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## POLICY AND GOVERNANCE

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service values: The  
Australian experience

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### **Abstract**

With the increasing use of private organisations to provide public services and the corresponding blurring of boundaries between the public and private sectors, can public servants be held to a distinct code of ethics or should public sector ethical standards be applied to private providers. This question is explored in the context of the Australian Commonwealth which has recently codified a set of public service values in legislation and where agencies are being asked to report on the extent to which they require contractors to comply with public service values. Practice is evolving, with most emphasis on values relating to direct service to the public. Public service values dealing with internal organisation and employment conditions, including the merit principle, are less likely to be extended to private contractors.

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**OUTSOURCING AND PUBLIC SERVICE VALUES.  
THE AUSTRALIAN EXPERIENCE**

**Richard Mulgan**

I

The blurring and interpenetration of the public and private sectors has become a familiar theme in the last decade of public sector management studies, as governments devolve core activities to semi-autonomous quangos which are not easily categorised as either fully public or private organisations and as they engage in public-private partnerships for the provision of public services (Fredrickson 1997, Rhodes 1997, O'Toole 1997, Brereton and Temple 1999, Agranoff and McGuire 2001). An interesting corollary of this trend is its effect on what have been seen as exclusively public service values. That public servants should be subject to a distinctive, and more demanding, ethical code is a longstanding assumption of public administration. The rationale for such expectations rests on two unique aspects of government, its powers of legitimate coercion and, in a democracy, its ultimate accountability to the voters (Mulgan 2003, 36-8). However, if the line between public and private sectors becomes more difficult to draw, how can a sharp distinction still be maintained between the special values expected from public servants and those espoused in the non-government sectors (Painter 2000, Kernaghan 2000)? Can each side retain its distinctiveness or is a degree of ethical convergence inevitable (Freeman 2003)? If convergence does develop, will it apply to all values or will certain core values remain unique to the public sector?

In this paper, these issues are explored in connection with the move to outsourcing within the Commonwealth (federal) government of Australia. Particular focus is placed on the extent to which private contractors providing public services are being required to comply with public service values. Practice in this area will be seen to be in a state of flux and indecision. On the one hand, governments have been forced to recognise the adverse political consequences of completely exempting contractors from public service standards. On the other hand, they are reluctant to force contractors to comply totally with the public service code of ethics. A new

consensus may be emerging that certain values are applicable to public servants only while other values apply to all providers of public services, whether drawn from the public or the private sectors. However, such a consensus is far from uncontested and contains several grey areas of continuing dispute.

An analytical advantage of focusing on the Australian experience is that the Commonwealth government, in its recent revision (1999) of the *Public Service Act*, gave particular prominence to Public Service Values, spelling out fifteen separate (if somewhat overlapping) values which were then supplemented by a formal Code of Conduct (itself containing thirteen clauses). Moreover, the Australian Public Service Commission (APSC), deprived of the service-wide controls exercised by its predecessor, the Public Service Board (abolished in 1987), has focused its activities on monitoring performance in the Australian Public Service (APS). This role has been reinforced in the new *Public Service Act* which makes the Commissioner responsible for determining the scope of the designated Values and for ensuring that the Australian Public Service ‘incorporates and upholds’ the Values (Section 11). As part of its regular monitoring of compliance with the Values and Code, the Commission has been reviewing the extent to which government agencies are extending the Values and Code to private contractors.

Detailed evidence on the use of values in government contracts is not readily available because most contracts are treated as commercially confidential documents. However, the *State of the Service* reports published by the Australian Public Service Commission, drawing on its annual surveys (APSC 2001, 2002, 2003), include summaries of current practice illustrated by particular examples. Moreover, government agencies engaged in extensive outsourcing frequently publish general templates or guidelines which outsourcing contracts are required to follow. Such statements will typically include reference to any general values that need to be covered in a contract. If a complete picture is impossible, current trends can be identified with reasonable confidence.

## II

Values and codes of conduct are by no means unique to the public sector. As private sector managers and business management experts increasingly recognise, any efficient and effective organisation depends on a shared corporate culture and on common ethical values. When prompt and flexible decision-making is at a premium, managers must not be tied down by rigid directions. The attempt to spell everything

out in advance must always founder on the complexity of events. Most present-day organisations are therefore placing greater emphasis on corporate values and teamwork rather than on detailed instructions as means of securing effective collective effort. Commercial damage from fraudulent and dishonest executives has led to an increased stress on specifically ethical values, such as honesty, integrity and interpersonal trust. Such values do not replace rules or legislation as means of controlling conduct but they are an essential supplement, particularly in uncertain and unpredictable situations.

Despite the similarities between government and non-government organisations (as well as the differences within the respective sectors (Lawton 1998)), public servants are still expected to observe more precise standards of ethics in certain matters. Most attempts to formulate public service values identify a few general and single-word values such as ‘honesty’, ‘integrity’, ‘impartiality’, ‘neutrality’ and ‘accountability’ (eg Sherman 1998, 15-16; Kernaghan 2000, 95-6). The Australian Commonwealth Public Service Act 1999 takes a more a more specific and concrete approach, describing fifteen distinct Values each of which is defined in a complete sentence [see box]. The broad thrust of the Values builds on a consensus about public sector ethics that evolved within the senior public service over the previous decade, notably through the Management Advisory Board (PSMPC 2001). The precise formulation owes much to the immediate political context in which the new Act was drafted. The initiative came from the right-of-centre Coalition government, first elected in 1997, which stressed new public management values of results-oriented management derived from private sector practice. The articulation of values was seen as a substitute for cumbersome rule-bound employment procedures and part of a strategy to reduce the level of controls and regulations generally. However, the government faced left-of centre opposition parties who held a majority in the upper house, the Senate, and who supported more traditional process-related values and the interests of public sector unions. The last four Values in particular, which were added to the original 1997 bill to help it pass two years later, bear obvious traces of the political compromises forced on the government by opposition parties in the Senate.

## **The Australian Public Service Values**

*(Public Service Act 1999 s 10 (1))*

The **APS Values** are as follows:

- (a) the APS is apolitical, performing its functions in an impartial and professional manner;
- (b) the APS is a public service in which employment decisions are based on merit;
- (c) the APS provides a workplace that is free from discrimination and recognises and utilises the diversity of the Australian community it serves;
- (d) the APS has the highest ethical standards;
- (e) the APS is openly accountable for its **actions**, within the framework of Ministerial responsibility to the Government, the Parliament and the Australian public;
- (f) the APS is responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programs;
- (g) the APS delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public;
- (h) the APS has leadership of the highest quality;
- (i) the APS establishes workplace relations that value communication, consultation, co-operation and input from employees on matters that affect their workplace;
- (j) the APS provides a fair, flexible, safe and rewarding workplace;
- (k) the APS focuses on achieving results and managing performance;
- (l) the APS promotes equity in employment;
- (m) the APS provides a reasonable opportunity to all eligible members of the community to apply for **APS employment**;
- (n) the APS is a career-based service to enhance the effectiveness and cohesion of Australia's democratic system of government;
- (o) the APS provides a fair system of review of decisions taken in respect of **APS employees**.

To help impose some conceptual order on an awkward example of legislative drafting, the Australian Public Service Commission commonly, and usefully, re-organises the Values under four general headings:

- (i) relationship with the government and the Parliament;
- (ii) relationship with the public;
- (iii) workplace relations;
- (iv) personal behaviours.

The first category (i), concerning the public service's role in relation to government, includes:

value (a) [that the APS] 'is apolitical, performing its functions in an impartial and professional manner';

value (b) [that the APS] 'is a public service in which employment decisions are based on merit';

value (e) [that the APS] 'is openly accountable for its actions, within the framework of ministerial responsibility to the Government, the Parliament and the Australian public';

value (f) [that the APS] 'is responsive to the Government providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programs';

and value (k) that the APS 'focuses on achieving results and managing performance'.

The second category (ii), which deals with the public service's relationships directly to the public, includes:

value (g), [that the APS] 'delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public'.

This category obviously overlaps with the former category in that the public service's duty to the government includes the duty to serve the public effectively and accountably.

The third set of Values (iii) concerns the internal working of the service, for instance:

value (b) [that the APS] 'is a public service in which employment decisions are based on merit';

value (c) [that the APS] ‘provides a workplace that is free from discrimination and recognises and utilises the diversity of the Australian community it serves’;

value (h) [that the APS] ‘has leadership of the highest quality’;

value (i) [that the APS] establishes workplace relations that value communication, consultation, co-operation and input from employees on matters that affect their workplace’;

value (j) that [the APS] provides a fair, flexible, safe and rewarding workplace’;

value (l) [that the APS] promotes equity in employment;

value (m) [that the APS] provides a reasonable opportunity to all eligible members of the community to apply for APS employment;

value (n) [that the APS] is a career-based service to enhance the effectiveness and cohesion of Australia’s democratic system of government;

and value (o) [that the APS] provides a fair system of review of decisions taken in respect of APS employees’.

This category, which includes the four later additions, is the longest and least integrated, reflecting its origins in political compromise. Again overlap occurs between the two categories of internal and external values. The merit principle, for instance (value (b)), applies both externally, to elected ministers (restricting their right to intervene in employment decisions) and to the public (in respect to their right to expect fair access to public employment), as well as internally to employment decisions taken by managers within a public agency.

The final category (iv) , personal behaviour, covers the general, catch-all statement:

value (d) [that the APS] ‘has the highest ethical standards’.

One advantage of this comprehensive and specific account of public service values is that it helps to bring out the distinctiveness of such values. Where values are described in simple terms, such as ‘impartiality’ or ‘accountability’, the generality of such concepts means that they can also be applied in the non-government sectors and therefore do not indicate what is particularly demanded of public servants in comparison with ethical members of other types of organisation. However, once accountability is linked to political institutions such as parliament and ministers or impartiality is fleshed out as implying an ‘apolitical’ profession and merit

appointment, the special requirements demanded of public servants become more apparent. Admittedly, some of the Values are still hard to distinguish from those that might be expected from non-government employees, for instance the general injunction to have ‘the highest ethical standards’ (d) and ‘leadership of the highest quality’ (h). In addition, some of the internal Values also simply reflect best employment practice regardless of sector, for instance value[ing] communication, consultation, cooperation and input from employees’ (i) or ‘focus[ing] on achieving results and managing performance’ (k). Support for ‘free[dom] from discrimination’, workplace ‘diversity’ (c) and ‘equity in employment’ (l) is not unique to the public sector though these values tend to be more stringently applied in the public than the private sector.

The most distinctively public service values, in the sense of values that are not normally required from private organisations, are: first, those that deal specifically with the institutions of government, such as political neutrality, merit appointment, accountability to ministers and Parliament, and responsiveness to government; secondly, those that involve the particular standards that citizens expect in their direct dealings with government, such as fair and impartial treatment; and thirdly, those that place unique expectations on workplace behaviour in the public sector, particularly merit appointment with its implication of a strong version of equal opportunity and workplace diversity as well as review of employment decisions. Of these values, some deal directly with outcomes or the substance of government decisions, for instance responsiveness to government and fair and impartial treatment of the public. Others, however, relate more to process issues, for instance, accountability to government, parliament and the public, merit appointment (including equal opportunity and workplace diversity), and political impartiality. They may have an important impact on policy outcomes but are primarily focused on the procedures by which such outcomes are brought about.

Each of these distinctive public service values is underpinned by a wide range of specific legal and administrative rules and does not depend solely on adherence to the general values as such. Thus, for instance, in the *Public Service Act* the merit principle is spelled out in detailed sections on the prohibition of patronage and favouritism (s 17) and limitations on ministerial directions to agency heads (s 19). Values are a complementary mechanism, to help reinforce compliance with rules and

regulations and to reduce the need to rely on formal compliance rather than flexible, individual judgment.

### III

If such values are generally expected of public servants providing public services, how far are the same values extended to private contractors providing similar services from the public purse? This question involves two separate issues. First, to what extent are private contractors required to match up to distinctively public sector standards in fulfilling government contracts. For instance, are they obliged to be responsive to government or to practice equal employment opportunity? Secondly, in so far as private contractors are held to public service standards, to what extent do governments need to resort to general values as such as a means of enforcing such standards, rather than relying on specific contractual requirements. Values, it is to be remembered, are not the only means of securing desired objectives. Equally important are specific laws, regulations and guidelines that public servants are obliged to follow.

In dealing with private contractors, governments can be expected to place greater reliance on specific instructions rather than on general values. The contract relationship assumes contracting parties with divergent interests operating in a competitive market-style environment. Governments typically attempt to achieve their desired outcome through detailed, unambiguous specification of what they want the contractor to deliver. Neither party can be automatically expected to perform any service not clearly stipulated in the contract nor to share the other party's objectives and values. While public servants may have been inculcated into an ethical commitment to serve the public impartially and to be responsive to the government's view of the public interest, private contractors will typically see no further than their own need to make a profit. The original rationale of contracting out, and many of the more straightforward 'classic' contracts, place little emphasis on values of any kind, let alone distinctive public service values (see eg Industry Commission 1996). Instead they stress the importance of specifying the desired outputs as precisely and objectively as possible, without relying on any value input on the part of the contractor. Whereas generalised values are a means of achieving desired results without the need to spell out all requirements in detail, classic contracts rely on detailed *ex ante* specification. In this respect, then, values and classic contracts are polar opposites.

Many outsourcing contracts, however, cannot totally avoid some reference to general values, particularly if the service being outsourced is comparatively complex and politically sensitive. Indeed, many government contracts are better classified not as 'classic' contracts, where matters are specified in advance, but as 'relational' contracts, sometimes known as 'partnerships' or 'alliances', which define a more open-ended relationship between the two parties (Sclar 2000). In such contracts, the parties agree to cooperate for shared purposes which are specified in only very general terms, the details being left to be worked out as the relationship proceeds. This type of contract, for instance, is commonly used for the provision of ongoing services such as information technology or personnel services. More and more contractual relationships between governments and private providers are now of this relational type or at least include important relational elements (Considine 2001; Barrett 2001; Grimshaw, Vincent and Willmott 2002). Such contracts may specify some precise deliverables, as in a classic contract, but they will also include an agreement to cooperate in the pursuit of common objectives and, to cover unforeseen circumstances, may need to include a contractual commitment to more general values.

Agency guidelines for contractors regularly include obligations to respect general ethical values which are common to both public and private sectors, for instance values such as honesty, integrity and fair dealing. For instance, the Code of Conduct for the Australian 'Job Network' (private contractors who provide employment assistance for the unemployed) requires members of the network to act 'with honesty, due care and diligence' and to behave 'ethically and professionally' (DEWR 2004). The Code of Conduct in Contracting of the Department of Education Science and Training expects that its 'business partners' will 'deal honestly' and 'behave in a highly ethical manner' (DEST 2004). Reference to such values is clearly intended to supplement and reinforce any legal obligations on the part of the contractors to abide by the terms of the contract as well as by other relevant laws, such as those against fraud or negligence.

Beyond such non-specific values, however, contractors are sometimes required to take account of values more peculiarly suited to the public sector. As the Australian Public Service Commission reports, agencies have taken a variety of approaches to the issue of private contractors and respect for public service values (APSC 2001, 148-9; 2002, 7. 8-9; 2003, 10. 2-3). Some (a diminishing minority) include no specific reference to APS values but, instead, rely on the contractors'

adherence to relevant legislation covering the public sector, such as legislation on privacy and confidentiality in relation to personal information. They thus recognise the relevance of some public service rules and standards to government contractors but prefer to rely on clearly stipulated rules rather than general values. At the other extreme, some agencies stipulate complete adherence to the APS values. The Department of Foreign Affairs and Trade, for instance, is reported to have a standard clause in all its contracts that 'the contractor must ensure that the specified personnel conduct themselves in accordance with the Values and Code of Conduct of the Australian Public Service' (APSC 2001, 148). More commonly, however, agencies single out certain relevant aspects of the APS Values and Code with which agencies must comply. Which aspects are considered most relevant can be summarised in terms of particular distinctive public service values noted above - namely two outcome-related values (responsiveness to government and fair and impartial treatment of the public) and two process-related values (public accountability and merit appointment).

#### Responsiveness to government

All government contracts may be said to aim at responsiveness to government in the sense that all such contracts are intended to achieve government-determined objectives. In the great majority of cases, this aim is achieved through careful stipulation of goods and services which the contractor is obliged to deliver rather than through explicit resort to the value of responsiveness as such. However, the value of responsiveness is implicit in contractual terms that require regular consultation between the contractor and government officials and allow for the contractor to take note of changing government priorities. Such clauses, for instance are standard in contracts for information technology and for human resources. All partnership or relational contracts may be said to imply some reliance on the contractor's general willingness to accommodate as yet unstated wishes of the government. However, no contracts appear to explicitly require contractors to exercise the same sensitivity to government directions that are expected of public servants.

#### Fair and impartial treatment of the public

Private contractors provide publicly funded services directly to members of the public in many areas, including employment services, health and social welfare. Some of the requisite standards of service can be covered by contractual obligations to obey relevant legislation, for instance privacy and confidentiality of personal

information. However, the complex and sensitive nature of many services means that detailed specification of expected requirements, while essential to set the basic framework of the contracts, is not sufficient to guarantee satisfactory performance. In addition to general commitments to behave professionally and ethically, contractors also need to treat members of the public according to the standards of fairness associated with public servants providing the same services. The Code of Conduct for the Job Network, for instance, requires contractors to be treat clients ‘with fairness and respect’ and ‘to consider their individual circumstances and backgrounds’. In effect, network providers are being required to follow the public service value (g) [that the APS] ‘delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public’. Other areas of service provision also make similar demands on private providers. Thus the Department of Immigration and Multicultural Affairs includes in its contracts for the management of detention centres for illegal immigrants a list of fundamental principles that need to be observed, beginning with ‘dignity (each detainee is treated with dignity and in a humane manner and is treated with respect; and the individuality of each detainee is recognised and acknowledged)’ (DIMIA 2004, Schedule 3). By contrast, the Health Department takes a less coercive approach in relation to private nursing homes for the aged which are subsidised by public funds. It publishes a Code of Ethics and Guide to Ethical Conduct for Residential Aged Care (DHA 2001) but relies on voluntary compliance on the part of providers rather than contractual obligation.

#### Public accountability

In general, private contractors, like other private companies, operate under a different accountability regime from public servants. Ultimate accountability is to their owners rather than to the public and they are not subject to the range of accountability pressures that face public officials from the legislature, government auditors, ombudsmen and the media (Mulgan 2000). The main avenue of public accountability of contractors is through performance of the contract and delivery of the defined outputs. To monitor performance, governments frequently also insist on rights of access to relevant information. For instance, Centrelink (the Commonwealth agency responsible for administering social assistance payments) standardly requires all contractors to allow access to their premises, and to supply any records or other information ‘related to the contract’ (Centrelink 2002). More broadly, contractors

may be required to 'respond promptly to reasonable requests for advice or information' (Defence 1998 cf DEST 2004).

When contractors are providing a service directly to members of the public, additional accountability requirements apply, similar to those imposed on the public sector. For instance, providers in the Job Network are required to provide timely feedback and information to clients about decisions 'that could affect them' and to have 'a complaints process of which clients are made aware' (DEWR 2003, Schedule 2). Their accountability also extends to the public's right of access to personal information as would be guaranteed under Freedom of Information legislation (DEWR 2003, Schedule 4). More generally, the Code of Conduct obliges contractors to be 'openly accountable for their actions', in effect imposing a public service commitment to accountability as a value.

None the less, private contractors do not face the same accountability demands for information that are placed on public organisations. In general, any information held by a public agency is liable to be revealed under public inquiry, subject only to certain limiting criteria, such as national security, cabinet confidentiality or privacy. Information held by private organisations, on the other hand, is generally confidential to the organisation and its owners, with even shareholders having substantially less rights of access to their companies than citizens have to their governments. The internal financial dealings of contractors are kept commercially confidential. Private companies are not subject to government audit nor are they liable to be questioned by parliamentary committees. In the Australian Commonwealth, contractors are still not directly subject to the jurisdiction of the Ombudsman. Contractual requirements on contractors to provide more open access to certain limited types of information do not change this fundamental difference in principle.

In debates over outsourcing, claims of commercial confidentiality have been heavily criticised because they have been used to shield information that would normally be available to the public through mechanisms such as parliamentary committees or government auditors (JCPAA 2000; Barrett 2001, 9-12). Significantly, however, the criticism has been levelled against the politicians and officials who conceal their own politically embarrassing dealings with contractors under the spurious pretext of protecting the contractors' competitive portion in the market. There has been little suggestion that the contractors themselves should reveal their

own commercial actions where they do not impinge on their dealings with government. What private companies do and how they spend their money in fulfilling government contracts is generally seen as their business and not a matter for public scrutiny. Overall, private contractors are not being obliged to submit public service accountability practices or values

Merit appointment (including equal employment and workplace diversity)

Another area in which public service values do not usually extend to private sector contractors is appointment conditions, including merit appointment and associated principles of equal opportunity and workplace diversity backed up by appeal procedures. On the whole, contracts cover the goods and services that the government wishes to purchase, leaving the contractor to decide, within the law, the means by which these goods and services are to be provided. Indeed, some of the most significant savings from outsourcing came from the fact that contractors are not subject to public service conditions of employment.

For instance, in appointment procedures, there is normally no general proviso to appoint on merit and no bar on cronyism and nepotism. A government-employed supervisor of cleaning services is obliged to advertise positions and appoint on the basis of qualifications and experience. A private company, on the other hand, cleaning the same offices under government contract, is free to employ friends and relations, no questions asked. Adding in the fact that pay and conditions, particularly in unskilled work such as cleaning and catering, are often significantly below those applicable in the public sector, it is not surprising that outsourcing such services leads to substantial savings (Hodge 1998). The main objection to private sector employment conditions has come from public sector unions, attempting to protect their own membership base from being undercut by cheaper or more flexible private sector employees. But otherwise, practices such as favouritism or nepotism, which would be roundly condemned if performed by public servants, appear to be generally tolerated from government contractors.

However, some agencies extend at least some of their own employment conditions to contractors. Thus for instance, the Department of Immigration, Multicultural and Indigenous Affairs requires all its contractors to comply with departmental processes relating to occupational health and safety, in addition to any general legal obligations that contractors would be under in this area. Moreover, in relation to equal employment opportunity, it insists on compliance not only with the

*Equal Employment Opportunity for Women in the Workplace Act 1999* but also with the Department's own workplace diversity program and its workplace behaviour strategy (quoted APSC 2002, 7.9). Here contractors are being held to stricter employment standards than would otherwise prevail in the private sector, even if the full public service code is not being applied.

Appointment procedures were the subject of a recent controversy relating to church-based organisations undertaking job assistance contracts in the Job Network. In 2000, as religious organisations such as the Salvation Army and Mission Australia took on new staff to meet their newly expanded government contracts, prospective employees complained to the Human Rights and Equal Opportunities Commission (HREOC) about being questioned on their religious beliefs and about being made to understand that subscribing to the religion in question was a condition of employment (HREOC 2000, ch 5).

The Human Rights Commissioner argued that such questions were discriminatory (*Canberra Times* 5 August 2000), a claim fiercely contested by the Minister, Tony Abbott, who defended the right of religious organisations to protect their own values and beliefs and to employ their own co-religionists (*Canberra Times* 12 September 2000). Indeed, the Minister placed considerable weight on the capacity of traditional religious charities to offer particularly valuable services in this area (eg Abbott 1999). Subsequent guidelines issued by HREOC (HREOC undated) after lengthy consultation insist that requiring a religious test for a job is generally discriminatory under the Human Rights and Equal Opportunity Act 1986. However, the law leaves open a number of exceptions if membership of the religion is related to the inherent requirements of the position and is needed to avoid offence to the religious susceptibilities of the members of the organisation. In effect, religious organisations can offer preference to adherents of their faith, provided such adherence is justified in terms of the role and ethos of the organisation.

The context of the original complaints suggests that what made discrimination on the basis of religion particularly objectionable in these cases was the fact that the positions in question were being funded under government contracts. That is, it might be acceptable for church-based charities to insist on appointing their own adherents provided they were engaged to in purely private functions. However, once the staff concerned undertook publicly funded and publicly authorised functions, such exclusiveness became discriminatory. Significantly, however, the Commission's

response implies that religious discrimination in employment is generally illegitimate (subject always to exceptions) regardless of whether the employer is publicly funded or not. That is, the Commission has defended a general ban on religious discrimination but has not sought to give any additional weight to the need to avoid such discrimination when private organisations are fulfilling public contracts.

Thus, no official endorsement has been offered to the argument that public funding of a position requires that every member of the public should have an equal opportunity of applying for and securing that position. Accountability remains focused on the delivery of outcomes, including fair and impartial service delivery, with appointment procedures treated as a private internal matter not affecting performance (except in so far as they comply with general legislation applying to all sectors). So long as members of religious organisations appointed on the basis of their religious faith can deal with the public fairly and without religious discrimination, no objection can be made against their securing preferential appointment.

#### Relations with the public service

A final context in which public service values may be applied to contractors is where the interaction between contractors and public servants and contractors in the performance of an outsourced service may compromise the public service's own commitment to public service standards and values. The concern is not so much that the contractors must themselves live up to the level expected of public servants but that they should not undermine the public servants' own ethical behaviour. One obvious such area is in the contracting process itself, where codes of conduct for contractors warn contractors against offering improper inducements to public officials or concealing potential conflicts of interest (Department of Defence 1998, DEST 2004). Another area is the outsourcing of personnel services where contractors are called on to administer a recruitment and employment regime that is subject to merit appointment principles and to accompanying standards of anti-discrimination and strict due process. Here, full knowledge of public service values and commitment to their implementation is a necessary condition of successfully performing such a contract. A majority of agencies that outsource their human resources functions make explicit reference in the contract to the need to abide by public service values (APSC 2001, 148).

#### IV

On the Australian experience, then, government agencies outsourcing services to private contractors not only require contractors to comply with certain specifically public service standards but also sometimes employ commitment to general public service values as one means by which such compliance can be assured. However, available evidence suggests that such values are not being extended to all activities undertaken by contractors but that certain areas are being exempted, particularly strictly internal matters such as access to commercial information and appointment procedures which do not directly impinge on the public. When particular agencies, such as the Department of Foreign Affairs and Trade, include in their contracts a blanket reference to the observance of public service values, they do not literally intend to oblige contractors to abide by all such values in their internal operations. There is no evidence, at least, that the value clauses in contracts are being literally interpreted and comprehensively enforced. More probably, the values are intended to apply only partially, most especially to those actions of the contractor which might affect the quality of the service provided and on the rights of citizens to fair treatment. In this case, the application of the values in practice depends on unspecified general understandings among the parties about where the values are relevant and where they are not.

The Australian Public Service Commission itself, while stressing the importance of maintaining the values in outsourcing contexts, has been careful not to endorse complete compliance. It notes that values will be particularly important when contractors are delivering services directly to members of the public (as in employment services or nursing homes). It also argues that the focus will be more on values relevant to the outputs and outcomes desired by the government rather than those concerned with process. In the words of the current Commissioner, Andrew Podger:

Generally speaking, the APS [Australian Public Service] Values and the Code of Conduct are particularly pertinent where services are being delivered by contractors to the public on behalf of the APS. However, not all of the Values and the Code are relevant even in these circumstances. The values relating to service delivery are critical, as is part of the APS Values relating to responsiveness to government in implementing the government's policies and programs. At the same time, values applying to the Service's internal workplace relationships are not relevant to

contractors' own employment practices, although other Commonwealth employment legislation, such as occupational health and safety and anti-discrimination will apply (Podger 2003)

In other words, the Commission recognises that internal workplace values such as merit appointment, fair and flexible working conditions, rights of review and so on, are not generally being applied to private contractors. The major emphasis is on the desired outcome, on whether the contractor has delivered the service in question to the required standard and within the negotiated price. How the contractor goes about achieving this outcome is to be left to the contractors' discretion and excluded from public scrutiny, subject to the normal legal requirements to which all company actions are subject, whether acting under government contracts or not.

How robust this demarcation will prove in the long term is open to question. That some agencies are requiring full, unqualified commitment to public service values leaves open the possibility that compliance could be extended into hitherto quarantined areas. For instance, expectations of public accountability could begin to penetrate the internal workings of companies that depend on the public purse. Contracting companies depending on the public purse could find themselves under public scrutiny for the level of their salaries or executive perks. The religious discrimination case reveals the unease with which certain sections of the public, at least, view the right of church-based organisations to use public funds in breach of the merit principle.

The rationale for distinctive public service values depends in part on the fact that government policies and public funds belong ultimately to the citizens. Citizens therefore have a right to determine that their own funds are spent fairly and frugally and their own policies are implemented according to due process. In this case, the public should arguably be concerned to know how its money is spent and its policies applied, whether the organisation involved is a government agency or a private contractor. Once responsibility passes to a private provider of a public service, why should the concerns for transparency, frugality and merit appointment become so attenuated? The habit of excluding private contractors from the high standards of ethical conduct applied to public servants may be a residue of an era when the lines between the sectors were less blurred and private contractors were less engaged in performing public functions.

Institutional linkages between the public and private sectors can therefore be expected to impose pressure for greater convergence between public and private sector values. Indeed, many non-government organisations are already drawing attention, not necessarily favourably, to such convergence, particularly in the nonprofit sector. Some members of the nonprofit sector have been concerned about the damaging effects of government contracting on their own distinctive ethos (Lipsky and Smith 1990, Schwartz 2001). If the demands of working for government are threatening to impose secular values on religious organisations, such secularisation could involve a greater acceptance of values traditionally associated with the public service, such as respect for fairness and openness.

Whether private contractors will ever be subject to standards as strict as those currently listed in the APS Values is highly unlikely. Too much insistence on public service values will tend to discourage private companies from tendering for public services and will erode the positive benefits that derive from employing more flexible private providers. Contrary pressures, both from the providers themselves and from governments as purchasers, will therefore work against imposing additional process constraints on contractors. However, the status quo appears far from stable. A little more than a decade of extensive outsourcing public services has already seen considerable evolution, as classic contracts have given way to relational contracts and the importance of shared values between the contracting parties has been given greater weight. The line between public and private is likely to become even more blurred and the distinctiveness of public sector values even less clear-cut.

## REFERENCES

Abbott, T. (1999), *Address to Jobs Australia* 19 May 1999 ([www.dwrsb.gov.au/ministers/abbott/speeches/1999](http://www.dwrsb.gov.au/ministers/abbott/speeches/1999))

Agranoff, R. and McGuire, M. (2001), 'Big questions in public network management research', *Journal of Public Administration Research and Theory* 11 (3), 295-326

APSC (Australian Public Service Commission) (2001), *State of the Service Report 2000-01* ([www.apsc.gov.au/stateoftheservice/2001](http://www.apsc.gov.au/stateoftheservice/2001))

APSC (Australian Public Service Commission) (2002), *State of the Service Report 2001-02* ([www.apsc.gov.au/stateoftheservice/2002](http://www.apsc.gov.au/stateoftheservice/2002))

APSC (Australian Public Service Commission) (2003), *State of the Service Report 2002-03* ([www.apsc.gov.au/stateoftheservice/2003](http://www.apsc.gov.au/stateoftheservice/2003))

Brereton, M. and Temple, M. (1999), 'The new public service ethos: an ethical environment for governance', *Public Administration* 77 (3), 455-74

Centrelink (2002), *Centrelink Standard Terms and Conditions* ([www.centrelink.gov.au/internet/internet.nsf/files](http://www.centrelink.gov.au/internet/internet.nsf/files))

Department of Defence (1998), *Defence and Industry: an Ethical Relationship*

DEST (Department of Education Science and Training) (2004), *Code of Conduct in Contracting* ([www.dest.gov.au/code](http://www.dest.gov.au/code))

DEWR (Department of Employment and Workplace Relations), *Employment Services Contract 2003-2006. Sample Copy* (<http://www.workplace.gov.au/Workplace/ESDisplay>)

DHA (Department of Health And Ageing) (2001), *Code of Ethics and Guide to Ethical Conduct for Residential Aged Care* ([www.ageing.health.gov.au/service.dwt](http://www.ageing.health.gov.au/service.dwt))

DIMA (2004), *Immigration Detention Contract* ([www.immi.gov.au/illegals](http://www.immi.gov.au/illegals))

Fredrickson, H. G. (1997), *The Spirit of Public Administration* (San Francisco: Jossey Bass)

Freeman, J. (2003), 'Public values in an era of privatization: extending public law norms through privatization', *Harvard Law Review* 116, 1285-1352

Grimshaw, D., Vincent, S. and Willmott, H. (2002), 'Going privately: partnership and outsourcing in UK public services', *Public Administration* 80 (3), 475-502

Hodge, G. A. (1998), 'Contracting public sector services: a meta-analytic perspective of the international evidence', *Australian journal of Public Administration* 57(4), 98-110

HREOC (Human Rights and Equal Opportunity Commission) (2000) *Annual Report 1999-2000* ([www.hreoc.gov.au/annrep\\_99\\_00](http://www.hreoc.gov.au/annrep_99_00))

HREOC (Undated) *The Human Rights and Equal Opportunity Commission Act 1986 (Cth): its Application to Religious Freedom and the Right to Non-Discrimination in Employment* ([hreoc.gov.au/human\\_rights/religion](http://hreoc.gov.au/human_rights/religion))

Industry Commission (1996), *Competitive Tendering and Contracting Out by Public Sector Agencies* (Melbourne: Australian Government Publishing Service)

JCPAA (Joint Committee of Public Accounts and Audit) (2000), *Contract Management in the Australian Public Service* ([www.aph.gov.au/house/committee/ipaa](http://www.aph.gov.au/house/committee/ipaa))

Kernaghan, K. (2000), 'The post-bureaucratic organization and public service', *International Review of Administrative Sciences* 66, 91-104

Lawton, A. (1998), 'Business practices and the public service ethos' in C. Sampford and N. Preston with C-A Bois (eds), *Public Sector Ethics. Finding and Implementing Values* (London: Routledge), 53-67

Lipsky, M. and Smith, S. R. (1990) Nonprofit organizations, government and the welfare state *Political Science Quarterly*, 104: 625-48.

Mulgan, R. (2000), 'Comparing accountability in the public and private sectors', *Australian Journal of Public Administration* 59(1), 87-97

Mulgan, R. (2003), *Holding Power to Account. Accountability in Modern Democracies* (Basingstoke: Palgrave Macmillan)

O'Toole, L. J. (1997), 'Treating networks seriously: practical and research-based agendas in public administration', *Public Administration Review* 57 (1), 45-52

Painter, M. (2000), 'Contracting, the enterprise culture and public sector ethics' in R. A. Chapman (ed), *Ethics in Public Service for the New Millennium* (Aldershot: Ashgate), 165-83

Podger, A. (2003), 'Public sector values and the relationship between the APS and the public', *Address to 15th Annual Government Business Conference, Queensland* ([www.apsc.gov.au/media/podger](http://www.apsc.gov.au/media/podger))

Public Service and Merit Protection Commission (2001), *Serving the Nation. 100 Years of Public Service* (Canberra: Commonwealth Australia)

Schwartz, R. (2001), 'Managing government-third sector collaboration: accountability, ambiguity and politics', *International Journal of Public Administration* 24 (11), 1161-88

Sherman, T. (1998), 'Public sector ethics: prospects and challenges' in C. Sampford and N. Preston with C-A Bois (eds), *Public Sector Ethics. Finding and Implementing Values* (London: Routledge),13-25

Sclar, E. D. (2000), *You Don't Always Get What You Pay For: the Economics of Privatization* (Ithaca, N. Y.: Cornell University Press)