(1)(d)).

2 Australian Government Gazette No. S175.
invitation of tender, for example, for the supply of goods or services in Australia - whether by formal advertising, competitive negotiations or sole-source - there is appended a condition, namely, "This tender shall be deemed to have been submitted subject to the General Conditions of Contracts arranged by the Commonwealth for supply of goods and services (Contract Form "A"), and any tenderer whose tender is accepted, shall, if required, sign a formal agreement in a form required by the Commonwealth and lodge a deposit as security for the proper performance of the contract in accordance with the provisions of such General Conditions". The standard terms contained in "Form A" are not set out in the tender invitation but these may be obtained from the procuring authority on request. It is, however, understood that the tenderers are generally made aware of the standard terms (general and special) sufficiently in advance so that they are not faced with surprise later on.

Generally speaking, the standard terms contained in the General Conditions or Special Conditions are not up for negotiation at all and the contracts are virtually on a take-it-or-leave-it basis. However, it may be added that the contents of the

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1 One reliably learns from government authorities that in the last 25 years, only in about half a dozen cases was the contractor's objection to the inclusion of some of the standard clauses (mainly with regard to "termination by Commonwealth" or "break clause", "price variation clause" and delivery terms) in the contract acceded to by the government. A standard term is excluded or varied upon the request of the contractor only if the contractor gives convincing reasons to support the exclusion, the rates quoted by him are the lowest and the government considers it impracticable to invite fresh quotations. But an exclusion or variation, which may put the government to risk of loss of money or property, is not accepted as a matter of policy.
standard terms contained in the various forms of procurement authorities in Australia are not significantly different from the standard terms to be found in other countries under survey.

B. U.S.A.

The various standard terms of government contracts in the United States are contained in the procurement regulations which implement the two basic statutes governing procurement by federal agencies - the Armed Services Procurement Act of 1947 and the Federal Property and Administrative Services Act of 1949.

The Armed Services Procurement Act represents a comprehensive revision and restatement of the earlier laws governing military procurement and is designed to provide a uniform purchasing authority for the entire military establishment under a single statute. The underlying policy is contained in §2304(a), which reiterates the long-standing requirement that formal advertising shall be the preferred method for placing contracts except in certain enumerated cases where "such method is not feasible and practicable". One significant

5 Ibid.
amendment which should be noted is the increase from $2,500 to $10,000 in the limit on exemptions from using advertised procurement procedures for small purchases, following the recommendation of the Commission on Government Procurement (1972). Other salient sections of the Act declare a policy of placing a fair proportion of contracts with small business concerns, prescribe procedures for formal advertising, prohibit or restrict certain types of contracts, and establish requirements concerning advance payments, delegation of procurement functions, and examination of contractor records.

In addition to purchase of personal property and nonpersonal services by military agencies, the Act applies to procurement by the Coast Guard and the National Aeronautics and Space Administration.

The underlying purpose of Title III of the Federal Property Act was to apply the principles of the Armed Services Procurement Act to all civilian agency procurement. The procurement sections of the Federal Property Act are fashioned after, and are substantially identical with, the provisions of the Armed Services Procurement Act, deviating only in the elimination of provisions applicable primarily to the military. In particular similar treatment is given to the requirement for formal advertising, subject to enumerated exceptions; contracting

3. Id. §2303(a) (1970).
with small business concerns; procedures for formal advertising; restrictions on certain types of contracts; advance payments; and examination of contractor records.¹ The Act governs the procurement of the General Services Administration (the central supply agency) and most other civilian agencies.

Although there are a number of ancillary statutes that affect procurement, imposing requirements in such areas as contractor employees² and foreign purchases,³ the two statutes stated above represent the fundamental statutory guidelines governing federal procurement. These two basic government statutes, however, state only the broad policies governing the manner in which federal agencies will contract, and establishing procedures for their effectuation is the function of the procurement regulations. The standard terms of government contracts are contained in the two major procurement regulations of the U.S. Government viz., the Armed Services Procurement Regulations (commonly referred by its acronymic "ASPR") and the Federal Procurement Regulations (commonly referred to as "FPR").

ASPR is designed to provide uniform policies and procedures relating to the procurement of supplies and services for the Department of Navy, Army, Air Force and the Defence Supply Agency.\footnote{All references to ASPR are here made from Title 32 of the Code of Federal Regulations (C.F.R.)(Revised as of November 1, 1975). ASPR has been issued under the authority of ch. 137, Title 10 of the United States Code (10 U.S.C. §2202 (1970), as amended (Supp. IV, 1974) which provides: "Notwithstanding any other provision of law, an officer or agency of the Department of Defense may obligate funds for procuring, producing, warehousing, or distributing supplies, or for related functions of supply management, only under regulations prescribed by the Secretary of Defense. The purpose of this section is to achieve the efficient, economical, and practical operation of an integrated supply system to meet the needs of the military departments without duplicate or overlapping operations or functions". The ASPR are to be found in Subchapter A of Chapter I (Office of the Secretary of Defense) of Subtitle A (Department of Defense) of Title 32 (National Defense) of the C.F.R. and they run into Volumes I, II and III, divided into sections [XXVI (26) in all], each section divided into parts and paragraphs. Each section of the ASPR deals with a separate aspect of procurement, covering a very wide field of subjects like the various methods of procurement, contract clauses, termination of contracts, patents, data, and copyrights, contract cost principles and procedures, procurement forms, contractor's industrial labor relations, contract modification, to mention only a few of them.} In addition to ASPR, there are other publications within the Department of Defense which have a bearing on contracting; many important provisions are found in Department of Defense Directives ("DoD Dir."), Department of Defense Instructions (DoD Inst.") and Defense Procurement Circulars ("DPC"). The other major procurement regulation is the Federal Procurement Regulation System. The purpose of the system is to codify and publish uniform policies and procedures applicable to federal agencies.
in the procurement of personal property and nonpersonal services (including construction) and to a limited extent procurement of real property by lease. The system includes regulations prescribed by the Administrator of General Services, called the Federal Procurement Regulation (FPR), as well as individual agency procurement regulations.

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1 All references to FPR are here made from Title 41 of the C.F.R. (Revised as of July 1, 1976). The authority to issue the regulations is vested in the Administrator of General Services by the Federal Property and Administrative Services Act 1949 [Title 40, U.S.C. §486(c) (1970), as amended (Supp.III,1973)] which states

The Administrator shall prescribe such regulations as he deems necessary to effectuate his functions under this Act, and the head of each executive agency shall cause to be issued such orders and directives as such head deems necessary to carry out such regulations.

The FPR are to be found in Chapter I of Title 41 (Public Contracts and Property Management) of the Code of Federal Regulations. Chapter I is divided into 30 parts, and each part is further divided into subparts, sections and subsections.

2 Regulations issued by individual government agencies, supplementing the FPR are given the names of the departments or agencies issuing them. For example, there are the Energy Research and Development Administration Procurement Regulations (ERDA-PR) (previously known as Atomic Energy Commission PR (AECPR)), the Department of Health, Education, and Welfare PR (HEWPR), National Aeronautics and Space Administration PR (NASAPR), and others. These regulations are to be found in Chapter 2 through 49 of Subtitle A (Federal Procurement Regulations System) of Title 41 of the C.F.R.
The ASPR and the FPR are structurally comparable, although the former is by far more comprehensive. Both regulations implement in detail the policies expressed in the basic procurement statutes and in many of the ancillary laws affecting procurement. For example, procedures designed to effectuate laws concerning labor and foreign purchases are prescribed in both regulations as are rules regarding contracting with small business concerns. Many other detailed procedures affecting government contracts are dealt with in both the ASPR and the FPR. Among the more important are formal advertising, negotiated procurement, termination of contracts, patent, data and copyrights.

1 ASPR runs into over 2,500 pages. The magnitude of these regulations may be illustrated by the following quotation from Doke, "Contract Formation, Remedies and Special Problems" (1968-69) 2 Public Contract L.J. 12, 13:

I had a student who made a study of the regulations and specifications involved in a typical supply contract, and he took the Government Printing Office edition of the regulations, beginning with ASPR, down through the implementing Army Procurement Procedures, down through the command, down through the procurement office, and he stacked them up. As I recall, it was about 2½ feet high.

2 ASPR §§12-000 to 12-1006 (the procurement regulations cited can be converted to the C.F.R. by pre-fixing "32 C.F.R." for the "ASPR"); FPR §§1-12.000 to 1-12.1003 (the procurement regulations cited can be converted to the C.F.R. by pre-fixing "41 C.F.R." for the "FPR"); and ASPR §§6-000 to 6-1110; FPR §§1-6.100 to 1-6.1004.

3 ASPR §§1-700 to 1-708; FPR §§1-1.700 to 1-1.712.

4 ASPR §§2-100 to 2-503.2; FPR §§1-2.000 to 1-2.503-2.

5 ASPR §§3-100 to 3-1100.2; FPR §§1-3.000 to 1-3.903-2.

6 ASPR §§8-000 to 8-811; FPR §§1-8.000 to 1-8.806-7.

7 ASPR §§9-000 to 9-606; FPR §§1-9.100 to 1-9.106-6.
contract cost principles, retention requirements for contractor and sub-contractor records, and contract financing. The treatment of each of these matters is most exhaustive and principles are stated to cover all conceivable situations.

Interspersed throughout various parts of the regulations are the many standard terms required to be included in government contracts. Of particular significance are those portions of the ASPR and FPR reserved exclusively for contract clauses, which are incorporated by way of "General Provisions" in the United States Standard Forms. Structurally, the standard terms contained in these forms are the essence of the government contract.

Two of the United States Standard Forms viz. Standard Form 23A (prescribing "General Provisions" for fixed-price construction contracts) and Standard Form 32 (prescribing "General Provisions" for procuring supplies by formal advertising as

1 ASPR §§15-000 to 15-809.5; FPR §§1-15.000 to 1-15.502-5. For the specific terms, see Articles 24 and 20 of Standard Forms 32 and 23A for Supply and Construction contracts respectively.

2 ASPR Appendix M; FPR §§1-20.000 to 1-20.301-3.

3 ASPR Appendix E; FPR §§1-30.000 to 1-30.710.

4 ASPR §§7-000 to 7-2003.70; FPR §§1-7.000 to 1-7.703-24.

5 April 1975 edition, prescribed by the General Services Administration, FPR §1-16.401 (41 C.F.R., revised as of July 1, 1976). FPR §1-16.401 also prescribes that pending the publication of a new edition of the Form, the Payment to Contractor Clause (FPR §1-7.602-18) shall be substituted for the Payment to Contractor Clause in Article 7, and the Listing of Employment Openings Clause (FPR §1-12.1102-2), the Employment of Handicapped Clause (FPR §1-12.1304-1), and the Clean Air and Water Clause (FPR §1-1.2302-2) shall be added as additional articles of the General Provisions.
well as by negotiation) contain much (but by no means all) of
the standard terms which seem to earn comment in connection
with government contracts.  

While many sections of the ASPR and FPR are for the
guidance of government officials involved in procurement
activity so as to provide for the government an economical and
efficient system for the procurement of goods and services, the
standard terms contained in the "Contract Clauses", "Standard
Forms" and elsewhere have a demonstrable effect on the
community which does, or is seeking to do, business with the
government either as contractors or indirectly as subcontractors.

1 April 1975 edition, prescribed by General Services Administration, FPR §1-16.101 (41 C.F.R., revised as of July 1, 1976). FPR §1-16.101 also prescribes that pending the publication of a new edition of the form, the Listing of Employment Openings clause (FPR§1-12.1102-2), the Employment of the Handicapped clause (FPR §1-12.1304-1), and the Clean Air and Water clause (FPR §1-1.2302-2) shall be added as additional articles of the General Provisions.


It may also be noted that the forms prescribed under ASPR contain for the most part identical standard terms to those prescribed under Forms 23A and 32. In addition, however, in order to meet special circumstances of defense contracts, ASPR §7-000 et seq. prescribe terms which may be inserted in appropriate cases. See, generally, ASPR §§16-000 to §§16-828 and Appendix F (32 C.F.R., revised as of November 1, 1975).

3 ASPR §§7-000 to 7-2003.70; FPR §§1-7.000 to 1-7.703-24.

4 See, in particular, Standard Forms 23A and 32, supra. See generally, ASPR §§16-000 to 16-828 and Appendix F; FPR §§1-16.000 to 1-16.903.

5 See, for example, 'Termination clauses' ASPR §§8-000 to 8-811 and ASPR §7-602.29(a); FPR §§1-8.000 to 1-8.806-7.
It is the impact of the contract rules upon this large, heterogeneous community toward which our further attention will be directed. The standard terms consist mainly of clauses required by statute or regulation to be included in public contracts and have a great effect on the rights and obligations of the contractor. Thus the bulk of the provisions of a government contract tend to be prescribed by law and regulation. Because deviations from the requirements of the regulations involve a tedious procedure, generally undertaken only on a case-by-case basis, such deviations are the exception rather than the rule.¹ This situation lends credence to the view that, for the most part, government of the United States contracts by regulation.²

C. U.K.

The real 'living law' of government contracts in the United Kingdom is hidden in standard terms of government contracts.³ The standard terms are contained in the two principal forms viz., "Standard Conditions of Government Contracts for Stores

¹See for example, FPR §§1-1.009 to 1-1.009-2 which lay down the procedure regarding deviations from the Federal Procurement Regulations.
Purchases" (Form GC/Stores/1)\(^1\) and "General Conditions of Government Contracts for Building and Civil Engineering Works" (Form GC/Works/1).\(^2\) The standard terms contained in these forms were composed by an inter-departmental group known as the "Contract Coordinating Committee" (whence the "CCC" in the title of the earlier forms) consisting of highly experienced contract administrators of the various government agencies. Legal advice with respect to the drafting of contract clauses is rendered by the Office of Treasury Solicitor. The standard terms are kept under review respectively by the Purchasing and Sale of Goods Sub-Committee and the Building and Civil Engineering Sub-Committee of the Procurement Policy Committee.\(^3\) The standard terms embodied in these forms are in part identical with those of the principles of ordinary law of contract, but although the ordinary law provides the framework in which government contracts are made, yet "the relations of the parties are determined less by the formal rules of contract law than by the standard contract forms in use, specially agreed terms, and the settled practices of the contracting departments".\(^4\)

Thus the ordinary law of contract has only a subsidiary relevance to government contracts because in practice they are

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\(^3\)Turpin, Government Contracts (1972) 103 et seq.; see also Whelan, "Public Contracts of the United Kingdom: A Comparative Survey and Introduction" (1964) 32 Geo. Wash. L. Rev. 82.

\(^4\)Turpin, op. cit. at 72-73 (emphasis supplied).
governed by the standard terms for "stores"\(^1\) and "works"\(^2\) contracts. Unlike the United States, it is a characteristic and striking feature of the British system of procurement that it is almost entirely unaffected by statutory regulation. The rules and procedures that govern the placing, conditions and management of government contracts have their origin not in legislation but in administrative agencies of the executive.

D. INDIA

The standard terms of government contracts in India, like in Australia and the U.K., do not have any statutory basis. These are drafted by expert and experienced contract administrators with the help of legal officers from the Ministry of Law. As elsewhere, these complicated and voluminous standard terms purport to protect the government's interests in virtually every conceivable situation. In India, procurement of supplies or stores and construction is conducted in a most centralised manner, which has led to the development of uniform and efficient procurement policies. Stores or supplies of various kinds are procured for defence and other administrative agencies of the Central Government and most of the state governments' offices, by a highly skilled Central Purchase Organisation known as the Directorate-General of Supplies & Disposals (DGS&D). The standard terms governing contracts of DGS&D (which are mostly entered through formal invitation of tenders followed by public opening

\(^1\)"Stores" contracts are equivalent to the American "Supply" contracts.

\(^2\)"Works" contracts are equivalent to the American "Construction" contracts.
of quotations, as in the U.S.) are contained in Form No. DGS&D-68 (Revised). Special Conditions which may be incorporated to supplement the general conditions in (i) contracts for plant and machinery and manufactured equipment, (ii) contracts for sea and river craft, (iii) supply and erection of structures, are provided in forms Nos. DGS&D-71, DGS&D-72 and DGS&D-73 respectively.

Again for 'works' or 'construction' contracts, the Central Public Works Department (C.P.W.D.) is the agency of the Central Government operating throughout the country for construction, maintenance and repairs of all works and buildings financed from Civil Works Budget. The standard terms on which contracts are awarded to contractors are contained in various forms, namely, P.W.D. (Public Works Department), Form No. 6 (Notice Inviting Tenders), P.W.D. Form No. 7 (Percentage Rate Tender), P.W.D. Form No. 8 (Item Rate Tender), P.W.D. Form No. 9 (Supply of Materials), P.W.D. Form No. 10 (Piecework), P.W.D. Form No. 11 and 11A (Work Order), P.W.D. Form No. 12 (Lump Sum Contract) and P.W.D. Form No. 47 (Tender for demolition of buildings).

3. Corpus of Standard Terms

Like an insurance policy, the government contract is a contract of adhesion, only more so.\(^1\) The magnitude of government procurement undoubtedly dictates a certain erosion of the bargain element in government contracts. Achieving measurable standardisation and uniformity in transactions entered into by its agents is clearly in the government's interest. For this reason

alone, some depreciation of the bargain element, as it pertains to individual transactions, must be countenanced as a fact of life in contracting with the government. Notwithstanding this erosion in the bargain element, a corresponding benefit enures to the public - the expectation that the standard terms of government contracts will be uniformly applied in a nondiscriminatory manner.

The standard terms of government contracts are of particular significance to the contractor, since they expose him to many of the peculiarities of government contracting uncommon to commercial dealings. Among those features having little or no counterpart in private commerce are conditions relating to termination of contract, alteration or changes, dispute settlement, inspection and rejection, patent rights, examination of records, default, delays, penalties, close supervision and stringent controls regarding manner and method of contract performance, recovery of sums due, use of plant and machinery of the contractor without compensation, conditions of labour, wages etc. Some of these standard terms subordinate and supersede the common law of contract. For example, under the common law, one party is not entitled to cancel a contract without compensating the other for his loss of anticipated profits. Nevertheless, under the standard terms, as pointed out in detail below, government can terminate contracts without liability for anticipated profits. Again, under the common law, one party is not entitled to recover any profit earned by the
other, but under the U.S. standard terms (authorised under Renegotiation Acts) government can recapture excess profits. Similarly, in the U.K., standard conditions provide for the recovery of excess profits. These standard terms drafted by procurement officials in collusion with lawyers obviously reek of the superior bargaining position of the government.

(i) **Unilateral Termination of Contract**

The standard term of government contracts by which the government reserves the unilateral power to determine the contract at any time and for any reason or for no reason and absent default by the contractor, is called "termination" or "break" clause. Under this clause, the government may terminate the whole contract or part of it because of increasing costs, the non-attainment of set goals, a change in government policy rendering procurement unnecessary, a new economy drive by the

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1 SCs 48 and 50, Form GC/Stores/1.

2 In Australia, a standard break clause (quoted in full in the next section of this chapter) is included in all contracts in any of the following categories: (i) developmental contracts and cost-plus contracts generally; (ii) contracts, other than period contracts, involving expenditure exceeding $100,000; (iii) contracts, other than period contracts, expected to run for a period exceeding 12 months; and (iv) any contract about which there is doubt concerning the continuation of the related project. In the U.S. this clause is titled "Termination for Convenience of the Government". Termination clause for fixed price contracts for 'supplies' is contained in FPR §1-8.701 and for 'construction' in FPR §1-8.703. The cognate clause for defence construction contracts is to be found in ASPR §7-602.29 (a). In the U.K. see SC 56, Form GC/Stores/1 and SC 44, Form GC/Works/1. In India the standard break clause is contained in the "Conditions of Contract governing contracts placed by Central Purchase Organisation of the Government of India".
government or just because of second thoughts. So even a
government becoming wiser after the event, may undo what it
wrongly did in the first instance, by invoking the termination
clause.

The power of the government to determine the contract "is
always something which a contractor finds it very hard to
swallow"¹ and particularly so, since the standard terms make the
whole matter injusticiablenote.² Furthermore, the concept of
"termination of contract" modifies the common law of contracts
by denying expectation damages, thus precluding recovery of
anticipatory profits when the government terminates a contract
without fault on the part of a contractor.

It is submitted that such a term in government contracts
is in crass conflict with the basic foundation of 'contract
document', because under this clause, a contract validly entered
into may be altered, varied, changed, terminated, constricted or
expanded at the whim and fancy of one party alone, the government,
on whose side of the bargain the loci poenitentiae never seem to
come to an end. A 'contract' whose basic tenet is to fulfil the
legitimate expectations of both parties, in the context of
government contract, caters only for the expectations of one
party, the government. The contractor's legitimate and

¹Turpin and Whelan (eds.), The London Transcript, A Comparative
Look at Public Contracting in the United States and the United
Kingdom (American Bar Association 1973) Part III at 44.
²E.g. SC 56(4), Form GC/Stores/1 (U.K.).
reasonable expectation to earn certain profits by satisfactorily performing the contract may be frustrated by the government almost with impunity. Thus contract which for centuries has served to protect the interests of both sides now rather protects the interests of one side only, the interests of the government.

(ii) Unilateral Variations

Another standard term included in nearly every government contract in order to give a great degree of flexibility over contract performance is the 'Alterations' or 'Changes' or 'Variations' clause.¹ Under this standard term the Government has the power to order unilateral changes of the sealed patterns, specifications, plans, drawings and samples or to order the increase, decrease, omission or substitution of the design, quality, character or quantity of something for which it had made a lawful contract with the contractor at some earlier moment. The unilaterality of this term is made obvious by addition of these or similar words: "No variation shall be made by the contractor without an order" of the contracting authority.² The two salient features of the clause are that the contractor

¹Australia: Condition 8, Form 'A' and Clause 40, Form W70; U.S.A.: Article 2, Standard Form 32 (Supply Contract) and Article 3, Standard Form 23A (Construction Contract); U.K.: SC 3, GC/Stores/1, and SCs 7 to 9, GC/Works/1; India: Condition 5, Form No. DGS&D-71, Condition 5, Form No. DGS&D-72 and Condition 4, Form No. DGS&D-73.

²E.g. in Australia, Sub-Clause 40.1, Form W70 (Construction).
cannot reject a change order and that he must proceed with performance of the contract as changed. The contractor is, however, assured of additional compensation and time extensions occasioned by such changes, but deductions may also be made for omissions or alterations.

(iii) Resolution of Disputes

Another example of the standard terms' substantial impact on the individual rights of the contractors are the widely used "disputes" or "arbitration" clauses which require the contractor to relinquish certain customary recourse to the courts. They establish a procedure for the administrative resolution of controversies arising under the contract and are designed to avoid formal litigation and to assure continuity of contract performance. While there is nothing wrong with arbitration clauses which call for both parties to the dispute to agree to appear before an independent arbitrator who considers their respective claims without debarring the dissatisfied contractor ultimately from taking the dispute to a court of law, subject of course to the arbitration laws, the clauses which prescribe that all disputes, differences or questions between the parties to the contract shall be referred to the government and to which the decision of the government shall be final and conclusive (or to which the government is to be the sole judge), go very much further. Nor can they be valid if only because such clauses constitute an unlawful attempt to oust the jurisdiction of the courts. For example, the construction contracts of government often provide that the government's engineer is to resolve
disputes and that, to use the words of Bowen LJ: ¹ "Virtually, the engineer, on such an occasion, must be the judge, so to speak, in his own quarrel." And if the contractor is lucky enough "he will find that an appeal lies from Caesar to Caesar, in that he may if dissatisfied with the decision of one official attempt to persuade another".²

In Australia, Condition 28 (Disputes) of the General Conditions of Tender and Contract³ is one such example which 'concludes' all disputes and virtually debars the contractor from taking the matter to court. It reads: "Any question or dispute arising between the parties in relation to the contract or its interpretation shall be referred to the Chairman of the Board whose decision shall be final and binding on the parties." Partly because of such clauses and partly because of the resolution of most disputes at arbitration level, seldom a dispute comes before a court for adjudication. Thus it is not surprising that in the last 20 years only one dispute on a standard term of contract between the Commonwealth and a contractor reached the High Court of Australia. But what is most surprising is that even that case was not reported in the law reports.⁴ The case referred to is The Commonwealth v. A.E. Goodwin Ltd., decided by the High Court of Australia (Menzies J) in March 1965. The

¹ Jackson v. Barry [1893] 1 Ch. 238, 247.
² Brooking, Building Contracts (Butterworths 1974) 25.
³ C.T.B. No. 1, Australian Government Stores and Tender Board (A.G.S.T.B.).
main contention of the defendant company was that cl. 23(1)(c) of the General Conditions of Tender and Contract,¹ was not valid as it constituted an unlawful attempt to oust the jurisdiction of the courts. Under cl. 23(1)(c) the government was entitled to regard the contractor's failure to make progress or to carry out the contract, to its (i.e. government's) satisfaction, and the contractor's inability to satisfactorily account for that failure, as a breach of contract amounting to its repudiation by the contractor. The contract was for the supply of 154 railway wagon bodies at the price of £698 each and the Commonwealth claimed £26,726.11s.0d. as damages for its repudiation by the contractor. The latter had not supplied the contracted goods because it was unable to fit the bodies with certain "Athermos" axle boxes, which the contract required, except by purchasing them from the sole Australian manufacturer, Bradford Kendall Ltd., at what it regarded as an extortionate price. The hearing of the case disclosed that the government had notified all the potential suppliers, including the defendant company, while inviting offers for the contract under reference, that they should quote their rates only after taking into account the price of the "Athermos" axle boxes manufactured solely by Bradford Kendall Ltd. The defendant company, however, had not taken the latest price of the axle boxes but quoted their price to the government on the basis of some old price list. Menzies J

¹Clause 23(1)(c) of the old Form 'A', has now been replaced by cl. 30(1)(c) of the new Form 'A' (July 1975).
rightly held that cl. 23(1)(c) was not concerned in any way with ousting the jurisdiction of the Court. His Honour observed: "Indeed, it recognizes that the Commonwealth must go to the Court if it desires to establish repudiation and recover damages therefor". The Court thus gave judgment for the Commonwealth for £26,726.11s.0d. plus costs.

(iv) Subjective Evaluation of Compensation

Mention should be made here of the cognate standard terms which once again recognise the superior position of the government and confer quite extraordinary government control over the contractor. These are terms which authorise that a contractor's fee or compensation will be determined on the basis of the government's subjective evaluations during performance or on completion of performance. This is illustrated by the standard terms which authorise the government to unilaterally make variations in the contract. For example, sub-cl. 40.1 in Form W70 provides that in consequence of a variation order, the contract sum shall be varied in the manner provided by sub-cl. 40.2. Sub-clause 40.2, inter alia, provides that in the event of failure of agreement on the rate or price for the variation, the Director of Works shall determine such rate or price as he considers reasonable. Similarly, upon unilateral termination of the contract, the standard 'break' clause provides that "the Commonwealth shall pay to the Contractor such sums as are fair and reasonable in respect of the loss or damage sustained by the

1Clause 40, Form W70. See also Condition 8, Form 'A'.
Contractor in unavoidable consequence". Observe that the condition does not lay down any explicit standards whatever to determine compensation. In the U.K. the standard 'break' clause in both the 'stores'\textsuperscript{1} and 'works'\textsuperscript{2} contract is explicit in the opposite sense for it states that "the Authority ... shall make such allowance, if any, as in his opinion is reasonable and his decision on that matter shall be final and conclusive".

The incorporation of such standard terms in government contracts presumptuously delegates to the government the right to determine the contractor's compensation. It is difficult to determine what a court would make of such a contract if such terms came into dispute under private contract theory. The unfettered authority of one party to a contract to establish a contract price or the other's compensation is certainly a departure from practice in any traditional contract setting. It is interesting to note that a step was proposed to the American Law Institute suggesting recognition of the right of parties to a proposed private contract to agree to one party's having the authority to make selection of terms in the course of performance.\textsuperscript{3} But a comment in the draft indicates that absolute discretion, which seems to exist in the above government

\textsuperscript{1}SC 56(4), Form GC/Stores/1.

\textsuperscript{2}SC 44(5), Form GC/Works/1.

\textsuperscript{3}See \textit{Restatement of the Law (Second) of Contracts} (Tentative Draft No. 1, 13 April 1964, American Law Institute, Philadelphia) §33(1).
contract example on the part of the superior party, would still render the contract void for lack of consideration. "If one party to an agreement is given an unlimited choice, that party may not be a promisor; and the contract may fail for want of consideration .... The other party's promise may be unconscionable and may be wholly or partly illegal".¹

(v) Recovery of Sums Due

The standard terms which confer upon the government the right to deduct from "any moneys then due or thereafter becoming due to the contractor under the contract or any other contract or any other account whatsoever" the amount of any damages, losses, costs and expenses alleged to have been incurred by the government in consequence of any breach by the contractor,² may not again hold good with reference to basic common law doctrines either because such a clause imposes a penalty or ousts the jurisdiction of the courts or, as the Supreme Court of India (the highest court of the land) held in a recent case of Union of India v. Raman Iron Foundry³ that "a claim for damages for breach of contract is ... not a claim for a sum presently due and payable and the purchaser is not entitled ... to recover the amount of such claim by appropriating other sums due to the contractor".⁴

¹Id. at 162 (references omitted here). See also Frenzen, "The Administrative Contract in the United States" (1968-69) 37 Geo. Wash. L. Rev. 270, 286.
²E.g. in Australia, Condition 26(2) C.T.B. No. 1; Condition 31(1) of Form 'A' and sub-cl. 41.5 of Form W70.
⁴Id. at 1273.
In the above Union of India case, the respondent tendered for supply of certain quantity of foam compound to the government and its tender was accepted subject to the usual "Conditions of Contract".¹ The performance of the contract ran into difficulties and a dispute arose between the parties giving rise to claims by each party against the other. One of the standard terms governing the contract viz. Condition 18 (Form DGS&D 68 - Revised) provided:

Whenever any claim for the payment of a sum of money arises out of or under the contract against the contractor, the purchaser shall be entitled to recover such sum by appropriating ... any sum then due or which at any time thereafter may become due to the contractor under the contract or any other contract with the purchaser or the Government...."²

The government made a claim for the payment of a certain sum as damages for breach by the respondent and threatened that upon non-payment by the respondent by a certain date, it would recover the same from the moneys due to the respondent in respect of certain other contracts. In an application for an injunction, the respondent argued before the Court that on a proper construction of cl. 18, the government is entitled to exercise the right conferred under that clause only where the claim for payment of a sum of money is either admitted by the contractor,

¹"Conditions of Contract governing contracts placed by the Central Purchase Organisation of the Government of India" Ministry of Supply, Form DGS&D 68 - Revised.
²For similar standard terms in Australia, see Condition 26(2), Form C.T.B. No.1; Condition 31(1), Form 'A' and sub-cl. 41.5, Form W70. In the U.K. see SC 9 of Form GC/Stores/1 and SC 43 of Form GC/Works/1.
or in a case of dispute, adjudicated upon by arbitration or a court. The Supreme Court held that the government had no right or authority under cl. 18 to appropriate the amounts of other pending bills of the respondent in or towards satisfaction of its claim for damages against the respondent. The Court observed that cl. 18 did not lay down the substantive rights and obligations of the parties under the contract but was merely intended to provide a *mode of recovery* to the government, and the government was entitled to exercise the right conferred under that clause only where there was a claim for a sum which was presently due and payable. A mere making of a claim for damages for the government, therefore, imposed no liability on the contractor to pay and was not a sum due for which there was an existing obligation to pay *in praesenti*.

The above case raises questions of fundamental importance not only in the sphere of government contracts but also in that of ordinary building contracts. Here standard terms often empower the employer *vis-à-vis* the contractor or the contractor *vis-à-vis* the sub-contractor, as the case may be, to withhold or deduct payments due to the other party because of defects or

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2 Id. at 1271 and 1272.
3 Id. at 1271.
delays in the performance of the contract. It also raises the question of extent of applicability of the common law and equitable rights to set-off and counter-claim. A short discussion of this may throw some light on the closely corresponding position in government contracts.

Under the common law, for a long time it appeared to have been generally accepted in the construction industry that an employer was entitled to set-off or counterclaim against the amount certified or due to the contractor until the decision of the Court of Appeal in Dawnays Ltd v. F.G. Minter Ltd and Trollope and Colls Ltd enunciated a different doctrine. In that case proceedings were instituted by sub-contractors claiming a sum included in the architect's interim certificate (or, as they are often called in Australia, progress payment certificates) as the value of their work. The contractors, who had received that money from the employer, sought a stay under cl. 13 of the sub-contract on the ground that there had been a delay in the completion of the sub-contract for steelwork. Clause 13

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entitled the contractor "to deduct from or set off against any money due from him to the sub-contractor ... any sum or sums which the sub-contractor is liable to pay to the contractor under this sub-contract". Lord Denning MR held that cl. 13 only applied to liquidated and ascertained sums which were established or admitted as being due and Edmund Davies LJ added: "Any other view would involve that the sub-contractor could be kept out of his money ... for an unconscionable period, with possibly disastrous financial results".

Dawnays' case was followed in rapid succession by six other cases in the Court of Appeal. The last of these went to the House of Lords. In Gilbert-Ash (Northern) Ltd. v. Modern Engineering (Bristol) Ltd., indeed on facts very similar to those in Dawnays' case, the Court was concerned with the construction of paras. 3 and 4 of cl. 14 which provided:

If the sub-contractor fails to comply with any of the conditions of this sub-contract, the contractor reserves the right to suspend or withhold payment of any monies due or becoming due to the sub-contractor. (Para. 3)

The Contractor also reserves the right to deduct from any payments certified as due to the sub-contractor and/or otherwise to recover the amount of any bona fide contra accounts and/or other claims which he, the contractor, may have against the sub-contractor in connection with this or any other contract. (Para. 4).

1 Id. at 1209
2 Id. at 1210
In his judgment in this case in the Court of Appeal, Lord Denning MR held that the contractor was bound to pay the moneys due to the sub-contractor without deduction.

When the main contractor [he said] has received the sums due to the sub-contractor - as certified or contained in the architect's certificate - the main contractor must pay those sums to the sub-contractor. He cannot hold them up so as to satisfy his cross claims. Those must be dealt with separately in appropriate proceedings for the purpose. This is in accord with the needs of business. There must be a 'cash flow' in the building trade. It is the very life blood of the enterprise. The sub-contractor has to expend money on steel work and labour. He is out of pocket. He probably has an overdraft at the bank. He cannot go on unless he is paid for what he does as he does it.¹

But the House of Lords overruled the Court of Appeal's judgment and held that the wording of para. 4 of cl. 14 clearly permitted the contractor to deduct the amount of any bona fide claims from the certified sums due to the sub-contractor and the sum to be deducted need not be a liquidated sum or an ascertained sum in the sense of an agreed sum or assessed by a court.²

¹(1973) 71 L.G.R. 162, 167 (C.A.).
²(1973) 3 W.L.R. 421, 426, 431, 438. At 441, Lord Diplock observed:

The amount of the 'contra account and/or other claims' (in para. 4 of cl. 14) must, of course, be quantified before it can be deducted; but there is nothing in those words themselves to suggest that the quantification may not be made by the claimant himself. The addition of the qualification that the contra account or claim, in order to be deductible, must be 'bona fide' seems to point irresistibly to this conclusion. It is wholly inapt if it refers only to contra accounts or claims which have already been the subject of agreement between the parties or of a judgment or an arbitral award.
The House of Lords, however, held para. 3 of cl. 14 to be a "penalty" clause and thus unenforceable. The Court pointed out that such a right with the contractor to "suspend or withhold payment of any monies due" with no reference to the amount of his claim, would entitle him to withhold sums far in excess of any fair estimate of the value of his claims and that would simply be to impose a penalty for refusing to admit his claims. The Court further observed that not only would the withholding of excess by the contractor permanently deprive the sub-contractor of the interest on that excess which would accrue while the dispute lasted, but it might have most damaging effects on the sub-contractor's business. Thus it concluded that such a heavily penalising provision ought not to be accorded any validity.

Two main reasons seem to be advanced by the House of Lords for holding para. 4 of cl. 14 as valid and enforceable. The first is that upon the interpretation of the wording in para. 4 of cl. 14, the Court found that the sub-contractor had agreed to allow the contractor to make deductions of all detailed claims outstanding under that or other contracts from the money certified by the architect as being payable to him. It is respectfully submitted that the House of Lords, unlike the Court of Appeal, paid no attention to the consequences of such a contract term and its unreasonableness, nor did it advert to the adhesion nature of such standard form contracts. In a situation like this (as also in government contracts), where the superior party imposes upon

1Id. at 426, 430.
2Id. at 438.
the other its own standard terms, it may be too complacent to conclude, as the Court did: "But if the sub-contractor chooses to agree to that, that is his affair"\(^1\) or "Whether it is wise for a sub-contractor to agree to a provision which may ... is not for us to decide".\(^2\)

The other reason for holding para. 4 of cl. 14 valid, that the contractor has a common law and equitable rights of set-off and counterclaim,\(^3\) is also not convincing. Both set-off and counterclaim are to a large extent the creature of statute-law and can only be pleaded as a defence to the plaintiff's claim.\(^4\) Besides it is very doubtful whether a party is entitled to withhold payment due to the other (due on account for the valid performance of a contract) on the ground that the latter has allegedly not performed some other contract properly. Both contracts are separate from each other and the payment due under one cannot be stopped for another's (alleged) non-performance, unless it has either been admitted or held so by an arbitrator or a court of law.

In view of the above, it is submitted that in such cases (whether arising in the sphere of government contracts or private commercial contracts), a party's right is limited to the deduction of amounts which have been agreed between them or to amounts calculated by reference to a liquidated and ascertained amount.

\(^1\)[1973] 3 W.L.R. 421 at 426 (per Lord Reid).
\(^2\)Id. at 431 (per Lord Morris of Borth-y-Gest).
\(^3\)[1973] 3 W.L.R. 421, 443-448 (per Lord Diplock).
\(^4\)Odgers, Pleading and Practice (21st ed. 1975) chapter 14.
(vi) Other Standard Terms

Other standard terms which are uncommon in private commercial dealings but usually present in government contracts are: inspection and rejection of contract work, examination of books, records and premises of the contractor, close supervision and control over the contractor's method and manner of contract performance, liability for delays by the contractor, use of plant and materials of the contractor without compensation etc. The degree of control which these and other similar standard terms give to the government over the contractor, without any signs of reciprocity, is really staggering and bears heavily on the rights of the contractors.

4. Validity, Force and Effect of Australian Finance Regulations, Directions and Standard Terms

What is the legal validity and force and effect of the Finance Regulations and Directions issued under the Australian Audit Act 1901-1975? Do these regulations (and directions) have the force and effect of law? Can they be enforced at the instance of a contractor in the court of law, if a breach is established?

1 Australia: Conditions 14(2), 15, 37(3), (4) and 39 of Form 'A'; U.S.: Articles 5(a), (c) and 10 of Standard Form 32 (Supply) and Article 10 of Standard Form 23A (Construction); U.K.: SCs 4, 38 to 40 of Form GC/Stores/1 and SC 13 of Form GC/Works/1; and India: Condition 17 of DGS&D 68 - Revised.

2 E.g. Articles 10 and 23 of U.S. Standard Forms 32 and 23A respectively.

3 E.g. Condition 12 of Australian Form 'A'.

4 E.g. Condition 30(l) of Australian Form 'A' and sub-cl. 27.1 of Australian Form W70. For U.S. see Article 17(b) of Standard Form 23A and Article 11(e) of Standard Form 32.

5 E.g. sub-cl. 43.3 of Australian Form W70.
Or are they merely "internal" or "housekeeping" regulations?

A related question arises with regard to the various standard terms which are inserted by government in its contracts. What is the position if one or more of the standard conditions is found to be inconsistent with or abrogative of an existing principle of the law of contract? A further question would seem to arise as to what extent is a government contractor or the government itself bound by regulations, directions and standard terms not expressly made a part of the contract by the parties? Is the contractor or the government (or both) contractually bound by such regulations, directions and standard terms just as if they were a part of the contract? Or does one or the other have the option of either enforcing the contract with such regulations, directions and standard terms read into it or else of treating the contract as void? None of these questions has so far been judicially considered in Australia. But these questions have been much alive in the United States, ever since the famous Court of Claims judgment in G.L. Christian and Associates v. United States.¹

The Christian case involved a Capehart Housing Construction contract which was terminated for the convenience of the Government when the project was cancelled. Because of the absence of a termination for convenience clause in the contract, the

contractor sued for breach of contract damages, including anticipatory profit which it would have earned had the contract been completed. The Court of Claims denied the request for unearned anticipatory profit (amounting to millions of dollars), finding that there was no breach since the government had, in fact, reserved the right to terminate. The Court, speaking through Davis J decided that the contract in question was subject to the ASPR requirement for insertion of the standard termination for convenience clause. It reasoned as follows:

As the Armed Services Procurement Regulations were issued under statutory authority, those regulations, including Section 8.703, had the force and effect of law ... If they applied here, there was a legal requirement that the plaintiff's contract contain the standard termination clause and the contract must be read as if it did.¹

The Court went on to say:

[W]e believe that it is both fitting and legally sound to read the termination article required by the Procurement Regulations as necessarily applicable to the present contract and therefore as incorporated into it by operation of law.²

¹Id. at 12, 312 F. 2d at 424 (footnote omitted).
²Id. at 17, 312 F. 2d at 427.
Various commentators in the United States have interpreted Christian to stand for the doctrine that all procurement regulations, including every section of the ASPR and FPR, have the force and effect of law and are automatically incorporated into any government contract to which they are applicable. Some commentators, however, have not accepted this broad interpretation of Christian that all procurement regulations have "the force and effect of law" and must be read into all contracts to which they apply. To them "This so-called broad Christian doctrine that all procurement regulations have 'the force and effect of law' and must be read into all contracts to which they apply, appears ... to be an unjustified over-simplification and over-reaction". The authors are of the opinion that the Christian doctrine is limited only to "mandatory" regulations which implement and express basic or fundamental procurement policies. In cases where "mandatory" regulations expressing a "deeply ingrained strand of public procurement policy" are ignored by the contracting officer, the government is not estopped (they point out) from asserting the invalidity of his actions. This seems to be the correct interpretation.


3 Id. at 102. See also Schoenbrod v. United States (1969) 187 Ct. Cl. 627, 634; 410 F. 2d 400, 404; Prester v. United States (1963) 162 F. 2d 620, 625; Federal Crop Ins. Corp. v. Merrill (1947) 322 U.S. 380; Sutton v. United States 256 U.S. 575.
of the Christian decision.¹

Be that as it may, we find that in Australia s.71(i) of the Audit Act 1901-1975 empowers the Governor-General to make regulations, inter alia, for and in relation to procurement by the Commonwealth Government.² In pursuance of this power, the Finance Regulations have been made which, inter alia, lay down the principles and procedures in relation to affairs and transactions involving the expenditure of public moneys by all government departments entering into contracts within Australia or overseas.³

In addition to the Regulations, Directions have also been issued from time to time in relation to government purchasing. A contravention of a direction is deemed to be a breach of a Regulation.⁴

Now the question is whether the Australian courts would, in a given situation, apply the Christian doctrine, say even in its narrow sense, to the Finance Regulations and Directions and Standard Terms. Let us discuss this further.

¹ Judge Davis, in his opinion denying the plaintiff's motion for rehearing and re-argument, stressed the fundamental procurement policy aspect of the particular regulation involved, stating: "[I]t is important ... that procurement policies set by higher authority not be avoided or evaded (deliberately or negligently) by lesser officials, or by a concert of contractor and contracting officer. To accept the plaintiff's plea that a regulation is powerless to incorporate a provision into a new contract would be to hobble the very policies which the appointed rule-makers consider significant enough to call for a mandatory regulation. Obligatory Congressional enactments are held to govern federal contracts because there is a need to guard the dominant legislative policy against ad hoc encroachment or dispensation by the executive .... There is a comparable need to protect the significant policies of superior administrators from sapping by subordinates" (1963) 160 Ct. Cl. 58, 66-67, 320 F. 2d 345, 350-51 (emphasis supplied).

² Section 71(1)(d)-(e) of the Audit Act.

³ Regulation 5A, Finance Regulations.

⁴ Section 71(2)(c), Audit Act 1901-1975 read with Finance Regulation 127A(3).
(i) **The Concept of Mutuality - its Effects on Standard Terms**

It may be stated at the outset, that since the standard terms of government contracts are not issued under any statutory authority, they do not, per se, have the force and effect of law. No statute or regulation requires them to be inserted into government contracts and thus they cannot be said to be incorporated into contract by operation of law. Their enforceability emanates from the agreement between the government and the supplier. It follows, therefore, if any of the standard terms is inconsistent with or abrogative of an existing principle of the law of contract or any other law, it shall not be enforceable. One such principle of the law of contract with which some of the standard terms may possibly come into conflict and thus make them unenforceable, is the concept of "mutuality". But first, what is meant by "mutuality"? That mutuality is necessary has

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1 The discussion of "mutuality" which follows in this section is mainly based on American literature, partly because of the availability of published material, and partly because of numerous American cases where the court has discussed the "mutuality" requirement in contracts.

been a commonly repeated statement:

The general rule of law is ... that, where the consideration for the promise of one party is the promise of the other party, there must be absolute mutuality of engagement, so that each party has the right to hold the other to a positive agreement. Both parties must be bound, or neither is bound.¹

Nevertheless the concept of "mutuality" has not been more clearly defined, and some eminent writers on the law of contracts have found it to be a "confusing" concept.² At the same time, however; the "mutuality" requirement has played an important part in the making of decisions as well as in the writing of opinions.³

The basic difficulty in clearly defining mutuality has been that of distinguishing it from the concept of consideration. While some have thought that mutuality and consideration are

¹American Agricultural Chemical Co v. Kennedy & Crawford (1904) 48 S.E. 868, 870. See also Town of Vinton v. City of Roanoke (1954) 80 S.E. 2d 608, 617, where the court cited with approval the above case and added: "Here the covenant under review lacks mutuality of promises, in that it purports to bind Vinton-Roanoke Water Co to furnish all water necessary to supply the demands of the town, but does not bind the town to take any amount of water"; United Butane Sales, Inc v. Bessemer-Suburban Gas Co Inc. (1968) 207 So. 2d 416. See further Miami Coca-Cola Bottling Co v. Orange Crush Co (1924) 296 F. 693; Maple Island Farm Inc. v. Bitterling (1954) 209 F. 2d 867; Oakland Motor Car Co v. Indiana Automobile Co (1912) 201 F. 499.

²Williston, op. cit. 420-21; Corbin, op. cit. 5-6. In an English case, Gaumont-British Picture Corporation Ltd v. Alexander [1936] 2 All E.R. 1686, Porter J stated at 1690 thus, "I am not, myself, very familiar in this connection with the phrase 'want of mutuality'."

³See e.g. Federal Electric Corp. v. United States (1973) 486 F. 2d 1377, 1381 (Ct. Cl.). In Australia, see McRobertson Miller v. Commissioner of Taxation (W.A.) (1975) 8 A.L.R. 131. See particularly at 148-149 (Jacobs J's judgment).
synonymous, ¹ others have held that mutuality (unlike consideration) is not an essential element in every contract. ² It is humbly submitted that neither interpretation of the term "mutuality" is correct.

If want of mutuality merely connotes want of consideration, one wonders why in the first instance the term "mutuality" has been used for such a long time. There is a long list of cases where the courts have held contracts void and unenforceable because of lack of mutuality though there was consideration. ³ Thus in a leading case in Velie Motor Car Co v. Kopmeier Motor Car Co., ⁴ the court said "it is a fundamental rule of law that contracts, in order to be binding, must be mutual". ⁵ In that case,

¹Williston, op. cit. 421. See also Clausen & Sons, Inc. v. Theo. Hamm, Brewing Co (1968) 395 F. 2d 388, 389, where the court said "'mutuality of obligation' is only a semantical exercise surrounding the real determinant of a contract, namely, consideration"; Meurer Steel Barrel Co Inc., v. Martin (1924) 1 F. 2d 687; Kane v. Chrysler Corp. (1948) 80 F. Supp. 360; Northwestern Engineering Co v. Ellerman (1943) 10 N.W. 2d 879; F. Jacobus Transportation Co. Inc., v. Gallagher Brothers Sand & Gravel Corporation (1958) 161 F. Supp. 507; "Mutuality is a legal term of elusive meaning, but ... lack of mutuality means only lack of consideration."; J.C. Millett Co. v. Park & Tilford Distillers Corp. (1954) 123 F. Supp. 484, 493.

²Corbin, op. cit. 5-6. In National Chemsearch Corp. v. Bogatin (1964) 233 F. Supp. 802, 809-10, the court stated that "[m]utuality of obligation is an old and seldom used doctrine which is often confused with consideration"; the latter being necessary to support a contract, the former not.

³For example, in Jenkins v. Anaheim Sugar Co (1916) 237 F. 278, (D.C. S.D. Cal.), the court said at 282: "the contract would have lacked validity, not from a want of consideration, but, as herein, from a lack of mutuality".

⁴(1912) 194 F. 324.

⁵Id. at 331.
the defendant's right was made subject to the plaintiff's right to arbitrarily, and without assigning any cause, cancel the contract. The court held that the defendant might well decline to go to the expense and trouble of advertising and developing the territory named, when its rights might at any time be terminated. Thus the court held that an agreement wherein one party reserves the right to cancel at his pleasure cannot create a contract.  

It is admitted that in a large majority of cases of lack of mutuality, a valid consideration would also be lacking. But there can be cases where consideration, howsoever inadequate, is present, but mutuality is not. In the Velie Motor Car Co case, for example, the consideration from the plaintiff was that it (the plaintiff) extended to the defendant "the exclusive right of sale during the continuance of this contract for the Velie line of automobiles in the following territory" (some 21 counties in the State of Wisconsin). But the court held the contract unenforceable "by reason of want of mutuality".  

The concept of mutuality is, therefore, a much broader

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1 Id. at 330-31. In Alameda County v. Ross (1939) 89 P. 2d 460, the court said: "[M]utuality of obligations is an essential element in every binding contract. In the present case there is an absolute absence of mutuality for the reason that the government may cancel the agreement and deprive the County of Alameda of the use or control of the bridges at any moment without cause" (at 464). But see Clausen & Sons, Inc. v. Theo. Hamm. Brewing Co. (1968) 395 F. 2d 388.

2 (1912) 194 F. 324.

3 Id. at 331.
concept than consideration; in many cases it overlaps but in some it (i.e. mutuality) supplements the concept of consideration. It is a well-recognised principle of law that the inadequacy of consideration does not generally affect the validity of a contract.¹ The law will not enter into an inquiry as to the adequacy of consideration because that is a matter "exclusively for the decision of the parties"² or "for the parties themselves to determine".³ But what is really meant by these or similar expressions? No one would deny that both parties should decide or determine the terms of their contract freely and with full understanding of their possible effects. But what is happening in actual practice is that in a growing class of cases (containing numerous standard terms, in fine print or otherwise), one party realising the financial predicament of the other party and making full use of its own superior bargaining position, is procuring an agreement which is grossly and flagrantly disproportionate to the promise of the other party. In such a case, it is hard to believe that the "bargain" is the result of "the decision of the parties" or is "determined" by both of them. The principle that inadequacy of consideration is

¹ See e.g. in Osborne v. Locke Steel Chain Co 218 A. 2d 526, the court stated: "The general rule is that, in the absence of fraud or other unconscionable circumstances, a contract will not be rendered unenforceable at the behest of one of the contracting parties merely because of an inadequacy of consideration"(at 530).
² Williston, op. cit. at 426.
³ Id. at 455 (quoting from Blanchard v. Haber 166 La. 1014, 118 So. 117).
immaterial to judge the validity of a contract may in such cases turn the whole concept of consideration into a mere formality, a mere sham and hold a nominal consideration as a valid consideration. That is where the concept of mutuality, it is submitted, plays a useful role, since mutuality would avoid contracts with unreal or insufficient consideration. It is to be remembered that the requirement of consideration is not a safeguard against imprudent and improvident contracts except in cases where it appears that there is no bargain in fact, whereas mutuality is.

Undoubtedly, there is a thin line which separates the two concepts, yet each has a distinct and separate role to play. For example, if X promises Y $1,000 in return for Y's promise to raise his hands once, one could argue that there is consideration, though not adequate (but inadequacy is no negation of consideration). But Y's promise might be treated as one in which there is only an illusion of mutuality, thus making the contract legally unenforceable.

Mutuality, like the American concept of "unconscionability", thus connotes equality, fairness and justice.\(^1\) This should not,

\(^1\)"Terms such as mutuality, uncertainty, and indefiniteness, etc. are construed in the light of the circumstances under which the agreement is made and such terms used, and have no definite and fixed meaning and are interpreted so as to deal equitably with the parties.": Pace Corporation v. Jackson (1955) 275 S.W. 2d 849, 853.
however, be taken to imply that the validity of a contract depends upon an objective equality of advantages or values.¹ Each promise made by one party does not have to be matched by an equivalent promise made by the other. Each right or power or privilege possessed by one party does not have to have its exact counterpart in the other. The fact that one party is given an option not accorded to the other does not, per se, render such contract void for lack of mutuality of obligation. To consider mutuality in the sense of creating reciprocal rights or duties, is to give it a very narrow and literal meaning.² Mere absence of reciprocal rights or duties should not, therefore, lead one to conclude that the contract lacks mutuality.³

¹There are cases in which courts have held that a contract is not valid because the obligation undertaken on one side is not commensurate with that undertaken on the other. See e.g. Frankfort Waterworks Co. v. McBride (1931) 175 N.E. 140; but see Lindner v. Mid-Continent Petroleum Corp. (1952) 252 S.W. 2d 631; Hancock Bank & Trust Co. v. Shell Oil Co. (1974) 309 N.E. 2d 482.

²Shorter Oxford English Dictionary (1959) defines mutuality as "the quality or condition of being mutual; reciprocity"; "A condition of things under which two parties are mutually bound to perform certain reciprocal duties".

³17 Corpus Juris Secundum §100 (1), pp. 792-93.
Mention should also be made here of a class of cases where the law gives a defence to one promisor enabling him at his option to avoid the whole agreement and yet it does not prevent his promise from being sufficient consideration for the counter-promise. For example, an agreement between an infant and an adult though voidable by the infant is binding upon the adult. So is a promise made by an insane person, or a promise of one who has been induced to enter into a bargain by fraud, undue influence, coercion or mistake (in some cases of mistake) considered sufficient to support a counter-promise. It is, however, well-settled that this rule should be regarded as an exception to the general requirements of mutuality.¹

In the light of the above analysis, it is submitted that mutuality is a cardinal requirement of contracts. Fundamentally, an executory agreement for the sale and delivery of goods or supplies, to be effective, must be obligatory on

both parties, or it lacks mutuality and is not enforceable.¹

That a contract, which in terms reserves the option of performance to the promisor, is insufficient to support a counter-promise because of lack of mutuality, is supported by case-law.²

Thus in Joliet Bottling Co. v. Brewing Co.³ where under a certain provision of the agreement, the appellant had the option of refusing to accept beer from respondent, at its pleasure, upon the ground that it was not satisfactory, the court said: "It cannot be doubted, we think, that the contract was unilateral and void for want of mutuality under repeated decisions of this and other courts [citations]."⁴

¹ Fowler's Bootery v. Selby Shoe Co. (1938) 117 S.W. 2d 931.
A unilateral contract, which consists of a single binding promise (the consideration on the other side being executed), however, does not require mutuality and has long been recognised as a valid contract. Such a promise can be binding if it is under seal or if an executed consideration has been exchanged for it. Agreements are frequently made which are not, in a certain sense, binding on both sides at the time when executed, and in which the whole duty to be performed rests principally with one of the contracting parties. See Restatement, Contracts §§ 12, 75, 76 and 85-94; Williston, op.cit. 421 and Corbin, op.cit. 3. Again it is well-settled that in most option contracts, where the option holder makes no promise, but pays cash or gives some other executed consideration, the option giver's promise is enforceable, in spite of lack of mutuality of obligation. See Corbin, op.cit. 459-66.

² See a long list of cases cited in Williston, op.cit. 417 n.9; Corbin, op.cit. 67 n.59; 17 Corpus Juris Secundum §100(1), pp. 790-92. See generally, Corbin, "The Effect of Options on Consideration" 34 Yale L.J. 571.

³ (1912) 98 N.E. 263.

⁴ id. at 265.
Thus, on principle it seems that where one party is given an option, not accorded to the other, of abrogating, or constricting or renewing the contract or any part thereof, or of discontinuing or extending performance or of determining the extent of performance, the option goes so far as to render illusory the promise of the party given the option and there is indeed no mutuality, and therefore no contract.

If the foregoing is correct, it appears to be equally certain that the government's retention of an "option to cancel" its contracts under the usual premature termination clause or the "break" clause invalidates such contracts on the ground that it prevents mutuality of obligation. If the government's retention of an "option to cancel" its contracts under the usual premature termination clause or the "break" clause invalidates such contracts on the ground that it prevents mutuality of obligation. The standard termination clause used in Australian Government contracts reads as follows:

1 Thus in American Agricultural Chemical Co. v. Kennedy & Crawford (1904) 48 S.E. 868, a written contract provided: "We [plaintiff-seller] reserve the right to cancel this contract at any time we may deem proper, but in the event of such cancellation the provisions of this contract shall govern the closing of all business begun thereunder." The court held that this invalidated the contract ab initio, saying, "as that proposition did not bind the plaintiff to sell, there was no consideration for the defendant's promise to purchase" (id. at 871). Again in Miami Coca Cola Bottling Co. v. Orange Crush Co. (1924) 296 F. 693, the defendant gave to the plaintiff the exclusive privilege of bottling and selling "orange crush", the plaintiff promising various things in return, with a provision that the plaintiff might cancel at any time. Refusing specific performance, the court said that "the contract was void for lack of mutuality" (id. at 694).
1. The Commonwealth may at any time upon giving notice in writing to the Contractor of its intention so to do abrogate or constrict the contract or any part or further part thereof and upon such notice being given the Contractor shall cease or reduce work according to the tenor of the notice and shall forthwith do everything possible to mitigate losses consequent thereto.

2. In that exigency the Contractor may submit a claim for compensation and the Commonwealth shall pay to the Contractor such sums as are fair and reasonable in respect of the loss or damage sustained by the Contractor in unavoidable consequence provided always the Contractor shall not be entitled to compensation for loss of prospective profits.

3. The Commonwealth shall not be liable to pay under the provisions of this clause any sum which additional to any sums paid or due or becoming due to the Contractor under the contract would together exceed the full price of the complete work ordinarily payable under the contract.

4. Where the provisions of this clause are invoked as to any part of the contract the provisions of this clause shall prevail over all other provisions of the contract inconsistent herewith in respect to those parts so affected.

5. The Contractor shall in each sub-contract or order to the value of $10,000 or more placed with any one sub-contractor or supplier for the purpose of this contract reserve the right to abrogate such sub-contract or order or part thereof whenever the Commonwealth abrogates and to do so and give notice thereof between Contractor and sub-contractor in manner alike as in this clause hereinbefore provided and also as between them upon the like terms as to compensation and otherwise.

The above quoted termination clause produces a result very similar to that produced by making a promise conditional on
personal satisfaction. The government attempts by this means to retain in as large a degree as possible its own economic freedom of choice, observing results as performance of the contract proceeds and terminating the contract if these results are not satisfactory to it. The legal power created by this clause is not made conditional upon dissatisfaction with the results; it is a power to cancel if the government so wills and desires. Government's option between cancelling and not cancelling is unlimited. Obviously therefore a promise by the government which does not bind it or which gives an option, not accorded to the other party, upon notice at any time to "abrogate or constrict the contract or any part or further part thereof" renders the government's promise illusory and lacks mutuality. Treitel seems to admit that there is "lack of mutuality" in such a case, though he holds that the other party would still be bound because "[t]he Crown's immunity

1 For convenience discussion here is confined to the standard term dealing with "Termination by the Commonwealth". It is obvious that similar difficulties will arise where unilateral variation clause is used in government contracts.

2 It should be noted that in the United States, the "Termination for Convenience of the Government" (as it is called there) is not as wide as the Australian counter-part. It reads, inter alia: "The performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interest of the Government. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance or work under the contract is terminated, and the date upon which such termination becomes effective." ASPR §7-103.21 (emphasis supplied).

in these cases is based on very special considerations which provide no basis for relieving the other party".1

Corbin, however, seems to think that the reservation of a power to cancel in one party does not amount to an illusory promise. He argues:

The power to cancel that is reserved is invariably a power to cancel the whole contract, including both promises alike. Where one promise is illusory and the other is not, it looks as if the one promised performance must be rendered whether the other is or not. This is not so in the case of a power to cancel .... It does not appear to involve an attempt to get something for nothing; and there is no such result whether the power is exercised or not.2

It is humbly submitted that by no means can one justify a one-sided and unlimited power of cancellation of one party by advancing an argument that the other party is also freed from performance after the act of cancellation. What is objectionable is that the other party has to stop performance against its will and against the terms of the initial promise. The will of the party reserving the right to cancel dominates over the written words and the threat of cancellation hangs like a sword over the head of the other party. The continuous threat of cancellation, apart from curbing the other party's freedom of action, may cause great hardship in the planning and management of its business. It is for this reason, viz. to avoid such potentially harsh and unjust

1Ibid. (citing Mitchell, Contracts of Public Authorities).
2Corbin, op.cit. 68.
consequences, that an unlimited power of cancellation should not be held valid and enforceable. Furthermore, the use of a termination clause by the government in its contracts may mean higher prices by contractors, attempting to lessen the risk of lost profits which a premature cancellation might cause, thus becoming a drain on the public exchequer.

Such a question has not so far been the subject of any reported judicial decision in Australia and thus it is not clear what legal effect the premature termination would have on the validity of government contracts, or on the liability of contractors. However, it does not seem unlikely that a court may regard such a promise by government as wanting in mutuality. This may be done not on the basis of lack of consideration or an absence of corresponding privilege with the other party (although these factors are relevant and do help a court to judge whether mutuality exists or not), but for the reason that government contracts are contracts of adhesion and entered into between parties of unequal bargain­ing power.

To return to the termination clause, we find that it gives unlimited and unbridled power to government officials to cancel a contract. For example, no reason needs to be assigned for the government's action and the clause may be invoked "at any time" implying thereby that it may be made to operate even before the performance has begun but after
the contract has been signed.\textsuperscript{1} Sometimes it is stated that since the party given the option is required to give a notice of cancellation, the contract is not invalid for lack of consideration or for lack of "mutuality".\textsuperscript{2} Corbin, for example, states that by giving the notice of cancellation, the party having power to cancel "not only goes to some trouble and expense" but also loses his right to performance by the other party.\textsuperscript{3} "In such a contract" he adds, "the party having power to cancel has an option between alternatives—between performing and giving notice .... The giving of the notice relieves him from obligation as well the notice-giver himself. This makes such a contract a reasonable one under ordinary circumstances; it is certainly not unconscionable ...."\textsuperscript{4} A contract which provides for

\begin{itemize}
\item[1] In \textit{Berry v. Walton} (1963) 366 S.W. 2d 173, 174, the court said that "if the agreement is wholly executory and one of the parties is not obligated even to commence the performance of it, there is a lack of mutuality".
\item[2] See \textit{Stern & Co. v. International Harvester Co.} (1961) 172 A. 2d 614 (either party could cancel upon notice). In \textit{Phalanx Air Freight, Inc. v. National Skyway Freight Corp.} (1951) 232 P. 2d 510, the court observed: "The contract contained a provision making it terminable by plaintiff 'at any time by giving Air Carrier at least thirty (30) days notice'. This did not render the contract illusory as contended by defendant. While a provision for termination by one party at will has that effect a provision for termination after notice for a fixed period does not." (p.512)
\item[4] \textit{Ibid.}
\end{itemize}
termination of contract by one party after notice for some specified period (according to Corbin, again) "should never be held to be rendered invalid thereby for lack of 'mutuality' or for lack of consideration",^ becausethe party in whom the power has been reserved has made a real promise, one that in terms purports to control his action during the specified period of notice. For performances continuing during that period, he must pay at the agreed rate. His cancellation is effective only at the end of the period; thereafter he will not have to pay, but neither will he receive performance.2

It is submitted, that Corbin's reasoning becomes somewhat fallacious, when some important practical considerations are taken into account. One is that it is very difficult and sometimes impossible for contractors to foresee whether and at what moment the termination may take place. For that reason, as government sources readily admit, many contractors strongly object to the inclusion of such termination clauses which leave them in such an uncertain state. Secondly, while some contractors may calculate their costs in such a manner that even if a premature termination clause is invoked they will be covered financially, others file their quotations on the assumption that the contracts may run their full term. But neither practice leads to satisfactory results. The former not only raises prices at public expense but in any

^Id. 83.
2Id. 83-85.
case merely allows calculations which are mere guess-work and often quite irrational. In the latter practice, a premature termination (if it does take place) may lead to ruinous losses. Thirdly, as the government usually places contracts with the most competitive contractor, more reliable contractors who include the extra costs caused by premature cancellation may find it hard to compete with perhaps less reliable contractors quoting lower rates in disregard of the termination risk. The position would be made much easier if such premature termination-clauses provided for a reasonable period during which the contractor could adjust his business or adapt his investments to the new circumstances. Unfortunately neither the Australian standard terms nor their counterparts in the U.S., the U.K. or India provide for such interim periods of adjustment.

In the light of all the relevant considerations, such as that the premature termination of contract denies private contractors their expected profits, that government contracts are contracts of adhesion, that there is inequality of bargaining power, that they are usually on a take-it-or-leave-it basis, that government officials realising a contractor's financial predicament can procure his acceptance to harsh and one-sided terms, and that such and similar clauses can work against the public interest, it is submitted that a contract with premature termination right lacks
mutuality and should be unenforceable. Since, however, government stands in a different position vis-à-vis private parties and there can be valid reasons to give such a right of cancellation to the government to be exercised in the public interest, such a right may, in certain specified circumstances, be given by a statute, making premature terminations by government enforceable.¹

(ii) The Christian Doctrine and the Australian Finance Regulations and Directions

Coming now to the Finance Regulations and Directions, it is submitted that except in some situations (discussed below), they, like the standard terms, cannot be accorded the full effect of federal law. Legal writers have classified regulations as "legislative" and "non-legislative"; "mandatory" and "directory" or "interpretative"; and "statutory" and "internal" or "housekeeping". They have stated (to put it broadly) that regulations which implement, interpret or prescribe law or policy are "legislative" or "mandatory" or "statutory". Such regulations are subject to minimum judicial scrutiny and have the full force and

¹In the United States, for example, the standard "Termination for Convenience of the Government" clause is contained in the Federal Regulations, which are issued under the authority of government statutes.
effect of law. On the other hand, regulations which concern
organisation, procedures, documentation, practices, or
generally speaking, management functions, are usually termed
"internal" or "house-keeping" or "non-legislative" or
"interpretative" or "directory". Such regulations may or
may not have the force of law depending on the circumstances
of each case. ¹ It is, however, submitted that a more careful
initial examination of any given regulation as also of the
statute authorising it, is required before a proper classifi-
cation can be made. Its history, its intent, and any under-
lying specific legislative authority and policy must be
scrutinized before one can give it the effect either of a
"mandatory" or of a "housekeeping" regulation.

Study of the purpose, intent, scope and general impact
on non-government rights of the provisions of the Audit Act
1901-1975 and the Finance Regulations and Directions leads
us to a conclusion that they are not the product of an exercise
of legislative power, but are "internal" or "house-keeping"
rules, concerned with financial matters, organisation,
procedures and practices of government departments. Apart
from the fact that in Australia, the Audit Act and Finance
Regulations, unlike the procurement statutes and regulations
in the United States, are not basically meant to deal with all
aspects of government purchasing, the preamble to the Audit

¹See generally, Davis, Administrative Law Treatise
Act makes the intent of the drafters very clear. It reads: "An Act to make provision for the Collection and Payment of the Public Moneys, the Audit of the Public Accounts, and the Protection and Recovery of Public Property and for other purposes". The provisions of the regulations issued under the Act are in the nature of general financial rules and are intended to be treated as executive instructions to be observed in common by all Departments and Authorities under Federal Government, except those specified. Furthermore, the placement of the Finance Regulations 45 to 53 (which deal with government purchasing) under Division I - "Certifying Officers of Part III - Payment of Public Moneys", corroborates the conclusion that they are intended only as internal directions to government procurement officials. In the matter of receipt, custody and disbursement of government moneys, the Finance Directions are supplementary to the Finance Regulations and are applied in conjunction with them.

The above analysis shows that the Christian doctrine (even in its narrow sense) is not applicable to the Australian Finance Regulations and Directions issued under the Audit Act. Difficulty, however, seems to arise when we find that certain regulations and directions, although phrased as internal directions to government procurement officials, nevertheless have a significant effect on contractor rights and obligations. Take, for example, Finance Regulation 52(1). It provides:
Subject to any Act making provision with respect to contracts for supplies and subject to the next succeeding regulation, contracts shall not be entered into, and orders shall not be placed, for supplies the estimated cost of which exceeds Five thousand dollars unless tenders have first been publicly invited for those supplies.

The regulation seems to be intended to benefit contractors, as Finance Direction 31/19 explains it:

The underlying intention of Regulations 51, 52, 52AA and 53 is that government procurement procedures should be, and be seen to be, beyond reproach: i.e. that all who wish to participate in government business are given the opportunity to do so, that the government maintains a reputation for fair dealing, and that the public money is spent effectively and economically ....

Now suppose a Purchase Order is issued, under reg. 52A in clear contravention of reg. 52, i.e. without an invitation to tenders (supposing also that the case is not covered by any of the exceptions enumerated in reg. 52AA), can (1) the government repudiate the contract; and (2) the other contractors challenge its validity? In the United States, the answer would be in the affirmative in both cases. There, in a Court of Claims decision in Schoenbrod v. United States,1 the Court found the contracting officer's negotiation of a contract without initially soliciting price quotations from eligible offerors to be a flagrant violation of FPR provisions, derived from statute, requiring that procurements "shall be made on a competitive basis".2 The Court emphasised that the

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1(1969) 187 Ct.Cl. 627, 410 F. 2d 400.
2FPR §1-1.301, quoted in (1969) 187 Ct. Cl. at 630, 410 F. 2d at 401.
competitive and pricing factors are perhaps the "most important" general policies for public contracts, and that therefore a contract negotiated without consideration of such factors was clearly invalid. For this reason it was held that the government's cancellation of the award pursuant to the opinion of the Comptroller General was not a breach of contract. The Court noted that the solicitation and award procedures were clearly beyond the actual authority conferred upon the contracting officer pursuant to the statutory regulation, and that the government could not be estopped from denying that limitation of authority. It may, however, be argued that the Schoenbrod principle will not apply in Australia because the Finance Regulations and Directions (as we have suggested above) are merely internal directions and not "legislative" rules.

But will not a regulation be still enforceable (although internal) if it contains benefits or establishes rights of contractors? In the United States, such a regulation (although phrased as an "internal" direction to procurement officials) would have the binding effect of law on both parties, under the "whose benefit" theory. According to this theory, if a regulation

\[1\] Id. at 634, 410 F. 2d at 404.

\[2\] For a most comprehensive statement of the "whose benefit" theory, see Chris Berg Inc. v. United States (1970) 192 Ct. Cl. 176, 426 F. 2d 314. In that case the Court held that the ASPR provisions on mistaken bids (ASPR §2-406.2) were written for the protection of bidders and thus the government was not entitled to rescind the contract. The Court accepted the contractor's argument that the government's award of the contract to him at his bid price, with knowledge of the mistake in bid and over his protest was a clear-cut violation of the regulations relating to apparent clerical mistakes. The Court therefore concluded that the actions of the Contracting Officer in awarding the contract contrary to the regulations entitled the contractor to reformation of the contract price.
appears intended to define and state the rights of a class of persons, it is presumptively intended to benefit those persons and binds both parties. On the other hand, if a regulation has no significant effect on private rights and obligations of the contractor but is solely for the benefit of the government and is waived by the government, neither party at the litigation stage can rely upon it; the doctrines of estoppel or waiver can be invoked against the government, and the contractor is likewise precluded from relying upon the regulation which the court finds was not made for his benefit.

1 Id. at 183, 426 F. 2d at 317-318 (citing Fletcher v. United States (1968) 183 Ct. Cl. 1, 392 F. 2d 266).

2 For an example of procedural regulations which create substantive benefits for contractors and are hence binding, see Moran Bros. Inc. v. United States (1965) 171 Ct. Cl. 245, 346 F. 2d 590. In that case an AEC (now ERDA) contract contained a standard Disputes Clause, requiring filing of a notice of appeal within a thirty day period. The AEC regulations governing disputes procedures permitted appeals within sixty days of the final decision. The Court held that the regulation had the "force and effect" of law and was binding on the agency and contractor (id. at 249-50, 346 F. 2d at 593). The Court therefore found the appeal timely as it was filed within sixty days after the final decision.

3 One example of this is Hartford Accident and Indemnity Co. v. United States (1955) 130 Ct. Cl. 490, 127 F. Supp. 565. (The Hartford decision involved procurement regulations prescribing a standard form of delay clause. In lieu thereof, a special liquidated damages clause was inserted by the contracting officer. The Court held that the regulations served merely as an internal guide and were not made for the benefit of the contractor. As they were promulgated for the sole benefit of the government, the contractor could not complain if they were not followed.) That case is similar to the Supreme Court decision in United States v. New York & Porto Rico Steamship Company (1915) 239 U.S. 88, which held that the government's violation of procurement regulations in failing to reduce the contract to writing made the contract merely voidable at the government's election, not void, for the government may waive forms designed for its protection (id. at 89). See also National Electronics Laboratories, Inc. v. United States (1960) 148 Ct. Cl. 308, 180 F. Supp. 337; Centex Construction Co. v. United States (1963) 162 Ct. Cl. 211.
If, however, because of a different government procurement set-up in the United States, or for some other reason, the American "whose benefit" theory is not applied to the Australian Finance Regulations, the same result can be achieved by accepting what Professor Enid Campbell, the leading Australian Constitutional expert on government contracts, has stated in one of her Research Papers submitted to the Royal Commission on Australian Government Administration 1974-76. 1 The author states that the legal effect of the regulations on the validity of contracts should be determined according to whether the facts disclosing compliance or non-compliance with the regulations were readily ascertainable to the contractor/s or not. The author points out that regulations dealing with preparation of written requisitions (reg. 46) or certification by an Authorizing Officer about the availability of funds (reg. 47) or issuance of Purchase Orders (reg. 52A)2 "relate to the performance of duties by public officers" and "it is not unlikely that a court would characterise

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2 Regulation 52 is not wholly procedural in effect. See at 105 supra.
[such] procedural provisions ... as directory rather than mandatory in effect". The reason being that "[i]ndividuals who are negotiating for the rendering of supplies to the Commonwealth have no control over those [government] officers, nor could they reasonably be expected to make inquiries to determine whether the procedural requirements had been fulfilled". She adds that if the requirements of the above-stated regulations were held mandatory, it would not "advance any important public purpose", but instead "could work inconvenience and injustice to contractors".

Professor Campbell, however, puts regulations 51 and 52 in a different category (as we have also done above for reg. 52 under the "whose benefit" theory). These regulations, according to her, not only "establish important and fundamental principles concerning the negotiation of contracts", but also in such cases "the facts disclosing compliance or non-compliance are more readily ascertainable".

Because of the general dearth of case-law on government contracts in Australia, the United Kingdom and India, it is quite difficult to predict the judicial approach in these

1 Id. at 18.
2 Ibid.
3 Ibid.
4 Ibid.
5 The present author has made a collection of cases on government contracts which have been decided by the courts in India between 1872-1974. See Ponnuswami and Puri, Cases & Materials on Contracts (Including Government Contracts) (Delhi 1974) ch.2.
countries if in fact a case did arise on the binding force of regulations dealing with procurement.\(^1\) Reference may, however, be made to N.P. Singh v. Forest Officer, Manipur\(^2\) decided by an Indian court in 1962 in which the petitioner sought a writ of mandamus directing the government to accept his tender and declaring the cancellation of the contract awarded to another party. The facts, in brief, were: In response to an invitation for tenders for extraction and for supply of timber in round and square logs from the government forests, the petitioner's tender was the lowest. But the government found that most of the tenderers did not quote the names of the species of timbers correctly and that the items for which the tenderers quoted rates varied from one to another and were not comparable. Thus a fresh tender notice was issued. In the re-tender the petitioner's average rates for square logs were lowest but were somewhat higher for round logs. The government accepted the lowest rate quoted by another contractor for round logs and stated that it did no longer require the square logs. Hence the writ application by the petitioner.

The petitioner argued, \textit{inter alia}, that the government's action in cancellation of the first tender notice amounted to a breach of Rule 19 (vi) of the General Financial Rules of the

\(^1\)In contrast to the paucity of decisions in these countries, a substantial body of case law has been generated by government contract matters in the United States.

Central Government for contracts.\footnote{The same Rule is now to be found in Clause (1) of Rule 15. See \textit{Compilation of the General Financial Rules} (Revised and Enlarged, 1963), as amended.} Rule 19 (vi) stated that whenever practicable and advantageous, contracts should be placed only after tenders have been openly invited and in cases, where the lowest tender was not accepted, reasons should be recorded. The petitioner further argued that clause 5 of the tender notice by which the government reserved the right to accept any tender without assigning any reason therefor was in conflict with the above-stated Financial Rule and that the said clause was invalid.

The Court held that since the government had in fact accepted the lowest tender for the round logs given by another contractor, the question whether Rule 19 (vi) was followed or whether clause 5 of the tender was in conflict with Rule 19 (vi) did not arise. But the court's following observation, though obiter, gives some idea of what it would have held had the facts been different:

... Rule 19 (vi) has provided that where the lowest tender is not accepted, the reasons should be recorded. The [government] would certainly have to record its reasons in the light of Rule 19 (vi) in cases where they do not accept the lowest tender. If without giving valid reasons, they fail to accept the lowest tender, and accept some other tender, it will be liable to scrutiny by the court in a petition like the present.\footnote{Ponnumswami \& Puri, \textit{op.cit.} at 61.}

It further stated:

Such recording of the reasons is intended to prevent arbitrary acceptance of a tender and to make it available for the purpose of scrutiny by the
Controlling Authority and by courts when the matter comes before court either in a writ application or in a suit .... Clause 5 cannot be used for arbitrary action, in violation of Rule 19 (vi) of the Financial Rules.

It will be pertinent here to refer to a matter which arose under reg. 52 (Finance Regulations) a few years back and received considerable attention of the Australian Parliament. That matter related to the purchase of six DC3 aircraft from Jetair Australia Limited by the Commonwealth Government in early 1971. The government was criticised, inter alia, on the ground that it had not complied with reg. 52 (requiring public tenders) before entering into the Jetair Contract. The government acknowledged that there was a breach of reg. 52 and the "normal purchasing procedures" had not been followed but argued that the "original irregularity" was later "cleared up" and thus it (i.e. the irregularity) did not continue to the point of impropriety. It is important to note that at no point during the debate on this controversial contract did the government suggest that the requirements of reg. 52 were merely procedural and directory rather than mandatory in effect. On the other hand, the whole episode

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1 Ibid.
4 Id. pp.2876-77, 2878, 2890. See also C.P.D. (H. of R.) 28 Sep.1972, pp. 2100-01 (Prime Minister’s reply to a question).
seems to suggest, as rightly pointed out by Professor Campbell,¹ that reg. 52 is considered in government circles as going to the formation of contracts with the Commonwealth.²

In the light of the American "whose benefit" theory, the Australian "Jetair Contract" parliamentary debate and the dictum in the above Indian case, it is submitted that some of the regulations made under the Australian Audit Act may be said to have the force and effect of law and be binding on both the government and the contractor alike if they appear to be intended to define and state the rights of the contractors. Regulation 52(1) is one such example for it appears intended to give a right to the contractors to participate in government business and require the government officials to publicly invite tenders, unless the case falls under specified exceptions. However, in those cases where regulations have no significant effect on private rights and obligations, but are merely internal guidelines promulgated solely for the benefit of the government, the contractor cannot complain that the regulations were not complied with and neither party is bound by them. But, if a regulation directly and

¹"Australian Government Contracts", _op.cit._ at 20.
²See C.P.D. (Senate) 27 Oct. 1972, pp. 2129-31, where an opposition Senator (Senator Cavanagh) stated that if the value of a Commonwealth contract was more than $1,000 (now $5,000) and it was not desired to advertise or call tenders, the Secretary "could not willy-nilly issue a certificate [of inexpediency] for the purchase of goods. The terms under which the certificate can be issued are limited to 'having regard to the nature of the supplies and to the established practice in a profession, business, trade or industry connected with the supply of supplies of that kind'", _id._ p. 2130.
reasonably implements a basic and specific procurement policy or has significant effect on private rights and obligations of the contractor, it will be binding upon both the government and contractors, and must be included in or applied to the contract, either actually or by operation of law, if the contract is to be valid. The government cannot be estopped from denying the invalidity or lack of authority of procurement actions taken contrary to such regulations, nor can they be waived or avoided by the government when detrimental to its pecuniary interests.

In summary, it is submitted that no broad generalisations can be made regarding the binding legal effect of Finance Regulations promulgated by the government. Each particular provision must be individually examined before its binding effect can be determined. The examination of a given regulation to determine its force and effect must extend well beyond the broad underlying statutory authority, and must include the basic policy of the regulation itself, its history, the intent of the drafters, and most importantly, its impact and effect on substantive and procedural rights of contractors. Looking at the Finance Regulations in Australia, their purpose, history, scope and impact suggests that they are, what may be termed for convenience, "non-legislative" regulations. The Christian doctrine will not apply to them but these regulations must be examined under the so-called "whose benefit" rule. If "non-legislative" regulations are merely for the government's own use and benefit - occasionally described as "internal" or "housekeeping" regulations - they can be waived at the government's option and the contractors cannot rely on
them or be bound by them. On the other hand, if such a
regulation is not merely for the benefit of the government, it
cannot be waived and is binding upon both parties with the full
force and effect of law. This approach is a two-way street.
It can work to the government's benefit, or to its detriment.

5. The Concept of Unconscionability

Some of the standard terms are so stringent, one-sided,
harsh, unreasonable and basically inconsistent with contract
theory that no contractor, given a choice, in his senses, and
not under any delusion, would agree to their insertion in the
contract. To the extent that many of these clauses are required
to be inserted into subcontracts, these standard terms also
affect the interests of those who are technically not even in
privity with the government. But one-sided and oppressive
standard terms are not confined to government contracts alone.
Although most of the above-stated standard terms have no
equivalent in private commercial dealings, numerous other terms
are often inserted (without dickering, of course) by the superior
party in the commercial contracts. Such contracts, usually
known as standardised form contracts, pad contracts, contracts
of adhesion or contracts with fine print, present the ordinary
consumer with Hobson's choice. The party with superior

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1 The writer is indebted to Professor Summers of Cornell
University Law School for his valuable suggestions on this
section of the chapter.

2 See, e.g. Articles 10(c) and 23(c) of U.S. Standard Forms 32
and 23-A respectively. In the U.K. see e.g. SCs 48(5), 51 and
56(6) of Form GC/Stores/1 and SC 44(6) of Form GC/Works/1.
bargaining power has the advantage of unilaterally setting most of the terms incidental to the weaker party's remedies for dissatisfaction. In a few areas, such as insurance, monopolies and restrictive trade practices, abuse of the standardised contract practice became so flagrant that legislative action was taken to protect the adhering party. But in most of the day-to-day sales transactions, the courts, saddled with a body of well-defined contract law which holds a party bound by his signature, are caught in the dilemma of either enforcing the harsh contract or incurring the accusation that they are violating "freedom of contract".1 Because of these countervailing forces, no common pattern of judicial treatment can be discerned. However, in the United States, the Uniform Commercial Code has since 1952 provided the first legislative aid to the problem of adhesion contracts in commercial dealing by section 2-302 dealing with Unconscionable

1The classical theory of contract is that "unlimited freedom of making promises was a natural right". Pound, "Liberty of Contract" (1909) 18 Yale L.J. 454, 456. Compare Sir George Jessel's famous statement in Printing and Numerical Registering Co v. Sampson (1875) L.R. 19 Eq. 462, 465:

[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice. Therefore, you have this paramount public policy to consider - that you are not lightly to interfere with this freedom of contract.

But see Kessler, "Contracts of Adhesion - Some Thoughts About Freedom of Contract" (1943) 43 Colum. L. Rev. 629, 642, where the argument is advanced that "freedom of contract must mean different things for different types of contracts. Its meaning must change ... with the degree of monopoly enjoyed by the author of the standardized contract".
Contract or Clause. The main thrust of the following discussion is to find out whether the doctrine of unconscionability should be adopted in Australian government procurement. To do so it would be helpful to discuss first the development of the concept of unconscionability (i) under the American Uniform Commercial Code and (ii) under the Common law.

(i) Unconscionability under the American Uniform Commercial Code

Section 2-302 of the Uniform Commercial Code represents the second statutory embodiment in a common law jurisdiction of the concept of unconscionability. It provides that a court may

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1 The section of unconscionability has been the subject of much discussion. In his article "Unconscionability and the Code - The Emperor's New Clause" (1967) 115 Univ. of Pa. L. Rev. 485, 486 n.3, Professor Leff notes that there are in excess of 130 discussions of §2-302 in various legal periodicals and study. The most leading and recent literature on "Unconscionability" is cited below: Murray, "Unconscionability: Unconscionability" (1970) 31 Univ. of Ptt. L. Rev. 1; Braucher, "The Unconscionable Contract or Term" (1970) 31 Univ. of Ptt. L. Rev. 337; Leff, "Unconscionability and the Crown - Consumers and the Common Law Tradition" (1970) 31 Univ. of Ptt. L. Rev. 349; Speidel, "Unconscionability, Assent and Consumer Protection" (1970) 31 Univ. of Ptt. L. Rev. 359; Ellinghaus, "In Defence of Unconscionability" (1969) 78 Yale L.J. 757; Spongle, "Analyzing Unconscionability Problems" (1969) 117 Univ. of Pa. L. Rev. 931; Shulkin, "Unconscionability - The Code, the Court and the Consumer". (1968) 9 B.C. Ind. & Comm. L. Rev. 367; Gusman, "Article 2 of the U.C.C. and Government Procurement: Selected Areas of Discussion" (1968) 9 B.C. Ind. & Comm. L. Rev. 1; Waddams, "Unconscionability in Contracts" (1976) 39 Modern L. Rev. 369. For a detailed recent study, see Angelo & Ellinger, "Unconscionable Contracts - A Comparative Study" 1-50 Unpublished manuscript contributed to the Canberra Law Workshop II (1977) [hereinafter cited as Angelo and Ellinger].

2 The first embodiment of unconscionability was New Zealand Hire Purchase Agreements Act 1939, section 8. The term "Unconscionable is defined in Webster's Third New International Dictionary (Unabr. ed. 1961) as "not guided or controlled by conscience", "excessive", "exhorbitant", "lying outside the limits of what is reasonable or acceptable", "shockingly unfair, harsh or unjust".
refuse to enforce a contract, or any clause thereof, which it finds to have been unconscionable at the time it was made. ¹

This section gives the courts power to police contracts and to refuse to enforce them in whole or in part because the contract, or part of it, as a matter of law, is unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determination that the clause is contrary to public policy or to the dominant purpose of the contract. Indeed, one of the avowed purposes of the section is to provide courts with a means of achieving the same results in such cases without having to resort to such manipulations, which often distort the growth of contract concepts. ² It is important to note that the section enables the courts to void particular terms without declaring the whole contract unconscionable, if circumstances so warrant. ³

¹ Uniform Commercial Code §2-302. The full text of the section, as amended to 1966, reads:

(1) If the Court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.


³ Uniform Commercial Code §2-302(1). See also Angelo & Ellinger, op.cit. at 36 and 44, where the authors distinguish this characteristic of §2-302 from para. 138 of BGB (the German Civil Code).
"The basic test is whether, in the light of the general commercial background and the commercial needs of a particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." The Official Comment states that the section is intended to prevent "oppression and unfair surprise", two rather common abuses of bargaining power by the stronger party to a contract.

An oppressive contract is one in which party A forces party B to accept burdensome terms, not justified by commercial necessities, as the cost of obtaining the contract's benefits. B accepts the oppressive terms, although aware of the consequences, because his bargaining power is such that he must do business on A's terms or not at all. Oppression may take the form of plain economic duress, damage clauses which are really penalties and may serve to create an in terrorem effect and thereby attempt to bring a potentially breaching party into line, or total one-sidedness or want of reciprocity. The contract generally provides for the rights of one party in specified situations but fails to define the rights of the other party in these situations or accord the other party similar rights - a situation very commonly to be found also in the standard terms of government contracts. The classic illustration of an unconscionable contract is Campbell Soup Co. v. Wentz. Campbell Soup Co. sought specific performance of a written contract made

1 Uniform Commercial Code §2-302, Comment 1.
2 Davenport, "Unconscionability and the Uniform Commercial Code" (1967-68) 22 Univ. of Miami L. Rev. 121, 131.
3 (1948) 172 F. 2d 80. This case is cited in the Official Comment to §2-302 also.
in June 1947, with farmer grower (Wentz) for the sale of all chantenay red-cored carrots to be grown on the farm of the sellers during the 1947 season. The contract was the standard type used by Campbell in dealing with farmers; it contained numerous fine-print clauses favourable to the company such as, among others, that the carrots were to have their stalks cut off and be in clean sanitary bags or other containers approved by Campbell; the company had the right to refuse carrots in excess of 12 tons to the acre; grower not to sell carrots to any other person (carrots rejected by Campbell were excepted from this requirement), grower to permit no one else to grow carrots on his land; grower to pay liquidated damages of $50 per acre for any breach (while no damages were stipulated in the event of a breach by Campbell). Another term in the contract gave Campbell the right to reject any carrots which it was unable to handle and use either because of any labour dispute or because of any circumstance beyond the control of Campbell. Under this clause, if the demand for its products (cans of soup) should decrease and production consequently fall off, Campbell could refuse delivery of the carrots and force the farmer into an unfavourable market. The farmer, however, had no protection in the event of a decline in the market, although Campbell was covered if the market price rose.

The farmer sellers harvested approximately 100 tons of carrots from their farm but declined delivery in January 1948, at a time when the market price was triple the contract price.
and chantenay red-cored carrots were virtually unobtainable. The district court denied relief on the grounds that chantenay red-cored carrots, although scarce, were not unique - an indirect means sometimes employed by the courts of avoiding enforcement of patently unreasonable contracts. The appellate court, however, disagreed with this ground and said that if this were all that was involved, specific performance was indeed appropriate. But still the court of appeals affirmed the judgment delivered by the lower court. The reason for affirmance rather than reversal was the court's view that the agreement was "too hard a bargain and too one-sided". The contract was found to be "drawn by skilful draftsmen with the buyer's interest in mind" and consequently "unconscionable". The provision which the court found the "hardest" was one excusing Campbell from accepting carrots under certain circumstances, but not permitting the growers to sell them elsewhere without the consent of Campbell. The court thus based its affirmance on the unconscionability of the contract.

1(1948) 172 F. 2d 80 at 82.

2Id. at 83. However, the criterion of unconscionability was overall imbalance, not objection to any single provision (id. at 84): "The plaintiff argues that the provisions of the contract are separable. We agree that they are, but do not think that decisions separating out certain provisions from illegal contracts are in point here. As already said, we do not suggest that this contract is illegal. All we say is that the sum total of its provisions drives too hard a bargain for a court of conscience to assist."

3See also Denkin v. Sterner (1956) 10 Pa.D. & C. 2d 203, where again the court ruled against the drafting party because the contract was one-sided. The court remarked: "Why anyone would sign such a biased and one-sided agreement is difficult to understand". (at 205).
Unfair surprise is found in various situations e.g., assent obtained by reason of ignorance or carelessness of one party known to the other,\(^1\) assent obtained by signature to forms in very fine print or otherwise difficult to read or understand or their being deceptively arranged,\(^2\) contracting out of dominant purpose of contract,\(^3\) or contractual limitations of remedies with respect to new consumer goods.\(^4\) Unfair surprise is most easily illustrated by the fine print contract\(^5\) - which is seldom read or understood by the party to whom the contract is offered. When the party learns, subsequent to his agreeing to the contract, that the fine print contains a provision which he had not known, nor could reasonably have known and understood the relevant terms, there is unfair surprise within the meaning of the Comment to section 2-302.


\(^5\)It is, however, wrong to conclude that the use of a form contract is a necessary ingredient of an unconscionable bargain.
The application of section 2-302 is mainly (but by no means wholly) limited to those contracts whose unfairness arises from unequal bargaining power between the parties.\(^1\) It has been suggested that the section is not intended to apply to all contracts which are "unfair", but only to those contracts in which unfairness can be said to have resulted from inequality of bargaining power between the parties.\(^2\) But there can be cases, it may be submitted, where though unequal bargaining power may not be present, yet unfair surprise may occur. Unfair surprise may, for example, take place when one party takes advantage of the other's inadvertence, ignorance or poor judgment and these can not be considered as cases of oppression or of unequal bargaining power.

There is, however, no doubt that for a party alleging oppression, it is necessary to prove that the other party took unfair contractual advantages because of its (the latter's) superior bargaining power. That inequality of bargaining power

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\(^1\) It may also be mentioned here that although article 2 of the Uniform Commercial Code concerns only sales transactions, the courts have invoked section 2-302 in areas other than sales, such as guarantees and leases of chattels, see Blount v. Westinghouse Credit Corp. (1968) 432 S.W. 2d 549 and Electronics Corp. of America v. Lear Jet Corp. (1967) 286 N.Y.S. 2d 711. But see Bankers Trust Co. v. Walker (1975) 371 N.Y.S. 2d 198.

is a prerequisite to a finding of oppression and hence unconscionability may be seen by an analysis of the relation between section 2-302 and the doctrine of freedom of contract. The freedom of contract doctrine rests on the assumption that parties to a contract are the best judges of the value to themselves of the reciprocal obligations in the contract. This assumption is realistic only so long as the contract represents real bargaining between parties with freedom of choice and consequent ability to negotiate in a meaningful sense. But when one party, either because of lack of economic power or inability to understand what is contained in the contract, does not have real bargaining power, the contract's conscionability becomes a matter of grace with the stronger party, rather than a matter of negotiation. In this case, the assumption that the parties have really agreed that the reciprocal obligations are adequate is no longer tenable. It is at this point that the rationale of section 2-302 becomes pertinent. Thus the purpose of the section is not to subvert the doctrine of freedom of contract but to limit it to situations where the assumption as to reciprocity of benefit is realistic.\footnote{Note, (1960) 45 Iowa L. Rev. 843, 846.} Where the assumption is not realistic, where the contract is not the product of a true bargain, then is a court justified under section 2-302 in examining the terms of the contract to determine whether they are so unconscionable as to require denial of enforcement.
In summary, it is submitted, for a bargain to be considered unconscionable, overall imbalance and weakness in the bargaining process are important factors. The types of terms which have not been enforced, because of unconscionability under section 2-302 are terms for unreasonably large liquidated damages, warranty disclaimers and remedy limitations. In the words of Professor Braucher:

\[G]\text{ross inequality of bargaining power, together with terms unreasonably favourable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, and hence did not in fact assent or appear to assent to the unfair terms.}\]

Thus for a contract term to be unconscionable, the term must be material and either unexpected, or expected but forced upon the party asserting its unconscionability.

\[1\text{Murray "Unconscionability: Unconscionability" (1970) 31 Univ. of Ptt. L. Rev. 1, 43 n.120 See generally, Kugler v. Romain (No.2) (1971) 279 A. 2d 640.}

\[2\text{Braucher, "The Unconscionable Contract or Term" (1970) 31 Univ. of Ptt. L. Rev. 337 at 341. The essence of the problem in Llewellyn's mind revolved around assent. He remarked: [T]he boilerplate is assented to en bloc, 'unsight, unseen', on the implicit assumption and the full extent that (1) it does not alter or impair the fair meaning of the dickered terms when read alone, and (2) that its terms are neither in the particular nor in the net manifestly unreasonable and unfair. Llewellyn, The Common Law Tradition: Deciding Appeals (1960) 370; see also Murray, op. cit. at 34-43.} \]
(ii) Unconscionability under the Common Law

Professor Waddams in his recent article\(^2\) has argued that the belief that "the common law of contract admits no relief from contractual obligations on grounds of unfairness, or inequality of exchange" is wrong and unjustified in view of the many historical antecedents to the contrary. According to him, even in the heyday of the doctrine of freedom of contract, "when the judges, by their words, refused to countenance any breach in the notion of sanctity of contracts, relief was, in practice, frequently afforded. For no civilised system of law can accept the implications of absolute sanctity of contractual obligations".\(^3\) The development of contractual principles has always been effected by an emphasis on one or other of the two competing sets of values viz. freedom of contract (which has promised stability, certainty and predictability) and prevention of exploitation and oppression by one of the contracting parties (which has promised the protection of the ignorant, unwary and the thoughtless). In the past, the values of freedom of contract have been emphasised over all others, but now it seems that the tide is slowly turning and the opposing values have started receiving more attention.

Waddams strongly recommends an open recognition of a principle of unconscionability because, according to him, failure to recognise a general principle of unconscionability has resulted not only in

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\(^1\) For a discussion of unconscionability in French and German law, see Angelo and Ellinger, op.cit. at 17-34. See also, Dawson, "Unconscionable Coercion - the German Version" (1976) 89 Harv. L. Rev. 1041.


\(^3\) Id. at 370.
the enforcement of agreements that ought not to have been enforced, but in the striking down of agreements that ought to have been upheld.¹

The notion of unconscionability, although that word was not then used to describe it, may be traced in the English common law at least as early as 1663. In James v. Morgan² (often referred to as the Horseshoe case), the defendant agreed to purchase a horse from the plaintiff at a price calculated at a barley corn a nail in the horse's shoes, doubling it with each nail. There were 32 nails in the horse's shoes, and this established the price at 500 quarters (4,000 bushels) of barley, a patently exhorbitant price of £100.³ In an action of assumpsit by the plaintiff, Chief Justice Hyde directed the jury to give the value of the horse, £8, in damages.⁴ In his renowned opinion in Earl of Chesterfield v. Jansseen,⁵ Lord Chancellor Hardwicke remarked (what is frequently quoted as the traditional definition of unconscionability)⁶ that courts of equity did

¹Id. at 371, 375.
²(1663) 1 Lev. III, 83 E.R. 323. See also Talbot v. Breddil (1683) 1 Vern. 183 and 394.
³The total number of barley-corns came to 4,294,967,295 (approx. 4.3 billion).
⁴See also Thornborough v. Whiteacre (1705) 92 E.R. 270 (where the agreement was to deliver two grains of rye on a certain Monday and to double it successively every Monday thereafter for a year - which exceeded the amount of rye in the entire world) and Jennings v. Ward (1705) 2 Vern. 520.
⁵(1750) 2 Ves. Sen. 125, 28 E.R. 82 (where an expectant heir entered into a bond to pay a creditor £20,000 unless he paid £10,000 by a certain date).
⁶Braucher, "The Unconscionable Contract or Term" (1970) 31 Univ. of Ptt. L. Rev. 337, 339.
relieve against unconscionable bargains:

It may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other; which are inequitable and unconscientious bargains; and of such even the common law has taken notice; for which it would not look a little ludicrous, might be cited 1 Lev. III James v. Morgan.¹

And in 1762 in Vernon v. Bethell, the court said:

[T]here is a great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them.²

The recent pronouncements of the English judges in three cases are a clear indication that there is gradual judicial recognition of the principle of unconscionability as a ground to set aside contracts (or some of their terms) in those cases where one party has used his superior bargaining power to obtain a harsh and oppressive contract.³ Thus in A. Schroeder Music Publishing Co. Ltd. v. Macaulay⁴ the House of Lords held a contract unenforceable and void which had been signed by a song-writer on the appellants' (who were publishers of music) standard form on the ground that it was one-sided and had been entered into between parties of

¹(1750) 2 Ves. Sen. at 155, 28 E.R. at 100.
²(1762) 2 Eden 110, 113. The concept of unconscionability has been applied at common law in numerous later cases. See, for example, Floyer v. Edwards (K.B. 1774) Cowp. 112; Jestons v. Brooke (K.B. 1778) Cowp. 793. In the U.S., see Hume v. United States (1889) 132 U.S. 406; Scott v. United States (1870) 79 U.S. (12 Wall.) 443.
unequal bargaining power. One of the clauses, which entitled the appellants to terminate the agreement, but gave no such right to the song-writer, was considered as particularly unreasonable and one-sided. In *Lloyds Bank Ltd. v. Bundy*, a case concerned with the bank's right to sell the defendant's farm to enforce a guarantee given by defendant for his son's business, Lord Denning MR observed:

... English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.

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1The elaborate agreement under which the appellants engaged the exclusive services of the song-writer was to remain in force for five years, which in the event of the royalties for the song-writer in the first five years exceeding £5,000, was to be extended to ten years. The Court observed: "£5,000 in five years appears to represent a very modest success, and so if the respondent's work became well known and popular he would be tied by the agreements for ten years" (id. at 1312). Lord Diplock, delivering a separate but concurring judgment, observed: "It is, in my view, salutary to acknowledge that in refusing to enforce provisions of a contract whereby one party agrees for the benefit of the other party to exploit or to refrain from exploiting his own earning power, the public policy which the court is implementing is ... the protection of those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable". (id. at 1315).

2See id. at 1311, 1313 and 1314 (Lord Reid).


4Id. at 509. The Court of Appeal, allowing the appeal by the defendant, held that there was such a relationship of confidentiality between the bank and the defendant that the court could intervene to prevent the relationship being abused; that, since the defendant's signing of the guarantee and legal charge involved a conflict of interests which could have resulted in his losing his sole remaining asset to the bank and being left penniless in his old age. The court therefore set aside the guarantee and charge. (see at 509, 515).
Again in Clifford Davis Management Ltd. v. W.E.A. Records Ltd. the Court of Appeal held the agreement unenforceable because of inequality of bargaining power between the parties. Lord Denning MR reiterated the principle that in cases where parties had not met on equal terms, the Court will not allow, as a matter of common fairness, the strong party 'to push the weak to the wall'. From these cases, it appears that the common law will relieve a party of the burden of a one-sided, harsh or oppressive contract or terms that are found to be unfairly onerous, if the other party has used his superior bargaining power to obtain such a contract or terms.

6. Application of Unconscionability Doctrine to Government Contracts

The standard terms of government contracts like the government's unilateral right to terminate, to constrict, to

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1. [1975] 1 W.L.R. 61 (C.A.). The facts were: two songwriters signed, on cyclostyled forms, publishing agreements assigning to the plaintiffs (music publishers) the copyright throughout the world in all their compositions for a period of five years which could be extended to ten years at plaintiffs' option. The agreements were very long and full of legal terms and phrases and drawn up by lawyers of the plaintiffs. The court found that the terms of the contract were manifestly unfair, that the consideration for the transfer of copyright was grossly inadequate, that the bargaining power of the songwriters was gravely impaired vis-à-vis the manager and that, if the plaintiffs wished to exact such onerous terms or to drive so unconscionable a bargain, they ought to have seen that the songwriters had independent legal advice. For these reasons the court held that there was such inequality of bargaining power that the agreement should not be enforced and the contract set aside.

2. Id. at 65.

3. For a similar view, see Angelo and Ellinger, op. cit. at 14-16. For a detailed discussion of the case-law upon this subject and the circumstances in which equity will relieve against unconscionable bargains in Australia, see Blomley v. Ryan (1956) 99 C.L.R. 362. In that case, McTiernan and Fullagar JJ (Kitto J dissenting), affirmed the judgment of the trial judge (Taylor J), according to which not only the specific performance of a contract for the sale and purchase of a grazing property had been refused, but the court had ordered instead that the said contract be set aside upon the ground that it was an unconscionable bargain which a court of equity would not enforce. See also Harrison v. National Bank (1928) 23 Tas. L. Rep. 1.
alter, vary or change the quality, quantity or character of goods and services contracted for, default, delays and damages provisions and many others are patently one-sided and lack reciprocity. Such standard terms evidently cause a gross inequality in the rights of the parties - providing generally for the rights of one party in specified situations but failing to define the rights of the other party in those situations or to accord the other party similar rights. Another factor which worsens the situation is the absence of any real negotiations, a factor which sets government contracts apart from other types of agreements. Moreover, even when there is negotiation, undoubtedly the bargaining power of the government far outweighs that of the contractor. Shouldn't, therefore, the concept of unconscionability be applied to government contracts?

The concept of unconscionability has not so far been applied to government contracts in the United States. It has so far primarily protected consumers against one-sided provisions in standardised agreements. But there is no reason that its application should be so limited in the United States or elsewhere.¹

¹Gusman, "Article 2 of the U.C.C. and Government Procurement: Selected areas of discussion" (1967) 9 B.C. Ind. & Comm. L. Rev. 1. The United States Commission on Government Procurement in its Report in 1972 made the following observation:

In view of the fact that the Uniform Commercial Code has been adopted in all the States as the basis for governing private business transactions, Federal tribunals, absent a settled Federal rule, may look to it for guidance as to the rule to be applied to Government contracts.

Public confidence in the fairness of government-contract policies is a very important factor and it has wide-ranging consequences with respect to the society and economy. This factor may require results which would not normally occur in a commercial contract case. A policy overlooking this factor will moreover be contrary to the modern governments' social policy of hyperhypocynophilia.

That the adoption of the concept of unconscionability is as desirable in the government contract law as it is in the common law of contract, perhaps more so, is obvious from the Australian High Court judgment in South Australian Railways Commissioner v. Egan, wherein Menzies J stated that the present case was:

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1 [1973] 47 A.L.J.R. 140. The facts were: Egan, alleging breach of contract by the Railways Commissioner, brought an action for damages for breach, claim for moneys due on a quantum meruit in respect of work done and materials supplied, and for the return of his plant and goods. The contract was for the construction of certain bridges and culverts on the Mannahill-Methuen Railway line. The Commission alleged that the contract had been validly determined under cl. 30 of the standard form of contract, that cl. 35 prevented any action for money being brought without first obtaining a certificate etc. from the Chief Engineer and that Egan had not obtained any such certificate which was a condition precedent to any liability. Clause 30 (determination of disputes) gave power, in the cases to which it related, to the Commissioner to determine a contract so far as it related to work remaining to be done, whereupon moneys already paid were to be taken as full payment for work done and provision was made for forfeiture of moneys which may be due to or unpaid to the contractor and implements and materials of the contractor. By cl. 32 (settlement of disputes), doubts, disputes and differences concerning matters specified in the clause were required to be referred to and settled and decided by the Chief Engineer for Railways, whose decision thereon was to be final and conclusive, with a proviso for appeal to an arbitrator in relation to a decision respecting measurement of work and prices to be paid. Clause 35 (requirement of a certificate) provided that no suit or action shall be brought or maintained by the contractor or Commissioner against the other of them to recover any money for, or in respect of, or arising out of this contract, unless and until the contractor or the Commissioner shall have obtained a certificate, order or award from the Chief Engineer for Railways for the amount sued for.
concerned with perhaps the most wordy, obscure and oppressive contract that I have come across. It is the standard form of contract which the South Australian Railways Commissioner requires those executing railways works for him to sign. It was probably compiled a long time ago mainly by putting together, with some incongruity, provisions from other contracts. In the compilation, I am sure that not one oppressive provision which could be found was omitted. The contract is so outrageous that it is surprising that any contractor would undertake work for the Railways Commissioner upon its terms.1

Gibbs J observed that "provisions such as those contained in the contract under consideration find little favour in modern eyes...."2 But despite all those obnoxious terms in the contract, the High Court regarded the contract as enforceable, Menzies J advancing a classic "bootstraplifting" apologia:

The employment of such a contract tempts judges to go outside their function and attempt to relieve against the harshness of, rather than give effect to, what has been agreed by the parties. Courts search for justice but it is justice according to law; it is still true that hard cases tend to make bad law.3 and Gibbs J adding "... but we are required to give them their legal effect and are not to be deflected from that course because they appear unfair and one-sided".4

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1 Id. at 141.
2 Id. at 148.
3 Id. at 141.
4 Id. at 148. It was held in the Supreme Court of South Australia (Mitchell J) that cl. 32 was invalid and that cl. 35 shared its fate. The High Court set aside the judgment of the Supreme Court of South Australia and held that Egan was not entitled to maintain the action for want of a certificate under cl. 35. Menzies J held cl. 32 invalid because it ousted the jurisdiction of the courts, but he considered cl. 35 valid. Gibbs J avoided deciding the validity of cl. 30 (i.e. whether it imposed a penalty) but it appears that he had grave doubts about its validity (see id. at 145).
Another opportunity to adjudicate on the reasonableness of government's standard terms of contract came into the hands of the High Court of Australia in a recent case of Forestry Commission of New South Wales v. Stefanetto. The General Conditions of Contract provided, inter alia, under sub-cl. 43.3 that in case of a default by the Contractor:

The principal may take possession of and permit other persons to use any materials, Constructional Plant and other things on or about the site which are owned by the Contractor and as are requisite and necessary for the purposes of such contract or employment.

It further provided that:

The Contractor shall have no right to any compensation or allowance for any action taken by the Principal pursuant to this sub-clause, other than a right to require the Principal to maintain in good working order the Constructional Plant referred to in the preceding paragraph.

Stefanetto, who made default in his performance of the contract for the construction of a gravel road for $803,459 and whose extensive and very costly plant and equipment was taken over by the appellants, argued that sub-cl. 43.3 imposed a penalty upon him and was thus not enforceable. He claimed that the right of the appellant to take possession of his plant on the site, and in effect to use that plant for an indefinite period without payment and with no responsibility to amend fair wear


2 Save for minor changes in the wording of the clauses applicable to the contracts entered into by the Forestry Commission of New South Wales, the Conditions contain virtually the same clauses which are applicable to the Commonwealth's 'construction contracts' prescribed by Form W70 - General Conditions of Contract, Department of Construction, Commonwealth of Australia.
and tear\(^1\) constituted a harsh and unconscionable provision in the nature of a penalty. He argued that there were other provisions of the contract \textit{viz.}, security deposit of \$30,000 (sub-cl. 5.2), liquidated damages for delay in completion at \$1,000 per week (sub-cl. 35.5) and deduction of any money due from any other moneys payable (sub-cl. 41.5), which sufficiently secured the appellant against any breach of the contract by him and that the provisions of sub-cl. 43.3 were not validly directed towards that end. It was held by the Supreme Court of New South Wales (Needham J) that a contractual right to appropriate highly expensive equipment and materials belonging to another contracting party for an indefinite period, without payment and without liability to compensate, not only for damage but also for fair wear and tear, could not be anything but a penal provision aimed at ensuring that the contractor did not breach his contract. The High Court, however, by a majority (Mason J dissenting) reversed the Supreme Court on this point.\(^2\) Barwick CJ thought that sub-clause 43.3 was not punitive because the possession and use of the machinery and plant was a direct means of achieving the purpose of the contract, namely, the completion of the work.\(^3\)

\(^1\)See sub-cl. 43.3 (third paragraph).

\(^2\)The discussion regarding the appellant's right to use the constructional plant and machinery on the site which was the subject of hire purchase agreements or leasing agreements, is omitted here. It may, however, be noted that both the Supreme Court and the High Court held that the machinery and plant under hire purchase to Stefanetto did not come within the expression in sub-cl. 43.3 "which are owned by the Contractor".

Jacobs J seemed to agree with this view, although with due respect, it is submitted, that his judgment is not comprehensible.¹ Mason J (dissenting) held sub-cl. 43.3 as a penalty clause and thus void for the following two reasons: (1) the power to take possession was not confined to possession for the purpose of executing the contract work and the appellant could retain possession of the materials, plant and equipment without using them at all until completion of the contract work and recovery of all balances due from the contractor and (2) the clause specifically denied to the contractor any compensation or allowance for the use or deprivation of the materials, plant and equipment. The power conferred by the impugned term, according to the judge, might be exercised arbitrarily and capriciously so as to prejudice and penalise the contractor and the power was not one which was so confined as to enable the appellant to complete the works on a footing whereby the contractor received some credit or allowance for the use or deprivation of his property.² The two cases discussed above serve as an example to show that many of the contracts entered into between public authorities and private contractors contain standard terms grossly unfair to contractors.

In these circumstances, it is submitted that the extensive rights of the government under the standard terms may lead to

¹Id. at 428-29.
²Id. at 427.
raising of prices by contractors to provide for various contingencies, and work to the eventual disadvantage of the government and indeed of the taxpayer. In addition, a blanket immunisation of the superior bargaining power of the Government would result in placing far too much power in the hands of individual bureaucrats, for the strict interpretation of these standard terms would place the immense power of the government behind their every act. It is therefore suggested here that the adoption of a general principle of unconscionability in government contract law, would act as a deterrent to an abuse of authority and deter inequitable government action or inaction.

We have further to remember that contract is an important principle of order in free society. Not an end in itself, freedom of contract is a means towards self-expression. In a very real sense, it is both an instrument of change and an instrument of order. Of change, in the sense that through it individuals are able to find a meeting place of promise and obligation for the achievement of individual objectives. Of order, in the sense that such agreements are a matter of private legislation between parties for the prescribing of their conduct one to the other. They are not directed to act by custom, tradition, or the commands of the realm. They decide their relations as a matter of their own volition. It is, therefore, an institution of freedom, deeply rooted in the moral sentiments supportive of individualism and repugnant to collective authoritarianism. Emanating from this orientation is the principle
that it is not the function of government to draft and impose such standard terms which are one-sided and wanting in reciprocity in its contracts upon the contractor who is forced to accept them because of his unequal bargaining power and who has little chance to vary them to meet his own particular circumstances. The recognition of a general principle of unconscionability in the common law of contracts as also in government contract law would manifest a realisation that a contract is not a signature affixed to a long printed form but rather a mutual understanding reached through a process of bargaining. The concept of unconscionability would merely give the courts authority to strike or modify a contract where free choice was absent, or where a term of contract to which the parties had never agreed was invoked, or where a literal reading would extend the contract beyond all intention of the parties. The court would, of course, not determine a term to be unconscionable without first affording an opportunity for a hearing on the commercial setting and background of the term and trade and judge it against the standards existing

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1 It may be noted that major changes to the law of contract to protect consumers from harsh conditions and to entitle the courts to re-open and review any type of contract alleged to be harsh or unconscionable, were recommended to the New South Wales Government by Professor Peden, Professor of Law at Macquarie University in the Report on Harsh and Unconscionable Contracts (October 1976). See also The Sydney Morning Herald 22, 23 and 27 December 1976. It may further be mentioned that in their comparative study of unconscionability concept in England, France, Germany and the United States, Angelo and Ellinger, op. cit. at 41, 43, suggest that unconscionability rules be introduced into the legal systems of Australia and New Zealand.
at the time of contracting.¹ Such action would not violate a realistic interpretation of "freedom of contract". The presence of government's pre-printed standard terms or boilerplate clauses drawn by skilful draftsmen with the buyer's interest in mind, unequal bargaining power of the parties, unilateral right of termination, alteration, constriction, modification of the contract, stringent inspection clauses, penalties, liquidated damages and forfeiture of deposits clauses, prescription of method and manner of contract performance and various other controls, examination of books and records of the contractor and the utter disregard of the contractor's interest, absence of real negotiations and the lack of mutuality of obligations can be some of the criteria for refusing to enforce the contract that never was. Utilising these guides, the courts can enforce head-to-head contracts and void unconscionable terms.² Far from limiting contractual liberty or disrupting commercial affairs, the concept of unconscionability will contribute to the stability and freedom of contract.

¹It may be submitted here that the adoption of unconscionability rules into government contracts will in some exceptional circumstances provide a remedy to government too e.g. where the government is dealing with a monopoly supplier and finds itself in a poor bargaining position. It is understood from a reliable source that in some contracts, particularly defence, the government has little actual freedom of choice of negotiation of terms. It is surprising to note therefore, that Professor Peden precludes, inter alia, government departments from seeking relief against another party for harsh or unconscionable contracts (see the draft bill with the report - Contracts Review Act, cl.5, Peden Report, op.cit. at 16-17). For a criticism of this limitation, see Angelo and Ellinger, op.cit.46.

²Perhaps the simplest application of the policy against unconscionable contracts will be to deny specific performance where the contract as a whole was unconscionable when made. But where a term rather than the entire contract is unconscionable, the appropriate remedy will be ordinarily to deny effect to the unconscionable term. See Dowsett v. Reid(1912)15 C.L.R. 695.
1. General

Unlike English law, the French developed a concept of administrative contract that is entirely different from the ordinary civil contract. Whereas in England and Australia, contracts made by the administration or government are governed by the ordinary law of contract, in France the administration has the choice of doing business by ordinary private contract (contrat privé) or of concluding a contrat administratif with the supplier in which case the contract is governed by special rules of administrative law (droit administratif), administered by a separate hierarchy of courts, the administrative courts.  

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1In France judicial control of administrative acts is entrusted to a special corps of judges who sit in special courts. These courts form a two-tier hierarchy headed by the Conseil d'État (Council of State). In the lower tier are grouped the twenty-five Tribunaux Administratifs (formerly the interdepartmental Councils of Prefecture), acting as the administrative courts of first instance for their particular region (in the upper tier, the Conseil d'État sits as a Court of Appeal). In addition to these administrative courts of general jurisdiction, there are a number of 'administrative tribunals' of special jurisdiction. Although France possesses a separate system of administrative courts having a general jurisdiction (which are courts in the ordinary English sense), these should not be identified with English Administrative tribunals. France has
In France, therefore, many of the difficulties of the kind which have arisen in England were easily avoided. Indeed the administrative contract has developed principles specially suited to it. For as Professor Mitchell has pointed out, the existence of a separate system of administrative courts in France facilitated departures from the rules of the Code Civil, such as the doctrines of imprévision and fait du prince. The decisions taken in the administrative courts were decisions by persons aware of the needs and the failings of administrative bodies, thus leading to a much broader conception of liability of administrative bodies (including much greater readiness to allow indemnity for loss resulting from the administrative

(footnote 1 continued from p. 294) comparatively few administrative tribunals of the English type, that is, tribunals with a narrowly limited jurisdiction. In England, their number has been put at some 2,000; in France, only some 40 or so categories of such 'administrative tribunals' can be listed: see Brown and Garner, French Administrative Law (2nd ed. 1973) 27. For an account of the working of the remarkably successful institution of the Conseil d'État, see Hamson, "Le Conseil d'État statuant au Contentie" (1952) 68 L.Q.R. 60; Drago, "Some Recent Reforms of the French Conseil d'État" (1964) 13 Int'l & Comp. L.Q. 1282; Rendel, "How the Conseil d'État Supervises Local Authorities" [1966] Public Law 213; Weil, "The Strength and Weakness of French Administrative Law" [1965] Camb. L.J. 242; Le Conseil d'État-Livre Jubilaire [published in 1952 to commemorate the 150th anniversary of the Conseil d'État]; Charles E. Freedeman, The Conseil d'État in Modern France (New York 1968).


and legislative activities of the government) - all circumstances which have greatly contributed to the success of the administrative courts in gaining popular confidence and acceptance.

Moreover, the administrative courts have shown how impartially they can handle disputes between the administration and citizens as they have consistently sought to strike a just balance between the requirements of efficiency of the service public and the rights of the individuals. In some instances the individual has received possibly better treatment than in civil law jurisdiction, so much so that there have been complaints that some decisions unduly favour the individual.

To understand how French, unlike common law, came to evolve

1 See e.g. La Fleurette, Conseil d'État 14 January 1938, Sirey 1938 Vol. III p.25.

2 Péquignot suggests that the contrat administratif is based on the principle of le but de service public in his work entitled Théorie Générale du Contrat Administratif (Paris 1945) 66. See also the remarks of Blum in Cie Générale Francaise des Tramways, Conseil d'État 11 March 1910, Sirey 1911 Vol. III p.1, where he speaks of 'L'équivalence honnête entre ce qui est accordé au concessionnaire et ce qui est exigé de lui'.

3 For a recent decision which led the government to pass a law to nullify the judgment of Conseil d'État see the Canal Case, Conseil d'État 19 October 1962, discussed in detail in Bergsten, Community Law in the French Courts (1973) 47-48 [hereinafter cited as Bergsten]. See also Société du Gaz de Nice, Sirey 1920 Vol.III p.32 on the same point. See generally Notes by Mauriou to Compagnie Nouvelle du Gaz de Deville-les-Rouen, Conseil d'État 10 January 1902, Sirey 1902 Vol. III p.17, and to Compagnie du Gaz de Saint Etienne, Conseil d'État 26 December 1891, Sirey 1894 Vol. III p.1. For an illustration where an individual was better treated under administrative than civil law see Epoux Grandclément, Dalloz 1927 Vol. III p.41.

4 Under English and Australian law, there is a single system of courts and as a general rule it is the same law of contract which is applied to public authorities as to private individuals. See Mersey Docks and Harbour Board v. Gibbs (1866) L.R. 1 Eng. and Irish Appeal Cases 93 (H.L.).
a special system of administrative courts, together with a special kind of contract, the contrat administratif, we need to appreciate some aspects of French constitutional history. To trace the story, albeit very briefly, we may begin with the well-known fact that the course of French political history since the Revolution has been characterised by repeated shifts of power between the executive and the legislature.¹ The Constitution of the Fifth Republic, established in 1958, occupies a midway position between the Bonapartist and parliamentary traditions. Article 34 of the 1958 Constitution states that 'All statutes [lois] shall be passed by parliament', but it proceeds to give a closed list of the matters upon which parliament may legislate. Article 37 then provides, by way of complement, that all matters not listed in art. 34 shall fall exclusively within the regulatory power of the executive (by 'décrets').² Moreover, under art. 38, even in the domain reserved to parliament, the government may legislate by 'ordonnance' for a limited period. This distinction between the 'pouvoir réglementaire' of the government (executive) and the 'pouvoir législatif' of parliament is fundamental in French constitutional theory and is enforced in two ways.³ If parliament tries to pass a statute (loi) on a matter outside the ambit of art. 34,

¹ "[I]n almost every French Constitution since 1789 the legislative and executive branches of government have alternated in dominating the state": Bergsten, op. cit. at 21.

² Government measures of a legislative character are described as 'décrets' in French law.

³ For this distinction, see Nicholas, "Loi, Règlement and Judicial Review of the Fifth Republic" [1970] Public Law 251.
the government may refer the bill to the Constitutional Council to decide upon its constitutionality.\footnote{The Constitutional Council is an innovation of 1958 and is, inter alia, responsible for ensuring that parliament keeps within the restricted legislative domain prescribed for it by the Constitution.} On the other hand, a regulation (règlement) is subject to the jurisdiction of the Conseil d'État, which ensures that it neither trespasses upon the domain of parliament nor infringes the 'general principles of the law' (principes généraux du droit). Once a statute has been enacted and promulgated, the courts (whether civil or administrative) have no power to question its constitutionality. Thus, while resembling the United States in having a written constitution, France differs from that country and follows the British pattern in having no judicial review of the constitutionality of statutes.\footnote{"The theory of the separation of powers as exacerbated by Rousseau gave French democratic political theory a matrix into which judicial review could not fit": Cappelletti and Adams, "Judicial Review of Legislation: European Antecedents and Adaptations" (1966) 79 Harv. L. Rev. 1207, 1211.}

It is an outstanding characteristic of modern French administration that the higher fonctionnaires or officials enjoy a remarkable degree of executive discretion.\footnote{Brown and Garner, French Administrative Law (2nd ed. 1973) 10. Modern Capitalism (1965)94.} The administrator can be trusted because he always has the Conseil d'État breathing down his neck. As Shonfield has written, administrative discretion, which "is meat and drink to the French, is anathema to the British official."\footnote{5 Modern Capitalism (1965)94.} The French civil servants have always had a great deal of responsibility, and it is sometimes said in France that 'we are not governed, but administered'.\footnote{Freedeman, op. cit. at 3.} The career structure...
of the fonctionnaires (civil servants) has contributed to the same result; indeed the French civil service has been described as 'one of the main driving forces, if not the driving force in French life'. The Conseil d'État was a direct consequence of the Montesquieu theory of the separation of powers by which the revolutionaries of 1789 tried to break the power of the Parlements. Article 13 of the famous Law of 16-24 August 1790 which is still in force expressed the principle of the separation of powers, providing that

Judicial functions are distinct and ... separate from administrative functions. Judges in the civil courts may not ... concern themselves ... with the operation of the administration, nor shall they call administrators to account before them in respect of the exercise of their official functions.

And it is this which directly led to the creation of Conseil d'État by the Constitution of the Year VIII (1799), which has remained ever since the supreme administrative court in France.

In French law, while the principle of administrative liability is accepted in order to do justice and to annul any

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1 Ridley and Blondel, Public Administration in France (2nd ed. 1970) 54. For a detailed discussion of the French civil service, see Brown and Garner, op. cit. at 15-18.
2 For a detailed study of Conseil d'État, see Freedeman, op. cit.; for its early origins, the dual (legislative and administrative) role and growth, see Brown and Garner, op. cit. at 19 et seq. See also Bergsten, op. cit. at 21.
3 The term 'administrative liability' is adopted in preference to 'governmental' or 'state' liability since, as we shall see, the principle extends in France to all public authorities. For an account see Street, Governmental Liability (1953) 15-19.
unlawful administrative act, the rules governing this liability differ in important respects from those found in the *droit civil* and applied by the civil courts in suits by or against private individuals. An administrative contract does not imply a bilateral agreement between two equal parties which cannot be unilaterally modified or repudiated by either party during its stated tenure. Bergsten notices two factors which distinguish dealings with the administration. The first is that the administration acts not only as a party to the contract but also as the 'sovereign', in which capacity it can modify all contracts, public and private, by price and currency controls, moratoria on debt payments, and other such means; indeed an agreement not to exercise these sovereign powers would be automatically void. The second is that any alleged breach of contract by the administration is to be adjudicated in the administrative courts which can enable the administration to limit either the remedies to which it will be subjected or the matters which can be disputed before the courts.  

1 Bergsten, "The Administration of Economic and Social Programs in France by the Use of the Contractual Technique" (1975) 48 South Calif. L. Rev. 852, 857. See also the references made there to other authorities. In some respects the French *contrats administratifs* seem to come very close to plan-contracts in the Soviet Union. See Lücke, Review of Dietrich Loeber's book on Government Contracts, (1970) 3 Modern Law and Society (Section II) 157, 159.
in the case in Blanco\(^1\) where the Tribunal des Conflits stated that the liability which fell upon the state for damage caused to individuals by the act of public servants was not governed by the principles laid down in the Civil Code for relations between one individual and another. The liability of the state was neither general nor absolute, but it had its own special rules which varied according to the needs of the service and the necessity to reconcile the rights of the state with private rights.\(^2\)

2. **Characterisation of a Contrat Administratif\(^3\)**

A dual system of courts, whether the dichotomy be between common law courts and chancery courts or between administrative and civil courts inevitably leads to conflicts of jurisdiction. In France, such conflicts have assumed even greater significance than they did in England before the Judicature Acts of 1873 and

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\(^1\) Tribunal des Conflits 8 February 1873 61; *Les Grands Arrêts de la Jurisprudence Administrative* (5th ed.) Sirey 1969 5. This decision is the keystone of modern French administrative law. The facts were: Agnès Blanco, five years old, was injured on a public thoroughfare by a wagon belonging to the state and pushed by the employees of the state-owned tobacco factory in Bordeaux. The question arose to which court, civil or administrative, the claim should be brought. The Tribunal des Conflits held that the injury arose out of the activities of a 'service public' and for this reason the administrative court had jurisdiction.

\(^2\) *Blanco* was a case in tort, but it may be submitted that the underlying principle also applies to contract cases.

and 1875 because, as Brown and Garner put it, "the French approach is to segregate according to the nature of the factual issue rather than according to the nature of the relief sought".  
Therefore, there is in each case a preliminary question of characterisation of a government contract as either civil or administrative. For not every government contract is necessarily an administrative contract, subject to rules of administrative law, but it is only so if one party to it is an agent of the Administration, and the contract is made in the exercise of an administrative function. These criteria have been evolved both by the Tribunal des Conflits and in French legal writing (doctrine). More broadly, a contract is an administrative

2 For a discussion on this point see Street, Governmental Liability (1953) 83 et seq. See also Bergsten, op. cit. (1975) 48 South. Calif. L. Rev. 852, 896, and Waline, Droit Administratif (9th ed. 1963) 565-74.
3 The final arbiter for the determination of respective competence of the two orders of courts in France is the Tribunal des Conflits.
4 The distinction between administrative contracts and those of the civil law is well recognised by perhaps all except Duguit (see Duguit, Traité de Droit Constitutionnel (2nd ed.) Vol.IIIp.402). For the cases in which distinction is drawn see Société des Affréteurs Réunis, Conseil d'Etat 23 May 1924 and Société Générale d'Armement, Conseil d'Etat 23 December 1921. For a standard work where the distinction has been recognised, and the contrat administratif dealt with separately, see Péguiognot, Théorie Générale du Contrat Administratif (Paris 1945).
contract if the contractor is entrusted with the discharge of
a public service, or if it contains terms that are inappropriate
to the ordinary contractual relation between private individuals.¹

The characterisation of a government contract as belonging
to, respectively, public or private law was not a simple process,
however much it was important to establish clear tests by which an
administrative contract could be recognised.² Indeed even today
the relevant criteria are variously defined.³ Under earlier
criteria, a government contract was regarded as public if (i)
the state was a debtor (l'Etat débiteur) in a contract, in which
case the Conseil d'Etat denied the ordinary courts competence to
condemn the state to any money payment; (ii) a contract was made
as an act of public authority (acte de la puissance publique or
acte d'autorité), though here a distinction was drawn between
those acts which involved public authority and those which were
mere acts of management. The former were held to be outside the

¹ Turpin, Government Contracts (1972) 69.
² "The development of any general theory of administrative contracts
was for a long time impossible": Mitchell, op. cit. at 160. It
may be stated that the classification of contracts as administrative
and private was important not merely from the point of view of
jurisdiction, but also because the two types of contract differ
radically in their consequences. The rights of the administration
and of the contractor depend upon this classification.
³ For a
discussion of trends, see Langrod, op. cit.
at 328 et seq.
jurisdiction of the ordinary courts, the latter within it; and (iii) a contract formed part of public administration (question publique) as distinct from private administration; if the latter, the administration used the same process as the private citizen and came therefore within the scope of the ordinary courts, but disputes arising out of its question publique belonged to the administrative courts.

These early criteria, tentative and overlapping, in effect giving a choice of proceeding to the administration in its contracts under private or public law, were discarded later by two alternative theories. Firstly in 1873 in the case in Blanco a new principle was enumerated, that of 'public service' which Rolland defined as 'any activity of a public authority aimed at satisfying a public need'. This definition lays emphasis on two elements of public service which must be present: the activity of a public authority, and 'satisfying thereby of a public need', both of which elements have received extensive attention in the case-law. The principle of public service is more essential since from it derive the two essential features of administrative contracts, the necessity for continuity, and the necessity of continuous adaptability despite the terms of the contract. However, the doctrine of public service though

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1 Tribunal des Conflits 8 February 1873. For the facts and decision see supra.
2 Rolland, Précis de droit administratif (10th ed. 1951).
3 See Odent, Cours de contentieux administratif (1965-66) 288.
4 Mitchell, op. cit. at 172. This criterion has been emphasised by many authors, see e.g., Geiger, "The Unilateral Change of Economic Development Agreements" (1974) 23 Int'l & Comp. L.Q. 73, 83 [hereinafter cited as Geiger].
providing the courts with a single criterion to apply to very
different situations, was found to be an inadequate and uncertain
criterion, because (inter alia) of the difficulty of defining
service public in a precise manner.

A second theory designed to characterise administrative
contracts was advanced by M. Péquignot. According to him, the
real test lay in the presence of clauses exorbitantes de droit
commun, that is, terms or clauses wholly inappropriate to a
private contract. It is true that 'public service' was still an
essential prerequisite of an administrative contract, but great
emphasis was now to be put on the presence of 'exorbitant clauses'.¹

This criterion, for distinguishing administrative from private
contracts, involves an examination of the terms of the particular
contract rather than its 'public' object. The terms are viewed as
'exorbitant' if 'they are different in their nature from those
which could be included in a similar contract under the civil law',²
or 'where their object is to confer rights or impose obligations
upon the parties quite unlike in their nature, those which anyone
would freely agree to in the context of civil or commercial law'.³

For example, a clause imposing a penalty upon the contractor, or
giving the administration (but not the contractor) an option to
rescind, or allowing the administration to vary the terms of the

² This formula was approved in Société des Combustibles et
Carburants Nationaux, Tribunal des Conflits 19 June 1952.
³ Stein, Conseil d'Etat 20 October 1950.
contract in the course of its performance. An illustration is a clause such as that usually included in the standard contract used by the Public Roads Administration (Administration des Ponts et Chaussées), according to which the contractor is required to comply with such alterations as are notified to him in the course of the work and to observe the orders of the Service Engineers even if those involve a modification in the specification of the work which he has already completed.\(^1\) The inclusion of such and other similar clauses in the contract justifies its subjection to jurisdiction of administrative courts, which are also the courts with greater experience in matters of service public.

Still this approach is not without its difficulties. Each of the above theories is helpful in defining an administrative contract to a certain extent but then each tends to exaggerate the weight to be given to the 'public service' or 'exorbitant clauses' element in a given contract. The via media seems to be to look at the contract in a broad sense so as to take note of the whole background, the parties, the nature of the administrative organ with which the contract has been made, the nature of the material or work required and the terms and conditions of the contract and then decide whether it is an administrative contract or not.\(^2\)

\(^1\) Waline, Droit Administratif (9th ed. 1963) 86 [hereinafter cited as Waline].

\(^2\) See Mitchell, op. cit. at 176-80.
3. Rules Relating to Contrats Administratifs

Assuming then that the contract in question is a contrat administratif, and thus subject to the droit administratif, our next concern is with the rules governing such a contract, made between what the French regard as essentially unequal parties, an organ of government on the one hand and the citizen on the other.¹ Now examining the extent to which the droit administratif differs from the ordinary civil contract law, we find that the general principles relating to the formation of contract are the same in each case,² although certain special formalities (such as prior approval of another administrative agency or rules regarding the appointment of a contractor by public tender (adjudication or marché de gré à gré)³ are required

¹ Brown and Garner, op. cit. at 93.
² This is so because administrative law has adapted the rules which originated in the private law sphere. Referring to the administrative contracts, Langrod states: "The predominant theory is that "loans" are made by administrative law from private law. This implies that all obligations originate in the area of private law and are "transposed" or "loaned" to the administrative sphere, either unchanged or with specific modifications required by the particular needs of public administration": "Administrative Contracts" (1955) 4 Am. J. Comp. L. 325, 327 (footnote references omitted).
³ Public adjudication normally is required by law in all adminis­trative contracts. As regards exceptions, see the French décret of 6 April 1942. Laubadère points out that the requirement of advertising for bids is receding in French law: Traité Théorique et Pratique des Contrats Administratifs (1956) 321. See also Bergsten, "The Administration of Economic and Social Programs in France by the use of the Contractual Technique" (1975) 48 South Calif. L. Rev. 852, 863.
to be satisfied in respect of an administrative contract. It is, however, in the enforcement and execution of the terms of the contract that the droit administratif has worked out special principles which stem mainly from the underlying idea of the need to recognise the predominance of the public interest. The public interest must always prevail, even to the extent of over-ruling the express terms of the contract; this is a doctrine imported
ab extra by the law, and is in no sense dependent on the intention of the parties to the contract (not even by implication, as some authorities suggest is the origin of the English so-called doctrine of 'executive necessity'). Continuity in administrative action requires that the contractor accepts unforeseen obligations or additional charges without being entitled to cease performance on the ground of its being outside the express contract. That does not mean that the private interest of the contractor is disregarded, but merely that it is regarded as subordinate. His remedy is to look for monetary compensation. In case the administration exercises any of its pouvoirs exorbitants, the contractor automatically acquires a right to indemnification. This serves equity, reconciles the interests of the parties (without endangering the public welfare), and encourages contractors to do business with the administration.

From this general principle have come several more precise doctrines:

(i) La Théorie de l'Imprévision
(Theory of unforeseen Circumstances) \(^1\)

The fundamental principle in an administrative contract is that the contractor must ensure continuity of service unless this continuity becomes objectively impossible. Thus in one of the leading cases it was remarked that 'Le Contrat Administratif étant conclu en vue d'assurer le fonctionnement du service public, son exécution ne saurait être interrompue sous aucun prétexte sauf en cas d'impossibilité matérielle absolue' (the administrative contract being concluded in order to ensure the functioning of public service, its execution ought not to be disturbed in any way save in the case of absolute impossibility of performance). \(^2\)

On this principle, accordingly, one case refused any extension of time of performance to the contractor, \(^3\) while another did not excuse the contractor from performance by the fault of the administration; \(^4\) although on the other hand the administration

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1 Waline, op. cit. at 622 et seg.
2 Tramways de Cherbourg, Conseil d'État 9 December 1932.
3 E.g., Gagnieux, Conseil d'État 14 March 1928.
4 Société Générale Française de Publicité et d'Édition, D.C. 1942, j.111. Again in Ville de Nantes, Conseil d'État 15 February 1895, it was held that the contractor is not discharged from performance of his part of the contract if there is delay in payment on the part of the administration. See also Cie de Gaz à la Ferté-Milon, Conseil d'État 5 January 1924; Cie d'Eclairage de Longny, Conseil d'État 6 February 1924; Fille, Conseil d'État 17 February 1888 and Ville de Saint-Pol, Conseil d'État 2 November 1927.
is discharged of its responsibility, if the contractor has defaulted. Again, in another case, the contractor was obliged to continue performance even though this ruined his business as performance became more expensive and troublesome and even impossible.\(^1\) Obviously, such consequences deterred contractors from dealing with the administration, with the consequence that administrative contracts were entered into by either inefficient contractors or by those expecting huge returns to cover unforeseen losses. These results were obviously unwelcome, and in order to make administrative contracts more acceptable the doctrine of imprévision was evolved.

This doctrine of imprévision provided that if supervening circumstances arise after the formation of the contract for which no provision or inadequate provision has been made in the express terms of the contract, circumstances which make it uneconomical for the contractor to perform his part,\(^2\) he will not be allowed to resile from the contract but may be compelled to perform it and then seek an indemnity (recours en indemnité) from the administration for his additional expenses. This was insisted upon by the administrative courts in circumstances where the public interest demanded that the contract must be performed.

The first clear exposition of the doctrine comes in the leading case of Compagnie Générale d'Eclairage de Bordeaux,\(^3\)

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1 Astruc et Société du Théâtre des Champs Elysées, Conseil d'État 7 April 1916.
2 E.g., steep rise of prices of raw materials used for the performance of the contract due to war, devaluation, economic crisis or earthquake.
3 Conseil d'État 30 March 1916. See also Freedeman, op. cit. 152-53; Hospice de Vienne, Conseil d'État 10 March 1947.
where the rising prices of coal due to the 1914-18 war had rendered totally uneconomical the continued operation of gas concessions at the rates originally laid down. The price of coal increased in fifteen months from 35 Francs per ton at the time when the contract was made to 117 Francs per ton; an increase which, unless the company was allowed to increase the contract charges for the gas supplied, would have compelled the gas company to go into liquidation. The Conseil d'État took the view that it was not in the public interest that this should happen, for, if the company became defunct, the streets of Bordeaux would not be lit. Therefore the Court ordered the company to continue to perform the contract, but substantially increased the price of gas charged to the administration under the contract.

The doctrine of imprévision denotes not only unforeseen circumstances which the court may take into account in modification of the terms of a contract between a private contractor and a public authority, but also goes much further than the common law doctrine of frustration. The theory of frustration releases the obligor by termination of the contract. It does not permit, however, one party or the court to modify the express contractual terms in order to adapt them to changed conditions. Imprévision does not operate to determine the contract; performance continues, for imprévision is especially designed to facilitate or ensure the continuity of performance. The doctrine operates in those cases

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in which the circumstances under which the contract was originally entered into have completely changed and performance has become more onerous, expensive, dilatory or risky. The pecuniary interest of the contractor is not jeopardised, he can recover monetary compensation for the additional burdens or unexpected losses which result from the happenings of unforeseen events. Again, it is not necessary for invoking the doctrine of imprévision that the contract should have become physically or legally incapable of performance, although the party claiming indemnity must show the existence of unforeseen circumstances which result in a 'bouleversement de l'économie du contrat' (an upsetting of the economic substance of the contract). Such circumstances justify the contractor in seeking from the administration an indemnity, as a result of which these unforeseen losses are shared by both parties, and are not shouldered in their entirety by either one or the other: in practice, the administration bears most of the actual losses, rarely more than five per cent are imposed on the contractor. Indeed, where the contractor is unwilling to continue his performance

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1 For the mode of calculating the indemnity, see Mitchell, op. cit. 192 and the authorities cited there.

2 Geiger, op. cit. (1974) 23 Int. & Comp. L. Q. 73, 98. For the successful working of the doctrine of imprévision and the theory of the financial equilibrium of administrative contracts, see an article by Waline, 'L'évolution des rapports de l'État avec ses co-contractants,' published in Revue du Droit Public et de la Science Politique 1951, 5; see also by the same author, Droit Administratif (1963) 622 et seq.
on any terms (or any realistic terms) the administration may take over the performance of his part of the contract and provide the service, etc. itself (en régie). If there is a total impossibility then of course the doctrine of force majeure is operative. Thus in Compagnie des Tramways de Cherbourg the concessionnaire was on the verge of bankruptcy, but if the tram fares had been increased any more, the company would have lost its customers. The Conseil d'État considered that this was an example of force majeure, beyond the powers of either of the contracting parties to overcome; the object of the contract (to run a tramway service at a reasonable price) had been destroyed, and so the contractor was entitled to be released from his obligations under the contract.

(ii) Fait du prince (Act of State)

Whereas imprévision is concerned with abnormal and unforeseen disturbance of the contractual equilibrium (where the performance is a long-range one), arising from events external to both contracting parties and involving extra-contractual charges for the contractor, the doctrine of fait du prince is concerned with

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1 Waliné, Droit Administratif 629.
2 Conseil d'État 9 December 1932.
such modifications of the contractual equilibrium as result from fiscal, economic or labour regulations prescribed by an acte administratif, that is, prescribed by the administration itself.¹ An example would be increased taxes on coal that affect a concessionnaire of gas light. The former doctrine relating to unforeseen events not caused by the contracting administrative authority, divides the loss between both parties so as to re-establish the altered financial equation; the latter includes any prejudice to the contractor's situation, whatever its extent may be, and allows full compensation (réparation intégrale) for the loss incurred.

The general rule applicable to a contrat administratif is that unless the governmental act consists of some general legislation affecting all citizens equally such as general taxation (the theory of 'égalité devant les charges publiques', i.e. all must support equally the burdens imposed by the state),² the contractor is entitled to an indemnity. This indemnity may take the form of an authorisation of increased charges to consumers or other measures of financial relief, or a diminution of the obligations of the contractor.

² Ville de Paris, Conseil d'État 14 February 1936; Chouard, Conseil d'État 17 July 1950.
The doctrine of fait du prince is similar to that of 'act of state' in English law. In English law it is recognised that an administrative agency cannot by contract fetter its right - or duty - to exercise an administrative discretion vested in it by statute; nor can a public authority by its conduct estop itself from exercising such a discretion, and thus the private party to the contract may well have no remedy in damages. In France, however, a contractor with the administration enjoys a greater degree of protection against the effects of legislative and administrative acts than does a contractor under a civil law contract; indeed the contractor is entitled to a full indemnity including the expectation of profits. The doctrine of fait du prince is applicable even though there is no bouleversement (upsetting) of the contract, provided the contractor can show the following: (i) that the acte administratif which has affected the contract is an act of the administrative body which is a party to the contract. If the legislation in question is passed by an administrative body, other than the contracting party, the contractor may bring himself within the scope of the doctrine of La Fleurette and obtain an indemnity in the same way as any other

1 See ch.2 supra.
2 Société des Alcools du Vexin, Conseil d'État 15 July 1959. For an analysis of the recent case law, see Geiger, op. cit. at 99.
3 Conseil d'État 14 January 1938. The facts were: a dairy company claimed damages against the state in respect of the losses which it sustained when it had to discontinue marketing its brand of artificial cream and hence to go out of business. The manufacture and sale of any article under the name 'cream' had been banned by statute unless the article consisted of real cream. The statute allowed no compensation. The Conseil d'État held that it was not the legislature's intention to impose an unequal sacrifice upon the complainant company and granted its claim.
citizen particularly affected, provided that the loss is both
direct and special;¹ (ii) that the contract has been particularly
affected in its substance, e.g. by the imposition of a tax or
other charge or excise upon the main raw material used by the
contractor in performance of his obligation, such as the imposi-
tion of excise upon coal in relation to a gas concession;² and
(iii) that the act of the administration which has affected the
contract is an act which involves public authority (acte de
puissance publique). Thus an act of entering into contracts with
other parties, which though it may render the performance of the
contract more expensive, is not an act which involves public
authority. In such a case, fait du prince will not be applicable.³

(iii) Pouvoir de Contrôle et de Sanction (Supervision)⁴

It is a trite principle of French administrative law that
the necessities of public law are not those of private law and
that the administration has at all times the right to ensure that
the contract is properly performed in accordance with the public
interest.⁵ In one case, the Conseil d'État went so far as

¹ Caucheteux et des Mont, Conseil d'État 21 January 1944.
² Tanti, Conseil d'État 28 November 1924.
³ See e.g. Prevet, Conseil d'État 8 March 1902.
⁴ See Debbasch, Droit Administratif (1968) 281-82.
⁵ See the early case of Rothschild, Conseil d'État 6 December 1855. See also Mitchell, op. cit. at 198; Brown and Garner, op. cit. at 112 and Street, Governmental Liability (1953) 100-101.
to state that the administration can impose controls on the contractor even if such conditions are not expressly provided in the contract.¹ One well-known writer has stated that this right of control is incapable of being excluded by contract though it might be modified as to the manner of its exercise.² A contract, for example, might require warning notices to be served on the contractor, before penalties could validly be imposed on him but the contract could not exclude the possibility of the imposition of penalties. The justification for granting a large measure of control to the administration is to be found in the close connection between administrative contracts and the idea of service public.

(iv) Pouvoir de Modification Unilatérale (Power of Unilateral Modification)³

Since the decision in Cie Générale Française des Tramways the modifiability or what the French call 'mutability' of administrative contracts is an established principle in French administrative contracts. 'Mutability' implies that the contractor cannot oppose adjustments made in the public interest in any claims for strict performance of the original contract. His remedy is to seek monetary compensation for the additional burdens or unexpected losses which result from these adjustments.

¹ Deplangue, Conseil d'État 31 May 1907. See also Geiger, op. cit. at 96.
³ For a comparative analysis of unilateral modification of contract clauses in the English, American, French and German laws, see Geiger, op. cit. at 95-9. See also Turpin, Government Contracts (1972) 69.
⁴ Conseil d'État 11 March 1910.
The administration can, therefore, unilaterally modify contracts in the public interest. The predominant position of the administration is based on the necessity for government effectiveness, coupled with the notion of 'service public'. The administration, even where it transfers by a concession agreement functions involving the interests of the community cannot thereby divest itself of its responsibility for the performance of these functions. It retains inherent powers of control and can adjust the terms of the agreement to the changing needs of the public service. The variation of the contractual terms may take the form either of an increase or of the diminution of the services or even of the termination of the contract. The administration may even make an alteration in the mode of carrying out the contract. For this purpose it can without any default on the part of the contractor suspend, vary or rescind the contract, transfer it to another party or take it over itself. Modification may be by means of legislation, administrative action of a general nature or by individual measures directly interfering with the contract.

According to one French view, the administration cannot unilaterally modify a contract unless there is an express term in the contract. But the modern position seems to be that stated by Mitchell, namely that the power to modify exists without any

1Ville de St. Etienne, Conseil d'État 29 October 1939; Barfin, Conseil d'État 24 April 1959.
2Debbasch, Droit Administratif (1968) 282: 'L'évolution des exigences de l'intérêt général implique que l'on reconnaisse à l'administration le droit de dépasser la lettre contractuelle pour imposer au contractant une adaptation du contrat. La portée (carried on to p. 319)
express contractual clause, 'and indeed even in the face of contractual clause purporting to exclude it'. ¹ Mitchell's view seems to be correct and the same view of the law has been taken by later authorities.² The administration cannot contract away its ultimate freedom to modify or terminate the contract for reasons of public interest. The administration has not only the right to unilaterally modify the contract; it has the duty to do so. The contract is always subject to the changing needs of the public interest: hence the contract can be altered, 'suivant les besoins sociaux, économiques du moment'.

In a number of cases,³ concerning the supply of gas, electricity and water, the Conseil d'État has allowed the administration to vary the terms of the contract under which long-term monopolies had been granted to concessionnaires, where the relevant circumstances had changed very radically. In Compagnie Générale des Eaux,⁴ a water company had a monopoly contract since 1882 for the supply of water in La Seyne. By

¹ See Mitchell, op. cit. at 186 (emphasis supplied).
³ See e.g. Compagnie Nouvelle du Gaz de Deville-les-Rouen, Conseil d'État 10 January 1902. See also Waline, op. cit. at 711.
⁴ Conseil d'État 12 May 1933.
1930 the population of the town had more than doubled and the quantity of water provided for in the contract was insufficient. The **Conseil d'État** thus authorised the commune to invite the company to provide adequate water at a price *pro rata* to that stipulated for in the contract, with the proviso that if the company failed to agree, the commune would be free to enter into negotiations with another concessionnaire for the supply of the extra water. In another case, a long term concession for street lighting by gas was converted into a demand for lighting by electricity since that was required by later scientific developments and public needs.

The unilateral power of the administration, however, is not without limits. Apart from the fact that its exercise is subject to the review by the administrative courts and - in the last instance - by the **Conseil d'État**, the administration has simply the power to modify those provisions of the contract which have a close nexus with the contractor's public duty to adapt his performance to conform to new technological developments. But the pecuniary interest of the contractor is protected and the law provides him with a double-guarantee, namely (i) if the changes prescribed by the administration cause an upsetting of the original

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1 Société le Centre Électrique, Conseil d'État 30 November 1928.
contract, he can seek the cancellation of the contract and (ii) if the new obligations disturb the financial equilibrium 
(équation financière) of his contract, he can seek an indemnity.

As seen from the above analysis, the rights of the contractor are well recognised. Like the inalienable right of the admin-
istration to modify contractual terms, the right of the contractor to an indemnity is a matter of public policy and cannot be excluded by the provisions of the contract. In practice, however, the administration exercises its overriding powers only as a last resort, if no consensual arrangement can be achieved. The Conseil d'État has made it clear that the inherent powers of control of the administration do not negate the binding force of administrative contracts.

(v) Restrictions on Freedom of Contract

Because of the need to stress the importance of the public interest, the administrative courts exercise a good measure of control over the terms of a contract. Detailed principles implementing such control are to be found in the decisions (jurisprudence) of the Conseil d'État and in the opinions of jurists (doctrine). There has developed, therefore, a body of

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1 Cie Générale Française des Tramways, Conseil d'État 11 March 1910. See also Waline, op. cit. at 617-18; Geiger, op. cit. at 96-99.
3 Sté Bordeaux-Maroc, Conseil d'État 7 March 1930.
4 See Geiger, op. cit. at 96-7 (citing from the leading decision in Gaz de Bordeaux pronounced by Conseil d'État on 30 March 1916).
law which differentiates between the administrative contract and ordinary private contracts in many particulars, especially with respect to its operation and effects. The contrat administratif is also regulated by the provisions contained in the cahiers des charges (specifications promulgated by the various public authorities), which contain model contractual terms for inclusion in the appropriate contracts.¹ Through the cahiers des charges, which, inter alia, contain the procedure for awarding the contract, the administration seeks to effectively regulate the activities of its officers, who are obliged to act upon them in drawing up individual contracts.² The contractor however, is not bound unless the cahiers are expressly incorporated in the contract. "In this way the cahier des charges ensures an important degree of uniformity in the terms of contracting and so makes possible the growth of both jurisprudence and doctrine with respect to the terms of administrative contracts".³

¹ The cahiers des charges may be made applicable either to all the procurement contracts of a particular authority (cahiers des charges administratives générales) or to all contracts for the procurement of a particular type of goods or services (cahiers des prescriptions communes): Turpin, Government Contracts (1972) 70.

² For an analysis of the rules governing the authority of the agents of the administration, see Jèze, Principes Généraux du Droit Administratif Vol. III p.178 et seq.

³ Turpin, op. cit. at 70.
More recently rules concerning the conclusion of contrats administratifs and the choice of contractors have been formulated by statute. Under two decrees of 17 July 1964 and 28 November 1966 there is now in force a 'Code des Marchés' which covers contracts concluded by both central and local authorities. This Code imposes various sets of standard clauses and conditions ('cahiers des clauses et conditions' and 'cahiers des charges') upon the different administrative authorities. But at the same time the administrative courts can influence the contents of the contract through their very wide powers of interpretation of the standard clauses or of the common intention of the parties and by this means they can insist that the most reasonable terms (from the administration's viewpoint) that can be obtained are in fact secured.

(vi) Rights of the Contractor and his Special Liabilities and Disadvantages

The administrative agency entering into a contract is often obliged to obtain approval of a superior agency; thus a commune requires the assent of the prefect under his powers of tutelle. If the requisite approval is not obtained, the contract is a nullity. There can be no validation of such an agreement by preventing the administration from setting up the defect or by subsequent conduct of the administration (estoppel). Again,

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1 This system of control (tutelle) is very detailed and important; in practice it goes much further than any comparable feature in England and Australia. See Rendel, "How the Conseil d'État supervises local authorities" [1966] Public Law 213.

2 Péquignot states that all the necessary stages should be completed to make a valid contract: Théorie Générale du Contrat Administratif (Paris 1945) 204. See also Commune de Ousse-Suzan, Conseil d'État 8 April 1911.
the administration is not bound by contracts in which its agent has exceeded his authority, or where in a contract parliamentary approval was required but not obtained. But, as in Australian and English law, the absence of appropriations or the fact that the contract exceeds the appropriation does not affect the validity of the contract.

A contractor who has wholly or partially performed his part under an agreement which is unenforceable for want of compliance with the law is, however, entitled to an indemnity, on the basis of what in common law terminology would be described as a quantum meruit. Alternatively, a contractor can challenge the validity of the superior authority's decision to withhold approval. Similarly, a contractor can question an exercise of la puissance publique in the modification of a contract: particularly so where that administrative agency makes variation while being a party to the contract.

As is to be expected, in interpreting an administrative contract, a rule of strict construction is applied but one almost

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1 Chartron, Conseil d'État 7 May 1926.
3 Id. at 16-18.
4 See e.g. Phillippe, Conseil d'État 27 June 1930; Bonniol, Conseil d'État 16 January 1931. See also Mitchell, op. cit. at 200.
5 The droit administratif provides two principal remedies to the contractor - the recours en annulation and the recours en indemnité.
6 Compagnie des Scieries Africaines, Conseil d'État 9 March 1928.
wholly in favour of the administration. Péquignot states that there may be a temptation to equate the contrat d'adhésion of civil law with the administrative contract, but he points out one important and significant distinction. The French civil court has a tendency to side with the weaker party to a contrat d'adhésion, yet there is no such tendency in a contrat administratif, based as it is on the subordination of all also to le but de service public.¹ Since the emphasis throughout is on the need to consider the requirements of the public interest in all matters of construction, the administration is not precluded from applying a lesser sanction (if the greater, which had been stipulated, might cause a disruption to the public interest, which is intended to be avoided), or from applying a greater when the consequences of breach are more severe than were appreciated at the time of contracting.²

But there are also several serious disadvantages that accrue to a contractor under an administrative contract. Apart from the fact that a contractor, as against the civil law rule, does not have the right of astreintes,³ he cannot assign his contract, or secure substituted performance or give a sub-contract, without the

¹ Théorie Générale du Contrat Administratif (1945) 66.
² Veuve Girdu, Conseil d'État 2 July 1924.
³ To impose a fine for delay in the performance of a contract, which can have much of the effect of a common law decree of specific performance.
If a contractor commits serious fault in performance, the administration is entitled to cancel the contract and to enter into another contract at the risk and cost of the defaulting contractor. In such an event, the defaulting contractor is liable for any loss which the administration sustains on that account including the loss sustained in the interim period (i.e. the period between the cancellation of the contract and the fresh adjudication) during which period the administration entrusts the contract to another party for the sake of continuity.

To these may be added the ability of the administration to impose executive sanctions upon a contractor without any preliminary recourse to the courts, whereas a contractor is always expected to approach the courts before stopping performance, no matter what justification he may have; otherwise his position may be prejudiced. Again, a contractor's liability to pay penalties does not have a compensatory character (as do ordinary contractual damages) but is in the form of penal sanctions, unknown in private law.2

Lastly, attention may be drawn to clauses of an administrative contract which require that government suppliers maintain fair

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1 See e.g. Société l'Énergie Électrique du Littoral Méditerranéen, Sirey 1924 Vol. I p. 65.

2 See Compagnie des Scieries Africaines, Conseil d'État 9 March 1928. These penalties are unilateral. They may be financial (pénalités) or coercive (mise en régie, séquestre, résiliation à titre de sanction) without previous recourse to a court; they may also take the form of control over the execution of the contract, introduction of imposed tariffs, modification of the scope or the modalities of the contractor's obligations and finally résccision (without penal character).
employment practices, provide safe and healthy working conditions, pay fair wages etc. to their employees. These stipulations for the benefit of a third party (pour autrui)\(^1\) have a much wider scope than the analogous Australian and British standard terms\(^2\) to be found in government contracts since an administrative contract's conditions, unlike the Australian and British ones,\(^3\) confer enforceable rights upon the workmen.\(^4\)

4. Administrative Contracts in the Common Law

It is clear from the above discussion that an 'administrative contract', what in French law is a 'contrat administratif', denotes a contract between the government or administration and a contractor with the following main features: (i) a fundamental inequality of the contracting parties; (ii) submission by the contractor to a set of special conditions which are implied by law such as the unilateral modification of the contract; (iii) collaboration of the contractor who is not considered as the 'opposite party' but co-operates actively by his participation or by providing capital, or by both, serving the public interest as represented by the administration; (iv) the legal right of the contractor to indemnification; and (v) subjection to the

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\(^2\) See ch. IV supra.
\(^3\) Under English and Australian laws, the principle of privity prevents the exercise of any contractual remedy by the affected employees themselves, see Simpson v. Kodak Ltd [1948] 2 K.B. 184. For a discussion, see Turpin, Government Contracts (1972) 254-7.
\(^4\) See e.g. Syndicat des Employés et Contremaîtres des Secteurs Électriques de la Seine, Conseil d'État 22 July 1927.
jurisdiction of administrative tribunals or courts to the exclusion of 'civil' or ordinary courts. Though the term 'administrative contract' is essentially a creature of French law, it may be used to signify similar contracts in the common law countries if such contracts exist there. But to call some of the government contracts (or sometimes all the government contracts)\(^1\) 'administrative contracts' may prove to be confusing. Especially, American authors have ventured to label, by a somewhat hasty analogy, 'research and development' contracts or 'contracting-out' arrangements as 'administrative contracts'.\(^2\)

It is true that there now exist various contracts in Australia, England and the U.S. which no longer are merely conventional procurement of supplies and services contracts but which are long-term contracts involving a continuing co-operative relationship between government and private contractors, with terms hitherto considered unenforceable in the courts, particularly long-term relationships to stimulate research and development (or as now in Britain to re-equip industry). But it is important to remember that such contracts (or government contracts generally) in the common law world are as yet not governed by a law different from that governing private contracts:

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\(^1\) For example, Langrod uses the term 'administrative contracts' as a substitute for government contracts: see *op.cit.* at 333-34, 337.

the basic equality between the parties is still assumed, they are adjudicated in the ordinary courts and there are no specific legal rules, though there are specific contractual terms and conditions applicable to these contracts, providing for compensation to a private contractor prejudiced by the overriding powers of the government. Furthermore, public law in the common law system is not yet regarded as a separate branch.

5. Conclusion

The recognition of the inequality between the parties has greatly influenced the French system of contrat administratif. The dominance of the administration is recognised in various ways - in its ability to impose executive sanctions without any prior recourse to courts and to make variations unilaterally in the contract; in the contractor's liability to continue performance even if the administration has failed to perform its part or to pay instalments due, to take a few examples. The fiduciary character of the administration is recognised in the rule of strict construction and in the insistence upon continuity of performance.

In practice, however, the interests of both the administration and contractors seem to be well balanced in French administrative law. The fundamental presumption of inequality

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1 Langrod, op. cit. at 325, 328, 330; Friedmann, op. cit. at 399; Brown and Garner, op. cit. at 93; Geiger, op. cit. at 83.
between the parties has not led to great hardships to contractors. The basic aim of serving the public interest is reconciled, as much as possible, with contractors' contractual rights and even their economic interests. Though the private interests of contractors must not endanger the public interest, principles of equity and good faith are applicable assuring advantages unknown in the civil or commercial laws.\(^1\) The decisions duly take into account the legitimate interests of private contracting parties and an effort is constantly made to maintain the financial equilibrium of the contract so as to respect the original intentions of the parties,\(^2\) and to prevent the individual from bearing alone all the detriment to his situation caused by the changing requirements of the public welfare. It is because of this that the private rights of the contractor have received special protection and consideration, notably in the doctrines of *imprévision* and *fait du prince*. As Mitchell has rightly observed, where such contracts of public authorities are regarded as a special class of contract, it is much easier to develop rules appropriate to the requirements of the whole

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1. Langrod, *op. cit.* at 344 states (citing Laubadère) that the right of the contractor to get indemnified accrues not only when the contract explicitly states it, but when it does not and even when there are explicit clauses excluding it.
situation in which those contracts are made, taking into account the interests of the public involved and the need of the private contractor for protection.¹

¹Mitchell, op. cit. at 215.
RESEARCH AND DEVELOPMENT CONTRACTS*

1. Introduction

In the past two decades, research and development has been perhaps the fastest growing segment of government procurement. As a result, a major development in government contracting has been the extensive use of contracts with commercial organisations, non-profit institutions and universities to provide for the operation and management of R & D facilities and programmes, for analytical studies and advisory services, and for technical supervision of weapons systems and other programmes administered on a systems basis. In part, the use of such contracts has been made necessary by the government's entry into new fields, such as atomic energy, missile development and space exploration, and the need for talents and services not previously

* The terms 'research' and 'research and development' are, as is often done, used interchangeably and called R & D.

1 E.g., 86 percent of all R & D performed in the United States is done by private sector and funds approximately 46 percent of the total national R & D effort: United States Report of the Commission on Government Procurement (1972) Vol.2, 5. The Commission on Government Procurement was created in November 1969 to study and recommend to Congress methods 'to promote the economy, efficiency and effectiveness' of procurement by the executive branch of the United States Government. The Report of the Commission was made in December 1972 and consists of ten parts packaged in four volumes. The Report is hereinafter cited as Report of the C.G.P. followed by volume and page number.
employed. In part, the use of contracts has been encouraged by the change in the nature of government that has taken place in recent decades - the rise of the 'Positive State' to replace the negative 'Nightwatchman State' - which has enlarged the area of governmental activity compelling it to enter those fields which were hitherto either ignored or left to accomplishment through individual and group action. The vast amount of government funds currently used to support R & D activity and its significance to the survival of a nation in the modern age makes the present subject one that clearly warrants discussion and understanding.

2. **Classification of R & D Activity**

During the last few decades, scientific advances and evolution of new manufacturing techniques have led to a growing requirement on the part of Government for original research and developmental work as well as adaptation of existing designs. Before World War II, technology was largely developed in peacetime by non-governmental organisations motivated by the commercial incentives of the market place. The progress of the automotive, electrical and chemical industries in the early decades of this century resulted from the organisation and management of resources

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¹For an interesting account of events forming a history of the recognition of research and development by the United States' Government from the early days, see Bledsoe and Ravitz, "The Evolution of Research and Development as a Procurement Function of the Federal Government" (1957) 17 Fed. B.J. 189.
in the private, profit-seeking sector of the economy. Private industry, utilising funds which came from the investing public or from the earnings of profitable enterprises, directed the scientific and engineering effort which resulted in the creation of new and improved goods and services. Success in commercial R & D rested primarily in the profit possibilities of future production; and the prudent manager of an industry's research work could not afford to disregard that factor. There were, of course, a few areas of research and development activity, such as military aviation, which were financed and directed by government rather than by private industry, but they were a relatively minor element in the total peacetime research and development effort of the nation. At the present time, however, government has assumed a completely new role vis-à-vis private industry. The urgent national interests which are at stake no longer permit science and technology to advance at the pace that economic factors would alone dictate. Principally because of the importance of atomic energy and aerospace technology to the achievement of national goals lying beyond the economic sphere, and because of the huge sums required for their development, government has taken over from the private sector the dominant role in selecting the ends to be sought and in organising and directing the means of attaining them.¹

Despite this massive reorientation of the nature and purpose of much of the nation's research and development work, the preponderance of the nation's scientific and engineering talent remains in the private sector. Thus while industry and the universities have become increasingly dependent upon governmental direction and financing, the government (in the United States of America and the U.K., but not in Australia, as we will see later) in turn has continued to depend on non-governmental organisations for the actual execution of the greater portion of the total work.  

1 The R & D contracts have been the means of harnessing the two sectors in a common effort.  

The major performers of R & D, which are called sectors, viz. government, private industry, higher education and

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1 See in the U.K., HC Deb. v.891 c.333 (5 May 1975); see also White Paper, Defence Research and Development (December 1969) Cmnd. 4236 para.36 and (1971) Cmnd. 4641 paras.18-20 (Rayner Project Team Report).  

2 Compared with the U.S.A. and the U.K., Australia has a very large proportion of R & D performed in-house and consequently very few R & D contracts are entered into with private industry. See infra.  

3 A sector is an aggregate of organisations or bodies which is identified by some important element that the members have in common, and which disburses money for R & D, some of which at least, is performed within the sector itself.
private non-profit institutions, embrace all but a few isolated and minor R & D activities.¹

Government (Federal and State) sponsored or financed R & D is accomplished mainly through three means: by direct governmental operations, laboratories and research establishments and other installations (generally known as 'in-house R & D'); by grants to private industry² and universities and further educational establishments, and by contract.³

¹In Australia, the Department of Science, has conducted a survey seeking information on expenditure and manpower resources devoted in 1968-69 to research and development in both the natural and social sciences in these four sectors: government, business enterprises, higher education and private non-profit. The results of this survey are published in the Project SCORE Reports 1-5 (SCORE is the acronym for Survey and Comparisons of Research Expenditure). A separate report Survey of Industry Research and Development Expenditure in Australia 1968-69 published by the Department of Trade and Industry in 1972, gives official statistics on the expenditure in Australia on industrial research and development activities.

²In Australia, grants to private industry are made under the provisions of the Industrial Research and Development Grants Act 1967-1976 and Industries Research and Development Incentives Act 1976. The term "grant" means a grant of financial assistance (Section 5 of I R & D Grants Act 1967-1976). Under the I R & D Incentives Act 1976, "grant" means a commencement grant or a project grant (Section 4). The Industrial Research and Development Grants Board provided $10.338 million for R & D performed by the Business Enterprise in 1968-69 — Project SCORE, Research and Development in Australia 1968-69, Department of Science, Canberra, 1974.

³In Australia, see Project SCORE, Commonwealth Government Sector 1968-69, Department of Education and Science, Canberra, Australia, 1972. See also Project SCORE, Research and Development in Australia P.P. No.271 of 1973. In the United States, out of the total R & D budget of $15.5 billion for fiscal year 1971, Federal in-house laboratories performed R & D work for $4,166 million and private industry for $7,630 million. The other performers, to whom the rest of the money was allocated, were Federally Funded Research and Development Centres (FFRDCs), Universities and Non-Profit institutions: Report of the C.G.P. Vol. 2, 13-15 and 20.
An important advantage of 'in-house' direct operation R & D is that it enables a government to monitor and evaluate the quality and effectiveness of work undertaken for it by industry. Government's R & D establishments also play an important part in the choice of weapon system programmes and evaluation on technical grounds of the submissions from industry. Moreover, there are certain types of work which are not attractive to civil industry and which the government's research and development establishments are able to undertake e.g. the development of explosives.

R & D activity is also carried out by industry, independently of government funds or direction. Independent R & D (generally known as I R & D or private R & D or private venture R & D, or as it is called in Australia - Industrial R & D) embraces that technical effort performed by private commercial industry which is not required by any given contract.


2 Defence Research and Development (December 1969) Cmnd. 4236 para.29 (U.K.)
nor performed with respect thereto. Rather the effort is typically undertaken in order that the private manufacturer may remain competitive in a world of technological innovation, overnight obsolescence and defence oriented expectations of continuous advancement. Broadly, I R & D covers systematic, critical investigations (carried out by or for manufacturing or mining enterprises) directed towards increasing knowledge or understanding of the subject studied and the application of the new knowledge acquired to the improvement or introduction of products, processes, systems or methods. It is also a means of maintaining the inside track for new awards in anticipated areas of government need.2

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1Private or Industrial R & D in Australia is well behind many other industrialised countries: Millar, op.cit. 146. The Industries Assistance Commission in its report on 'Aerospace Industry' observed "... it is apparent that the proportion of R & D at present being performed in the private sector of the industry is very low" P.P. No.34 of 1976, 47 (Australia).

The two other sectors - Universities and private non-profit - carry out R & D work under grants obtained from the government and other sources. The Universities and further educational establishments' sector sometimes perform R & D under contracts too with the government.

It is beyond the scope of this chapter to determine the magnitude of total R & D as carried out by these four major performers. We are here concerned only with that portion of R & D which is funded by government and performed by private

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1 The total expenditure by Australian Universities on R & D in 1969 was $67 million (54 million in the Natural Sciences). Advancement of science was considered to be the primary objective of all R & D performed by Universities (98 percent of this expenditure was incurred intramurally). The R & D efforts of Australian Universities are financed almost entirely from Research Funds, General University Funds, Building Grants and other Commonwealth Funds. For details, see Project SCORE, Higher Education Sector 1968-69, Department of Science, Canberra, Australia 1973.

2 The total expenditure by Australian private non-profit sector on R & D in 1968-69 was $3.1 million (2.8 million in the Natural Sciences). Community Welfare was considered to be the primary objective of all R & D performed by the private non-private sector (71 percent of this expenditure was incurred intramurally). Funding of the R & D efforts of this sector is mainly by grants. The names of four major private non-profit organisations performing R & D (66 percent of the total expenditure in 1968-69) are: Walter and Eliza Hall Institute of Medical Research (Victoria); National Safety Council of Australia; Institute of Medical Research (New South Wales), and Royal Children's Hospital Research Foundation (Victoria). For details, see Project SCORE, Private Non-Profit Sector 1968-1969, Department of Science, Canberra, Australia 1973.
industry (and in a few cases by higher education) under contracts between the government and private industry.\(^1\) Thus the discussion of R & D which is performed in-house or by industry (government-funded or not) or by higher education, is excluded, since these activities do not involve contracts, but their role in the whole sphere of R & D activity is no less significant than the contractual R & D.\(^2\) Again the present discussion is confined to the R & D in the natural sciences only, on the assumption that contracts are usually entered into to obtain R & D in the natural sciences.\(^3\)

\(^1\)For the discussion of the various methods by which government can encourage industrial research and development, see Douglas (ed.), *Research and Development in Australian Industry* (Sydney University Extension Board Symposium, 1967) 68-69.

\(^2\)It may be noted that each of the four sectors stated above incurs intramural and extramural expenditure. For each, funds may come from within the sector itself, from one another, or from outside sources. Intramural R & D is the totality of R & D performed within a particular sector, whatever the source of funds may be. Extramural R & D connotes disbursement of funds by a particular sector to other sector(s) for the performance of its (i.e. the financing sector's) R & D.

\(^3\)The term R & D in its totality covers research and development in the natural sciences and the social sciences, i.e. R & D which is concerned with the products processes, systems or methods of the mining and manufacturing industries, R & D in industries other than mining and manufacturing, such as agricultural research, R & D in non-industrial areas of the natural sciences such as medicine, and R & D in the social sciences, which covers activities such as the development of new or improved personnel evaluation techniques, accounting methods etc.
3. Definitions

'Research and development' means, in general terms, all those activities which are directed towards the acquisition of scientific facts and techniques, or towards their application, to the design of new or improved materials, or equipment, or to the devising of new processes, often involving, in the later stages, the construction of prototype equipment or of pilot plants.¹ It has also been defined as 'an innovative process of scientific and technological preparation for change.'²

Research and development has internationally been agreed to mean, under the auspices of the Organisation for Economic Co-operation and Development (OECD), 'creative work undertaken on a systematic basis to increase the stock of scientific and technical knowledge.'³

¹In the U.K. see The Report of the Committee on the Management and Control of Research and Development (HMSO 1961) para. 17. The Committee was appointed (under the Chairmanship of Sir Claude Gibb and after his death, of Sir Solly Zuckerman) in 1958 by the Lord President of the Council to inquire into the management and control of government research and development - the greater part of which is carried out by contract. The Committee's Report [hereinafter cited as the 'Zuckerman Report'] made important recommendations (published in 1961) with regard to, inter alia, the placing and control of research and development contracts by government departments, by research councils and by the Atomic Energy Authority upon industry and the universities. The recommendations of the Committee were substantially adopted by the government.

²Andrews, "In the Guise of Research" (1974) 6 Public Contract L. J. 201, 202-3; Report of the C.G.P. Vol. 2, 1; see also Bledsoe and Ravitz, "The Evolution of Research and Development as a Procurement Function of the Federal Government" (1957) 17 Fed. B.J. 189, where the authors state: "The pursuit of new knowledge, the application of existing knowledge and the resulting 'end items' in the way of scientific reports, books, designs, prototype developments, up to the point of production constitute the area commonly known as 'research and development'."
technical knowledge and to use this stock of knowledge to devise new practical applications.\(^1\) The Zuckerman Report stated that the portmanteau term, research and development, included five categories of activity, namely, pure basic research, objective basic research, applied (project) research, applied (operational) research and development.\(^2\) More often a distinction is made between 'basic' research, 'applied' research and 'development'.\(^3\) Basic research is research directed towards an increase of knowledge in science and the primary aim of the investigator is a fuller knowledge or understanding of the subject under study,

\(^1\)OECD Manual of Standard Practice for Surveys of R & D. The manual goes on to define three exhaustive and mutually exclusive categories of R & D: (i) basic research; (ii) applied research; (iii) experimental development, which are defined in the following terms: (i) 'Basic research is original investigation undertaken in order to gain new scientific knowledge and understanding. It is not primarily directed towards any specific practical aim or application'. (ii) 'Applied research is also original investigation undertaken in order to gain new scientific or technical knowledge. It is, however, directed primarily towards a specific practical aim or objective'. (iii) 'Experimental development is the use of scientific knowledge in order to produce new or substantially improved materials, devices, products, processes, systems or services'.

\(^2\)For the definition of each, see Project SCORE, Research and Development in Australia 1968-69, Department of Science, P.P. No. 271 of 1973. See also Zuckerman Report, para. 18. In the United States, the National Science Foundation suggested the following categorization of R & D contracts viz. 'basic', 'specific' and 'management'. For details, see Miller, "Administration by Contract" (1961) 36 N.Y. Univ. L. Rev. 957, 969-70. See also ASPR (Armed Services Procurement Regulations) §4-100 et seq. (1975) (The United States Procurement Regulations cited here can be converted to the Code of Federal Regulations (CFR) by prefixing the agency procurement regulation number by 32 CFR for the ASPR, 41 CFR 18 - for the NASA Procurement Regulations, and 41 CFR for all other agency procurement regulations).

rather than any practical application thereof. Basic research is an investment in the future, such as, to give one example, the study of the properties of high energy cosmic ray particles. Basic research lays the foundation for applied and development efforts toward creation of usable products or services that sometimes require years of effort before the findings and follow-on development can be practically applied. As a result, most basic research efforts are concentrated in the academic community and in in-house government laboratories. Applied research is research that attempts to determine and expand the potentialities of new scientific discoveries, for example, to provide design data for a nuclear-powered submarine.

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2 Cited in Zuckerman Report, para.18.

3 In the United States, Armed Services Procurement Regulations (ASPR) define the term as follows: 'Applied research is that effort which (a) normally follows basic research, but may not be severable from the related basic research, (b) attempts to determine and exploit the potential of scientific discoveries or improvements in technology, materials, processes, methods, devices or techniques, and (c) attempts to advance the state of the art. Applied research does not include efforts whose principal aim is design, development, or test of specific items or services to be considered for sale; these efforts are within the definition of the term "development", as defined below.' ASPR §15-205.35(a)(2)(1975).

4 Zuckerman Report, para. 18.
Development is that systematic use of scientific knowledge which is directed toward the production of useful products.\textsuperscript{1}

An example of development is: the work required to determine the appropriate process for manufacturing penicillin on a large scale, research having established its antibiotic properties, and small scale trials, its clinical usefulness.\textsuperscript{2} Development thus bridges the gap between research and production. In other words it may be defined as the work necessary to take, for example, a new process or piece of equipment to the production stage. It often includes the erection and operation of pilot plants or the construction of prototypes. The essence of development is therefore the testing of design.

In the United States, the Report of the Commission on Government Procurement, concluded that universities should continue to be the primary performers of basic research, that industry should be the primary source of applied research and

\textsuperscript{1}Development is the systematic use, under whatever name, of scientific and technical knowledge in the design, development, test, or evaluation of a potential new product or service (or of an improvement in an existing product or service) for the purpose of meeting specific performance requirements or objectives. Development shall include the functions of design engineering, prototyping, and engineering testing'. ASPR §15-205.35(a)(3)(1975

\textsuperscript{2}Zuckerman Report, para.18.
product development, and that in-house laboratories should be strengthened and should maintain the technical competence to properly sponsor and manage the research and development programmes, as well as to perform basic and applied research and carry out the required test and evaluation function.\(^1\) The Zuckerman Report had also favoured the carrying out of basic research in an academic environment, rather than in government research establishments.\(^2\)

\(^1\)Report of the C.G.P., Vol.2, 1-2. In the United Kingdom, the Science Sub-Committee (of the Select Committee on Science and Technology), which is engaged on a broad ranging inquiry into the relationship between scientific research and industrial innovation, has recently observed (see HC 136-i of 1975-76 (22 January 1976)) that there are a number of similarities between the United States and the United Kingdom with regard to R & D patterns. The Sub-Committee has pointed out: "To the extent that one can find figures, both countries appear to spend on Research and Development about the same percentage of gross national product running at 2.7 to 2.8 per cent a few years ago. About the same proportion of total Research and Development (somewhat over 50 per cent) is funded by the government. Industrially oriented R & D in both countries, is highly concentrated in a few industry areas - aerospace, electronics, chemicals." For the Minutes of Evidence of the Sub-Committee, see HC 23-i to 23-viii (1975-76).

\(^2\)Zuckerman Report, para.81. The following two reports have recently been made by the Science Sub-Committee as a result of an inquiry into the organisation and funding of scientific research in British universities: (1) Second Report from the Select Committee on Science and Technology: Scientific Research in British Universities HC 504 of 1974-75 (23 July 1975) and (2) First Report from the Select Committee on Science and Technology, Second Report on Scientific Research in British Universities HC 87 of 1975-76 (17 December 1975).
4. Government Organisation for Research and Development Procurement

A. AUSTRALIA

In Australia, the major Commonwealth Government R & D agencies are: Defence Science and Technology Organisation (DSTO) in the Department of Defence, Commonwealth Scientific and Industrial Research Organisation (CSIRO) and the Australian Atomic Energy Commission (AAEC). Till the amalgamation of the Department of Supply with the Department of Secondary Industry as the new Department of Manufacturing Industry on 11 June 1974, the Department of Supply performed most of the R & D undertaken to meet Australia's defence needs. In line with the Defence Re-Organisation during 1974-75, on 2 July 1975 the Research and Development Division of the Department of Manufacturing Industry (which later became the Department of Industry and Commerce) was transferred to the Defence Science and Technology Division of the Department of Defence. At present the Chief Defence Scientist conducts the policy, administrative and technical control of defence R & D. He is assisted by the Defence Science and Technology Committee (which has replaced the Defence Research and Development Policy Committee) on the

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1 For an appraisal of the R & D activities of the Department of Supply, see Millar, Australia's Defence op. cit. at 147 et seq. See the Supply Reports 1959-1974 for a detailed account of the Department's R & D activities and attainments during that period.

defence research activities. 1 Whereas DSTO conducts research, development, trials and evaluation in 11 establishments throughout Australia, a small proportion of the R & D work is also obtained from private industry under contract through the Purchasing Division, Department of Administrative Services. The programmes of DSTO's laboratories are co-ordinated to provide for the needs of the Services and the Defence Department and to maintain an effective technology base. Formal consultation occurs at all levels between the Department, the Services and the laboratories and this provides a basis for planning activities. 2 The total expenditure on Research and Development in the defence field in Australia since 1970-71 is presented in the following table. 3

<table>
<thead>
<tr>
<th>Year</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>1970-71</td>
<td>$47.351 million</td>
</tr>
<tr>
<td>1971-72</td>
<td>$48.831 &quot;</td>
</tr>
<tr>
<td>1972-73</td>
<td>$53.568 &quot;</td>
</tr>
<tr>
<td>1973-74</td>
<td>$59.440 &quot;</td>
</tr>
<tr>
<td>1974-75</td>
<td>$71.3 &quot;</td>
</tr>
<tr>
<td>1975-76</td>
<td>$84.1 &quot;</td>
</tr>
<tr>
<td>1976-77</td>
<td>$88.9* &quot;</td>
</tr>
</tbody>
</table>

* Estimated

Source: Compiled from Defence Report 1975, Table 3, Department of Defence, Canberra 1975 and Defence Report 1976, Tables 3 and 12, Department of Defence, Canberra 1976.

3 For figures regarding Defence R & D from 1950-51 to 1968-69, see Bellamy and Richardson, Australian Defence Procurement (Canberra 1970) 4-5.
On the civil side, Commonwealth Scientific and Industrial Organisation (CSIRO) is the largest and most diversified scientific body in Australia conducting R & D.\(^1\) This agency is a statutory body and functions under the Department of Science. The Organisation's primary function is to carry out research for the development of primary and secondary industries in the Commonwealth and its Territories. Most of the R & D activity is carried out intramurally and thus a very small proportion of R & D is obtained under contract with private industry.

The Australian Atomic Energy Commission (AAEC) is another R & D agency responsible for encouraging the search for, and mining of, uranium, and for developing the practical applications of nuclear energy by constructing and operating plant, and by co-ordinating research. AAEC is a statutory body, answerable to the Minister for National Resources and like CSIRO, it conducts most of the R & D activity intramurally.

B. U.K.\(^2\)

Virtually every department of the United Kingdom government is involved to some extent in R & D contracting,

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\(^1\)See generally, Douglas (ed.), *Research and Development in Australian Industry* (Sydney University Extension Symposium 1967) 43-44.

although the Ministry of Defence occupies the most prominent place. Other important departments which enter into R & D contracts are the Department of Environment, the Department of Health and Social Security, the Department of Education and Science, Department of Trade and Industry (formerly the Ministry of Technology), and the Ministry of Agriculture, Fisheries and Food.\(^1\) Responsibility for the R & D required to support specific national policies lies with departmental Ministers having responsibilities for those policies; the Lord President of the Council is charged with ensuring that there is adequate co-operation and co-ordination between departments in the R & D field. He is assisted in this work by the Chief Scientific Adviser to the Government.\(^2\) The organisational arrangements for commissioning, carrying out and monitoring of R & D work in the government departments is in accordance with customer/contractor principle.\(^3\)

\(^1\)A lot of research and development work is conducted by government Research and Development Establishments e.g. Mining Research and Development Establishment near Burton-on-Trent, England; Harwell Atomic Energy Research Establishment at Harwell. See "Research and Development in Britain's Mining Industry" by Norman Siddall (24 October 1975) Vol.21(4) Trade and Industry 218-21.

\(^2\)HC Deb. v.872 c.293 (written answer by the Prime Minister, 11 April 1974).

\(^3\)White Paper, Framework for Government Research and Development Cmnd. 5046 July 1972 Para.13. See also HC Deb. v.876 c.144 (written answer by the Lord President of the Council, 2 July 1974).
In the defence field, R & D procurement is now the sole responsibility of the new procurement organisation.\(^1\) The Ministry's Chief Scientific Adviser co-ordinates from a scientific point of view the needs of the department as a customer for R & D; the Procurement Executive as the contractor has to meet the requirements of the three services for weapons and equipment. R & D requirements are determined by committees on which the central military, scientific and finance staffs, the service departments and the Procurement Executive are represented. Within the Procurement Executive, responsibility for the execution of extramural programmes lies with four Systems Controllers\(^2\) and responsibility for the management of R & D establishments, including the Atomic Weapons Research Establishments, for the execution of intramural work and for all research rests with the Controller for Research and Development Establishments and Research.

The Controller of R & D Establishments and Research receives advice and guidance from the Defence Research

\(^1\)The procurement organisation, headed by a Procurement Executive (who is the chief executive and directly responsible to the Secretary of State for Defence) has been set up in 1971 following the implementation of the recommendations in the White Paper on Government Organisation for Defence Procurement and Civil Aerospace, Cmnd. 4641, 1971. The White Paper contains the Report of the Project Team under Mr D.G. Rayner which was accepted by the government in toto. The Report outlines the main structure of a new defence procurement organisation [hereinafter cited as 'Rayner Project Team Report'].

Committee. The work is organised into eighteen major fields of research, such as aero-dynamics, electronics, armaments, ships, and submarines. Most of it is done in defence-related industries and the R & D establishments, but some help is also provided by university laboratories. Rationalisation of R & D establishments, which is being undertaken in two stages, will complete the framework of an R & D organisation based on four main systems establishments - sea, land, air and underwater - complemented and supported by a number of technology establishments.¹

C. U S.A.

In the United States, procurement of R & D is examined by several levels of the legislative and executive branches. Various legislative and appropriation committees of both the Senate and House of Representatives (e.g. the Senate Committee on Aeronautical and Space Sciences, the House Committee on Science and Astronautics, the Armed Services Committees of both Houses, etc.) review and assess the R & D programmes of the procuring agencies. The Congressional Office of Technology Assessment assists the legislative branch of the

government in reviewing the R & D activity. Broad reviews of the Federal R & D are also provided by the President of the United States who is assisted by the Office of Science and Technology, the President's Science Advisory Committee and the Federal Council for Science and Technology. The agencies and departments with R & D responsibilities have an Assistant Secretary for Research and Development, who is generally responsible for R & D procurement functions. Various other high administrative officials are appointed to deal primarily with R & D programme content and direction.¹

5. Expenditure on R & D by Contract

A. AUSTRALIA

The statistics published by the five Survey Reports by the Department of Science for R & D in Australia in

1968-69 (called *Project SCORE* Reports 1-5)\(^1\) clearly show that, during that year, compared with U.K., U.S.A. and Canada,\(^2\) Australia spent less per capita on R & D, that it was high on the list dependent on government funding for R & D, that it had the smallest transfer of funds from the government sector to the business enterprise sector and that it had the largest proportion of expenditure in the government sector (see the following table). In the field of defence R & D only 6 percent of expenditure devoted to total defence R & D was incurred extramurally. This differed from the situation in the U.K., U.S.A. and Canada, where a larger proportion of defence R & D was performed outside government establishments. The following table is designed to give some idea about (1) Australia's GNP and GERD as compared with the U.K., U.S.A. and Canada, and (2) government funded R & D in Australia and other countries by sector of performance.

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\(^1\) The five reports in the *Project SCORE* series present detailed information on the national commitment to R & D. A companion document is *Survey of Industry Research and Development Expenditure 1968-69*, Department of Trade and Industry, Canberra 1972.

\(^2\) See also Bellany and Richardson, *Australian Defence Procurement* (Canberra 1970) 6-7.
International Comparisons (Selected Countries) in GNP, GERD, Government-funded R & D - by sector of performance

1968-69

<table>
<thead>
<tr>
<th></th>
<th>GNP* ($US.000m)</th>
<th>GERD+ ($US.000m)</th>
<th>GERD % of GNP</th>
<th>Govt. funds as % of GNP</th>
<th>SECTOR OF PERFORMANCE</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>GNP* ($US.000m)</td>
<td>GERD+ ($US.000m)</td>
<td>GERD % of GNP</td>
<td>Govt. funds as % of GNP</td>
<td>Govt. Business %</td>
</tr>
<tr>
<td>Australia</td>
<td>30.48</td>
<td>0.34</td>
<td>1.13</td>
<td>67</td>
<td>73</td>
</tr>
<tr>
<td></td>
<td>(A$27.215)³</td>
<td></td>
<td></td>
<td></td>
<td>5</td>
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<tr>
<td>U.K.</td>
<td>55.643</td>
<td>2.44</td>
<td>2.23</td>
<td>51</td>
<td>43</td>
</tr>
<tr>
<td>U.S.A.</td>
<td>203.213</td>
<td>26.60</td>
<td>2.81</td>
<td>57</td>
<td>43</td>
</tr>
<tr>
<td>Canada</td>
<td>21.089</td>
<td>0.98</td>
<td>1.34</td>
<td>54</td>
<td>63</td>
</tr>
</tbody>
</table>

* Gross National Product

1 Data compiled from Tables 20 and 21 of the Project SCORE, Research and Development in Australia 1968-69, P.P. No.271 of 1973.


Complete data regarding government-funded R & D performed by private industry under R & D contracts is not available for Australia or other countries and thus such comparisons cannot be made. But it is apparent from the overall figures and some statistics in the Commonwealth Government sector for the year 1968-69,\(^1\) that in Australia very little R & D is obtained by Government from the private industry under contracts. For example, in 1968-69 out of total expenditure in the natural sciences by the Commonwealth Government sector on extramural R & D ($52.4m), R & D contracts that were let to private industry and others amounted only to $2.4m (5 percent).\(^2\) The rest of the funds were disbursed in the form of grants, patents and licences and fellowships etc.\(^3\)


\(^2\)Total expenditure on R & D equalled 3 percent of the total Commonwealth Budget outlay ($6,559m) for 1968-69 and 0.7 percent of the Australian National Product (GNP) ($27,215m) in that same year. Total value of scientific R & D performed in Australia in 1968-69 was $306 million, out of which the Australian Government provided $234 million. Most of the R & D was performed intramurally ($181m) and business enterprise performed only a small part ($10.4m) of the total R & D work for the Government. See for details, Project SCORE, Commonwealth Government Sector 1968-69, Department of Education and Science, Canberra 1972 and Project SCORE, Research and Development in Australia 1968-69, P.P. No.271 of 1973.

\(^3\)Project SCORE, Commonwealth Government Sector 1968-69 at 5, Figure 18 and Tables 29 and 30, Department of Education and Science, Canberra 1972.
Even the bare bones of these figures suggest that as an economic, industrial, defence problem, R & D procurement in Australia is a subject different in kind and not merely in scale from its counterparts in the U.S.A., U.K. or other major economies.¹ In the defence area, for example, low volume production because of Australia's relatively small, fluctuating and fragmented defence requirement,² low exports, large importations of new technology,³ heavy concentration of R & D in government

¹One good example is the Reserve Capacity Maintenance Scheme in Australia, which has no equivalent in the U.S.A. and the U.K. The Reserve Capacity Maintenance- an annual Government appropriation (which has existed in one form or another since 1945-46) is intended to meet various costs incurred in maintaining production capacity in both Government and civil factories for emergency defence needs but which are not covered by receipts arising from current use of that capacity. Where production capacity of a factory required for emergency defence needs is being only partially used, that part of the costs of maintaining that capacity - including overhead expenditure of a fixed nature and costs of maintaining plant and equipment- which cannot reasonably be regarded as production costs at current level of production, is treated as a charge against the Reserve Capacity Maintenance Appropriation. The Industries Assistance Commission has suggested that the scheme be retained: see IAC Report, Aerospace Industry P.P. No. 34 of 1976 at 43.

²The greater the volume of the production run, the greater the number of units over which non-recurring pre-production costs can be amortised. A large production run also provides the opportunities for obtaining full benefits of learning, for justifying the use of more productive capital intensive processes and for securing economies in the bulk purchasing of materials. See generally, Douglas (ed.), Research and Development in Australian Industry (1967) 19-20.

³New technology is imported in Australia mainly as a by-product of licence production programmes.
establishments\textsuperscript{1} are some of the main causes which have restricted the opportunities for private sector participation through government R & D contracts. The defence industry, outside the Australian Government sector, with a few exceptions, has tended to engage in little original R & D activity and manufactures to precise service specifications. A research contract for $600,000 awarded in 1968 for the establishment of a micro-electronic facility was the biggest of its kind ever let to private industry in Australia - a fair indication of the scale of spending and effort involved.\textsuperscript{2}

In recent years however, Australian Government has moved to strengthen local industrial R & D capability by placing more R & D contracts upon the industry. For example, an R & D contract was awarded in January 1975 for pre-production activities

\textsuperscript{1}"Practically the whole of the local R & D effort has been initiated and executed within three government establishments - ARL, WRE and GAF" : Industries Assistance Commission Report on the \textit{Aerospace Industry} at 45, P.P. No. 34 of 1976 (ARL is an abbreviation for Aeronautical Research Laboratories, Fishermen's Bend, Victoria; WRE for Weapons Research Establishment, Salisbury, South Australia and GAF for Government Aircraft Factory, Port Melbourne, Victoria). See also the paper by Robinson "Defence and Australian Industry" at the Seminar on \textit{Defence Policy and Procurement}, sponsored by Sydney University Extension Board and the Centre for Continuing Education at the Australian National University, 23 April 1971. At p.3 the author states: "In no other developed, non-socialist country in the world is such a high proportion of defence production and research carried out directly by Government agencies."

\textsuperscript{2} Robinson, \textit{op.cit.} 3, 15.
concerning Project MULLOKA (an advanced sonar system being developed for the RAN)\(^1\) with E.M.I. Electronics (Aust) Pty Ltd. Since 1973 many contracts have been placed with Australian companies concerning the BARRA sonic system.\(^2\) In the first stage of the BARRA development contract, the Phase 1 (Engineering Study) contract for $200,000 was let to Amalgamated Wireless (Australasia) Ltd. and four other companies in 1973. Later, approval was given for Phase 2 (Project definition and initial development) at an estimated cost of $2.7 million. Phase 3 (full development, and establishing production facilities) began in 1974 with a three-month $1 million allocation. In March,

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\(^1\) The contract covers assistance to Weapons Research Establishment (WRE) with the setting to work of the Mulloka prototype, an examination of the prototype hardware and documentation to see where cost savings in production may be effected, and the preparation of manufacturing drawings and handbooks. E.M.I. Electronics (Aust) Pty Ltd. has formed a project team including personnel from British Aircraft Corporation (Aust.) Pty Ltd., Fairey Australasia Pty Ltd. and Philips Industries Holdings Ltd. This project will enable industry to assimilate sonar equipment expertise and introduce technologies new to the Australian defence industry.

the government approved an additional $13.6 million to complete Phase 3 by the end of 1977. Contracts totalling just over $8 million were let to the five Australian companies which participated in the earlier phases of the project. These were Amalgamated Wireless (Australasia) Ltd, Sydney; Commonwealth Aircraft Corporation Pty Ltd., Melbourne; Plessey-Ducon Pty Ltd., Sydney; Electronic Systems and Management Services Ltd., Sydney; and Cable Makers Australia Ltd., Sydney. Development contracts, totalling $75,000 were also placed with private industry during 1974 for military electronic equipment development. In the aerospace (the earth's atmosphere and outer space), where research and development is most important in modern times, the Australian Government's contracts to private industry for research and development work totalled $3.8 million between 1965 and 1974 and were mainly confined to the Ikara anti-submarine missile system¹ [total value of contracts: $3.5 million, the major recipients were E.M.I. Electronics (Aust) Pty Ltd. ($1.6m), Amalgamated Wireless (Australasia) Ltd. ($1.2m), and Hawker Siddeley Electronics Ltd. ($0.7m)] and the Jindivik target aircraft system² [total value of contracts: $0.3m, shared by

¹This Australian-designed anti-submarine guided-weapon system for the RAN, Royal Navy and Brazilian Navy has been developed by the combined efforts of Government's R & D establishments and private industry.

²Pilotless target aircraft designed and developed in Australia.
Fairey Aviation (Australia) Pty Ltd. and Bendix Corporation (Australia) Pty Ltd.]. Unlike many overseas countries, R & D contracts by the Australian Government amount to very small government funding of R & D work outside the public sector. The practice in other countries of placing a larger share of government R & D contracts with industry has helped to spread technological benefits into commercial or non-defence industries. But in Australia, historical concentration of virtually all R & D work in government facilities has meant that private industry is unable to maintain specific R & D resources. Contracts are undoubtedly very important to the maintenance of industry's R & D resources. The Industries Assistance Commission in its recent report on the 'Aerospace Industry' has observed that "the proportion of R & D at present being performed in the private sector of the industry is very low" and recommended that "the Government direct a reasonable proportion of total R & D expenditure to the industry, and more than at present to the private sector of the industry".

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2 For an account of historical factors, see Robinson, "Defence and Australian Industry" op. cit. 8 et seq.
4 Id. at 47.
5 Id. at 58-59. "Research and development contracts should be let far more extensively to industry. ... This will not only add to our defence capacity, it will also provide a more meaningful boost to industrial development than any policy of across-the-board high tariff protection": P. Robinson, op. cit. 16. See also to the same effect, Douglas (ed.), Research and Development in Australian Industry op. cit. at 82.
B. U.K.

Statistics showing the exact amount spent by the U.K. government by contract with private industry and universities and further educational establishments (including private non-profit making bodies such as Cancer Research Campaign) for Research and Development work, are nowhere available. The latest data on British R & D spending is to be found in a publication of the Government Statistical Service entitled 'Research and Development Expenditure'.\(^1\) This volume presents an historical conspectus of estimates of spending on 'scientific R & D' and includes tables which fall into four main groups, namely (a) summary tables which cover all sectors of the economy involved in R & D activity and show the value of the work carried out in each sector; the value of the work that each sector provides the finance for, and the flow of funds showing whence each sector obtains the funds for the work it carries out and also what payments are made from any given sector to others to finance work done there;\(^2\) (b) tables regarding work performed in, and other work financed by, central government;\(^3\) (c) tables regarding work performed in, and other work financed by, industry;\(^4\) and (d) tables giving certain data about transactions between the United Kingdom and the rest of the world in respect of royalties.

\(^3\)Id. Tables 6-14.
\(^4\)Id. Tables 15-20.
including those paid for new technological developments.¹

One thing which is most conspicuous by its absence in this quite exhaustive volume is a separate table stating the volume of government R & D work done by contract. Be that as it may, the following information has been collected from various sources² to provide an index of the economic impact of R & D contracting.³

(a) The following table relates to (1) the value of the R & D carried out in the United Kingdom⁴ from 1964-65 to 1969-70, the

¹ Id. Tables 21-24.
² The sources are Studies in Official Statistics No. 21 HMSO 1973, the House of Commons Papers and Debates, Departmental Reports on Research and Development, Command Papers, and the Supply Estimates.
³ Information about R & D spending can also be found in a piecemeal manner in the following: United Kingdom House of Commons Debates Volume Nos. 806 c.1-2 (1970-71); 809 c.191-4 (1970-71); 810 c.94-5 (1970-71); 812 c.476-75 (1970-71); 867 c.326-8 (1974); 868 c.87-8; 892 c.574, 637 (1975); 894 c.4, 38, 144-5 (1975) and 908 c.438 (1976). See also Cmd. 4814 (November 1971), Lord Rothschild Report - The Organisation and Management of Government R & D; Cmd. 5046 (July 1972) paras. 14, 18, 20 and 23; Report on R & D 1974, Department of Environment; "Research and Development by Manufacturing Industry in Britain" (2 May 1974) Vol. 15(5) Trade and Industry 201-17.
⁴ In the United States, the total Federal R & D expenditure reached a peak of $17.0 billion in fiscal 1968. It declined to $15.5 billion in fiscal 1971. According to the Commission on Government Procurement, the R & D obligations were expected to total $15.2 billion in fiscal 1972 and $17.8 billion in fiscal 1973 - Report of the C.G.P. Vol. 2, 11-12. See also Nieburg, In the Name of Science (Chicago 1966) 187. For a table stating (a) the total funds for the conduct of scientific R & D in the United States; (b) R & D inside the government; (c) R & D grants and contracts, etc. for the years 1955, 1956 and 1957, see Colman,"Small Business and Research and Development" (1957) 17 Fed. B.J. 285, 289.
latest year for which the complete estimates are available;

(2) the total government expenditure on R & D; (3) the value of the R & D work financed by government but actually performed by contract ¹ by private industry and (4) work performed by university and further educational establishments. ²

¹ R & D work is performed by the private industry through the instrumentality of contracts entered into with the government, but with universities and further educational establishments the work is not always performed by contract. Sometimes grants are made for the purpose. Since the break up of figures between contracts and grants for the performance of R & D work by the universities and further educational establishments is not available, it is hard to state how much work is being done by grants. For the literature on grants and the difference between a grant and a contract, see Glockler, "The Contractual versus the Grant Approach to Basic Research Activities" (1957) 17 Fed. B.J. 265; Richardson, "Methods of Supporting Basic Research" (1957) 17 Fed. B.J. 281. It may be noted that the United States Assistant Secretary of Defense Research and Engineering (John H. Rubel) pointed out that out of U.S. Defense Research and Engineering budget of 1963 which exceeded $7 billion, approximately $5.5 billion was expended by private industry under contract to the Defense Department: R & D Contracting (Conference Papers on Research and Development Contracts, published by the George Washington University and Federal Publications, Inc. 1963) 19 [hereinafter cited as R & D Contracting].

² There are a number of ways in which links are maintained between government research establishments and the universities, e.g. through extramural contracts, the use of university consultants (both for short-term advice and also for work in government laboratories during the long vacation), grants, and membership by university scientists on advisory committees: see Zuckerman Report paras. 257-9. See also the two recent reports made by the Science Sub-Committee's enquiry into the organisation and funding of scientific research in British universities: Scientific Research in British Universities HC 504 of 1974-75 (23 July 1975) and HC 87 of 1975-76 (17 December 1975).
<table>
<thead>
<tr>
<th>Year</th>
<th>Total value of scientific R&amp;D performed in the U.K.</th>
<th>Total funds provided by the government.</th>
<th>Work performed by private industry.</th>
<th>Work performed by universities and further educational establishments.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1964-65</td>
<td>771,382</td>
<td>421,242</td>
<td>183,177</td>
<td>48,835</td>
</tr>
<tr>
<td>1966-67</td>
<td>926,332</td>
<td>479,370</td>
<td>195,357</td>
<td>54,590</td>
</tr>
<tr>
<td>1967-68</td>
<td>962,067</td>
<td>493,104</td>
<td>196,012</td>
<td>61,517</td>
</tr>
<tr>
<td>1968-69</td>
<td>1,016,575</td>
<td>514,114</td>
<td>203,959</td>
<td>69,007</td>
</tr>
<tr>
<td>1969-70</td>
<td>1,081,879</td>
<td>558,831</td>
<td>221,800</td>
<td>74,791</td>
</tr>
</tbody>
</table>

*£ Sterling*

(b) The total expenditure by the Ministries of Supply and Aviation on R & D contracts with U.K. industry in the ten years up to 1966-67 was £1,550 million.¹

(c) In the field of defence procurement, it is estimated that the procurement organisation will be spending on R & D by contract £103.6 million in 1975-76 and £116.6 million in 1976-77.²

6. **Distinctions between R & D Contracts and Other Government Contracts**

R & D contracts, like most government contracts, consist of standard or 'boiler plate' clauses together with a break clause; changes clause; costs, price and payment provisions; provisions relating to the furnishing of government property; delivery provisions; security provisions; and other special provisions as provided for by negotiation. Thus on the surface they resemble most ordinary 'supply' or 'construction' contracts. However, beneath the surface there are substantial differences.

The basic difference between R & D and the government's commercial contracts is that R & D contracts, more often than not, involve contracts for personal services, while the latter are for supplies. In an R & D contract, the government, in effect buys the brain-child, the scientific and engineering knowledge and techniques of individuals and organisations to seek solutions to problems, to improve existing items, to design new items, or to make new discoveries in knowledge; what is supplied is not an off-the-shelf item, nor one listed in a catalogue. While the

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1 For a list of distinctions, see Lazure, "Why Research and Development Contracts are Distinctive" (1957) 17 Fed. B.J. 255, 261-62.

2 "And even in the business of procurement, the contractual relation is not the traditional market affair: the contract is not let on competitive bids, the product cannot be specified, the price is not fixed, the government supplies much of the plant and capital, and the government may determine or approve the letting of sub-contracts, the salaries of key executives, and a host of other managerial matters." Price, "The Scientific Establishment" (1962-63) 31 Geo. Wash. L. Rev. 713, 726.
government's commercial contracts generally specify large quantities of end items to be supplied strictly in accordance with prescribed specifications and drawings, R & D contracts either set forth objectives to be pursued in broad terms; or call for the design of one or more prototypes wherein guidance is usually not available through preconceived drawings or specifications. It follows that a sound appraisal of the competence of the individuals and organisations that perform the contract is the most critical determination required by those responsible for the procurement of R & D, an appraisal which is different from that required for the procurement of supplies.

Another basic distinction of R & D contracts which set them apart from other contracts is that in R & D contracts the requirements are indefinite and results are not guaranteed.\(^1\) The end result is frequently not known at the time the terms of the contract are settled.\(^2\) That is why R & D contracts

\(^1\)"Much procurement, especially that for research and development, is carried out in conditions of unpredictability and risk, giving rise to difficult problems of public accountability", Turpin, Government Contracts (1972) 18. In the U.S., the Director of Defense Research and Engineering, in his testimony before the Congressional Sub-Committee on Military Appropriations, listed 57 R & D programmes which had been cancelled during the previous ten years and on which $6.2 billion had been spent [cited in Downey Report (infra.388) Vol.1, para. 174].

\(^2\)Cf. in the U.K., Report by Lord Rothschild - The Organisation and Management of Government Research and Development Cmdn. 4814 (November 1971) para. 5."One must remember that the Research and Development effort of a country will have no effect on that country's welfare for at least seven years after the date of the effort in question."
are entered into by negotiation, as an exception to the general rule requiring formal advertising and competitive tendering.\(^1\)

R & D procurement is not susceptible to formal advertising\(^2\) since it (i.e. formal advertising) contemplates the inclusion in the invitation for bids of the specifications or descriptions defining the product to be supplied in clear and specific terms so that each 'sealed offer' will comply with the terms and be based on substantially the same product. In R & D however, identity of product is intrinsically impossible because of the importance of such qualities as innovation, related experience, and individual qualifications.

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\(^1\) E.g., in the United States, there is a statutory exception to the general requirement for formal advertising: 10 U.S.C. §2304 (a)(11)(1970) as amended (Supp. IV, 1974).

by their very nature include exploratory pursuits, unknown and intangible elements upon which answers are to be sought by investigation and experimentation, and other elements which cannot be described with a definiteness which would enable contractors to bid with the same approach and technique in mind: only the ultimate objectives and general scope of the project can be outlined. This type of work must be negotiated in order to permit full discussion of new ideas, work approaches, etc. The contractor is to be selected for his reputation, skill, or exceptional facilities in much the same manner that an individual selects another to seek an expert's services or professional advice. It has been stated that if actions leading to research objectives were all sufficiently well known as to permit accurate specifications, they would be so well known as to preclude the need for R & D effort. In the U.K., the Rayner Project Report pointed out that though competition was an essential ingredient of good purchasing, the design, development and manufacture of defence weapon systems was quite different from normal commercial operations.\(^1\) However, the Project Team observed further, open competition could have the disadvantage of inhibiting the buyer from exercising his supposed skills and judgment in selecting the right R & D contractor.\(^2\)

\(^1\)Cmnd.4641 (1971) para. 24.
\(^2\)Ibid.
Another feature of R & D contracts which distinguish them from other government contracts is that they are concerned with a continuing relationship in carrying on a project over a substantial period of time, in contrast to a more defined and limited procurement action such as the purchase of off-the-shelf items or the construction of (say) a conventional building. From this flows still another feature: the parties do, or can, negotiate a genuine agreement tailored to cover the essentials of their relationship with express or tacit recognition that the details will be worked out as the relationship proceeds. The relationship between the government and a private organisation under R & D contract has been characterised as a 'partnership arrangement', a 'co-operative relationship', and a 'mutual undertaking'. Although the contracts themselves frequently state that the contractor is an 'independent contractor' the parties actually operate on a somewhat closer basis than the arms-length relationship signified by the 'independent contractor' legal concept. This 'partnership' relationship as developed in large scale R & D contracts involves the mutual working out of problems.

1"The market place for defense research and engineering is not the sort of 'supply and demand' market place studied in freshman economics courses. It is less diverse, but more complex. The choices open to customer and supplier alike are both different and less. It is subject to a form of control by the Government that is very rare in other market places. And contractors often acquire a de facto partnership in decisions and in determining projects trends that is also rare in most business situations": John H. Rubel, Assistant Secretary of the U.S. Defense Research and Engineering, "R & D Contracts: Policies and Problems", R & D Contracting op. cit. (1963) 21.
by the government and the contractor all the way through the contract process, beginning with the negotiations and continuing through execution, performance, and completion or termination of the contract. Thus, during negotiations, considerable emphasis is placed upon establishing policies and procedures by representatives of the parties, and on effecting necessary adjustments in them at the time the contract is entered into, with the understanding that such policies and procedures may be further adjusted by mutual agreement as experience is gained and other problems are encountered under the contract. During the later stages of negotiation and immediately after execution of the contract, the parties usually work out more detailed guides and procedures on such matters as personnel, procurement and property management. Mutual agreement is reached annually as to the budget and work programme for the succeeding year, during which the entire programme is reviewed. Important problems which arise during the life of the contract are discussed and solved again by mutual and not by unilateral action. It should, however, be observed that the relationship under an R & D contract varies depending upon a number of factors, including the size and subject matter of the contract, the nature of the parties, and their experience in handling R & D contracts. It is particularly with large scale cost-type contracts, usually at government-owned installations, that the full-blown partnership arrangement is established. With respect to medium and small scale work at the contractor's own facilities, the government usually takes a, so to speak, 'evolutionary' approach, with it normally exercising somewhat greater controls until
the contractor has demonstrated that he is capable of greater responsibility under mutually agreed upon policies and procedures. In the United States the Bell Committee, which was appointed to report to the President on government contracting for research and development reported in 1962 that it was their firm conclusion that it was in the national interest for the government to continue to rely heavily on contracts with non-federal institutions to accomplish scientific and technical work needed for public purposes. It observed that a partnership among public and private agencies is the best way to enlist the nation's resources and achieve the most rapid progress.¹

In supply procurements, where the type and quantity of the item to be procured is set forth specifically in the invitation for bids or request for proposals, the contract is generally awarded to the lowest bidder or proposer. In research and development, however, price is not the most relevant factor in contractor selection and evaluation, because the work to be performed is not fixed, and actual evaluation based on results and costs is possible only after the project has been completed. Moreover, most R & D procurements seek innovative ideas and frequently cannot be considered as essentially cost or price

¹U.S. Bureau of the Budget, Government Contracting for Research and Development: Report to the President, commonly called the "Bell Report". Submitted by the President of the United States to the U.S. Senate and reproduced as Senate Document No. 94, 87th Cong., 2nd sess., 1962.
competitive. The selection of the R & D contractor is usually based primarily on the competence of the technical personnel who perform the work, the attitude and ability of management, and the facilities and experience available in the contractor's organisations.

The U.K. Rayner Project Report\(^1\) warned that the procurement organisation must be wary of falling into the trap of treating second-rate suppliers as cost-effective simply because they quote lower prices. The Report proceeded to point out that suppliers who did not make a profit were rightly considered less effective in giving value for money than those with good profit records, except in short-term once-for-all transactions.

The size of its purchases usually makes the Government a significant, frequently the dominant, and in many fields the sole buyer of R & D. Moreover, in R & D procurement, freedom to enter or leave the market place is sharply constrained by security classifications, protection of proprietary information, and lack of usefulness of R & D capabilities in other kinds of enterprises. These factors give rise to a difficult problem in R & D contracts: to what extent should the government commit itself to awarding the future mass production contract to the contractor doing the development work? Contractors are most often unwilling to commit key personnel and facilities to a development contract, owing to the relatively small scale of

\(^1\)Cmnd. 4641/1971 para. 27.
development operations, and the 'headaches' so frequently a part of such operations (as compared to production operations), unless they can have some assurance that they will be awarded the first production run contract. Yet this conflicts with one of the fundamentals of government procurement, that all competent contractors should be given the chance to compete for government business.¹ Of course, it is true that even in strictly open competition, the development contractor has a decided advantage in the competition for first production both by reason of the 'know how' acquired in development and the possession of much of the tooling, equipment, and machinery required for production,² and also because development and the first stage of production are usually interlocked, the production contract being often awarded before development is complete.³ In the U.K., the

¹See the discussion in Turpin, Government Contracts (1972) 134, 251.

²This type of situation is recognised in ASPR §3-214.1 and 2 (1975) which authorise the negotiation of contracts if "for technical or special property that he [the Secretary] determines require a substantial initial investment or an extended period of preparation for manufacture, and for which he determines that formal advertising would be likely to result in additional cost to the Government by reason of duplication of investment or would result in duplication of necessary preparation which would unduly delay the procurement of the property. The authority of this paragraph will in general be used in situations where it is preferable to place a production contract with the supplier who had developed the equipment, and thereby either assure to the government the benefit of the techniques, tooling, and equipment already acquired by that supplier, or avoid undue delay arising from a new supplier having to acquire such techniques, tooling, and equipment".

³Turpin, op. cit. 161-2.
Rayner Project Team stated that contractual policies which expected a supplier to devote his scarce scientific resources to the development phase without any assurance for future business would stand effectively between the development of a partnership between buyer and seller which, in their view was essential for long-term planning and the minimisation of manufacturing costs.\(^1\) The Project Team further observed that continuity of work would enable suppliers to acquire the skills and maintain the trained personnel necessary for effective process quality control.\(^2\)

To avoid giving undue advantage to a development contractor over other possible competitors for subsequent production contracts, what the Australian Government does is to give all potential contractors an opportunity to tender in the first instance, i.e. when a requirement arises for a new item. A complete coverage at this stage ensures as far as possible that the most efficient equipment is finally obtained at the best price available.

Finally, an R&D contract, unlike most 'supply' and 'construction' contracts of Government, is not a contract of adhesion.\(^3\) Although R & D contracts do usually contain 'boiler

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\(^1\) Cmnd. 4641 (1971) para. 24.
\(^2\) Id. para. 26.
\(^3\) In the United States, this is termed as a "conflict of interest" situation. For details, see Report of the C.G.P. Vol.2, 47-49.
\(^4\) It is interesting to note that the skills and expertise developed in R & D in the Industrial Research Establishments of the Government are sometimes made available to industry on contract: 3rd Report from the Select Committee on Science and Technology HC 302 of 1971-72 (U.K.) paras. 57 and 58.
plate' or 'standard conditions' regarding the changes and termination of contracts, the basic nature of these contracts is so different that the government is not often in a position to dictate one-sided terms. R & D contracts more or less involve a sort of collaboration between the government and the contractor on a long-term basis. Since much of the work is done at the forefront of scientific and technological fields where things are uncertain and unpredictable, and often (as in the defence procurement), the monopoly buyers deal with monopoly suppliers,\textsuperscript{1} the details of contracts are negotiated between the parties, with few exceptions, almost on equal level as the contract proceeds.\textsuperscript{2} At the same time, however, the manner in which the R & D procurement functions, is very different from the ordinary commercial government contracts. In R & D procurements, particularly for defence, the Government decides what will be developed and when; it decides what will be produced and when and in what quantities. Its decisions, right or wrong, are often final decisions. Similar factors and considerations seldom apply with anything like equal force to the non-defence contracts nor is the Government so likely to be largely or even entirely dependent upon a single supplier or a group of them.

\textsuperscript{1}Cf. Cmnd. 4641/1971, para. 23.

\textsuperscript{2}It was the recommendation of the Zuckerman Committee that the oversight of a development contract should, as far as the government is concerned, be by a team or management board chaired by a technical official of the Supply Department and represented by members from the technical, financial and contracts divisions of the Supply Department concerned, as well as the potential user and a representative of the prime contractor: \textit{Zuckerman Report} para.217 (iv).
for the non-defence products that it needs. There are no standard conditions specifically laid down for the purposes of R & D contracts. In some cases where the terms are not negotiated or intelligently picked up from the standard conditions of government contracts for stores purchases, the contractual relationship is carried out under the conventional legal language of the standard form contract, complete with the usual whereas clauses, boiler plate and fine print. But in order for a going co-operative relationship to work under such a contract, the parties, particularly the government, strive to make sense out of the situation by a scheme of informal administration outside the formal arms-length relationship prescribed in the contract document. Another method is to postpone the evil day of entering into a standard form contract as long as possible. But whatever may be the case, the fact remains that the contractual relationship is entered into and carried through on a far more equal footing than the supply contracts because the R & D contracts involve a technical and professional job for very long periods of time and in some cases the private party is in a stronger position as far as the scientific and technological knowledge is concerned. In the U.K., the Zuckerman Committee reported this in 1961: "Considerable numbers of professional and technical staff from industry work alongside the Authority's [Atomic Energy Authority] own staff on particular projects... Through contracts for extra-mural work, links are maintained with university
scientists who also make frequent use of the large experimental installations at Harwell."\(^1\)

7. Contracting-out

There are three main means by which R & D contracting takes place: (1) R & D contracts for the management and operation of government-owned facilities; (2) R & D contracts in which government finances research which is of the contractor's choice—generally of a basic or fundamental nature and generally with universities and academic institutions; and (3) R & D contracts entered into with private commercial organisations requiring the contractors to solve particular problems assigned by the government. The choice between the various means of accomplishing an R&D task ultimately boils down to relative efficiency and effectiveness of the means selected. Before dealing with the contractual forms of an R & D contract, it will be pertinent to discuss what, in the United States, has been termed 'contracting-out'.

Nieburg\(^2\), tracing the developments which have occurred in American society in this scientific age, observes that R & D contracts have become the wedge that opens the door to larger procurement awards and in effect controls the fate of companies, corporate managements, financial elites, geographical areas, and political leadership. According to him, scientific research and

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\(^1\) Zuckerman Report, para.66. See also para.87.  
\(^2\) Nieburg, In the Name of Science (Chicago 1966).
development are open-ended undertakings. In the chapter entitled 'The Contract State' he points out how public control has been eroded:

The dominant centres of corporate power have largely usurped the government's evaluation and technical direction responsibilities .... The Government's Bell Report of 1962 expressed concern at the erosion of its ability to manage its own affairs and to retain control over contracting .... The proliferation of quasi-public corporations, both profit and non-profit, springing from the soil of R & D spending (such as Bellcomm, Aerospace Corporation, or Comsat Corporation), symbolizes the bewildering innovations of the Contract State.

Another well-known author similarly observes that:

No sharp line separates government from the private firm; the line becomes very indistinct and even imaginary. Each organization is important to the other; members are intermingled in daily work; each organization comes to accept the other's goals; each adapts the goals of the other to its own. Each organization, accordingly, is an extension of the other. The large aerospace contractor is related to the Air Force by ties that, however different superficially, are in their substance the same as those that relate the Air Force to the United States government. Shared goals are the decisive link in each case.

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1 Chapter X, 184-99.
2 Id. at 192.
This state of affairs has been dubbed by many American scholars as 'contracting-out' and defined as "the transfer of responsibility for the performance of desired functions, mostly of a personal service (i.e. administrative) nature, to private institutions". Power to administer governmental programmes is 'delegated' to the managers and directors or non-governmental organisations 'who in turn use their own personnel to fulfil contract obligations'. 'Contracting-out' has been described

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3 Ibid.
also as "a system that allows the government to farm out a complete range of administrative and executive responsibilities, accompanied by money, authority, and responsibility".\(^1\) Thus the term implies a divestiture of responsibility, an arrangement by which the functions which ought to be performed wholly within the precincts of government are turned over - lock, stock and barrel - to a non-governmental organisation.\(^2\)

The tag of 'contracting-out' has been attached to a broad range of contractual relationships between government agencies and private organisations, including contracts for weapons systems management and technical supervision, management analysis and consultant services, contracts for the maintenance and repair of facilities and equipment, personnel training, educational services, technical co-operation, operations analysis, research and advisory services in the planning and policy fields, the conduct of basic and applied research, management and operation of government research establishments and laboratories, and for the services of a contractor in the areas of systems engineering, integration, testing and overall 'technical direction' of complicated development projects. Each of these functions is often believed to fall in the 'in-house' category utilising only government employees. On the other hand, there are many avenues of contractual activity where the 'in-house' alternative is not

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present. No one today conceives of the government manufacturing the automobiles it uses, refining the oil it consumes, or producing the infinite variety of standard commercial items it procures from industry. The purchase of such items involves the most conventional and stereotyped use of the government contract, and the 'contracting-out' label is never thought to be applicable to them; nor, for that matter, is it ordinarily applied to the quantity production by industrial corporations of some of the unconventional items, even though those involve some research and development, or to the field of big construction contracts, although such contracts vest extensive responsibility with the contractor for the actual performance of the work. In these areas the pattern of government-industry relationship is so long established that one hardly ever thinks of choosing between governmental and private means of getting the job done. It is only where government agencies appear to have a choice, and especially where there is a shift away from an exclusively 'in-house' method of doing the work, that the process of reaching beyond the ranks of government employees to accomplish the task is labelled as 'contracting-out', and the dangers of undue delegation and transfer of managerial responsibility are highlighted.¹

¹For the nature and extent of contracting-out, see Miller, "Administration by Contract ...". (1961) 36 N.Y.Univ. L.Rev. 957, 968-76.
Those who criticise 'contracting-out' observe that government agencies have come dangerously close to abdicating responsibility by relying to an excessive degree upon contractors in the decision-making process and in the performance of functions of an inherently 'governmental' nature. Professor Arthur Miller maintains that under the contracting-out process "power over governmental decisions is turned over to private groups and individuals", thus magnifying "the problem of discretion in administration". That has led to the undesirable result that 'private administrators' are making policy or at least strongly influencing it. Thus, "the power to interpret, to implement, to advise and to analyze becomes a governmental power privately exercised."¹ Dr Heyman fears that simple dependence of the government on certain contractors may result in a dangerous increase in bargaining on the part of organisations which become virtually indispensable.² The same view seems to be held by Galbraith.³

While the Bell Committee Report⁴ stated the "fundamental conclusion that it is in the national interest for the

¹Id. at 981-83.
²Heyman, op. cit. 61.
⁴President Kennedy wrote to the Director of the Budget (Mr David E. Bell) on 31 July 1961, asking for an exploration of "the circumstances and conditions under which contractor operations provide the most effective means of accomplishing the government's objectives in the areas under review". S.Doc.No.94, 87th Cong., 2nd Sess. 25-26 (1962). [These extracts are reprinted in Miller, "Introduction: The Rise of an 'External Bureaucracy'" (1962-63) 31 Geo. Wash. L. Rev. 685, 689-97].
government to continue to rely heavily on contracts with non-federal institutions to accomplish scientific and technical work needed for public purposes", it also pointed out very firmly that the management and control of all federal R & D programmes must not be delegated to private organisations. Such functions are: determining whether a certain project shall be undertaken, setting the pace at which it shall be performed, deciding on the organisation to carry it out, instituting appropriate means of controlling that organisation's performance, and, finally evaluating the results.

The use of R & D contracts has grown because new social conditions have brought problems which cannot be resolved adequately with government's existing apparatus. The protagonists of 'contracting-out' remark that it is not the result of any desire on the part of government agencies to divest themselves of responsibility. The motivation, rather, has come from the need of the government to avail itself of talent where it already exists - in the private sector - on terms which provide a sufficient incentive for participation.

Moreover, the 'contracting-out' device effectively pleases

1 In the United Kingdom, the Treasury Officials exercise financial control on R & D: see the discussion in Turpin, op.cit. 122 et seq.

2 In the United States only 13 percent of the nation's R & D scientists and engineers are employed by government: Report of the C.G.P. Vol.2, 25.
those who clamour against 'big government' but want big new governmental programmes. It allows projects to be carried on without a regular staff with which the 'government would be saddled.' It allows full flexibility of personnel policies and salaries, fringe benefits and working 'atmosphere', which can be changed as the work changes. People with fresh ideas are free to be hired and released without a single service regulation being applied. Whole institutions and their prestige can be hired when needed, in effect temporarily 'nationalizing' them. Special equipment for special projects need not be purchased, only to lie unused at the end of the programme. People who would not work for the government because of salary, red tape, pension and personal commitments, etc. are obtainable.

These are not small benefits. However, it is apparent that here, as elsewhere, 'fleas come with the dog', and it is to a discussion of these that we now turn. 'Contracting-out' is a sharp break with tradition and creates unresolved problems - constitutional and technical. It has been observed that 'contracting-out' results in delegations of legislative and administrative power to private groups and is thus "constitutionally invalid." In the United Kingdom, the Select

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1See Heyman, op.cit. 61; Johnson, op.cit. 763.
2Miller, "Administration by Contract ...", op.cit. 981 et seq.
Committee on Science and Technology (Second Report 1968-69) making the first comprehensive parliamentary inquiry into defence R & D, recommended that industry should participate in the formulation of defence R & D policy. But the British Government very cautiously pointed out that "its [industry's] involvement in responsibility for policy is to the extent which the Committee recommend would raise constitutional issues which go much wider than research and development".¹

In the defence field, the government observed further, industrial firms, "are primarily agents for the execution of government defence equipment policy; it is for the government to take the ultimate decisions and it cannot share the responsibility for these decisions".² The government stated that the major objective of its policy was to build up a closer partnership with industry in the framing and execution of research and development policy and programmes so that decisions could be taken with the best possible advice. But it then hastened to add that sight must not be lost of differing responsibilities of government and industry: "In particular, they must not be such as to derogate from the ultimate responsibility of the Minister concerned for

²Cmnd. 4236/December 1969 para.12.
implementing government policy as expressed in the objectives of the programme and the priorities within it, or for the control of defence expenditure." These observations clearly show that the British Government is aware of the constitutional problem. But it is very hard to say how far the strict judicial doctrine of delegability of power has been applied in practice.\(^1\) Be this as it may, the growth of private administration of public affairs is carrying traditional delegation practices into a new area.

Another problem of 'contracting out' is that government is never able to attain the knowledge and experience to perform its assigned functions with civil service and military personnel since it contracts for them every time they are needed. Again, R & D contracts provide an opportunity for patentable inventions to be created, the ownership of which creates a serious source of conflict and unpleasantness. The simple dependence of the government, particularly the military, on contractors is most undesirable. In the United States the Department of Defense and the three military services already find themselves heavily dependent on their 'think group' contractors, like RAND (Research and Development)\(^2\).

\(^1\)Id. para.35.

\(^2\)It is the admitted policy and practice of the government to leave the total management responsibility of development projects of great importance e.g. in the aircraft and guided weapon field, in the sole hands of the contractor, see Defence Research and Development Cmnd.4236 (December 1969) para.29.
Corporation, and would be severely handicapped without them. With such dependence, what may happen if the contractor and the government disagree as to fee, patent rights, or any of the many other features of the contract, can be anybody's guess. At least one congressional committee in the U.S. finds it 'difficult to conclude otherwise' that all impasses are resolved in favour of the contractor.

8. Sequence of Operations: The Range from Basic Research to Production via Development

To better understand R & D contracting problems, it is helpful to outline the various stages between basic research and production (basic research and development are stated by the Zuckerman Report as bands at opposite ends of a continuous spectrum\(^1\)). The categories which make up this spectrum include the research area, comprising basic and applied research, and the development area, including feasibility studies, design, construction and testing of prototypes. After approval by the 'user' department (civil or defence, as the case may be), the prototype moves out of research and development and into production and supply channels.\(^2\) But before reaching the 'production' contract stage, a lot of effort, time and money has still to be spent. Seldom is this achieved by means of one contract. At each phase contracts are entered into with the private parties to

\(^1\)Para.18, Zuckerman Report.

\(^2\)It should not be inferred however, that each category is a discrete step in the R & D process with a clear beginning and end entirely separate and distinct each from the other. See ASPR §3-402(b)(1975).
accomplish a particular task. Thus a contract may cover research only or research and development, development only or development coupled with production on a greater or lesser scale. Decision to proceed from one step to the next is based on all available information about likely progress, cost and time scales.¹ Though there is no single system of processing which can be applied to R & D projects in the interval between their conception and the moment they become the basis of a development contract, the following sequence of operations has been recommended in the U.K. by Zuckerman Report and improved upon by the Downey Steering Group Report:²

¹R & D consists of a series of stages of trial and error, each of which may involve equipment redesign and retest and unforeseen difficulties may arise at any stage.

²The 'Zuckerman procedure' was further developed in a report of a steering group set up in 1964 by the Permanent Secretary of the Ministry of Aviation (under the chairmanship of Mr W.G. Downey), to examine and consider the methods used in industry and in the Ministry of Aviation for cost estimation and control of defence development projects; and to make recommendations. The Report of the Steering Group on Development Cost Estimating (HMSO 1969) is in two volumes [hereinafter cited as the 'Downey Report' volume 1 and 2]. The recommendations have been adopted by the British Government (See HC Deb.v.792 c.1476, 3 December 1969 - oral answer by the Secretary of State for Defence). The Downey Report and the Zuckerman Report provide the framework of principles for the government research and development contracting in the United Kingdom. (See Turpin, op.cit. at 83). In the United States, the categories of Research, Exploratory Development, Advanced Development, Engineering Development and Operational Systems Development (see ASPR §4-101), represent the spectrum of the R & D development cycle. For the details of this classification see ASPR §3-402(b)(i),(ii) and (iii)(1975). See also Downey Report Vol.1, chapter 8. In Australia, the usual sequence of a research and development project includes most or all the stages discussed here.
(i) **Basic and Applied Research Contracts**

These are directed towards the expansion of knowledge in various scientific areas and are generally entered into with universities and academic institutions. Some of the results of these contracts lead to the formulation of a draft operational requirement (Staff Requirement or Staff Target)\(^1\) and this is followed at an appropriate stage by the initial sketch of a technical specification.

(ii) **Feasibility Study Contracts**

Normally on major development projects a feasibility study is carried out in industry, with advice and guidance from government establishments where necessary. Feasibility studies are often carried out by a number of contractors in competition.\(^2\) The government may or may not make a contribution to the cost of work by the contractors. The main object at this stage is to secure competition in ideas (i.e. any alternative ways of meeting the government's requirements) in order that the government can select the most suitable and promising idea for detailed project study. The feasibility study contract also enables the government to identify the scientific and technical problems involved.

\(^1\)Zuckerman Report paras.187-94.

\(^2\)Zuckerman Report para.198. In Australia, it is Government policy to make best use of whatever possibilities for competition exist, although this is limited by the scarcity of suitably equipped firms.
in meeting a staff target and to assess whether those can be solved. Normally it does not involve any experimental work or engineering, but does include approximate indications of the cost and time that would be necessary to complete the project. The British Downey Steering Group Report\(^1\) recommended that the feasibility study may last up to six months and cost around one half per cent of the estimated total development cost.

(iii) **Project Definition Study Contracts**

The results of the feasibility study are studied by government agencies to determine whether the project should proceed beyond that stage. In some cases the feasibility study may reveal the need for further research and appropriate contracts are then entered into for that purpose. In other cases, the contract is made with the selected contractor for the Project Definition Study. It involves a detailed examination of the scientific and technical problems in developing a weapon or equipment to meet a staff requirement - leading up to a plan of design, development, and testing (quantified in terms of money, manpower and time) and to an indication of subsequent production costs. This study is generally not competitive\(^2\) but is covered by a single contract, normally on a cost-reimbursement basis, calling for work to be done in two phases: Project Definition Stage 1 and Project Definition Stage 2. The contract includes


\(^2\) Competitive project studies may be obtained for selecting a contractor only in rare cases: *Downey Report* Vol. 1. para. 160.
the standard break clause so that it can be terminated at the end of Project Definition Stage 1, if necessary.\(^1\) Stage 1 corresponds broadly with the project study envisaged by the Zuckerman Report.\(^2\) It may last up to nine months and cost up to five per cent of the total development cost.\(^3\) During this phase the contractor carries out design and experimental work so as to reduce the technical uncertainties and to evolve a draft specification. The contractor also prepares a first development cost plan. Unless the government decides to terminate the contract at this point, it proceeds without interruption to Project Definition Stage 2. In this stage the contractor carries out more detailed design and experimental work. The experimental programme includes the construction of models - such as space models of complete equipment and working prototypes of sub-systems. In addition, tests are carried out to examine components and further reduce technical uncertainties. The Downey Report recommended that on major projects this may occupy some twelve to fifteen months and cost up to a further ten per cent of the estimated total development expenditure.\(^4\) It is used to prepare detailed specifications covering performances, development trials and engineering characteristics. These specifications form the basis for a revised development/cost plan and for the government's decision on whether to proceed with the development

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\(^1\) *Downey Report* Vol. 2, 5 *et seq.*  
\(^2\) *Zuckerman Report* para. 203 *et seq.*  
\(^3\) *Downey Report* Vol. 2, 5.  
\(^4\) Id. 7.
to completion. Two products of project definition contract are thus - a development specification and a synthetic estimate of cost.

(iv) Development Contracts

The transition from a project-study contract to a development contract represents a critical stage of decision. It forms the basis for a final examination of the desirability of proceeding from a project study to a development contract. In the course of a project study it usually becomes apparent whether it is likely to be successful. But in some cases consideration of a project study report takes time, and it is important to ensure that the teams which have been built up in industry to study the project are not left idle, or worse still, disbanded because of the time-lag between the completion of the project study and the letting of a development contract. Both the Zuckerman and Downey Reports were of the opinion that in order to maintain the momentum of promising projects, a sort of stop-gap arrangement (sometimes called a 'holding contract') may be made. In other cases a development contract is placed upon the contractor to meet a specific requirement on lines

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1 Downey Report Vol.1, paras. 253-70. In the United States, this is called the "Program Definition Phase". For details see R & D Contracting op. cit. 25-26.
2 Zuckerman Report paras. 207-11.
indicated by a preceding project study. Development contracts normally involve much larger sums than research contracts and involve many aspects which are not usually material or applicable to research contracts, such as change orders, critical delivery targets, large quantities of government-furnished machine tools, large numbers of sub-contracts, manufacturing drawings, production engineering etc. It must, at this point, also be stated that once a prototype has been accepted by the user department and the production contract has been placed, a new cycle of R & D with respect to that item continues with the end in mind of improving that product or weapon.

9. Type of Contract most appropriate for R & D Work

A wide selection of types of contracts is prevalent in government procurement which provide the requisite flexibility needed in the purchase of large variety and volume of civilian

1Zuckerman Report paras. 213-19.

2The Downey Committee Report recommended "[W]e consider it desirable that, before placing any new major development contract, the Supply Department should look again at the selected company's proposed system of [cost] control in order to be sure that the requirements of an effective system have been introduced, consistent with the estimating, budgeting, and cost collection procedures recommended in the Handbook of Procedures .... We also recommend that where the supply department is doing continuing major business with a contractor, his financial and accounting system should be checked at regular intervals, every five years." op. cit. para. 97. See also 'The Handbook of Procedures' (contained in Vol.2 of the Downey Report) which describes an integrated set of procedures for programming, estimating, and control, on ministry-sponsored development projects. These procedures are intended as an aid to contractors in the effective management of development projects and also to assist government project officers in the evaluation of proposed projects, and in the oversight of development contracts.
and military supplies and services.\(^1\) The respective contract types mainly vary as to the degree and timing of responsibility assumed by the contractor for the costs of performance and the amount and type of profit incentive offered to the contractor to achieve or exceed specified standards or goals. With regard to the degree of cost responsibility, a wide variety of arrangements is constructed; the following three being the major ones which are arranged in order of decreasing contractor responsibility for the costs of performance: fixed price contracts, incentive contracts and cost-reimbursement contracts. With regard to contract types, which are rated according to the incentive, they provide for the contractor to improve his performance in one or other or all aspects of the contract. There is again, an infinite variety of arrangements which is available for inclusion in an incentive plan. Incentive contracts currently in use however are: Cost-Plus-Incentive-Fee (CPIF), Fixed-Price-Incentives (FPI) and Cost-Plus-Award-Fee (CPAF). In the following pages, we consider the suitability or otherwise of each of the three major types of contracts for research and development work.

(i) **Fixed-Price Contracts for R & D Work**

As for the procurement of supplies and services, also for R & D work, public policy favours the use of fixed-price contracts, except where a cost-reimbursable or incentive contract

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\(^1\) A general discussion of the methods and types of government contracts is to be found in chapter II, *supra*.\hfill
promises some net advantage over a fixed-price contract. In competitively negotiated procurements, the fixed-price contract provides the greater assurance that the benefits of competition have been obtained and employed. In this type of contract, the contractor undertakes the performance of a definite scope of work for a fixed amount of compensation. The amount is determined at the time of entering into the contract. From a financial viewpoint, it is the best type of contract for the contractor, providing him with the greatest incentive because any reduction of costs below those originally estimated in his price normally results in added profit. This type of contract is used when the work is well defined and the cost of performance can be determined in advance with reasonable accuracy. There are certain clear-cut advantages to the government in placing R & D work on a fixed-price basis. Among them are: (1) an incentive to the contractor to reduce contract costs and accelerate the completion of the work; (2) a reduction of administrative costs, both for the government and the contractor, due primarily to the absence of detailed records and audit; and (3) an increased stability in the government's funding, due to the reduction (but not elimination) of the cost over-run problems. But, at the same time there are substantial hazards involved in undertaking research and development work on a fixed-price

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1Turpin, op. cit. 188. Report of the C.G.P. Vol.1, 22. For the various types of fixed-price contracts used by the United States procurement agencies see FPR§1-3.404 (1976); ASPR§3-404 (1975). See also the discussion in chapter II, supra.
basis. To a greater extent than in any other type of procurement, a contractor is faced with these risks: (1) impossibility of performance; (2) miscalculation of cost and time; and (3) likelihood of a dispute concerning the prior interpretation of the specifications.\(^1\) In summary, the high degree of uncertainty in R & D contracts obviously militates against the use of fixed-price contracts.

(ii) Cost-Reimbursement contracts for R & D work

For R & D work it is generally felt that the cost-reimbursement contract or cost-type contract is more appropriate than the fixed-price type, for the same reasons that negotiation is preferable to bidding in R & D contracts.\(^2\) That is, fixed-price contracts contemplate that the subject matter of the contract can be substantially specified before the execution of the contract. R & D projects, however, generally are not subject to fixed requirements or definite work approaches, and the anticipated costs and variations in approaches necessary to pursue best the objectives cannot be forecast accurately at the time of contract negotiations. Flexibility in pursuing the R & D objectives being essential, the cost-reimbursement contract offers such flexibility and


\(^2\) See the discussion chapter II, supra.
it is the most common type used for R & D activities.

The cost-reimbursement or cost-type agreement is used for most large scale research, development, and demonstration work and for production type activities carried on in government-owned facilities. Under this type of arrangement, the government reimburses the contractor for his direct costs together with payment of an overhead allowance and a fixed fee. Thus, in effect, on large scale R & D work where costs are at best an educated estimate and a comparison of cost estimates is not a good basis for contractor selection, the management and technical 'know-how' of contractors is obtained on a cost-plus-a-fixed-fee (CPFF) basis. In this arrangement profit rather than price, is fixed and the contractor's cost responsibility is minimal. The government therefore, assumes all or most of the financial risk for the work. However, the contractor, particularly in a difficult new research and development project, risks his technical and managerial reputation to some extent. Conversely, the contractor, in addition to receiving payment of all costs, and a fixed fee, may obtain valuable training of its personnel in new fields which may later be applied in his regular commercial or academic pursuits.¹

¹A discussion of advantages and disadvantages is to be found in Nash's paper "Cost Plus Fixed Fee Contracting" in R & D Contracting, op.cit. 109-19.
Another type of profit arrangement which is made is a cost-plus-a-percentage-of-cost (CPPC). In the CPPC contract, the initial agreement fixes the percentage of the ascertained costs which is to be added as profit. Since in this type of contract, the actual amount of profit increases with costs, the contract is said to have an inherent disincentive to economy and is generally viewed with disfavour in the United Kingdom.\(^1\) In Australia, too, a cost-plus-a-fixed-fee (CPFF), rather than a cost-plus-a-percentage (as it is called here) is considered the more appropriate type of price basis.\(^2\) In the United States, cost-plus-a-percentage-of-cost system of contracting is prohibited by law.\(^3\)

There are two other types of cost-reimbursement arrangements which are sometimes used by government in obtaining R & D work, viz. a 'cost contract' and a 'cost sharing contract'. A 'cost contract' or as it is sometimes

\(^1\) Turpin, op.cit. 188. See also Downey Report Vol.1, para.210.
\(^2\) Statement of Mr Bernie Long, Assistant Secretary, Purchasing Division, Department of Administrative Services, in a Seminar given by him on 20 July 1977. A series of seminars on Purchasing Program for 1977 were held in the Department of Administrative Services, Canberra under the auspices of the Institute of Purchasing and Supply Management, A.C.T. Branch.
called cost-without-fee-contract, is the same as CPFF type, except that the contractor receives no fee. It is normally used for R & D contracts with non-profit institutions, such as the universities. The 'cost sharing contract' resembles the cost contract in that the contractor receives no fee, but differs in that he is reimbursed only an agreed portion of his allowable costs. This type is considered appropriate for R & D projects which are jointly sponsored by the government and the contractor, theory being that the contractor will obtain other benefits in lieu of full monetary reimbursement of costs. It is used in cases of jointly sponsored R & D projects with educational or other non-profit institutions, or in cases where the results of the research result in commercial benefit to the contractor.¹

In reviewing the use of cost-reimbursement types of contracts for obtaining research and development, it is apparent that they also are not best suited. The cost-plus-a-percentage-of-cost contract (CPPC), as stated above, not only fails to provide an incentive to economy, but may actually encourage uneconomic working and performance. In

¹See in the U.K. Cmd.3927(1969) Chapter VIII, "Research and Development" and Cmd.4236, Defence Research and Development para.43, where cost-sharing contracts have been called 'partnership agreements'. In the United States, see FPR§1-3.405-2 and §1-3.405-3; ASPR§3-405.2; and §3-405.3. It should, however, be noted that the U.S. Commission on Government Procurement (1972) recommended the elimination of the cost-sharing on R & D projects - see Report of the C.G.P. Vol.2,2.
a CPFF contract too, a contractor has little inducement to keep his costs at a minimum. Since he is paid for all allowable costs, a cost-plus scheme does not discourage the extravagance of cost overruns.\(^1\) The more he experiments, the more he learns, and with little or no out-of-pocket expenses. He, in essence, receives an education at government expense, and the government may well pay for more research on a particular project than it needs or wants. When it is also considered that the R & D contract is quite often the forerunner of the production contract, much of which is on cost-plus-incentive-fee (CPIF) basis (i.e. the government and the contractor share in any 'saving' below the 'target price'),\(^2\) the research contractor has a positive incentive to boost his research and development costs as high as possible so that the production target price will similarly be set high. This presents a very difficult problem of cost control. Moreover, since the contractor is assured that the incurred costs of certain types will be reimbursed, and any mistakes he makes will not reduce his profits, a negative incentive develops leading to stretch-outs and increased costs.\(^3\)

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\(^1\) In Australia, see Industries Assistance Commission Report, Aerospace Industry P.P. No.34 of 1976, 24.

\(^2\) See infra.

The United States Defense Department summarised the disadvantages of CPFF contracts as follows:

It provides little or no incentive for private managers to reduce costs or otherwise increase efficiency. Indeed, the cost-plus-fixed-fee contract, in combination with strong pressures from Governmental managers to accomplish work on a rapid time schedule, probably provides incentives for raising rather than for reducing costs. If a corporation is judged in terms of whether it accomplishes a result by a given deadline rather than by whether it accomplishes that result at minimum cost, it will naturally pay less attention to costs and more attention to speed of accomplishment. On the other hand, where there is no given deadline, the cost-plus-fee contract may serve to prolong the research and development work and induce the contractor to delay completion.¹

(iii) Incentive Contracts for R & D work

The various incentive contracts which provide for varying degrees of contractor cost responsibility, depending upon the degree of uncertainty involved in contract performance, are the third type of government contracts.² In these types of contracts, the parties agree to a target cost, a target profit and a target formula which provides that profit increases if actual costs are less than the

²It may be noted that in the United States, the Procurement Regulations treat incentive contracts as one of the cost-type or cost-reimbursement contracts: FPR§1-3.405-4 (1976); ASPR§3-405-4 (1975).
target cost and that profit decreases if actual costs are more than the target cost. The aim of an incentive contract is to induce the contractor, by means of rewards or penalties, to meet or improve upon either performance and/or delivery requirements and to reduce costs. These objectives are best achieved by development and negotiation of an incentive plan which encourages the contractor to accept more risk in return for greater profit.

In essence, nearly all contract incentives use a 'target' approach as an alternative to the 'cost-plus' approach. They take the form of a sharing arrangement, expressed as a percentage ratio. For example, if a 60:40 cost sharing formula is negotiated as part of the contract, the terms and conditions of the contract will require that the government must pay 60 cents and the contractor 40 cents of every dollar by which actual costs increase above and beyond the agreed target cost figure. Conversely, for every dollar saved (that is, for every dollar allowable costs are below the agreed target cost figure), the government retains 60 cents and the contractor's profit or fee increases by 40 cents. These cost sharing arrangements ensure that the profit or fee of the contractor reflect his management skills in controlling cost overruns against the target cost estimate.
In addition to cost incentives, performance and delivery incentives are also used sometimes, the theory being that a positive emphasis, spurring the contractor through the profit motive, is more effective and administratively more convenient than reliance on legal remedies such as determination of contract for default and provisions for liquidated damages. Such incentive arrangements hinge on quality and timeliness of performance as well as cost. Performance incentive contracts are generally developed to cover a requirement where complete specifications cannot be written, the methodology of production is undecided, and/or the technology and appropriate industrial capacity are unknown. Hence equipment performance targets are set in relation to specific standards and agreed test procedures. The targets are tied to such characteristics of performance as range, speed, thrust, manoeuvrability, reliability, maintenance costs, interchangeability, standardisation, compatibility and failure probability.

Delivery incentive contracts are developed where supplies are urgently required or where government desires accelerated completion of the contract. A delivery incentive is normally written in days, weeks or months, with a target on a calendar date or time. The delivery targets set in the schedule are then related to rewards or penalties for
prototype acceptance delivery dates, first batch production run completions, slippage or delinquency, and achievement of interim milestone or critical interface dates. However, where delivery by a specified date is a prime requirement warranting consideration of incentive provisions, the incentive plan must provide for the cost targets to be met in conjunction with the delivery targets. Use of delivery targets alone could see costs run rampant and specifications being barely met while the contractor seeks to deliver early to earn increased profit on the contract.¹

Contracts containing two or more incentives are called multiple incentive contracts. A multiple incentive contract not only uses cost targets but also performance and delivery schedule targets and incentive rewards as well. Each element within such a contract establishes neat balancing of trade-offs, giving appropriate recognition to relative weighting of the various elements making up the contract and the critical activities required to carry large or small incentives. The method of 'structuring' the multiple

¹ In the United States, Armed Forces Procurement Regulations provide that a multiple incentive contract may contain two or more incentives in any combinations; for example, cost and delivery, cost and performance, or cost, delivery and performance incentives. Delivery or performance incentives alone are not authorised by the Defense Department. These provisions obviously reflect hard-earned lessons in this area of contracting whereby contractors have sought incentive goals in their own interest at the expense of the government. See, for example, ASPR §3-407.2(c)(1)(1975).
incentive consists of first determining the total target fee (representing normal profit for an acceptable job) and then to divide this in the desired proportions between the cost, performance and delivery incentives; the target fee for each of these aspects is then varied up or down for success or failure. However, the application of the incentive varies according to the stage of the project. In the development phase the main emphasis is usually on performance; cost and delivery are stressed in production contracts. In the United States, performance and delivery incentives in R & D contracts are used extensively. ¹

To summarise this discussion of multiple incentives in R & D contracts, it is apparent that an effective use of incentive contracts depends upon the successful control of certain factors in contracting. The first, and most basic of these is of course the definition of requirements.

¹The ASPR regulations governing the selection of the proper type of contract contain the following statement regarding the preferred contract type for development work: "The cost-plus-incentive-fee contract is suitable for use primarily for development and test when ... a target and a fee adjustment formula can be negotiated which are likely to provide the contractor with a positive profit incentive for effective management. In particular, where it is highly probable that the development is feasible and the government has determined its desired performance objectives, the cost-plus-incentive-fee contract should be used in conjunction with performance incentives in the development of major systems, and in other development programs where use of the cost and performance incentive approach is considered both desirable and administratively practical ...". ASPR §3-405.4(b) (1975). The cognate provision in the FPR is contained in §1-3.405-4(b)(1976).
The government must know what it wants. A corollary to this is the designing of the incentive formula. Again, the methods of measuring performance should be based on the existing means and standards and these methods must be agreed to before the development effort is performed.

There are large numbers of permutations and combinations of incentives. The basic types of incentive contracts which are often employed in R&D are (1) cost-plus-incentive-fee and (2) fixed-price-incentives.\(^1\) The distinction between these two is that whereas in a cost-plus-incentive-fee (CPIF) contract there is no ceiling price and thus all allowable costs are paid by the government and with no obligation for the contractor to continue working if the government does not provide sufficient funds, with fixed-price-incentive (FPI) contract a ceiling price is included and the contractor is obligated to complete the work at this amount. Again in a CPIF contract, normally a maximum and minimum profit fee is prescribed but in the FPI contract no such maximum or minimum profit is prescribed.\(^2\) In the United Kingdom

\(^1\)In the U.S. see FPR§1-3.404-4 (1976); ASPR§3-404.4(1975). Another type of contract which is used in defence and NASA procurement of research and development is called cost-plus-award-fee (CPAF) contract (see ASPR§3-405.5 and NASA PR§3-405.6). CPAF provides a means of applying incentives in contracts which are not susceptible to finite measurements of performance necessary for structuring incentive plan. The amount of special fee (award fee) is paid to the contractor upon a subjective evaluation by the government of the quality of the contractor's performance. See also Burt, "Contracts that Save Money" (Aug/Sept 1976) Australian Purchasing 5,6.

\(^2\)For an illustration of these two kinds of contracts, see Burt, op.cit. 5.
unlike the United States, these two types of incentive arrangements are classed together as 'target cost contracts'.

Unfortunately, it is only within rather narrow limits that an incentive approach can be effectively employed. For instance, a CPIF contract cannot be used where costs are completely unknown, as in advanced state-of-the-art or basic research.\(^1\) Neither is it likely to be used where costs can be estimated with great accuracy and with a substantial historical base - a situation suited to fixed-price contracting. One of the hazards of CPIF contracting is that a very strong incentive to inflate estimated costs is built into the system. According to Turpin, the success of the system depends "on the negotiation of a good target" and its usefulness is confined to that "narrow but important sector of procurement in which the knowledge and predictions of the parties do not provide sufficient certainty for a fixed price but do allow of the calculation of a reasonable target or target range".\(^2\) Moreover, experience in the United States and the United Kingdom suggests that the incentive approach is unsatisfactory in circumstances where substantial changes

\(^1\)For example, in the United States, NASA found it difficult in the initial stages to write into its contracts cost and performance incentives. There was so little cost history in the areas in which NASA was contracting that fair cost targets could not be arrived at. See the paper by Brackett, Director of Procurement, NASA in R & D Contracting op.cit. 76.

in specifications or work to be done are required in the course of the contract performance.


A. AUSTRALIA

The Australian Government contracting authorities usually arrange fixed-price contracts wherever possible and this applies to developmental as well as production contracts. In most R & D contracts the unknowns are, however, so incalculable that a fixed-price contract is considered too hazardous or uncertain either to the contractor or to the government and these contracts are, therefore, generally arranged on the basis of 'ascertained costs' plus profit basis (as the cost-plus-a-fixed-fee (CPFF) contract is called in Australia). Under this 'ascertained costs' plus profit system, costs are seldom accurately estimated in advance. The total cost of a job is estimated on completion of the work and a pre-determined percentage profit mark-up is added. Major reasons for the use of this system are that it is time-saving and simple, particularly when there are frequent modifications to original specifications, that there is a lack of opportunity for competitive tendering when often only one industry has the necessary R & D resources to undertake the work, and that accurately estimating costs of dissimilar jobs is difficult.

The selection of a contractor for an R & D project is made by the contracting authority, in consultation with the competent
technical and financial authorities, on the basis of responses
to such questions as whether the total cost estimates
are submitted, whether the relative labour hours and materials
allowed for each item/stage of the task are realistic, whether
the proposals show an adequate understanding of the task, the
relative technical chances of each proposal to be completed
successfully, the supporting managerial, industrial and financial
resources of each tenderer, the suitability of each tenderer to
undertake subsequent production, the suitability of each design
for quantity production, Commonwealth equipment/facilities held
or required by each tenderer for testing or other contract
purposes and so forth.

The price basis of "ascertained costs" plus profit (i.e.
CPFF) is chosen by the contracting authority if the nature of
R & D task is (i) insufficiently defined by specifications,
drawings or other means and the Commonwealth and the tenderer
cannot reach a reasonably accurate assessment of costs, or
(ii) involves solving of developmental problems, or (iii)
concerned with development and production of prototypes, but
with a continuing development factor in each prototype. In
some cases, the contracting authorities stipulate that a cost-
plus contract may be converted into a fixed-price type e.g.
where the developmental content is expected to be largely
resolved early in the life of the contract, and by which stage
a reasonably accurate assessment of the cost of the balance of the
contract is possible. But in those cases where the first prototype has been accepted and the task involves production of fully engineered units, a fixed-price contract type is entered into in preference to any other price basis.

Incentive contracts are not as yet common in Australia. The only instance of the application of incentive arrangements to a research, development and production project is the contract for supply of wireless sets from Amalgamated Wireless (Australasia) Ltd (AWA) in 1969. The essential features of that contract which was on a cost-plus-incentive-fee (CPIF) basis were as follows:

<table>
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<tr>
<th>CPIF - 500 Wireless Sets - 1969</th>
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<tr>
<td><strong>Target Cost</strong></td>
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<tr>
<td><strong>Target Fee</strong></td>
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<tr>
<td><strong>Maximum Fee</strong></td>
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<tr>
<td><strong>Minimum Fee</strong></td>
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<tr>
<td><strong>Share Ratio</strong></td>
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<td><strong>Cost Incentive Range</strong></td>
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The company maximised its return by completing the project at an actual cost which represented 86 percent of the agreed target cost estimate. Thus it received the maximum fee payable on the target cost, i.e. 14 percent of target cost.

Experience with the developmental order for the Wireless Sets clearly indicated to the contracting authority that, because of
the risk and uncertainty inherent in the project, there was no possibility of reaching agreement on a mutually acceptable fixed-price contract for the production stage. The company's preference had been for a cost-plus-percentage-profit contract (CPPC) on the grounds that an incentive-type arrangement would erode expected profit, if it did not result in an outright loss, when there was an overrun of costs. The Commonwealth's view at the time was that, because there was a defined "build standard", historic costs were available of the material content, and some cost data was known on manufactured costs, the requirement was ideal for use of a cost-incentive contract arrangement. While the company showed some reluctance initially to the use of a cost-incentive approach, once the negotiations were completed, the motive to increase profit by cutting costs in the productive processes ensured that the contract was successful, with benefits going both to the government and the contractor. This success was followed up in 1970 by placing with AWA further three orders involving target cost incentives for supply of wireless set spares for the Army and Navy. Again the actual costs were well below the estimated target costs, and the contractor received the maximum fee of 14 percent of target cost.

No further incentive-type contracts have been let in Australia since 1970, other than a cost-plus-award-fee (CPAF) contract valued at $15 million arranged with Fairey (Australasia) Pty Ltd for operation and maintenance of three NASA tracking
stations in the A.C.T. and the support facility at Fyshwick for a period of three years ending 31 August 1977. The main reason for not having incentive arrangements for R & D procurement is stated to be that the purchasing authorities do not at present have the facilities or ability (such as appropriate management techniques supported by pricing, audit, logistics and engineering considerations and all the sophisticated supporting procedures that the participation of personnel representing these functions entails) necessary to determine target costs with sufficient accuracy for use as part of an incentive arrangement.  

The Industries Assistance Commission, which recently released a report on the 'Aerospace Industry', has strongly recommended that incentive contracts should replace cost-plus contracts wherever practical for defence work undertaken by local industry. The Commission stated that as a general rule fixed price contracts should be arranged but where

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1 The supporting procedures include new techniques of price/cost analysis, Project Definition, Development Categorisation, Contractor Performance Evaluation, PERT/Cost and the Cost of Economic Information System.

2 This was stated by Mr Bernie Long (Assistant Secretary, Purchasing Division, Department of Administrative Services) in a seminar given by him on 20 July 1977 held under the auspices of the Institute of Purchasing and Supply Management (IPSM).


4 Id. at 58. It may be noted that this recommendation of the IAC has been recently implemented by the government.
uncertainties regarding costs were likely to be significant, the application of more moderate forms of incentive contracts should be considered. The Commission observed: "Whether based on a fixed price incentive or cost-plus-incentive-fee arrangement, the main feature of such a system should be that the contractor is permitted to retain some part of any cost savings, relative to a target cost named in the contract, and is penalised by some part of any costs in excess of the target." The Commission felt that the introduction of incentive contracting in Australia would lead to an improvement in the overall efficiency of industry.

Although the recommendation by the Commission has been made mainly for the production contracts, there seems to be no reason for not extending it to R & D procurement.

B. U.K.

Current government practice is to try to negotiate wherever possible a form of contract which provides the contractor with a financial incentive to keep the costs to the minimum compatible with the satisfactory performance of the work. In

1 Id. at 30.

2 The evidence given to the Commission by the aerospace industry showed general agreement that the cost-plus scheme, including the necessity of complying with complicated check on costing, did not encourage an increase in efficiency. The industry advocated as a method of encouraging greater productivity, the introduction of incentive schemes allowing the government and contractors to share cost savings resulting from greater management and production efficiencies (id. at 24).

the past few years the use of incentive contracts by procurement authorities is on the increase. In 1961 the Zuckerman Committee stated that the Ministry of Aviation was attempting to improve the contractual arrangements it made with industry by the greater use of incentive contracts rather than those based on cost-plus-profit basis.\(^1\) In 1966 the Downey Committee considered in detail the application of incentives in development contracts in the U.K. It supported the policy of seeking incentive arrangements for development work wherever possible. The Committee concluded however, that only in exceptional cases would the essential conditions exist for the successful negotiation of an incentive contract at an early stage. It emphasised that negotiation of incentives was largely dependent upon establishment of firm and realistic specifications and on the ability to make realistic estimates of cost and time based on those specifications. Advanced development work involved, according to the Committee, a degree of uncertainty which militated against this, but that there was scope for incentive contracting on the smaller, less risky projects and on the main phase of development of bigger projects if the project studies were carried out with greater thoroughness.\(^2\) The Committee then remarked that although incentives had considerable merit

\(^1\)Cmnd. 3927 (1969).
in certain applications, their use in the U.K. could only be introduced if additional technical expertise was available. It did not, therefore, recommend the adoption of any particular type of contract for R & D contracts but suggested that the circumstances of each project should be examined by the technical staff, in consultation with the finance and contracts branches. It further stated that before a project definition contract was placed, the contractor should be required as one of the outputs of that phase to put forward proposals for incentive arrangements for any subsequent full development contract or for such parts of the programme as appear suited to that form of contracting. The government would then need to decide in each case whether and what incentive arrangements were appropriate and the stage at which they should be introduced.¹

The Committee of Public Accounts in its report made in 1970² has also drawn attention to the difficulties which the government has experienced in negotiating target cost (i.e. incentive) contracts. In a number of cases it found that targets had to be revised because the specifications had been modified after the finalisation of target costs. In other cases, great difficulty

¹ Downey Report Vol.1 Ch.10, "The Scope for Incentives in Development Contracts" paras. 210-246.
was experienced in estimating and negotiating realistic cost and performance targets at an early stage in the development or production process, in agreeing to such targets in relation to specifications which had not been finally determined, or in negotiating profit rates commensurate with the risks likely to be involved. The Committee cited the instances of the Concorde and Harrier Aircraft contracts for the engines and airframe where such difficulties were experienced in the negotiation of incentives.

C. U.S.A.

Until the March 1962 ASPR Revision, the U.S. Defense Department made widespread use of cost-plus-fixed-fee (CPFF) contracts for R&D work.\(^1\) As a result of findings by the Bureau of the Budget\(^2\) there was a shift to incentive contracts. Since then the Department of Defense and the National Aeronautics and Space Administration (NASA) have made increasing use of CPIF contracts. The successful use of incentives in defence development contracts in the U.S. has reduced considerably the need for the Defense Department to monitor the contractor's progress during development. It has also helped the government in forward budgeting for defence expenditure.

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\(^1\)Thus in 1961, $8.9 billion worth of defence awards (39 percent of total DoD contracts) were made under the CPFF type of contract: R&D Contracting \textit{op.cit.} 98.

\(^2\)Ibid.
The idea of procuring the development of a weapon system under an incentive contract however is not new there. In fact the contract which, for practical purposes, established the present American system of procuring aerospace weapon systems contained an incentive clause. This was the contract signed in 1908 between the Wright brothers and the Aviation Division in the Office of the Chief Signal Officer. It was a fixed price contract with a performance incentive. It called for an airplane with a speed of 40 miles per hour, a range of 125 miles, and a payload of 350 pounds. In addition, the Signal Corps Specification No. 486 included incentives for performance up to 140 percent of the price for 44 miles per hour and down to 60 percent of the price for the minimum acceptable performance of 36 miles per hour. The price was $25,000. The Wrights were paid $30,000 or a 20 percent incentive, for a 42 miles per hour performance. This early example of a performance incentive illustrates one of the basic requirements for incentive development contracts - that is, the determination of desired performance objectives.

11. Terms of R & D Contracts

(i) The terms for an unsatisfactory performance of an R & D Contract

The legal remedies available to the government in the case of an unsatisfactory performance of an ordinary procurement contract are either the determination of contract for default
or payment of damages - liquidated or otherwise\(^1\) - or in appropriate cases both. In addition to the legal remedies, there are certain 'administrative remedies' that may be taken against a contractor such as profit reduction or disallowance and not placing future contracts.\(^2\) Performance is said to be unsatisfactory if the contractor has not performed the contract to the expectations of the government - either in the sense of quality, quantity or time. Whether the performance of the contract is in accordance with the specifications or whether it has progressed satisfactorily is a very difficult question to decide. These difficulties are aggravated in the field of R & D contracts because there it is often not possible to foresee, when the contract is placed, the results perhaps several years ahead, that will be achieved by the contractor. It is in the nature of R & D work that the final answers are uncertain and problematic.\(^3\) The whole area of R & D work is surrounded by uncertainty about the specifications which translate the staff requirements into engineering terms and about the work that will have to be done to meet it; and uncertainty about the technical problems that

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1"The practice in recent years ... has been to rely on common law rights for breach of contract to safeguard the government's interests in the event of delay in preference to liquidated damages clauses stipulating fixed sums." Second Report from the Estimates Committee (U.K.), Electrical and Electronic Equipment for the Services, HC 53 of 1966-67, 6.

2See generally, Turpin, op. cit., "Disputes, Remedies and Termination" (Chapter 8).

3Paul, United States Government Contracts & Subcontracts (1964) 102 et seq.
will arise and the effort and time that should be allowed for their solution. Moreover there is the paramount difficulty of the availability of qualified personnel fit to oversee performance. Performance supervision is vitally dependent on definition of parameters and methods of testing and these aspects are very complex. Nevertheless, despite all these difficulties, unsatisfactory performance by the contractor must not pass without notice. In a report presented to the United Kingdom Parliament by the Comptroller and Auditor General in 1965, it was stated that the normal practice of the Ministry of Aviation was to impose an appropriate penalty against the contractors to the extent that inefficiency on their part could be demonstrated to have contributed to increased costs of the R & D projects.¹

In the following year the Ministry of Aviation was asked by the Committee of Public Accounts for examples of cases since 1963 in which contractors' profits had been reduced for unsatisfactory performance and six illustrative cases were given in a memorandum presented to the committee.² All were cases of unsatisfactory technical performance in development work and all but one were cost plus contracts. It would appear from these six illustrative cases that some of them may have involved actual breaches of contract (e.g. failure to meet a technical target by the date

¹ Report of the C & AG, Civil Appropriation Accounts (Classes I-V) HC 28 of 1964-65, para. 79.
² Second Report from the Committee of Public Accounts HC 158-1 of 1966-7, Evidence, Appendix I.
stated in the contract, and 'lateness in delivery') but others did not, or could not easily have been demonstrated to amount to a breach (e.g. 'poorer' performance of technical tasks than could reasonably have been expected, 'inferior' technical performance, 'failure' to provide adequate control of sub-contracts). In all the six cases, the profit of the contractor concerned was reduced and in the last three cases it was reduced by £3,513, £36,125 and £3,440 respectively. It is all right if the defaulting contractor accepts a profit reduction or disallowance in settlement of a claim by the government for damages, but the legal validity of such a measure is in doubt where no actual breach of the contract has occurred. Fortunately for the British government, no contractor has taken the matter to court so far, but one really wonders what criteria the court would apply if faced with such an issue.

(ii) Break Clause

R & D contracts are ordinarily subject to a 'break' clause,¹

¹In the U.K. see Standard Condition 56 of Government Contracts for Stores Purchases (Form GC/Stores/1, Edition, October 1970). In the United States, government contracts are usually subject to 'termination for the convenience of the government' (see FPR §1-8.702 and §1-8.704 (1977)). The Department of Defense and the NASA require use of a termination for convenience clause for all contracts over $10,000 (see ASPR §8-701 (1975) and NASA PR §18-801 (1976)). The ASPR §7-302.10 (1975) Termination for Convenience of the government clause used in fixed price research and development contracts contains the following: 
"(a) The performance of work under this contract may be terminated in whole or from time to time in part, by the Government whenever for any reason the Contracting Officer shall determine that such termination is in the best interest of the Government...." See further Nash and Cibinic, Federal Procurement Law (2nd ed. 1969) chapter 20.
a procedure whereby the government may unilaterally determine the contract, notwithstanding absence of fault on the contractor's part, at any time by giving to the contractor written notice. In the U.K. the Zuckerman Committee recommending the retention of the 'break' clause in defence R & D contracts stated that the clause was justified because the general pattern of an R & D programme may be affected by some major change in national policy determined by political or economic considerations, either at home or abroad. However, the Committee thought that the use of feasibility and project studies would go far to prevent the need for operating the break-clause except where major technological, strategic or economic changes were such as to justify its application.¹ The Downey Committee in 1967 envisaged the use of the standard break-clause at the end of Project Definition Stage 1, if the government decided not to proceed further.²

The express right of the government to terminate the contract unilaterally is one of the most significant distinctions between government contracts and customary private commercial practice. In an ordinary contract between two private parties, if one party has reserved to itself a unilateral right to terminate the contract at any time, for any reason or for no reason and without being liable to pay the damages for breach, the other party may still perform the contract. But if the validity of such a clause is challenged in the law court the

¹Zuckerman Report, para. 220.
court would perhaps, even in the absence of a precedent, declare the clause unenforceable on ordinary contract principles, such as that there was a lack of consideration or mutuality, or of free consent or good faith or that the contract is against public policy. But in the sphere of government contracts and specially in R & D contracts, fast changing technology and new development often make uncompleted work under existing contracts obsolete or unnecessary. When this occurs, it is usually in the government's best interests to cancel or terminate the contract, thereby preventing the contractor from completing performance. Adjusting the rights of the parties when a contract is terminated is a complex and difficult matter. If the government is required to indemnify the contractor for unavoidable loss as well as loss of anticipated profits, obviously the purpose of the termination clause is frustrated. In recognition of this difficulty, government contracts include 'break' clauses, giving the government the right to terminate and setting out in detail the procedures to be followed in settling and adjusting the rights of the parties under the contract. But, although the inclusion of a 'break' clause has become accepted by those doing business with the government as a reasonable and necessary incident of sovereignty, from a pure legalistic contract theory point of

1 This is discussed in chapter IV supra.
2 The Rayner Project Team (U.K.) observed: "It is recognised that nothing can be firm and final in the environment in which defence procurement operates, but it should not be impossible to make contracts with adequate break clauses which would be acceptable to manufacturers and would allow sufficient flexibility in dealing with changing defence needs" (emphasis supplied). Cmnd. 4641/1971 para. 25.
view, its validity is open to grave doubts. Besides, the 'break' clause does not lay down any standards or reasons for its application and makes the whole matter of sufficiency of indemnification injusticiable. Neither has this clause ever been litigated in the courts. Can the contractor contend that the determination of contract was not done in good faith? or that it contravenes the principles of administrative law? or that it confers unfettered powers on the administrative officers who may exercise their discretion arbitrarily? These questions, too, have not been canvassed.

12. Conclusion

R & D procurement is an investment that the government makes to meet its obligations to provide for defence and the general welfare of the Nation. It is not capable of precise lines of demarcation. Its spectrum extends from a contract for basic or pure research on the one hand 'what makes the grass green' type of project, to a contract for construction and delivery of prototypes, say of a spaceship or of a highly complex experimental weapons system. Historically, the predominant use of contracts has been for procurement of supplies and construction services from commercial organisations, and contract provisions as well as government contracting personnel have been oriented to this type of procurement. The use of these provisions for R & D work raise many problems for the contractors. Furthermore, the wide and nebulous range of research requirements and projects; the

1See chapter IV, supra for discussion.
variety of research contractors - commercial, non-profit laboratories, academic institutions, large business, small business, individual researchers - contribute to the complex problem of procuring research under contracts predicated primarily on standard supply contract laws and regulations. Not long ago the Rayner Project Team in the U.K. made a sharp criticism of prevailing practices when it stated that "the complexity and rigidity of some of the existing contractual procedures, particularly as they have been operated following the 'Bloodhound' and 'Bristol Siddeley Engine' cases, are also matters of concern. They are time-consuming and costly in terms of staff for both government and industry and result in long delays in price and cash settlements". The Project Team hoped that the Review Board for Government Contracts in agreement with the Confederation of British Industry (CBI) would simplify the procedures.

It is submitted that the desirability of uniform procurement standard conditions may be debatable where the uniformity is applied to such widely divergent items as 'nuts and bolts' and 'research and development'. In the United States the Commission on Government Procurement also believed that the procurement of R & D was sufficiently different from other types of procurement and that special treatment of the process was desirable. The Commission recommended, inter alia, that statutory changes be made in the Procurement Statutes and Regulations to recognise negotiation as the normal procurement technique for R & D; that

1 Cmnd. 4641 (1971) para. 28.
uniform regulations be developed for R & D; that changes in source-selection procedures be made to maximize competition rather than the number of competitors; and that unsolicited proposals be more often encouraged and accepted.¹

In the absence of a clear government-wide direction, the procuring departments do not use any particular terms and conditions for their R & D contracts.² This lack of uniformity amongst procuring authorities inevitably leads to confusion as well as delays adoption of contract provisions specifically 'tailored' for R & D procurement objectives. It is submitted that specific contract clauses, different from supply contracts, may be provided regarding the description of work, contractor's compensation, cancellation of contract, default, government property, inspection, military security requirements, patents, copyrights and other proprietary rights,³ liability insurance,


²In the U.K., there are, however, certain internal instructions on the procedure for the control of R & D set out in a number of notices issued by the Controller of Aircraft and the Controller of Guided Weapons and Electronics (under the Procurement Executive set up in 1971 in the Ministry of Defence). For a list of notices, see Appendix L of the Downey Report, Vol.1.

extra hazardous risks, et cetera.

In the United States the Federal Procurement Regulations (FPR) do not furnish much guidance concerning contracting for R&D. However, significant refinements in contracting for R&D have been made by those agencies having the largest stake in the area. In the defence R&D procurement, Armed Services Procurement Regulations deal with the procurement of R&D separately.

After the fashion of ASPR, the NASA Procurement Regulations prescribe terms and conditions to be used in R&D contracts distinguished from those employed in supply contracts, and the Energy Research and Development Administration (ERDA) has developed a variety of standard clauses applicable to research contracting. In addition, ERDA and NASA have developed contract


\[2\] The FPR system governs procurement of all non-military agencies except NASA.

\[3\] E.g., Energy Research and Development Administration Procurement Regulations (ERDA-PR) (previously called Atomic Energy Commission Procurement Regulations - AEC-PR) §§9-4.5800 to 9-4.5807 (1976). These sections establish procedures for the submission, evaluation and selection for award or support of proposals offered in response to specific Program Research and Development Announcements issued by ERDA to conduct research, development and related activities in the energy field (see 41 FR (Federal Register) 10606, March 12, 1976).


\[6\] See above. See also ERDA-PR §9-4.52 and §9-7.50 (1976).
provisions and forms specifically suitable for research at universities or non-profit organisations.¹ In the United Kingdom, the two forms which are generally used for all government procurement viz. Standard Conditions of Government Contracts for Stores Purchases (GC/Stores/1) and General Conditions of Government Contracts for Building and Civil Engineering Works (GC/Works/1) make no mention of R & D contracts.

Actually the whole field of government contracts needs investigation. It is unfortunate that the British Government did not ask the Law Commission to inquire into question D., which was one of the questions raised by the Commission with regard to reforms in administrative law in its Working Paper No. 13 and recommended for inquiry in Law Commission No. 20.² The Commission, it may be recalled, had recommended an inquiry, inter alia, as to how far, if at all, special principles should govern contracts made by the administration. It is hoped that as and when an inquiry is made into this area, sufficient attention will be paid to the government's R & D contracts as well.

1. Introduction

As will have appeared from the foregoing chapters, government contracts are not only procurement contracts but can have other purposes too. Thus besides the acquisition of goods and services, government contracts can also function as instruments for the achievement of various national, mainly industrial but incidentally also economic and social objectives on a case-to-case basis. Such government contracts are designed to promote the nation's industrial growth and strength, including its technological resources which, in turn will depend on the encouragement of research and development. In this way a government is actually financing large segments of industry: some industries operate almost exclusively on government funds, others rely on lesser but still significant amounts of government subsidies. In this area it is therefore unrealistic to perpetuate the fiction of the independent, private contractor
dealing at arm's length with a government which does not care how he performs his contract so long as the end result is satisfactory. In a very real sense, the government contractor now becomes, so to speak, a quasi-agent of the government as he disburses and deploys public funds for public purposes. Conversely, the government has a duty to supervise the manner in which the contractor does this, not just in terms of dollars and cents, but also in terms of the contribution he makes in furthering industrial innovation and product development.

Again, it will now be clearer that government contracts cover a very wide spectrum of agreements. At one end there are contracts which have all the elements of an ordinary commercial contract; at the other end, they appear as quasi-administrative or regulatory instruments, used as an alternative means of implementing government policies; and at this latter end of the spectrum, a so-called government contract may sometimes even cease to remain an enforceable contract. The system of planning agreements, recently introduced in the United Kingdom, is perhaps the best example of this. This chapter will now deal with such planning agreements, although their discussion will be brief as we are not concerned with their details, which are in any case extra-legal, but rather with the way they
contrast with more orthodox government contracts. Our consideration of planning agreements is thus meant to round off our discussion of government contracts in general.

2. What are Planning Agreements?

"Planning Agreement" is one of the two institutions recently introduced by the British Government under the Industry Act 1975; the other is the National Enterprise Board. The basic theme of planning agreements is to bring about a closer relationship between the government and industry for the achievement of national needs and objectives.

Section 21(2) of the Industry Act 1975, defines "planning agreement" as

... a voluntary arrangement as to the strategic plans of a body corporate for the future development in the United Kingdom over a specified period of an undertaking of the body corporate ... being an arrangement entered into by the body corporate and any Minister of the Crown which in the opinion of that Minister is likely over the specified period to contribute significantly to national needs and objectives.

The White Paper - the Department of Industry's The Regeneration of British Industry produced by the Benn/Heffer team in August 1974 - gave pride of place to the notion of

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2. The planning agreement system is being operated through the Department of Industry: Trade and Industry Vol.25(13), 24/31 Dec. '76.

3. Cmnd. 5710.
planning agreements between major companies and government. It stated that these were to be non-enforceable arrangements under which private and public investment and development plans would be co-ordinated in the interests of more stable economic management. The Agreement, it was further pointed out, will, however, be given sufficient recognition by statute to enable the company concerned to rely on assistance promised under it.\(^1\) Later on, a spokesman for the government observed that although a planning agreement would not be a civil contract enforceable by law, it would represent a statement of firm intention by both sides.\(^2\) The agreements were to be regarded not so much as documents but as a new relationship between the government, a company and its workers where consultation was of the essence.\(^3\) The planning agreement has been variously described as a co-operative, or continuing, or growing, or developing or voluntary arrangement. It is said to be based on an exchange of information and understanding and on the development of relationship between the government and the company, its employees and trade unions and not merely on an exchange of financial benefits or an exchange of legal or technical obligations.\(^4\) Although a document will be drawn up which will form the basis, the agreement will get

\(^{1}\text{Id. at 3.}\)

\(^{2}\text{HC Deb. v.907 c. 179 (written answer by the Under-Secretary of State on 9 March 1976).}\)

\(^{3}\text{HC Deb. v.886 c. 1069; Cmnd. 5710 (August 1974) at 3.}\)

\(^{4}\text{Official Reports, House of Commons Standing Committee E on the Industry Bill 1975, columns 1171, 1173, 1184, 1185, 1301 [The Committee held 40 sittings between 4 March - 12 June 1975 and its proceedings extend from columns 1 to 2304. Hereinafter"Standing Committee E"].}\)
under way deeply and profoundly only after a certain period of time. The agreement is therefore not an explicit exchange of bits of paper, but is the development of a closer relationship, a partnership between government and a company. The government would not make a planning agreement with a company that had not achieved, or shown signs of the development of a satisfactory relationship over a range of issues and topics with its employees.

The concept of planning agreements is not a new one. It reflects a development of a practice in a number of European countries. In implementing its various Economic Plans the French administration, for example, often enters into contracts, called 'contrats de programme', with private industry in which the latter agrees to do something desired by the administration. The French have used this 'special' tool for achieving economic administration and economic democracy in a technological society. The contractual mechanism has also been used by the French Government to discuss with an individual company that company's problems and prospects. For example, companies have been allowed

1Id. c. 1824.
3Standing Committee E c. 1446.
4Although the term 'agreement' is often used as synonymous with "contract" [Radin, Law Dictionary (2nd ed. 1970) 13], here it is used in a much broader sense.
5Hayward and Watson, Planning, Politics and Public Policy - The British, French and Italian Experience (Cambridge University Press 1975). Sharpe, op. cit. para. 214, has stated: "There is little doubt that the French experience lies behind Part III of the Act".
6For an excellent article see Bergsten, "The Administration of Economic and Social Programs in France by the use of Contractual Technique" (1975) 48 Southern Calif. L. Rev. 852.
under these agreements, to raise prices in order to finance investment subject to their compliance with the objectives on output, investment and exports of a national plan.¹

Italy has also used since 1968 similar contracts called "Planned Bargaining" with leading companies as part of its national plan. These agreements are meant to establish a constructive dialogue between government and industry with the aim of examining and harmonising their respective programmes of action. Like the British planning agreements, the Italian planned bargaining procedure consists of an exchange of information between the government and industry on their respective investment plans, so that their projects can be effectively harmonised.² Belgium has also employed similar contracts since 1969 and the parties are the government, trade unions and the relevant companies.³

2A. Planning Agreements in Australia

Mention should here be made of arrangements under which large numbers of industries have received, and are continuing to receive, government subsidies in Australia. These subsidies are made by the Government with a view to achieve some of its social, political, economic, or national objectives. Besides, grants are also made to Australian industry under the provisions

¹ Trade and Industry Vol.26(10), 11 March 1977, 624. See also HC Deb. v. 886 c. 975.
² For details see Hayward and Watson op.cit. ch.6.
of the Industrial Research and Development Grants Act 1967-1976 and Industries Research and Development Incentives Act 1976. While grants are regulated by statute, government subsidies are often not so regulated. The legal nature of subsidy arrangements is as yet not free from doubt: are these arrangements contracts, governed by the principles of the private law, or are they administrative or planning arrangements and therefore not cognizable by courts of law? Below we discuss two leading Australian cases which clearly show that the question of enforceability has given rise to difficulties.

It will be recalled that in Australian Woollen Mills case,¹ the High Court was faced with such a problem. In June 1946 the Commonwealth Government announced that it would pay a subsidy to manufacturers of wool, on purchases made and used for local manufacture. The main objective of the Government for the making of subsidies was to maintain price of wool low in the country. The plaintiff company, which was a manufacturer, purchased very large quantities of wool and duly received payments by way of subsidy. The Government, however, refused to pay subsidies for some of plaintiff's later purchases. The company brought action against the Commonwealth claiming money which, it alleged, was due to it by the Commonwealth under a contract to pay a subsidy. The Commonwealth denied the existence of any such contract. The High Court unanimously held that there was no intention on the part of the Commonwealth Government to assume a legal obligation

when it offered to pay a subsidy to a manufacturer for purchasing wool for local use, and thus no contract was constituted at any stage binding the Government.\(^1\) The Court continued:

On the whole case the conclusion is unavoidable that the Commonwealth authorities never for a moment intended to make an offer capable of leading to a contract binding the Crown, and that nobody ever supposed for a moment that they did so intend. A wide discretion in a variety of matters was clearly regarded by the authorities as residing in them, and was, in effect, acknowledged as residing in them.\(^2\)

Another case in which the High Court again held the arrangements non-contractual is *The Administration of the Territory of Papua and New Guinea v. Leahy*.\(^3\) There the plaintiff had claimed damages for breach of contract by the Administration of the Papua and New Guinea. The plaintiff's case was that the Administration through its officers having undertaken to carry out the campaign to eradicate cattle tick from his cattle skillfully and thoroughly, failed to do so and thus was guilty of breach of contract. It was contended that the campaign was conducted by officers of the relevant Department in a very inefficient manner resulting into the death of a number of cattle. The Court held that the parties had not intended the arrangement to be legally enforceable: the conduct of the parties constituted only "an administrative arrangement".\(^4\) McTiernan J continued:


\(^2\)Id. at 465.


\(^4\)Id. at 11 (per McTiernan J).
The work done by the Administration was analagous (sic) to a social service which generally does not have as its basis a legal relationship of a contractual nature and from which no right of action would arise in favour of the citizen who is receiving the services if the Government acts inefficiently in performing them".1

Kitto J, with whom Dixon CJ agreed, said that assistance had been rendered to the plaintiff as a function of government in accordance with its settled policy to eradicate cattle tick, not as a matter of private contract.2

The two judgments cited above reveal judicial attitude in Australia towards subsidy arrangements. It seems that these and other similar arrangements3 will fall (in the widest sense) into the class of which illustration may be found in the planning agreements in the U.K.

3. Objectives and Contents of Planning Agreements

In their application to the private sector, the system of planning agreements is expected to provide a new and improved framework for co-operation between the government and leading industrial companies. The primary purpose of a planning agreement is that the government's projections and the companies' own intentions and plans should interact on each other.

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1 Ibid.
2 Id. at 21 (per Kitto J); at 10 (per Dixon CJ). See also Milne v. Attorney-General for the State of Tasmania (1956) 95 C.L.R. 460; John Cooke & Co Pty Ltd v. The Commonwealth (1922) 31 C.L.R. 394; Munday v. Western Australia [1962] W.A.R. 65. See generally, Lücke, "The Intention to Create Legal Relations" (1970) 3 Adelaide L. Rev. 419, 425 et seq.
3 Other instances of governmental assistance are, programmes for the provision of social services, such as relief of disasters like bushfires, floods, droughts, cyclones, etc., for the control of diseases of cattle, for the promotion of the production and marketing of agricultural or industrial items, and the like.
They are also expected to improve and influence the development of government's own central economic policy. They are further designed to provide a new and improved opportunity for workers to be consulted about and involved in a company's forward plans.

The definition of planning agreements (s.21(2)) envisages that they will include such arrangements between industry and government which are likely to contribute significantly to national needs and objectives. The agreements will be concerned with economic objectives which will serve perfectly proper commercial purposes. However, they are not to be viewed strictly as purely and uniquely commercial since they (the agreements) would also be concerned with the widest social and political objectives of the government, e.g., the regional location of jobs, protection of interests of consumers and the community etc., on which other than wholly commercial criteria may sometimes operate.

The concept of planning agreements represents a new initiative, the purpose of which is to improve the quantity and quality of industry's contribution to the development and growth of the economy. It will do this by providing a framework within which decision-taking by government and management is improved by sharing information about plans and objectives.
and in which the effectiveness of action to achieve agreed objectives is enhanced by co-ordinated use of the resources of government and industry.

The exact form which planning agreements will take will therefore be tailor-made to each case. A series of consultations between the government and companies, eventually leading to an agreement about strategic plans, will take place annually but there will be scope for revising the agreement during the course of the year, should circumstances require. These annual consultations will be timed to coincide with the companies' own planning cycle. In their discussions with companies, the government will be essentially concerned with strategic issues. In a Discussion Paper entitled "Contents of a Planning Agreement" the government has stated that it was well aware that commercial plans and forecasts of companies frequently have to change at short notice to keep up with changes in the market. Clearly it was essential that planning agreements should not restrict the freedom of companies to respond to market fluctuations, above all where companies are in competition with overseas manufacturers. This would have to be reflected in the final form that planning agreements take and for that reason alone the agreements will not be rigid. As well as including firm statements of intentions, the agreement may therefore also set out the kind

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1 Standing Committee E c.1164.
2 Published in Trade and Industry Vol.20(6), 8 August 1975, 337-342.
of circumstances which might lead to changes in particular plans and projects and provide arrangements for consultation as necessary.

To sum up, the issues covered by planning agreement discussions will be: economic prospects, the company's broad strategy and long-term objectives, United Kingdom sales, exports, investment, employment and training, productivity, finance, prices policy, industrial relations and arrangements for negotiation and consultation, interest of consumers and the community, and the product and process development.¹

Although no statutory limitation is placed upon the nature of the enterprise that may make a planning agreement, the Government has recently announced that the principal application of planning agreements will be to large companies, that is Category One companies.² Category One companies, broadly speaking, include manufacturers with total annual home sales of £50 million or more and service companies with total home sales of £20 million or more.³

²Trade and Industry Vol.27(8), 27 May 1977, 387.
³Ibid.
Mr Eric Varley, Secretary of State for the Department of Industry recently stated in answer to a parliamentary question, that a planning agreement had been concluded with Chrysler (UK) Ltd. within the meaning of section 21(2) of the Industry Act 1975, and that seven other major companies had agreed to enter planning agreement discussions. Since the planning agreement with Chrysler (UK) Ltd. is confidential, the contents of the agreement cannot be known. However, it has been disclosed that payments totalling £40 million have been made by the Government to that company. Additionally, certain advances in respect of a guaranteed loan have also been made under that agreement, but for confidentiality reasons, the amount of these advances has not been disclosed. The agreement covers the period 1976 to 1980.

1 Trade and Industry Vol.26(10), 11 March 1977, 610. The names of seven companies which are in the process of entering into planning agreements with the government are: British Leyland, Babcock & Wilcox, Clarke Chapman, Head Wrightson, Whessoe, GEC, and Reyrolle Parsons.


4 Trade and Industry Vol.26(10), 11 March 1977, 610. It may be noted that the Industry Act 1975 is silent as to the duration of a planning agreement: the White Paper (Cmnd. 5710) refers to a normal period of three years, although the agreement would be reviewed annually in the light of progress over the previous year and rolled forward for a further year.
4. **Benefits of a Planning Agreement**

There are genuine substantial benefits for companies in the planning agreement system. First, as already stated, they will help the development of a better understanding by government of industry, and a better understanding of the individual company's plans and problems, which will in turn influence the Government's development of industrial, economic and other relevant policies. Large companies have in the past felt that the greatest weakness of their forward planning is the uncertainty of government action. When the Government decides that there has to be a change in industrial direction in the national interest, that can be very damaging to companies. Thus a closer relationship with government through planning agreements will assist companies in their forward planning. There will inevitably also be a greater commitment by government to the economic objectives of companies - to their investment, to their job creation and to all their economic purposes.

Secondly, planning agreements will provide an improved framework for consultation with government and for solving difficult issues, bringing in all government departments involved. Within this framework the discussion might, for example, aim to identify any specific constraints which are inhibiting profitable growth and identify areas for co-ordinated action by government departments and the company.
Thirdly, and leading on from this, they will provide the opportunity for a company to secure specific commitments by government to tackle the particular problems experienced by the company, commitments which, because they are recorded in the agreement, can be monitored by the company.

Fourthly, since it is intended that companies should consult their workforce, planning agreements will provide a means of improving employee participation, building in a flexible way on a company's existing participation arrangements to help secure co-operation by the workforce in carrying out the company's plans.

And fifthly, the system will provide considerable financial benefits to planning agreement companies. Sub-section (1) of s.21 enumerates two main financial incentives for an undertaking to enter into a planning agreement, which we discuss below very briefly.¹

¹Section 21(1) of the Industry Act 1975 reads as follows: When a body corporate has made a planning agreement - (a) the amount of grant under Part I of the Industry Act 1972 (regional development grant) in respect of approved capital expenditure incurred during the period mentioned in sub-section (2) below in respect of any project identified in the agreement may not be less than - (i) the percentage which is the prescribed percentage at the date of planning agreement, or, (ii) in the case of a project which was also identified in a previous planning agreement, the percentage which was the prescribed percentage at the date of that agreement, and (b) financial assistance in respect of any such project may be given under Part II of that Act, without regard to any order under that Act or the Local Employment Act 1972 made after the date of the planning agreement by virtue of which, as the case may be, the grant or part of it could for any reason not have been paid or the financial assistance or part of it could not have been given.
(1) Regional development grants under Part I (ss.1-6) of the Industry Act 1972

The first financial incentive emanates from the provisions of Part I of the Industry Act 1972. Under s.1(1) of the Act, the Secretary of State may make a grant to a person towards approved capital expenditure incurred by that person on new buildings, or works or on the adaptation of existing buildings or works where they form part of "qualifying premises" in development areas or intermediate areas; on new machinery and plant for use in qualifying premises in development areas or in the construction of industry in development areas. Grants may be subject to conditions, including a condition for repayment in whole or in part, and comprehensive provisions with regard to the enforcement of conditions are attached to them, including provisions as to offences and penalties. Now cl.(a) of sub-s.(1) of s.21 of the Industry Act 1975 enables the Secretary of State to guarantee the planning agreement companies the level of regional development grant made to them under 1972 Act in respect of approved capital expenditure on projects identified in the Agreement, at rates which are not lower than those applying when the agreement was concluded. In addition, it provides that "in the case of a project which was also identified in a previous planning agreement," the rate of grant will not be less than that which was prescribed at the date of the

1Regional development grants totalling £325 million were paid out under 1972 Act in 1975-76: Trade and Industry Vol. 24(12), 17 December 1976, 706.

2Section 4 and Schedule 1 of the Industry Act 1972.
earlier planning agreement. The planning agreement companies are thus given a statutory guarantee that the level of their grants will not be reduced during the lifetime of each agreement.

(2) **Financial Assistance under Part II (ss.7-9) of the Industry Act 1972**

The second advantage which the planning agreement companies would have will be the availability of financial assistance to such companies under Part II of the Act for projects so identified notwithstanding subsequent variations in the assisted areas. Selective financial assistance is provided for industry where the assistance is likely to provide, maintain or safeguard employment in those areas; or where it is likely to benefit the economy of the United Kingdom or any part or area of the United Kingdom.

The aforementioned statutory guarantee given under s.21(1)

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1. Section 21(1)(a)(ii). Unfortunately, this no less significant benefit accruing to the planning agreement companies has so far been overlooked. No mention is made of it in the whole of the long proceedings of the Standing Committee E.

2. Sections 7 and 8 of the Industry Act 1972 have been extensively amended by the Industry Act 1975. The sections, as amended, are set out in Part II, Schedule 4 to the latter Act. For a good discussion see Sharpe, *op. cit.* ch.3.


of the Industry Act obviously confers substantial financial benefits on a planning agreement company as against a non-planning agreement company. Therefore, to call the financial incentive a "somewhat jejune guarantee," it may be submitted, is a gross under-statement. The guarantee is indeed an important response to the demands from industry that there should be greater certainty in its dealings with government and provides a firmer base for company decision-making.

5. Can a Planning Agreement be enforced?

The Government of the United Kingdom has repeatedly declared that planning agreements are non-enforceable arrangements, i.e. they are not agreements in the sense of civil contracts enforceable at law. According to Sharpe also, there is no contractual basis to a planning agreement. He has stated that "there is no duty placed upon the Government to undertake the risks attached to Government grants".

2 The Regeneration of British Industry Cmnd. 5710 (August 1974) at 3; HC Deb. v.907 c.179 (written answer by the Under-Secretary of State of Industry on 9 March 1976); Standing Committee E c.1220.
4 Id. at para.233.
Nevertheless the full meaning of 'non-enforceability' has never been fully explained. If by non-enforceability is meant that planning agreements are not binding on the parties, that a company having received a certain grant or financial assistance from the government for a certain project along with a guarantee not to reduce it during the lifetime of the agreement, may flout the agreement or squander the grant for extraneous purposes with impunity, or that a company having been promised a certain level of regional development grant or financial assistance by the government for a project named in the planning agreement for the period of the agreement, may never get it, or the grant be discontinued or reduced, as the case may be, then, it is submitted, planning agreements would be rendered absurd. But the complete non-enforceability does not seem to be the intention of the government. A Minister of the Crown recently confirmed that a promise by the Government to guarantee the level of appropriate financial assistance for a project identified in the planning agreement will be legally binding.\(^1\) Furthermore, it would seem to follow from this that a company which has received financial assistance under a planning agreement will be legally bound to spend the money in the manner prescribed or be liable to legal consequences.\(^2\)

\(^1\)Speech by Mr Gerald Kaufman, Minister of State, Department of Industry at the Institute of Bankers in York on 17 February 1977 published in Trade and Industry Vol.26(8), 25 February 1977, 476.  
\(^2\)See infra.
the guarantee is conditional on the company fulfilling its obligations under the agreement. This is not to say that the company must guarantee that it would perform its obligations absolutely, for the Government expressly acknowledged that:

Market situation can change over the course of operation of a planning agreement in a manner which is entirely beyond the control of a company. The fact that that situation can occur - indeed, might be expected to occur in many cases - in no way diminishes the commitment, at least on the side of the Government, to a planning agreement. What we are concerned about are the other aspects of a company's performance which are within its field of competence to ensure that the agreement is fully carried out.¹

That the respective obligations which may be created under a planning agreement upon a company and the government have a legal effect and are binding, seems clear both from the provisions of s.21(1) of the Industry Act 1975 and s.4 read with Schedule 1 to the Industry Act 1972. As earlier stated, s.21(1) gives a statutory guarantee to the planning agreement companies that the level of their grants for identified projects will not be reduced during the lifetime of each agreement. This part of a planning agreement is legally binding and enforceable.² On the other hand, s.4 of the Industry Act 1972 enables the Secretary of State to impose conditions on the

¹Standing Committee E, c.1175 (Mr Meacher) (emphasis supplied).
²A Government Minister has stated that this will be legally binding, see supra.
making of regional development grants under Part I of the Act and introduces Schedule 1. Schedule 1 contains comprehensive provisions with respect to the enforcement of conditions attached to grants, including provisions as to offences and penalties. For example, paragraph 1 of the Schedule makes it obligatory upon a company which has received a grant, on notice to furnish such information, or to produce such books etc. for the purpose of enabling the Secretary of State to determine whether any condition subject to which the grant was made is satisfied or is being complied with, or whether the grant had become repayable in whole or in part in accordance with any such condition. Paragraph 2 gives a right to entry and inspection of the premises where any asset in respect of which a grant has been made is located. Paragraph 3 provides that a breach of the provisions of paragraphs 1 or 2 would make a person guilty of an offence and liable on summary conviction to a fine not exceeding £400 or £50 respectively. This paragraph also provides that any person who in purported compliance with a notice under paragraph 1 knowingly or recklessly makes any statement or produces any document which is false in a material particular shall be guilty of an offence and liable to a fine not exceeding £400 or to

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1Both s.7(3) and s.8(2) of the Industry Act 1972 also provide that financial assistance under Part II of the Act may be given on any terms and conditions which may be prescribed by the Secretary of State. But unlike regional development grants, the sections are not supplemented by Schedule 1 or any other provisions providing for enforcement of such conditions.
imprisonment not exceeding two years, or to both. Paragraphs 4
and 5 of the Schedule cover certain other provisions for the
enforcement of conditions attached to grants.

There is no doubt that the abovementioned provisions
regarding enforcement of conditions would be equally applicable
to planning agreement companies. Obviously, then, to describe
planning agreements as entirely non-enforceable arrangements,
or perhaps even as entirely 'voluntary', is more than a little
misleading.

At the same time, however, planning agreements are of
course not completely enforceable like contracts. For instance,
remedies like the recovery of damages (including loss of antic­
ipatory profits), specific performance and injunction, which
are usually available to an aggrieved party for a breach of an
agreement by another, will not be available to planning agree­
ment parties. For planning agreements, unlike contracts,
involve development of a closer relationship and a continuous
commitment by parties in a very flexible and informal setting,
so that making this sort of partnership relationship enforceable
will not serve any useful purpose. Some of the government's
R & D contracts, particularly long-term research contracts,
involve a similar sort of close relationship between the parties
and in those cases too, enforceability has got a completely
different connotation. Actually it seems from the above analysis
that the planning agreement system confers more rights
upon private industry than ordinary government contracts, for
under the former either party may resile from the agreement in certain events, whereas under government contracts only the government can do so, e.g. under unilateral termination or break clauses.

6. **Planning Agreements and Government Contracts**

The system of planning agreements resembles closely government contracts. A planning agreement, like a government contract, is between the same parties, viz. government and private industry; is put into writing in a formal document; contains mutual promises, i.e. an agreement by an industry to do something desired by the government in exchange for some benefit conferred by the government; and above all is voluntary, in the sense that a party may not enter upon such an agreement.¹ Negotiation of a planning agreement provides the mechanism for a dialogue between a private concern and the government. It allows the former to participate in shaping the rules that will bind it. If the company does not agree to the proposed agreement, it is not obligated; if it does agree, it is of its own free will.

Whatever the precise legal status of the obligations which planning agreements may create, it is not unarguable that in certain circumstances (though not as an inflexible rule) the Government may seek to make the granting of such discretionary

¹The White Paper, *The Regeneration of British Industry* stated at para. 11 "There will ... be no statutory requirement upon a company to conclude an agreement". Cmnd.5710 (August 1974). See also Trade and Industry Vol.25(11), 10 December 1976, 723; HC Deb. v.906 c.908 (oral answer by the Under-Secretary of State for Industry on 1 March 1976).
benefits, like contracts with Government Departments or the nationalised industries, conditional upon the conclusion of a planning agreement. Since government is overwhelmingly the biggest buyer of manufactured goods and planning agreements involve those very parties in this novel arrangement, the institution of planning agreements can significantly influence the development of government procurement law. Planning agreements can, for example, by creating closer links between the government and industry, bring a better understanding between the parties in their commercial dealings. They can provide information to government contractors about the projected demands of government and, in return, government can get information about how its suppliers are working, what new designs they have on the stocks, what new plant they propose to buy, et cetera, et cetera. This information can, inter alia, lead to financial and other assistance by government to indigenous industry to encourage it to match more closely government requirements so as to reduce the proportion of government procurement from overseas.

1 Besides placing contracts and granting other benefits enumerated in the above pages, the Government may also give the planning agreement companies benefits listed below: Industrial Development Certificates, Office Development Permits, grants under Local Employment Act 1972, grants made by the National Research Development Corporation and the Development of Inventions Act 1967 and export credit guarantees.

It can also help to reduce variety and cut out wasteful proliferation of specifications in public purchasing.  

7. Conclusion

In terms of high technology, space research, aircraft, computers, and so on, it is difficult to imagine the success of industry without a substantial degree of government support given either in the way of direct financial interest or in the way of major research contracts. There is a need also for substantial support in regional policy where, without it, there would be grave and serious distortion in regional investment. The British Government believes that Britain's prosperity and welfare depend on the wealth generated by its industry and all those who work in it. This requires a closer, clearer and more positive relationship between government and industry; and the construction of that better relationship requires the development of new institutions. Planning agreements are one such institution. The British Government seems to remain fully committed to planning agreements.

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1 Cmnd.6315. op.cit. It may be noted that the Public Sector Standardisation Team of the British Standards Institution is already working on this particular aspect of government purchasing.

2 Mr Robert Cryer's (Parliamentary Under-Secretary of State for Industry) written reply to a parliamentary question on 19 May 1977 - Trade and Industry Vol.27(8), 27 May 1977, 386. See also Trade and Industry Vol.26(3), 21 January 1977, 161.
CHAPTER VIII

GENERAL CONCLUSION

Though we have sharply separated various types of government contracts and agreements, it should not be inferred that each is a discrete category entirely separate from the others. A government contract may fit several definitions. Thus, a contract properly classified as research and development may include terms and conditions more usually found in adhesion contracts, or in rare cases, even in commercial contracts. In any case, the terms of a government contract are selected to fit the work required, not selected solely on the basis of the classification of the overall programme.

A major era in Australian government procurement began in the 1960's. Technological industry grew in sophistication and complexity. This created a new set of needs and objectives, just as it speeded up efforts to apply the new scientific techniques, including those of systems analyses, to industry. Apart from the fact that the government's needs for commercial products have constantly grown, it is the development of procurement programmes for
military and aerospace systems from here and abroad which particularly required new contractual and organisational arrangements. New legal and administrative approaches were required to create new and sometimes unorthodox relationships between government and private enterprise. The new organisational patterns still seem strange as we have for so long been used to earlier and simpler arrangements. As the above chapters have shown, the government has emerged as the most powerful purchaser of goods and services - an activity that involves so much money and so many people, and has such important economic implications.\(^1\) As we have also seen, contract has become an instrument of economic policy through the extension of government functions and the socialisation of industries. From being mainly a bargain between parties, contract has to a large extent become a vehicle for the realisation of social, economic and industrial policies.\(^2\)

This thesis has, amongst other things, attempted to demonstrate that the government procurement rules, procedures and standard terms have an enormous impact on non-governmental interests and that government contracting is not simply a "housekeeping" activity, with contracts being made

\(^1\)Chapter I, supra.

\(^2\)Chapters IV and VII, supra.
solely for the benefit and protection of the government. It is therefore suggested that the process of formulating procurement rules and standard terms should be made more politically visible through enlarged opportunities for public involvement. Subjecting government contract terms to the crucible of public scrutiny is likely to result in the development of validly authorised and reasonable contract terms, capable of withstanding attack on their merits.

Further we have tried to show that courts have not been unmindful of the disparities of bargaining power in government contracts, though they have been handicapped by the absence of appropriate devices in the existing law to curb oppressive or harsh government provisions. If we are to prevent government contracts from becoming overpowerful instruments in the hands of procurement agencies, "enabling them to impose a new feudal order of their own making upon a vast host of vassals",¹ we shall need to reappraise very drastically that ambivalent concept "freedom of contract".² Often, in the sphere of government contracts³ as well as in private contracts,⁴ freedom of contract has prevailed over

¹ Kessler, "Contracts of Adhesion - Some Thoughts about Freedom of Contract" (1943) 43 Colum. L. Rev. 629, 640. See also Ch.III, supra.
² Chapters III and IV, supra.
³ See e.g. South Australian Railways Commissioner v. Egan (1973) 47 A.L.J.R. 140, 141, 148.
⁴ Chapter IV, supra.
the individual's plea that a contract held up against him was not what he agreed to do. Unless our contract law is to become an "antiquated strait jacket and then [a] dead letter",¹ it will have to adapt itself to new exigencies; in particular, some judicial recognition will have to be given to the American concept of unconscionability in government contracts so as to deal more effectively with oppressive and unfair contracts.²

Finally it is suggested that Australian lawyers should give fuller consideration to the report of the Scott Committee and its various recommendations after a thorough inquiry into Australian Government Procurement Policy.³ Recommendation 4 of that Committee which suggests the setting up of a centralised purchasing body deserves particular attention.⁴ It may be noted that such a centralised purchasing agency has been working in India for a long time with considerable success.⁵

¹U.S. v. Standard Oil Co. of California (1947) 332 U.S. 301, 313.
²Chapter IV, supra.
⁴Scott Committee Report paras. 9.12-9.16. See also paras. 8.26-8.34.
⁵See chapter IV, supra.
1. The Commonwealth Constitution

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(i) Trade and commerce with other countries, and among the States:

(ii) Taxation; but so as not to discriminate between States or parts of States:

(iii) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth:

(iv) Borrowing money on the public credit of the Commonwealth:

(v) Postal, telegraphic, telephonic, and other like services:

(vi) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth:

(vii) Lighthouses, lightships, beacons and buoys:

(viii) Astronomical and meteorological observations:

(ix) Quarantine:

(x) Fisheries in Australian waters beyond territorial limits:

(xi) Census and statistics:

(xii) Currency, coinage and legal tender:

(xiii) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money:

(xiv) Insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned:

1 Sections 51, 75 and 78, as altered to date.
(xv) Weights and measures:
(xvi) Bills of exchange and promissory notes:
(xvii) Bankruptcy and insolvency:
(xviii) Copyrights, patents of inventions and designs, and trade marks:
(xix) Naturalization and aliens:
(xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth:
(xxi) Marriage:
(xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants:
(xxiii) Invalid and old-age pensions:
(xxiiiA) The provisions of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances:
(xxiv) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States:
(xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States:
(xxvi) The people of any race, for whom it is deemed necessary to make special laws:
(xxvii) Immigration and emigration:
(xxviii) The influx of criminals:
(xxix) External affairs:
(XXX) The relations of the Commonwealth with the islands of the Pacific:
(XXXI) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws:
(XXXII) The control of railways with respect to transport for the naval and military purposes of the Commonwealth:
(XXXIII) The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State:
(xxxiv) Railway construction and extension in any State with the consent of that State:

( xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State:

( xxxvi) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides:

( xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law:

( xxxviii) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia:

( xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

75. In all matters -

(i) Arising under any treaty:

(ii) Affecting consuls or other representatives of other countries:

(iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:

(iv) Between States, or between residents of different States, or between a State and a resident of another State:

(v) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth:

the High Court shall have original jurisdiction.

78. The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power.
2. The Judiciary Act 1903-1973

56. (1) A person making a claim against the Commonwealth, whether in contract or in tort, may in respect of the claim bring a suit against the Commonwealth -
   (a) in the High Court;
   (b) in the Supreme Court of the State or Territory in which the claim arose; or
   (c) in any other court of competent jurisdiction of the State or Territory in which the claim arose.
   (2) For the purposes of paragraph (c) of the last preceding sub-section -
       (a) any court exercising jurisdiction at any place in the capital city of a State, or in the principal or only city or town of a Territory, that would be competent to hear the suit if the Commonwealth were, or had at any time been, resident in that city or town, or in a particular area in that city or town, is a court of competent jurisdiction; and
       (b) any other court is not a court of competent jurisdiction if its competence to hear the suit would depend upon the place where the Commonwealth resides or carries on business or at any time resided or carried on business.

57. Any State making any claim against the Commonwealth, whether in contract or in tort, may in respect of the claim bring a suit against the Commonwealth in the High Court.

58. Any person making any claim against a State, whether in contract or in tort, in respect of a matter in which the High Court has original jurisdiction or can have original jurisdiction conferred on it, may in respect of the claim bring a suit against the State in the Supreme Court of the State, or (if the High Court has original jurisdiction in the matter) in the High Court.

59. Any State making any claim against another State may in respect of the claim bring a suit against that State in the High Court.

^Sections 56-67, 79 and 80, as altered to date.
60. In a suit against a State brought in the High Court, the High Court may grant an injunction against the State and against all officers of the State and persons acting under the authority of the State, and may enforce the injunction against all such officers and persons.

61. Suits on behalf of the Commonwealth may be brought in the name of the Commonwealth by the Attorney-General or by any person appointed by him in that behalf.

62. Suits on behalf of a State may be brought in the name of the State by the Attorney-General of the State, or by any person appointed by him in that behalf.

63. Where the Commonwealth or a State is a party to a suit, all process in the suit required to be served upon that party shall be served upon the Attorney-General of the Commonwealth or of the State, as the case may be, or upon some person appointed by him to receive service.

64. In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.

65. No execution or attachment, or process in the nature thereof, shall be issued against the property or revenue of the Commonwealth or a State in any such suit; but when any judgment is given against the Commonwealth or a State, the Registrar or other appropriate officer shall give to the party in whose favour the judgment is given a certificate in the form of the Schedule to this Act, or to a like effect.

66. On receipt of the certificate of a judgment against the Commonwealth or a State the Treasurer of the Commonwealth or of the State as the case may be shall satisfy the judgment out of moneys legally available.
67. When in any such suit a judgment is given in favour of the Commonwealth or of a State and against any person, the Commonwealth or the State, as the case may be, may enforce the judgment against that person by process of extent, or by such execution, attachment, or other process as could be had in a suit between subject and subject.

79. The laws of each State, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State in all cases to which they are applicable.

80. So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law of England as modified by the Constitution and by the statute law in force in the State in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

3. **The Audit Act 1901-1975**

71. (1) The Governor-General may make regulations (not inconsistent with the provisions of this Act) for carrying out the provisions of this Act and in particular for and in relation to -

(a) the collection, receipt, custody, issue, expenditure, due accounting for care and management of all public moneys and the guidance of all persons concerned therein,

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1Section 71, as altered to date.
(b) the more effectual record examination, inspection and departmental check of all receipts and expenditure and the keeping of all necessary books and accounts,

(c) the necessary forms for all books and documents whatever required under the provisions of this Act or the regulations,

(d) the execution of works and the supply of services for or by the Commonwealth,

(e) the purchase of chattels and other property for or by the Commonwealth, and

(f) the custody, issue, sale or other disposal and writing off of stores and other property of the Commonwealth, and the proper accounting for, and stocktaking of, those stores and that property.

(2) The regulations may -

(a) authorize the Secretary to the Department of Finance to give to persons employed in the service of the Commonwealth or to any other persons who are subject to the provisions of this Act directions, not inconsistent with this or any other Act or with any regulations under this or any other Act, for or in relation to any of the matters referred to in paragraphs (a) to (f), inclusive, of the last preceding sub-section;

(b) authorize a prescribed officer of a Department to give to officers of, or persons employed in, that Department directions, not inconsistent with this or any other Act, with any regulations under this or any other Act or with any direction referred to in the last preceding paragraph, for or in relation to any of the matters referred to in paragraphs (a) to (f), inclusive, of the last preceding sub-section; and

(c) provide that a contravention of, or failure to comply with, a direction referred to in either of the last two preceding paragraphs shall be deemed to be a breach of the regulations.

(4) The regulations may provide for the imposition upon any accounting officer or person subject to the provisions of this Act of a penalty not exceeding Ten dollars for any offence for the breach of any regulation and such penalty may be recovered either in the same manner as a penalty incurred
under this Act, or by deducting the same from any money due
or thereafter becoming due to such accounting officer of person.

4. **Finance Regulations**

4. (1) In these Regulations, unless the contrary
intention appears -

"Authorizing Officer" means a person appointed by the Treasurer
under sub-section (1) of section 34 of the Act to author-
ize payment of accounts;

"Certifying Officer" means a person appointed by the Department
of Finance under sub-section (1) of section 34 of the Act
to certify accounts as correct;

"Chief Officer" means -

(a) a person who is, or is performing the duties of, the
Permanent Head of a Department;

(aa) the person for the time being holding, or performing
the duties of, an office established by or under an
Act, the holder of which has all the powers of, or
exercisable by, a Permanent Head under the Public
Service Act 1922-1973 in respect of a branch of the
Australian Public Service;

(ab) a person who is, or is performing the duties of,
the Chief Executive Officer of an Authority estab-
lished under an Act;

(b) the officer for the time being occupying an office
which the Public Service Board has determined con-
stitutes the occupant of that office a Chief Officer
in a Department; or

(c) the officer appointed by the Public Service Board,
on the recommendation of the Permanent Head, to be
a Chief Officer of a Department,

as the case requires;

"Collector" means a Collector of Public Moneys appointed under
these Regulations or under the repealed Regulations;

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Finance Regulations, in force under the Audit Act 1901-1975,
comprise Statutory Rules 1942, No. 523, as amended by Statutory
Rules 1943, No. 32; 1953, No. 3; 1959, No. 9; 1961, Nos. 77 and
122; 1964, No. 21; 1965, Nos. 32 and 169; 1966, No. 176; 1968,
No. 87; 1972, No. 31; 1974, No. 129; 1975, No. 156; 1976, Nos.
91 and 260, and 1977, No. 111 (Issue No. 91).
"head of expenditure" means -

(a) a division in the Schedule to an annual Appropriation Act that has no sub-division or items;
(b) a sub-division of a division in the Schedule to an annual Appropriation Act that has no items;
(c) an item of a division, or of a sub-division of a division, in the Schedule to an annual Appropriation Act;
(d) a Special Appropriation;
(e) a separate account of the Trust Fund; and
(f) a separate account of the Loan Fund;

"licence" includes any permit the issue of which is subject to the payment of a fee;

"Receiver" means a Receiver of Public Moneys appointed under these Regulations or under the repealed Regulations;

"supplies" means supplies that are to be executed, furnished or performed for or by the Commonwealth, and includes works, stores and services that are to be so executed, furnished or performed;

"Territory" means Territory of the Commonwealth;

"the Act" means the Audit Act 1901-1975;

"the Auditor-General" means the Auditor-General for the Commonwealth;

"Accounting Office" means an office of the Department of Finance established under regulation 123;

"the Authorizing Officer", in relation to an advance, means the Authorizing Officer who authorized the payment of the account for the advance;

"The Commonwealth Public Account" means the bank account referred to in section 21 of the Act;

"the repealed Regulations" means the Regulations repealed by these Regulations;

"the Secretary" means the Secretary to the Department of Finance.
A reference in these Regulations to directions given by the Secretary shall be read as a reference to directions given by the Secretary under regulation 127A of these Regulations.

46. (1) A Requisition for supplies -
   (a) shall relate only to supplies that are necessary for the proper conduct of the public service;
   (b) shall be prepared -
      (i) in the case of supplies that are to be obtained from or through the Department of Construction and the appropriation for which is under the control of that Department - in accordance with a form determined by the Minister of State for Construction; or
      (ii) in any other case - in accordance with Form 11; and
   (c) shall contain a description of the supplies, stating, where appropriate, the quantity of the supplies.

(2) A Requisition for supplies shall specify the contract under which the supplies are to be obtained and the contract price expressed, where practicable, as a rate.

(3) Where supplies specified in a Requisition can be obtained under an existing contract between the Commonwealth and a supplier, those supplies shall not be obtained otherwise than under that contract or, if there is more than one such contract, under one or more of those contracts.

47. (1) A Requisition for supplies (other than a Requisition to which the next succeeding regulation applies) shall be submitted to the appropriate Authorizing Officer for a certificate whether funds are available for the purposes of the Requisition.

(2) The last preceding sub-regulation does not apply in relation to a Requisition if -
   (a) an Authorizing Officer has, with the approval of the Treasurer, before the issue of the Requisition, given a certificate that an amount specified in the certificate is available for expenditure on supplies required for a purpose specified in the certificate;
(b) the Requisition relates to supplies that are required for that purpose; and

(c) the sum of -

(i) the amount specified in the Requisition to be the cost or estimated cost of the supplies specified in the Requisition; and

(ii) any amount specified in previous Requisitions covered by the certificate to be the cost or estimated cost of supplies specified in those Requisitions,

does not exceed the amount specified in the certificate to be available.

48. (1) A Requisition for supplies that are to be obtained from or through the Department of Construction and the appropriation for which is under the control of that Department shall be submitted for approval to the Minister of State administering the Department from which the Requisition originated or to an officer appointed by that Minister for the purpose and shall not be sent to the Department of Construction until that approval has been obtained.

(2) After the approval has been obtained, the Requisition shall be submitted to an Authorizing Officer for the Department of Construction for a certificate whether funds are available.

49. When an Authorizing Officer has certified that funds are available for the purpose of a Requisition or has given a certificate of a kind referred to in paragraph (a) of sub-regulation (2) of regulation 47 of these Regulations by virtue of which a certificate whether funds are available for the purpose of a Requisition is not required, the Requisition shall be submitted for approval -

(a) in the case of a Requisition for supplies the appropriation for which is under the control of a Department of the Parliament - to the President of the Senate or the Speaker of the House of Representatives or both, as the case requires, or to an officer appointed for the purpose by the
President or the Speaker or both, as the case requires;

(b) in the case of a Requisition to which the last preceding regulation applies - to the Minister of State for Construction or to an officer appointed by that Minister for the purpose; or

(c) in any other case - to the Minister of State administering the Department in which the requisition originated or to an officer appointed by that Minister for the purpose.

50. (1) In cases of emergency, expenditure in respect of the purchase of articles of small value, the transport of parcels or the performance of other minor services may be incurred, before the issue of a Requisition in respect of that expenditure, by a person referred to in the last preceding regulation to whom the Requisition, when issued, is to be submitted for approval in accordance with that regulation.

(2) Where expenditure is so incurred, the Certifying Officer shall enter the details of the transaction to which the expenditure relates in a book to be kept by him for the purpose.

(3) The amount of expenditure that may be incurred under this regulation on any one occasion shall not exceed -

(a) in the case of expenditure on articles or services included in a class of articles or services in relation to which the Treasurer has determined the maximum amount of expenditure that may be incurred - the amount so determined; or

(b) in any other case - Fifty dollars.

51. (1) Subject to any Act making provision with respect to contracts for supplies and to regulation 52AA of these Regulations, where -

(a) any supplies the estimated cost of which exceeds One hundred dollars;

(b) there is no existing contract between the Commonwealth and a supplier under which the supplies so required can be obtained; and

(c) the supplies are not obtained under a contract between a State and a supplier,
at least three representative quotations for the supplies shall, wherever possible, be obtained unless tenders are publicly invited.

(2) [Repealed]

(3) Where the estimated cost of any supplies exceeds One hundred dollars but does not exceed Two hundred and fifty dollars, a quotation obtained under this regulation in respect of the supplies may be oral or in writing, but, in the case of an oral quotation, the details of the quotation shall be recorded in the appropriate Departmental file.

(4) Where the estimated cost of any supplies exceeds Two hundred and fifty dollars, each quotation obtained under this regulation in respect of those supplies shall be in writing.

52. (1) Subject to any Act making provision with respect to contracts for supplies and subject to the next succeeding regulation, contracts shall not be entered into, and orders shall not be placed, for supplies the estimated cost of which exceeds Five thousand dollars unless tenders have first been publicly invited for those supplies.

*   *   *   *   *

52AA (1) Regulation 51 of these Regulations and the last preceding regulation do not apply to:

(a) supplies the expenditure on which is authorized by the Governor-General;

(b) supplies to be obtained under an existing contract between a supplier and the Commonwealth or a State;

(c) supplies to be obtained from the Australian Government Publishing Service, the Commonwealth Government Printing Office, a State Government Printing Office, Commonwealth factories, Commonwealth workshops, Commonwealth stores or Commonwealth dockyards;

(d) supplies that by their nature can be obtained only from a State Government Department, an authority of a State or Territory or a municipal or other local governing body;
(e) supplies of radioactive isotopes for medical purposes to be obtained by the Commonwealth X-ray and Radium Laboratory of the Department of Health from the Australian Atomic Energy Commission.

(2) Where the Secretary certifies that compliance with regulation 51 of these Regulations, or with the last preceding regulation, in respect of supplies of a kind specified in the certificate is, having regard to the nature of the supplies and to the established practices in a profession, business, trade or industry connected with the supply of supplies of that kind, impracticable or inexpedient, regulation 51 of these regulations or the last preceding regulation, as the case may be, does not apply to supplies of that kind.

(3) The next succeeding sub-regulation applies to supplies of the following kinds:—

(a) metals for use in the manufacture, by or on behalf of the Commonwealth, of coins, medals, medallions, plaques and other like objects at a mint;

(b) supplies relating to the defence of the Commonwealth;

(c) supplies for the Department of Construction;

(d) supplies obtained by or on behalf of the Administrator of the Territory of Christmas Island in connection with the administration of the Territory; and

(e) supplies approved, or to be obtained, by the Australian Government Stores and Tender Board or by a Tender Board of a Department.

(4) Where the Secretary, or an officer authorized by him by instrument in writing for the purpose, certifies, in respect of particular supplies, being supplies of a kind to which this sub-regulation applies, that compliance with regulation 51 of these Regulations, or with the last preceding regulation, is, by reason of the urgency with which those particular supplies are required, the sources of those particular supplies or otherwise, impracticable or inexpedient, regulation 51 of these Regulations or the last preceding regulation, as the case may be, does not apply to those particular supplies.
52A (1) When -

(a) an Authorizing Officer has -

(i) certified that funds are available for the purpose of a Requisition; or

(ii) given a certificate of a kind referred to in paragraph (a) of sub-regulation (2) of regulation 47 of these Regulations by virtue of which a certificate whether funds are available for the purpose of a Requisition is not required; and

(b) the Requisition has been approved after submission for approval under regulation 49 of these Regulations

the appropriate Chief Officer, or an officer authorized for the purpose by the appropriate Chief Officer, shall issue a Purchase Order in accordance with Form 13 in respect of the supplies specified in the Requisition.

(2) Unless the Treasurer otherwise approves, Purchase Orders shall be prepared in triplicate and shall be numbered consecutively.

(3) A Purchase Order shall not be issued except in accordance with the Requisition as approved.

52B (1) Immediately after the issue of a Purchase Order, the officer who issued the Order shall forward the Requisition for the supplies to which the Purchase Order relates to the Certifying Officer.

(2) The Certifying Officer shall not, except where the Treasurer otherwise approves, certify an account for expenditure in respect of supplies specified in a Purchase Order unless the duplicate of the Purchase Order upon which the officer responsible for receiving, or for the execution or performance of, the supplies has certified that the supplies are, or have been executed or performed, in accordance with the Purchase Order is attached to the account and the Order number is quoted on the account.

(3) The Certifying Officer shall make a memorandum on both the Requisition and on the duplicate of the Purchase Order that the account has been certified.
53 (1) Subject to this regulation, where a contract for supplies is entered into by, or on behalf of, the Commonwealth and the total liability of the Commonwealth under the contract for those supplies will be not less than One thousand dollars, the Chief Officer of the Department that required the supplies, or, if tenders for the contract were considered by a Tender Board, the Chairman of that Board, shall publish, or cause to be published, in the Gazette as soon as practicable after the contract is made, a summary of the provisions of the contract setting out such matters as are specified in directions given by the Secretary.

(2) The last preceding sub-regulation does not apply where -

(a) the contract is a contract for supplies to be supplied by a Department of a State, by a State Government Printer or by an authority or body established by or under a State Act;

(b) the contract has been made with a person who has entered into a contract in respect of supplies of the same kind with a State or an authority or body established by or under a State Act and the contract with the Commonwealth provides for the supplies to be supplied to the Commonwealth on the same terms and conditions as are contained in the contract with the State or with such an authority or body;

(c) the contract has been made for supplies required by the Administration of the Northern Territory of Australia and a summary of the provisions of the contract has been published in the Northern Territory of Australia Government Gazette; or

(d) the Chief Officer of the Department that required the supplies, or, if the tenders for the contract were considered by a Tender Board, the Chairman of that Board, determines that the terms of the contract are such, or the contract is for supplies of such a kind, that, in the public interest, the provisions of the contract should not be so published.

(3) Subject to any directions given by the Secretary, where a contract referred to in sub-regulation (1) of this regulation has been made, the Chief Officer of the Department that required the supplies or, if tenders for the contract were con-
sidered by a Tender Board, the Chairman of that Board, may authorize the disclosure to such persons as the Chief Officer or the Chairman thinks fit of such information relating to that contract as the Chief Officer or the Chairman thinks fit.

127A (1) The Secretary may give to persons employed in the service of the Commonwealth or to any other persons who are subject to the provisions of the Act directions, not inconsistent with the Act or any other Act or with any regulations under the Act or any other Act, for or in relation to any of the matters referred to in paragraphs (a) to (f), inclusive, of sub-section (1) of section 71 of the Act.

(1A) Where-

(a) in pursuance of a direction given under a provision of these Regulations, that provision does not apply in the circumstances specified in the direction; or

(b) the operation of a provision of these Regulations depends on a direction or approval referred to in that provision and such a direction or approval is given,

the power conferred by the last preceding sub-regulation extends to the giving of directions, not inconsistent with the Act, with any other Act, or with any other regulations under the Act or any other Act, in relation to the matter dealt with by that provision.

(2) A Chief Officer of a Department may give to officers of, or persons employed in, that Department directions, not inconsistent with the Act or any other Act, with any regulations under the Act or any other Act or with any directions given under sub-regulation (1), for or in relation to any of the matters referred to in paragraphs (a) to (f), inclusive, of sub-section (1) of section 71 of the Act.

(3) A contravention of, or failure to comply with, a direction given under this regulation shall be deemed to be a breach of these Regulations.
**REQUISITION FOR SUPPLIES.**

**Reg. 46.**

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<th>Head of Expenditure</th>
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- **Signature of officer requiring supply**
- **Funds are available**
- **Authorizing Officer**
- **Approved**

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<thead>
<tr>
<th>Quantity</th>
<th>Description</th>
<th>As per Contract/Quotation</th>
<th>Claims passed for Payment</th>
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- **Requisition No.**
- **Purchase Order No.**
- **To**
- **Quantity**
- **Description**
- **As per Contract/Quotation**
- **Amount**
- **Receipt of Officer to whom supply is given**

**Reg. 52A.**

- **Commonwealth of Australia**
- **Finance Regulations.**
- **Requisition No.**
- **Purchase Order No.**
- **To**
- **Quantity**
- **Description**
- **As per Contract/Quotation**
- **Amount**
- **Receipt of Officer to whom supply is given**

OFFICER AUTHORIZED TO ORDER
5. **Finance Directions**

**SECTION 31 - PURCHASING PROCEDURE**

Purchase of Supplies

1. Adequate departmental directions shall be issued to ensure that officers are made aware of the need to pay due regard at all times to economy in purchasing. The directions should make provision, inter alia, for using appropriate contracts (as discussed below) and also for the inviting of public tenders wherever it is reasonable to expect that this will result in more economical purchasing - notwithstanding that the amount of the purchase is below $5,000 (see Direction 31/20). Regulation 46(2) provides that requisitions shall specify the contract under which supplies are to be obtained. It is the duty of a requisitioning officer, after consultation with the person requiring supplies, to determine whether or not there is an appropriate contract. In making this decision he should consider:-

(a) whether there is a contract for supplies of the same kind as those required;

(b) if not, whether there is a contract for supplies of a similar type which could reasonably be used in substitution for those required.

Action under sub-regulation (3) and (4) of regulation 51 or regulation 52 should be taken only if he is satisfied that each of these questions should be answered in the negative. The general principles contained in these Directions are subject to the limitations imposed for specific matters, e.g. Direction 31/41.

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2. Responsibility for ensuring that the charges for any goods or services purchased by departments are not excessive rests on all officers who approve the acceptance of quotations or tenders.

Register of Commitments

3. A register shall be kept, under the direction of the Authorizing Officer, to record by item all commitments incurred, other than salaries. The register shall be designed to show at any time whether or not funds are available (Direction 31/4) for the purposes of regulation 47. It will be recommenced at the beginning of each financial year, the amount of outstanding commitments at 30 June being carried forward to the new year.

4. Funds are available:-

(a) If the amount of the commitment to be funded, plus:-

(i) the net expenditure under the item from the beginning of the year to date;

(ii) the outstanding commitments for the year to date (including outstanding balances of Requisitions brought forward from the previous year); and

(iii) recurring or other known charges which must be met later in the year do not exceed:-

(iv) the amount of the appropriation or approved allocations (see Section 17 of these Directions) of the appropriation for that purpose in the year current; or

(v) the amount of the credit available in a head of Trust Fund or a Trust Account for that purpose;

(b) if the Treasurer has approved that the commitment specified in the Requisition may be incurred (a reference to the approval shall be given on the Requisition).

(c) in the case of a Trust Account of the revolving fund type, if the Authorizing Officer forms the view that it can reasonably be expected that there will be a sufficient balance in the Trust Account to meet the expenditure to be incurred against the Requisition and all other known or anticipated commitments as and when payments fall due.
When certifying that funds are available, Authorizing Officers should also ensure that Warrant Authority or Warrant Advice will be available at the time the related accounts become due for payment.

Requisitions and Purchase Orders - Appointments

5. Where under the provisions of the Regulations an Officer is appointed in writing:-

(a) by the Minister, for the purpose of approving Requisitions (regulation 49); or

(b) by the Chief Officer, for the purpose of issuing Purchase Orders (regulation 52A(1))

the relevant appointments should be renewed when a new Minister or Chief Officer assumes office. It will suffice if the written authority to approve Requisitions or to issue Purchase Orders, as the case may be, is given to the occupants for the time being of particular positions.

Requisitions

6. Requisitions (Form 11) shall be completed for all purchases of supplies except where an Authorizing Officer determines that a Requisition is not required in respect of recurring expenditure such as quarterly telephone and electricity accounts; when he so determines, the Authorizing Officer shall ensure that the estimates of the recurrent expenditure are regularly reviewed by the person appointed to approve Requisitions pursuant to regulation 49 and are entered in the Register of Commitments.

Requisitions shall be completed to show:-

(a) the description and quantity of the supplies required;

(b) where there is a contract:-

(i) the contract under which the supplies are being obtained;

(ii) the contract price or rate;

(c) the known or estimated amount of commitment to be entered into by the purchase; and
(d) the item of expenditure, head of Trust Fund or Trust Account to be debited.

Funding of Requisitions

7. All Requisitions, except those covered by Direction 31/8, shall be submitted, before approval, to an Authorizing Officer for the Department concerned, for a certificate that "funds are available" (see Direction 31/4). The Authorizing Officer shall ensure that the correct item of expenditure is shown on the Requisition.

Bulk Allocation of Funds

8. The alternative procedure (prescribed by regulation 47(2)) to funding each Requisition prior to approval is not to be used unless the Treasurer or his delegate has approved the variation. Applications for approval should indicate clearly the necessity for departure from the provisions of regulation 47(1).

Purchases in an Emergency

9. In cases of emergency, regulation 50 permits expenditure on certain specified supplies to be incurred by the delegate of the Minister (regulation 49), in anticipation of the funds certificate required under regulation 47(1).

Filing of Requisitions

10. A separate numerical series should be maintained for Requisitions (Form 11) in each financial year. Requisitions shall be filed in numerical sequence. Accounts for requisitioned expenditure, when certified for payment, shall be noted on the relative Requisitions, which when fully discharged shall be transferred to a separate "paid" file.

Requisitions on Department of Construction

11. Works Requisitions are to be limited to supplies required from the Department of Construction and the appropriation for which is under the control of that Department. The
Requisitions are to be signed by the Minister of the requisitioning Department or by an officer authorized by him in writing. The designation of each of the officers authorized to sign the Requisition is to be advised to the local branch of the Department of Construction and is to be placed on the Requisition by the officer signing it.

12. [Deleted].

Purchase Orders

13. The three copies of a Purchase Order shall be signed by the officer authorized to issue and distributed as provided in Direction 31/16.

14. The officer authorized by the Chief Officer under regulation 52A to issue Purchase Orders shall, where purchases are made under an existing contract, ascertain the terms of settlement provided in the contract and where purchases are made as a result of quotations, acquaint himself with trade practices regarding terms of settlement and clearly insert the relevant terms on the Purchase Order. This action will ensure that the best possible discounts on purchases are obtained and enable the terms of settlement of any account to be kept under notice during the examination of the account prior to certification.

Exemption from Sales Tax on Purchase Orders

15. In issuing a Purchase Order for goods which are required for departmental purposes, the following certificate may be placed by means of a stamp on the original of the Purchase Order:-

"I hereby certify that these goods are free of Sales Tax as they are for the official use of the Department of ................. and are not for resale."

Distribution of Purchase Order Forms

16. Copies of Purchase Order Forms (Form 13) shall be distributed as follows:-
Original - to the supplier;
Duplicate - to the officer who will receive, or who is responsible for the execution or performance of the supplies;
Triplicate - to be retained by the officer issuing the Purchase Order.

Although regulation 52A refers to the preparation of Purchase Orders in triplicate, additional copies on plain paper may be made for departmental purposes.

Filing of Completed Orders

17. Regulation 52B provides that unless the Treasurer otherwise approves, an account shall not be certified unless the duplicate of the relevant Purchase Order, duly indorsed as to the delivery of stores or as to the satisfactory execution or performance of the works or services, is attached to the account. After certification of the account, the duplicate may be left attached to the account, returned to the officer receiving the stores (where the delivery of the whole of the goods ordered has not been made) or to the officer responsible for certifying that the works or services have been executed or performed (where a part payment only is being made), or filed to suit departmental requirements, provided that the arrangements so made are acceptable to the Auditor-General's Office.

Procurement Procedure

18. Regulations 51, 52 and 52AA prescribe the procedures to be followed when departments wish to purchase supplies and no Commonwealth or State contract is available. The following Directions amplify the provisions of those regulations and are issued for the guidance of Chief Officers in framing directions for the preparation, use and maintenance of lists of potential suppliers.

Tenders and Quotations

19. The underlying intention of regulations 51, 52, 52AA and 53 is that government procurement procedures should be, and
be seen to be, beyond reproach: i.e. that all who wish to participate in government business are given the opportunity to do so, that the government maintains a reputation for fair dealing, and that public money is spent effectively and economically. This intention is best achieved by the public invitation of tenders by press or Gazette advertisement (regulation 52) and the subsequent publication in the Gazette of details of contracts arranged (regulation 53). It is not, however, always appropriate to call tenders or publish details of contracts and the Regulations provide alternative procedures which are covered by Directions 31/22-4 and 31/32-4. The underlying intention should always be borne in mind when these alternative procedures are applied.

20. Administrative cost may make it inappropriate to apply the full tendering procedures to small orders, and regulation 51 provides for the obtaining of representative quotations where the supplies are estimated to cost $5,000 or less. Although regulation 51(1) prescribes numbers of suppliers who shall be invited to quote for specified cost-categories of supplies, the regulation uses the word "at least", and it is not intended that the number of quotations obtained should always be restricted to the prescribed number. In the public interest and with the object of achieving the best and the most economical purchase, consideration should be given to inviting quotations from all suitable suppliers included in a list of potential suppliers (see Directions 31/26 et seq.) who are available to undertake supply. Moreover, circumstances will arise in which it would be advantageous publicly to invite tenders for such supplies, and regulation 51 does not preclude the invitation of tenders for items costing less than $5,000.

21. It is not permissible to divide a single requirement into a number of separate orders so as to bring each purchase within any of the limits prescribed in regulations 51 and 52.
Exemptions by Regulations

22. The exemptions from the tender and quotation procedures provided in regulation 52AA(1) are self-explanatory. Authorization by the Governor-General should be used as little as possible and only when the supplies are of a kind not otherwise specified under regulation 52AA. When it is necessary to use this procedure the authority of the Governor-General in Council should be obtained before any commitment is incurred. Departments should take advantage, as far as possible, of any State contracts, except where:-

(a) there is an existing Commonwealth contract (see Direction 31/39); or

(b) it is considered that more favourable terms and conditions than are contained in the State contract could be obtained by obtaining representative quotations or publicly inviting tenders, e.g., because of the quantity required.

Details of State contracts are advised by State Authorities from time to time.

Exemptions by Secretary to the Department of Finance

23. Regulation 52AA(2) empowers the Secretary to the Department of Finance to certify that, for certain kinds of supplies, it is impracticable or inexpedient to use the tender or quotation procedures. In addition, legal advice indicates that the regulations do not apply to the appointment of legal counsel and to other appointments in circumstances in which, as a matter of business practice, a system of tendering does not operate. The kinds of supplies listed in Appendix A to this Section are either not subject to regulation 51 or 52 or have been the subject of a certificate by the Secretary and it is not therefore necessary to obtain the prescribed number of quotations or publicly invite tenders for such supplies or obtain certificates of inexpediency. The Secretary to the Department of Finance should be advised if a department considers that a further category of supplies should be included in Appendix A.
23A. When obtaining supplies which have been exempted from the quotation/tender procedures, departments should take particular care to ensure that the procedures used for the selection of suppliers will stand up to public scrutiny; it should be evident that all potential suppliers have been given an opportunity to obtain Commonwealth business and that in the selection of the supplier and the terms of the contract the basic criterion has been the best interests of the Commonwealth. In particular, where there is a continuing need to obtain the services of members of a particular profession, lists of potential suppliers shall be compiled (in appropriate cases, with the assistance of the relevant professional body). Lists shall not remain static but shall be reviewed from time to time. Where there is only an occasional need for such a service, other departments which regularly use the required service should be consulted for advice as to suitable firms and the selection procedure.

Certificates of Inexpediency

24. Regulation 52AA(4) provides for certificates of impracticability or inexpediency in respect of particular supplies which fall within the categories set out in regulation 52AA(3). Under these provisions a certificate cannot be given granting a general exemption to cover a series of contracts - the exemption can apply only to 'particular supplies', i.e. to the supplies covered by a particular contract. The certificate can be restricted to the tendering procedures, in which case it will be necessary to obtain quotations in accordance with regulation 51, or to the quotation procedures, or it can cover both tenders and quotations. A certificate is not necessary in relation to the quotation procedures where it is not possible in the circumstances to obtain the number of quotations required by regulation 51.
25. The person authorized to give certificates of inexpediency will exercise his judgment upon the facts of each proposed purchase: he will consider, e.g. the non-availability of competing sources of supply or the real urgency of the requirement. The responsibility for the issue of a certificate that it is impracticable or inexpedient to obtain the prescribed number of representative quotations or publicly invite tenders rests finally with him. The grounds upon which a dispensation is sought from the requirement either to obtain representative quotations or publicly invite tenders shall be clearly stated in writing by the recommending officer and contracts shall not be signed or orders placed until a certificate of inexpediency is given. If a situation arises where the obtaining of representative quotations or the public invitation of tenders is considered impracticable or inexpedient in the case of particular supplies, and the department has no person authorized to issue certificates of inexpediency, application may be made for the issue of a certificate to the Chief Executive Officer, Australian Government Stores and Tender Board, Box 2820AA, G.P.O., Melbourne, Vic. 3001.

Lists of Potential Suppliers

26. Except where requirements are likely to be small in volume (see Direction 31/32) or for the purchase of common-use items (see Direction 31/38), lists of potential suppliers, drawn up in such form as the Chief Officer determines, shall be used by departments as part of their purchasing procedure, whether or not tenders are to be called. Where tenders are to be called, likely suppliers on the departmental lists who are capable of meeting the requirements may be specifically invited to tender. Where tenders are not to be called, the lists should be used for the purpose of selecting suitable suppliers to be asked to submit quotations.
27. Where it is possible to deal with principals only, agents who do not render a useful service need not be registered.

Compilation and Maintenance of Lists

28. Lists shall be compiled from all available sources (advertisements, trade directories, classified sections of telephone directories, previous satisfactory suppliers, etc.). Records already in existence may be used as the basis for the lists to be approved in accordance with Direction 31/29. Lists may be compiled (or sub-divided) in respect of such branches, regions, districts, etc., as the Chief Officer determines. Where there is a continuing requirement for the services of any class of person or supplies listed in Appendix A to this Section, lists will consist of persons who have indicated their willingness to provide their services.

29. The lists, when compiled, shall be reviewed and approved by the Chief Officer or by a senior officer authorized by him for the purpose. Additions to and deletions from the lists shall not be made except with similar approval. Deletions may be made if, e.g. the supplier goes out of business, becomes bankrupt or goes into liquidation, fails to respond to three or more successive invitations, consistently submits unreasonably high tenders, has an unsatisfactory performance record. In these cases the reason for the deletion should be properly documented on the departmental file.

30. Lists must not be allowed to remain static but must be subject to continuous review by the purchasing officer. For the larger purchasing departments which have an exclusive interest in a particular class of supplies, the Chief Officer should give consideration to advertising annually for potential suppliers to be registered on the departmental lists. If more than one department has large purchases of the same class of
supplies, unnecessary advertising should be avoided by co-operation between the departments concerned. As a precaution against overlooking new sources of supplies, particularly in cases when the public tender procedure is not regularly used as a means of selecting suppliers (either generally or for particular classes of supplies), a useful form of control and check will be the periodical public invitation for tenders.

Unsatisfactory Suppliers

31. Firms, etc., proving unsatisfactory in the performance of contracts, or who, for any other good and sufficient reason are considered unsuitable for participation in departmental business may, on the approval of the officer who approved the list, be transferred to an "ineligible" list. Until the firm, etc., proves to the satisfaction of the department that it should be removed from this list, it shall not be considered eligible for departmental business. When a firm, etc., is transferred to an "ineligible" list, the department should notify other departments which may have dealings with the firm, etc., if the reason for transfer is such (e.g. fraud, bankruptcy, etc.) that it is undesirable that it participate in any future Government business.

Access to Lists by Departments with Minor Interests in Procurement

32. Departments need not keep formal lists of potential suppliers if their purchases of supplies, either generally or of a particular type, are only small in volume. If they want to purchase supplies costing more than $50 and have no lists, the Chief Officer shall arrange for his department (or branch of a department) to have access to the lists maintained by a large purchasing department, as appropriate for the nature of the supplies to be obtained.
Notification of Contracts Arranged

33. Where a summary of the provisions of a contract entered into by, or on behalf of, the Government is required to be published in the Gazette in accordance with regulation 53, it shall contain the following details:-

(a) Reference - the tender schedule, quotation, order number or other reference used for identification purposes.

(b) Description of Supplies - a brief description of the supplies including the place where the works or services are to be performed, where appropriate, and the period, if any.

(c) Value - fixed quantity contract - the total value; period and approximate quantity contracts - the estimated total value, based on the estimated quantities, etc., notified in the Invitation to Tender. (Monetary amounts are to be expressed in $A. Estimates are to be indicated by the contraction "(est)").

(d) Contractor - the full name of the contractor and location i.e. capital city, city or town, as appropriate, and the State.

Disclosure of Information relating to Contracts

34. Regulation 53(3) enables information relating to contracts, additional to that published in the Gazette, to be disclosed at the discretion of the Chief Officer or the Chairman of a Tender Board to such persons as unsuccessful tenderers, potential tenderers and other genuinely interested parties. Such information may include unit prices. Information to an unsuccessful tenderer about the reasons for non-acceptance of his tender should be in terms of his tender's insufficiency rather than in terms of the merits of the successful tender.

35. Deleted.

36. Deleted.

37. Deleted.
38. The Australian Government Stores and Tender Board is responsible for the purchase of all stores, including office machines, in general use throughout departments. Details of the goods held in stock and of current contracts under which supplies may be obtained, are contained in the Circulars issued by the Board. Departments should ensure that those Circulars are brought to the notice of appropriate officers. Orders for supplies placed with the Board or the Board's contractors should clearly identify the items required. Stores required from Australian Government Stores and Tender Board stocks shall be ordered on Form T.B.3 provided by the Board.

39. Where the Government has contracted to purchase all its requirements for a particular class of supplies from the one contractor, departments must obtain individual requirements for those supplies from the Government contractor as failure to use the Board's contracts could involve the Government in actions for breach of contract. If supplies to be obtained, other than those to which Direction 31/44 is applicable, are not covered by a contract, adequate specifications must be submitted to the Australian Government Stores and Tender Board, which will invite public tenders. These specifications should contain a detailed description of the supplies, compiled in such a manner that their nature will be apparent to all potential tenderers, e.g., measurement, capacity, similarity with an article manufactured by a particular firm, etc. Adequate instructions regarding delivery date, packing, marking, etc., should be given in all orders.
40. The address of the Australian Government Stores and Tender Board is Box 282044 G.P.O., Melbourne, and all enquiries should be addressed to the Chief Executive Officer.

Advertising

41. Advertising within Australia for the Australian Government shall be arranged through the Australian Government Advertising Service unless approval for other arrangements is obtained from the Service. The planning and production of advertisements and the selection of agencies to assist in or carry out this work shall be arranged by the Service in conjunction with the department concerned.

Payment of Accounts for Advertising

41A. The payment of advertising accounts must be made as a matter of urgency in conformity with arrangements made with the Australian Advertising Council representing the agencies. Detailed procedures and dates for the payment of advertising accounts which have been agreed with the charging/placing agencies have been advised to departments by Treasury Circular 1974/17. To assist in the prompt delivery of cheques, departments shall attach priority paid mail stickers (obtainable from Post Offices) to the Advice to Payee section of the Department of Finance Forms 12. Separate Department of Finance Forms 22A shall be prepared for advertising accounts.

Christmas Cards

42. Strict economy is to be exercised in the printing and distribution of Christmas cards. Directions issued from time to time by the Department of the Prime Minister and Cabinet are to be followed. Printing costs should be debited to the printing item of the Administrative Expenses subdivision of the department.
Office Requisites and Equipment, Stationery and Printing

43. Purchases which are correctly chargeable to the appropriation for office requisites and equipment, stationery and printing shall not be made from petty cash except in cases of emergency, the circumstances of which shall appear on the petty cash voucher.

Printing/Publishing Requirements

44. Departments shall not arrange for the supply of printing and publishing requirements otherwise than in accordance with the procedures set out in Australian Government Publishing Service Circulars, unless other arrangements are approved by the Controller, Australian Government Publishing Service. This Direction does not apply to the procurement of publications or forms through the Sales and Distribution Section in accordance with Directions 31/44C and 31/45.

44A. Where arrangements are made by the Australian Government Publishing Service for work to be carried out by the Printing Branch or an outside printer, purchase orders will be issued by officers of that Service under authority provided by Chief Officers of departments in terms of regulation 52A. Suppliers' invoices for work carried out, checked and verified against the contract documents and endorsed accordingly by the Australian Government Publishing Service, will be passed to the appropriate department for further examination and subsequent payment. The endorsement, dealing with rates of charge and compliance with specifications, may be accepted as sufficient evidence for the purposes of the relevant certificates required under section 34 of the Audit Act.

Procurement of Publications

44B. The Australian Government Publishing Service makes available to departments lists indicating the Government and
other publications distributed through the Sales and Distribution Section and the various sources from which those publications are obtainable. Where a publication is available from these sources, supplies other than small urgent requirements shall not be obtained through bookselling or other agencies.

Procurement of Forms

45. A forms stock list issued by the Sales and Distribution Section, Australian Government Publishing Service, shows the prescribed Department of Finance and other forms in general use in departments. Departments should consult this list before ordering their requirements and follow the directions thereon when preparing purchase orders. Special care is to be taken in placing orders for prescribed and other forms so as to avoid excessive stockholdings and consequent waste in the event that forms are amended. In this connection, orders for Public Service Board and Department of Finance forms placed on the Sales and Distribution Section are not to exceed twelve months' estimated requirements.

Purchase of Office Machines

46. Unless otherwise directed by the Department of Finance, a copy of all requests to the Australian Government Stores and Tender Board to approve the purchase of office machines in the categories listed in Direction 31/49 shall be forwarded concurrently to the Management Improvement Division, Public Service Board, Canberra. This procedure is designed to assist the Australian Government Stores and Tender Board properly to determine the numerous requests of this nature that it receives. Copies of requests for approval to purchase office machines not included in these categories should not be forwarded to the Public Service Board's Management Improvement Division, but an explanatory statement supplying the information set out in Direction 31/47, as far as it is appropriate, should be forwarded to
the Australian Government Stores and Tender Board for its guidance. In these cases, the Australian Government Stores and Tender Board will exercise its discretion as to whether the Public Service Board's Management Improvement Division should be consulted. For the purpose of this Direction and Directions 31/47 - 31/49 the term 'office machines' does not include printing equipment detailed in Direction 31/53.

47. The request to the Chief Executive Officer, Australian Government Stores and Tender Board (copy to the Public Service Board's Management Improvement Division where required), shall give the following information:

(a) whether the machine is in replacement of an existing machine and, if so, whether, and in what number, other machines of the same type are in use, the reason for replacement and the age and condition of equipment to be replaced (see also Direction 32/37);

(b) expected machine work load;

(c) for other than replacements:

(i) whether a new procedure is involved and, if so, a summary description of changes contemplated. (Note: If the proposed installation is on a trial basis and subsequent requests for purchases are foreseen, this should be stated);

(ii) whether the department holds other machines of the same or similar type;

(iii) whether the department has conducted any machine tests prior to requisition and a brief indication of the reason for the particular selection made; and

(iv) estimated costs or savings.

48. A copy of the quotation obtained from the suppliers of the equipment required shall be submitted with the proposal. The quotation should indicate:

(a) if the equipment is imported, whether the price covers supply ex bond (if purchase of imported equipment ex duty paid stock is desired, the reason why purchase ex bond is not practicable should be stated);
(b) the supplier's charge per annum for maintenance of the equipment;
(c) the country of manufacture of the equipment;
(d) the supplier's guarantee for the equipment;
(e) the supplier's trade-in offer for any equipment to be replaced.

49. The categories of office machines in respect of which copies of requests for approval to purchase should be forwarded to the Public Service Board's Management Consultancy and Review Division are:-

Accounting machines (including analysis and dissecting machines and ledger posting machines)
Adding and listing machines
Addressing machines and associated embossing equipment (excluding plates, frames and furniture)
Calculating machines
Cheque writing and/or signing devices
Dictating and transcribing machines
Duplicating and reproducing machines (including photocopying equipment but excluding equipment used by Drawing Offices)
Franking machines
Internal Communications Systems, other than P.M.G. installations
Punched card equipment
Specialised filing equipment, such as rotary index systems and motorised card filing cabinets, but excluding mobile shelving
Typewriters - electric, semi-electric, and other specialised machines

Orders for Postage Stamps

50. Orders on the Postmaster-General's Department for the supply of postage stamps or the re-setting of franking machines shall be accompanied by a cheque in favour of that Department for the amount concerned.

51. Deleted.

52. Deleted.
Purchase of Printing Equipment

53. Proposals to purchase printing machines or printing equipment shall be referred in the first instance to the Australian Government Publishing Service, Canberra, which may arrange for their examination by its Printing Branch. When submitting the proposals, information in accordance with Direction 31/47 (a), (b) and (c) shall be supplied. For the purposes of this Direction printing machines or printing equipment shall include:-

(a) composing machines capable of composing type or preparing matter which simulates typesetting (including hot metal casting equipment, photo-mechanical equipment or devices, justowriters, varitypers, etc.);

(b) printing machines, either letterpress, offset, gravure, silk screen or photo-mechanical, which print or reproduce from type, metal plate, plastic, rubber, film or paper-master (including xerox, map or plan-printing equipment and offset duplicators similar to multilith machines, but not including stencil duplicators and office photo-copying equipment);

(c) ancillary equipment for process engraving, block making, stereotyping, electro-typing, lithographic plate making, xerox, or ektalith plate making, die stamping, or gold blocking;

(d) binding machines for folding, gathering, collating, stitching, punching, perforating, drilling, slitting, sewing, covering, mounting, ruling, binding, and cutting paper or other printing materials for use with any of the types of equipment included in (a), (b) and (c) above, and the cost of which exceeds $100.

"Consultancy Services - Management"
"Management Consultancy - Services"

55. For the purposes of this Direction, the term management consultancy services means services offered by management consultants (or other agencies) by way of investigating assigned problems and submitting recommendations for improvement of the organisation, management, planning, direction,
control and operations of a department, including direct assistance with implementation of agreed recommendations and with staff selection and development, education and training. Departments proposing to use the services of management consultants shall, before entering into any negotiations with a consultant, refer their proposals to the Management Consultancy and Review Division of the Public Service Board's Office for advice whether the engagement of a consultant is justified, having regard to the availability of suitable staffing resources in the department, the Public Service Board's Office or other departments. The Division will assist with the selection of a suitable consultant and with the control of the assignment. Guidelines to assist departments in these matters are issued separately by the Public Service Board's Office. The selection of a particular consultant shall normally be made only after carefully considering the experience, resources and particular skills of at least three consultants.
APPENDIX A

(See Direction 31/23)

FINANCE REGULATION 52AA(2.)

The following kinds of supplies are exempt from the requirement to obtain quotations or publicly invite tenders:

The services of

- Accountants
- Acoustical and Environment Consultants
- Advertising Agents and Media
- Aerial and Hydrographic Surveyors
- Agricultural Scientists
- Architects
- Auctioneers
- Construction Consultants
- Consultant Psychologists
- Dental Practitioners
- Engineers
- Graphic Designers
- Industrial Designers
- Insurance Consultants
- Investment Consultants
- Journalists and Specialist Writers
- Landscape Architects
- Language Tutors
- Medical Practitioners
- Public Relations Agents
- Quantity Surveyors
- Stockbrokers
- Surveyors
- Town Planners
- Veterinary Surgeons

Management Consultancy Services (see Direction 31/55)
Transport of Assisted Migrants in pursuance of an Intergovernmental Agreement
Travel and freight on Scheduled Services
Welfare Reports for the Family Law Court
Works of Art
SECTION 32 - STORES AND STORES ACCOUNTS

Authority for Sale of Stores

24. Unless otherwise provided by Act or Regulation, sales of stores shall be made only under the authority of the Minister or an officer appointed by him for the purpose. The original or assessed original cost of stores items to be sold shall be stated for the information of competent authority and also, in cases where Ministerial delegations are given within monetary limits, the aggregate of such costs shall be shown for the purpose of determining the delegate who will approve the sale.

Directions Relating to Sales

25. Directions issued by the Chief Officer pursuant to regulation 127A(2.) in relation to sales of stores shall ensure that there is a proper link between the Register of Assets (including stock ledger and inventory), approvals to sell, stores held pending sale and the accounting for proceeds of sales. The directions shall also ensure that there is adequate internal check throughout the system. They shall have regard to the different treatment which may be required for the following types of sales or as many of them as are applicable to the Department:-

(a) stores which it is the proper function of a Department to produce or purchase and subsequently to offer for sale to the public, to a government contractor, to a Commonwealth Department or to any Government or Instrumentality;

(b) stores which in an emergency or where unprocurable from trade sources are sold to Governments, Instrumentalities, government contractors and private firms, where such action is in the public interest;

(c) buildings, land and improvements which have been declared surplus to Commonwealth requirements;

(d) waste material, scrap metal, food refuse, empty containers and the like;
(e) stores forfeited to the Commonwealth, which are subsequently sold;

(f) stores which have been declared surplus to departmental requirements or are being sold due to unserviceability, obsolescence, etc.

Wherever appropriate, approval of competent authority may be given in respect of classes of items rather than individual transactions. It is not necessary to notify the Auditor-General of stores to be sold except in cases where the Treasurer otherwise determines.

Disposals Record

26. Disposals shall be registered in such a way as to provide a ready record for internal check and audit of all approvals for sale and the subsequent accounting for proceeds of sales. For the purpose of this Direction the Register may take the form of recommendations to competent authority, recommendations by an Inspecting Officer or a Board of Inspectors, Board of Survey recommendations, Disposals Schedules or other suitably controlled record on which approval to sell will be recorded. Whatever form the Register might take, it should contain some cross-reference of the items for disposal to the Assets Register (including the stock ledger and inventory).

Disposal of Surplus Stores

27. All land, buildings and improvements surplus to departmental requirements shall be declared to the Department of Administrative Services for disposal action.

28. All surplus furniture shall be declared to the Department of Construction. No financial adjustment of any kind shall be made for furniture declared surplus by Departments. Departments requiring furniture shall submit their requirements to the Department of Construction, which is responsible for ensuring that, as far as possible, requirements will be met from the furniture pool. Under no circumstances shall purchases of common items of furniture be made
without a clearance from the Department of Construction that requirements cannot be satisfied from the pool or the unused furniture holdings of other Departments or Authorities.

29. Typewriters not required by Civil Departments, elsewhere than in the Northern Territory, shall be returned to the Australian Government Stores and Tender Board store in the capital city of the State concerned under cover of Board's Form T.B.8. Civil Departments in the Northern Territory and all Service Departments, shall declare their machines direct to the Department of Administrative Services for disposal. That Department will forward appropriate details of the machines to the Australian Government Stores and Tender Board representative and shall not dispose of the machines unless notified by the representative that he does not require them for any purpose.

30. Departments which have surplus stores other than land, buildings and improvements, furniture and office machines (including typewriters) should advise the Department of Administrative Services which periodically circulates lists of items available for disposal. Departments requiring stores that may be held surplus by other Departments should first confirm that their requirements cannot be met from surplus stocks. Notification to, and enquiries from, the Department of Administrative Services should be made prior to disposal or purchase. The price at which stores are to be transferred is the lesser of book value plus any departmental oncost, or current market value. Transfers of surplus stores between Departments in the Defence group are to be without financial adjustment with the exception of raw materials, aids to manufacture of Service requirements, stores on charge to Trust Fund and land, buildings and improvements.
31. Stores approved for sale, other than those transferred to another Department or Authority or referred to in Direction 32/25 (a) and (b), shall be sold by one of the following means:—

(a) through the Disposals Authority, Purchasing Division, Department of Administrative Services;
(b) by public invitation of tenders;
(c) by public auction.

While for other than the Service Departments the disposal of stores is the primary responsibility of Departments, the services of the Disposals Authority, Department of Manufacturing Industry should be availed of if the technical services and machinery of that Authority would be of assistance and might result in better prices being obtained for the stores concerned. The Departments of the Defence group shall declare all surplus stores for disposal (except land, buildings and office machines) to the Disposals Authority, Purchasing Division, Department of Administrative Services.

32. Delivery of stores sold to the public shall be made under one of the following conditions:—

(a) prior payment in cash;
(b) payment by cheque, under conditions outlined below; or
(c) under bank guarantee or other arrangements approved by the Treasury, which ensure that no loss of public moneys will occur.

Normally all sales shall be for cash, but payment by cheque may be accepted:—

(i) where the cheque is a bank cheque;
(ii) if the cheque is from a firm etc. approved by the Disposals Authority;
(iii) if a personal cheque is within the limits prescribed by the Chief Finance Officer of the Disposals Authority or his nominee or on the approval of the Receiver of Public Moneys or an officer of similar standing.
in the Holding Department concerned. A cheque is only to be accepted where the purchaser is well-known and is of satisfactory financial standing.

Where Department of Finance approval has been given under paragraph (c) above for sales on credit on extended terms, interest at the rate approved by the Department of Finance shall be charged. The present approved rate is 9.5 per cent per annum. Provision may be made in contracts for the charging of a penalty rate not exceeding 2 per cent added to the original approved rate.

33. Sales by public invitation to tender and auction shall be in accordance with the normal procedures followed by the Department of Administrative Services.

34. Sales to Commonwealth Departments or Authorities, State Departments or State Instrumentalities may be on terms that settlement shall be made promptly at the end of the month of delivery on the invoice price as rendered. Any disputed amount or other adjustment shall be rectified subsequently. Once delivery is taken by a Commonwealth Department and a receipt given to the Holding Department, full payment shall be made in accordance with the receipt given. Any deficiencies subsequently disclosed shall be adjusted in accordance with the provisions of the Act and Finance Directions.

35. The act of sale and the consequential entries remove the stores sold from the stores ledger account and, except in the case of stores on charge which have been condemned, are declared obsolete or unserviceable and are subsequently destroyed or sold as scrap, action to write off is not necessary.

Trade-ins

36. Trade-in offers may be accepted on stores that are being replaced, except motor vehicles being replaced in
Australia (for trade-in of motor vehicles overseas, see Direction 34/89A), furniture and typewriters. Details of offers received, together with a report on the condition and serviceability of the stores, shall be submitted to the relevant disposal authority. The authority approving the purchase may accept a trade-in offer only where the disposal authority advises that acceptance is to the best advantage of the Commonwealth.

37. When office machines other than typewriters are being replaced, trade-in offers are to be obtained whenever possible. Details of offers are to be notified to the Chief Executive Officer, Australian Government Stores and Tender Board (who is the disposal authority under Direction 32/36 for the class of stores which are purchased through the Board) when approval to purchase the new machine is being sought. The report on the condition of the machines will enable the Chief Executive Officer to decide whether they can be taken into stock for re-issue.

38. When a trade-in arrangement is approved, only the net amount paid to the supplier is to be charged to the appropriation.

Customs duty, sales tax, etc.
on Stores Sold

39. Where stores procured by Commonwealth Departments and Authorities free of customs duty, sales tax and like charges are sold to other than Departments and Authorities which are entitled to immunity from indirect taxation, such charges shall be taken into account in determining the amount payable by the purchaser of the stores.

40. If the stores have gone into use in Australia prior to the sale, sales tax is not payable in respect of the sale but, in order to ensure that the advantage of the original immunity from duty and sales tax is not passed on to the buyer, the selling price should, as far as possible, be
ascertained by adding to the actual cost of the stores the duty and sales tax which would have been payable, had the stores not been acquired for governmental use, subject to an appropriate allowance for depreciation.

41. Where the stores have not been used in Australia, payment of sales tax is required in respect of the sale as applies to ordinary commercial transactions.

42. Where the purchaser is a Commonwealth Authority, exemption from the inclusion of the equivalent of customs duty in the purchase price will depend upon whether the acquisition of the stores by that Authority can be regarded as being in the same category as articles imported by or being the property of the Commonwealth not being for the purposes of trade within the meaning of the relative Tariff Item.

43. Exemption from the inclusion of the equivalent of sales tax in the purchase price shall be permitted only if the purchasing Department or Authority furnishes an Exemption Certificate in the form prescribed under Sales Tax legislation.

Gifts of Stores

44. No stores are to be issued as gifts except with the approval of or under delegation from the Treasurer, or alternatively with the approval of Cabinet on a report from the Treasurer. The question whether Parliament shall be informed of the gifts proposed to be made will be decided by the Department of Finance on the merits of each case and on the understanding that wherever a large sum is involved Parliament will be duly informed at the earliest practicable date. In view of the functions and responsibilities of the Disposals Authority, applications for free issues of surplus items should first be made to that Authority which in turn will seek the approval of the Department of Finance as necessary. In considering the general question of free issues, the Disposals Authority will consider such questions as:-
(a) the possible requirements of Commonwealth Departments other than the one which has the surplus property for disposal;

(b) whether the particular surplus property has any commercial use or appreciable market value;

(c) the fixing of a nominal charge in order to discourage indiscriminate applications;

(d) the rationing of free issues with a view to fair distribution and the avoidance of discrimination.

Free Issues and Sale of Stores to Officers

45. Free issues of stores to officers shall not be permitted unless authorized by the Treasurer. The sale of stores to an officer shall not be permitted except under the following conditions:

(a) the stores to be sold have been declared by competent authority to be surplus to departmental requirements; and

(b) no concession whatever is given in regard to price or in any other direction; and

(c) the sale is conducted by public tender or public auction.

Stores Condemned, Uns Serviceable etc.

46. The Chief officer shall specify in writing the procedures to be followed in relation to the disposal of stores. The procedures should:

(a) identify the types of stores that the department will itself dispose of and those to be declared to the appropriate Disposal Authority;

(b) recognise the different arrangements required for the differing reasons for disposal e.g. condemned, obsolete, unserviceable, unrepairable, worn out, damaged etc., and set out the action to be taken in each instance. Disposal action to be taken shall be based on the requirements of Directions 32/24 to 32/45 and 32/46(a);

(c) provide for the appointment of an Inspecting Officer (except in relation to (f) and (g) here-under), or, when considered necessary, a Board
of Inspectors, to report upon the stores to be disposed of. The appointment of a Board of Inspectors should only be considered if the particular circumstances or the nature of the stores, in the opinion of the Chief Officer, warrant this additional safeguard. Neither an Inspecting Officer nor the majority of a Board of Inspectors should be officers who are responsible for the physical custody of the particular stores. Reports should include recommendations for retention or disposal and, where appropriate, the method of disposal e.g. sale, transfer, reduction to scrap, destruction;

(d) require that the recommendations of the Inspecting Officer(s) be submitted to the Chief Officer or his delegate for approval;

(e) make it clear that where other than fair wear and tear is suspected to have occurred e.g. negligence, misappropriation etc., the Inspecting Officer(s) should submit a detailed report to the Chief Officer or his delegate for consideration whether further action should be taken in accordance with section 33 of these Directions;

(f) if appropriate, in the light of departmental operations, provide for the abandonment of stores when necessary, e.g. where recovery or retention would endanger life or other property, or where the cost of recovery or retention is excessive in the circumstances. In such cases the appointment of an Inspecting Officer(s) would clearly be inappropriate, but a report as to the circumstances of the abandonment would be required. Write-off action under section 70C of the Audit Act would, in the light of the report etc., be a matter for the Treasurer's delegate;

(g) specify the disposal action to be taken for stores with a pre-determined life and which can be retired on a time or usage basis e.g. motor vehicles, typewriters. In such cases the appointment of an Inspecting Officer would normally be unnecessary unless the department's records of the operation of the equipment indicated that unfair wear and tear may have occurred; and

(h) ensure that stores approved for disposal are subsequently disposed of in such a way as will prevent their re-submission as current stock or conversion to unauthorised use.
Writing-off Stores

47. The value of stores destroyed or converted to scrap may be written-off by the Treasurer or his delegate under the authority of section 70C of the Act. Stores transferred to another department or sold do not require to be written-off under section 70C; upon disposal by these means entries shall be made to remove the stores from the Stores Ledger. "Value" for the purposes of write-off action under section 70C of the Act means the original cost charged to a head of expenditure, or, if this is not available, an assessed original cost. Officers exercising delegations under section 70C of the Act should ensure that all administrative action, including reduction to scrap, disposal, etc., has been taken, and that destruction certificates are provided.

6. Overseas Accounts Directions

Application of Audit Act and Finance Regulations outside Australia and the Territories

4. (1) Sub-sections (2), (5), (6) and (6B) of section 34 of the Audit Act 1901-1975 and regulations 6, 8, 12, 13, 14, 15, 17, 18, 26, 27, 28, 29, 30, 33, 37, 48, 52, 53 and 56B, sub-regulation (2) of regulation 60, regulations 67, 68, 71, 72, 73, 84, 86, 87, 88, 89, 90, 91, 92 and 95, sub-regulation (2) of regulation 100, regulations 101, 103, 104, 105, and 108, paragraph (b) of sub-regulation (2) of regulation 112 and regulations 116 and 126 of the Finance Regulations do not apply in relation to -

(a) the collection, receipt, custody, expenditure, care and management, outside Australia, of public moneys and the due accounting for those moneys;

(b) the keeping of books and accounts and the furnishing of statements, returns and vouchers in respect of the matters referred to in the last preceding paragraph;

(c) the execution of works and the supply of services outside Australia for or by the Commonwealth;

(d) the purchase outside Australia of chattels and other property for or by the Commonwealth;

(e) the custody, issue, sale or other disposal and writing off of stores and other property of the Commonwealth outside Australia, and the proper accounting for, and stocktaking of, those stores and that property; and

(f) the inspection and examination (otherwise than by the Auditor-General), and the departmental check, of books, accounts, statements, returns, records and vouchers prepared or kept outside Australia in respect of public moneys, stores and other property of the Commonwealth.

(2) For the purposes of the application outside Australia of the provisions of the Audit Act 1901-1975 and the Finance Regulations (other than the provisions of that Act and those Regulations referred to in the last preceding sub-clause) —

(a) a reference in those provisions to a Chief Accounting Officer shall be read as a reference to a Chief Accounting Officer as defined by the next succeeding clause;

(b) a reference in those provisions to a Collector shall be read as a reference to a Collector as defined by the next succeeding clause;

(c) a reference in those provisions to a Paymaster shall be read as a reference to a Paymaster as defined by the next succeeding clause;

(d) a reference in those provisions to a Collector's Receipts Account or to a Drawing Account shall be read as a reference to a bank account as defined by the next succeeding clause;

(e) a reference in regulations 61, 112, 120 and 121 of those Regulations to The Commonwealth Public Account shall be read as a reference to a bank account as defined by the next succeeding clause;
(f) a reference in regulations 52A, 75 and 132 of those Regulations to a Chief Officer shall be read as a reference to a Chief Accounting Officer as defined by the next succeeding clause;

(g) a reference in regulations 47, 49, 52A, 65, 66 and 74, sub-regulation (3) of regulation 75 and regulations 77, 78, 94, 98, 99, 111, 118 and 120 of those Regulations to an Authorizing Officer shall be read as a reference to an Overseas Authorizing Officer as defined by the next succeeding clause;

* * * * * * *

Allocation Advices

10A (1) Expenditure by an overseas office of public moneys for any purpose shall not be made unless the Overseas Authorizing Officer for that office has received from an Authorizing Officer or from another Overseas Authorizing Officer an Allocation Advice specifying that moneys are available for expenditure for that purpose.

(2) Where, in an Allocation Advice, it is specified that the moneys referred to in the Advice are available for expenditure for a specified purpose during a specified period, those moneys are available for expenditure for that purpose only during that period.

Requests for Payment of Moneys and Procurement of Supplies by Overseas Office

11. (1) Each request by a Department in Australia or by an overseas office for the payment of moneys by another overseas office shall -

(a) be accompanied by an Allocation Advice that specifies that moneys are available for payment of those first-mentioned moneys or by a statement referring to the Allocation Advice that specifies that moneys are so available;

(b) show the head of expenditure to be charged;

(c) contain a direction as to the Authorizing Officer to whom the paid account or copy of the paid account covering the transaction is to be forwarded;
(d) be signed by the Chief Officer or an Officer authorized for the purpose by him;

(e) be addressed to the Chief Accounting Officer for the overseas office to which the request is made; and

(f) be sent to that office in duplicate.

(2) A request by a Department in Australia or by an overseas office for the obtaining of supplies shall -

(a) be accompanied by an Allocation Advice that specifies that moneys are available for the purchase of those supplies or by a statement referring to the Allocation Advice that specifies that moneys are so available;

(b) shows the head of expenditure to be charged;

(c) contain a direction as to the Authorizing Officer to whom the paid account or copy of the paid account covering the transaction is to be forwarded;

(d) be signed by the Minister or an officer authorized for the purpose by him;

(e) be addressed to the Chief Accounting Officer for the overseas office to which the request is made; and

(f) be sent to that office in duplicate.

Tenders to be invited for Certain Supplies

12 (1) Subject to the next succeeding sub-clause, contracts shall not be entered into, and orders shall not be placed, for supplies outside Australia the estimated cost of which exceeds $5,000 in Australian currency at the current rate of exchange unless competitive tenders have first been invited for those supplies.

(2) The last preceding sub-clause does not apply to -

(a) supplies the expenditure on which is authorized by the Governor-General;

(b) supplies that are to be obtained only from or through the Government of an overseas country; or

(c) particular supplies approved, or to be obtained, by a Tender Board established for the purposes of an overseas office, being supplies in relation to
which the Secretary to the Department of Finance, or an officer authorized by him in writing for the purpose, certifies that the inviting of tenders is impracticable or inexpedient.

Purchase Orders

13. When a request is received by an overseas office for the obtaining of supplies, the Chief Accounting Officer for that office or an officer authorized for the purpose by him may issue a Purchase Order in accordance with Form 13 in respect of the supplies.

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