

# Duncan Lawyers Newsletter

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## Government objectives, private service delivery: Can statutes and contracts be harmonised?

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Legislation is an important tool of government - but it is a means to an end, not an end in itself. A government is elected to implement policies, not simply to fill a statute book.

The mention of legislation often brings to mind *command and control* provisions - government-imposed obligations, with sanctions for those who do not comply. Laws of this type can assist in the achievement of objectives. A government's objective of improving public health, for example, can be advanced by enacting a law banning smoking in public buildings. If the legislation is effective (if there is a good level of compliance) the imposition of this legislative prohibition will help to reduce lung disease. If it is ineffective it can bring about disrespect for the law and facilitate corrupt behaviour - this will be the subject of a future *Newsletter*.

Legislation operates in other ways too. The funding of health services is likely to be beneficial to community health - but this is possible only if the funding has been authorised by legislation.

Another reason to enact legislation is to establish norms. Modern Acts often includes a statement of legislative objectives. These, alone or in combination with sanctions, can operate as a call to comply with government policies.<sup>1</sup> Australians who vote in elections (most of us) are generally aware that voting is compulsory, and we do not like paying \$20 fines for failing to vote. It is not only the indignity of paying a fine, though, that encourages us to vote - we are also motivated by a sense of civic responsibility which aligns with, and is reinforced by, the statutory obligation.

Not all government objectives relate to outcomes. There are also process objectives, such as transparency and accountability. The objective of eliminating public sector corruption is advanced by establishing good processes for engaging contractors. Ideally, of course, good *outcomes* (such as value for money) will be achieved through the use of good *processes*.

Process objectives too can be advanced by legislation. Statutory authorities (by definition) are created by legislation, with specified functions, objectives and powers. Typically the Act creates a reporting relationship with parliament by means of annual reports tabled in parliament and oversight by parliamentary committees. Criteria for assessing their performance are to be found in their statutory objectives.

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<sup>1</sup> Sometimes the voice rumbles ominously, as with Queensland's *Vicious Lawless Association Disestablishment Act 2013*.

This brings us to the many contracts which are made by governments, under which contractors are paid to build roads, construct submarines and provide medical services. But how do contracts align with government objectives, and with the legislation under which government entities operate?

A public bus service might be operated by a private company in accordance with a contract between that company and a Minister, a statutory authority or a local government. The contractor responds to the terms of the contract, endeavouring to obtain payment and position itself for future work. But does the contract provide the ultimate measure of success? Is there a connection between the contract and legislation?

Statutes and contracts. How do they relate to each other? Who has the responsibility for ensuring alignment between statutory objectives and contract outcomes?

In this newsletter we consider these questions, and venture opinions as to how abstract concepts can be used to produce concrete outcomes.

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## Contract types

### *Schedule of rates contracts*

These are contracts which specify in great detail the inputs to be provided - so many tonnes of gravel, so many cubic metres of concrete. Contractors bid for jobs by inserting prices into a table of inputs supplied with the bidding documents. They offer to accept a fixed amount for each item of input, and usually the tenderer with the lowest price is selected.

Schedule of rates contracts have practical advantages, mainly related to their simplicity. They are said to reduce the “tender burden” - the cost incurred by tenderers in making their bids. The schedule of quantities on which tenders are based is derived from engineering calculations made by (or for) the government agency, avoiding the need for each tenderer to make those calculations.

What if the calculations are wrong? It would be unfair for contractors to suffer loss caused by another person’s miscalculations. On that reasoning, project risk should be borne by the government agency which has prepared the schedule.<sup>2</sup>

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<sup>2</sup> “Traditional Delivery Model”, New Zealand Government Procurement Information Sheet, October 2019.

Contracts of this type are said to be the “best delivery model to use for routine, uncomplicated works of small to medium size and duration” where:

- requirements for innovation are less important, the project being straightforward and scope well defined; and
- the government agency has access to appropriately-skilled and experienced resources available to administer the contract.<sup>3</sup>

There is another argument in their favour as well. The expenditure of government funds should always align with government policy objectives. If expenditure is closely controlled by contract terms, the agency is well positioned to control contract outcomes. The private contractor, in that scenario, has only to do what it is told.

### *Contracts specifying performance measures*

Performance-based contracts are also simple in concept - however the concept is quite different. Performance-based contracts specify *outcomes* rather than *inputs*. They are intended to ensure that required performance is achieved, with payment being related to the degree to which performance

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<sup>3</sup> New Zealand Information Sheet, page 4.

meets the specified standards.<sup>4</sup>

## A “partnership”?

The term “public private partnership” is often used. It is founded on the notion that government and the private sector can work harmoniously to achieve shared objectives. At first sight, this is analogous to harnessing a horse and a water buffalo to pull a cart: a shared objective is to move the cart forward, but it requires the involvement of two very different beasts.

### *The contractor’s objectives*

A contractor providing services under a schedule of rates contract would have no hesitation in responding to the question, “what are you doing?” The terms of the contract make that perfectly plain.

The question, “why are you doing it?” should, however, give pause for thought - even in the most uncomplicated of contracts. Possible answers are one or a combination of the following:

- to obtain profit from the contract;
- to maintain cash flow;
- to retain staff;
- to position itself for future work.

These very same objectives apply to contractors operating under a performance-based contract. The difference between the two, if there is a difference, is the action required of the contractor in order to best achieve its objectives.

These are the contractor’s objectives. But what about the *government’s* objectives?

## The government’s objectives

This inquiry is more complex, and may require examination of the type of contracting entity and the level of government (national, regional or local). It may also require an examination of the internal approval processes - if (for example) Cabinet approval of the contract is required it is

more likely that *whole of government* objectives will predominate. A statutory authority, however,, will have objectives which are closely related to its *statutory functions*.

## A case study: public transport

The engagement of private contractors to provide services inserts an intermediate step between a decision by parliament (the enactment of legislation) and the decisions which directly affect the provision of services (activities undertaken in accordance with the contract).

This potential weakening of control can be addressed in several ways. An important technique is the establishment of an industry regulator with powers over industry structure and pricing. This *Newsletter* is concerned with another technique - the specification of requirements in an Act of Parliament. For this, we turn to the provision of bus services in Brisbane, Queensland.

What is it that contracted service providers are expected to provide? Whose policy objectives are they seeking to achieve? How are government objectives translated into service delivery outcomes?

### *Queensland service contracts*

In Queensland urban bus services are provided under “service contracts.” A service contract is defined in the applicable statute<sup>5</sup> as being a contract between the Ministry and an operator:

*... under which the operator is required to provide a public passenger service for an area or route in a way that meets or exceeds performance levels stated in the contract.*<sup>6</sup>

The statute (unusually) goes further, by setting out the purpose of a service contract:

*The purpose of service contracts is to hold*

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<sup>4</sup> This succinct summary is taken from the US Nuclear Regulatory Commission’s *A Short Guide to Performance-based Contracting*.(2001).

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<sup>5</sup> The *Transport Operations (Passenger Transport) Act 1994* (Qld).

<sup>6</sup> Section 38 of the Act.

*operators accountable for minimum performance levels to ensure the communities served under the contracts receive, at a reasonable cost, quality and innovative public passenger services.<sup>7</sup>*

Consistently with this, the Act specifies contractual terms which “must” be stated in service contracts. These include minimum service levels.<sup>8</sup> It then sets out “other matters” which “may” be included in a service contract. These include performance outcomes (such as punctuality and frequency) and criteria for government payments under the contract.<sup>9</sup>

## **Contracts or regulations?**

Legislation which controls the terms of contracts can be seen as a response by parliaments to the outsourcing of functions which, in the past, have been provided directly by governments. Public transport is an example.

In assessing this approach it is useful to remember that a contract is essentially a private affair - an agreement between two (or more) parties. In general a third party cannot enforce a contract to which it is not a party. A member of the public is not a party to a contract for the provision of bus services, and most likely will not even be aware of its terms. This leaves some issues to be addressed:

- a member of the travelling public, while not a party to the operating agreement, will have contractual rights under the agreement created upon purchasing a ticket;
- there is the possibility of establishing a dual system of regulation - both the operating contract and transport regulations applying to the provision of transport services generally;
- other laws will also apply to the provision of transport services, such as consumer protection laws and occupational safety laws;

- requirements such as payment for use of transport services (to eliminate “fare dodging”) is likely to require the conferral of enforcement powers on inspectors - who thereby become “authorised officers” *albeit* as employees of a private contractor and not members of the police force.

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<sup>7</sup> Section 37 of the Act.

<sup>8</sup> Section 40 of the Act.

<sup>9</sup> Section 41 of the Act.