

Theme 1: Changing nature of governance/ outsourcing and privatisation

- **Opinion:** Must put extensive accountability provisions into contracts and give the ombudsman teeth, to ensure human rights such as on Manus Island with Berati death and G4S. But must be globally economically competitive and not a nanny state.
- What is governance?
 - Governance is the action of government exercising power, by making and implementing decisions.
- How has governance changed?
 - During the 1980s and 1990s the government restructure and reduced the involvement of government in service delivery
 - Cane & McDonald
- Government increased reliance on outsourcing and devolving functions to private sector bodies whenever it felt that those bodies could deliver a particular function more efficiently and effectively.
 - Return to liberal ideas.
- Why is it an issue for administrative law?
 - Private companies are not subject to judicial review like government.
 - *Neat*: Had to give consent to allow exportation of wheat.
 - Kirby dissent: was government power per *Datafin*.
 - Anytime government wants to remove accountability can simply contract out a function or privatise a body. Especially if highly political.
 - *Plaintiff M61*
 - Should the private company or government be accountable?
 - *Plaintiff M61*: Independent contractor fell within scope of review as had a decision post their decision open to review. Any step leading up to the minister's decision could be reviewed, as impacts minister's decision. Two-step process.
- Two approaches in administrative law to this issue.
 - UK *Datafin* approach- where a private takeover panel was ruled to be subject to JR as exercising a public function and operating within a public law character. Not clear whether *Datafin* forms part of Australian law but per *Plaintiff M61* constitutional text of s75(5) likely to make difficult.
 - Institutional approach, administrative law applies to bodies/ people who are part of the formal institutions of government. Government accountability will continue to decrease (*Plaintiff M61*).
- **Administrative review council report**- 'the contracting out of government services should not result in a loss of government accountability or ability of public to seek JR.

- Ombudsman should be given power/ jurisdiction to hear complaints about government services by private contractors.
 - Contractors should be subject to MR and if any government service is changed retain access to MR and JR.
- *Forbes v NSW Trotting Club*- Owned and operated trotting clubs and controlled trotting meetings there. Question of whether have to provide PF?
 - When rights exercised affect the public to a significant degree, they may be described as a public power and must be exercised *bona fide* and in accordance with the purpose given.
 - Non-government body could not rely on the exercise of private power.
- *Cane and McDonald*: If review limited, other accountability mechanisms would be appropriate.
- *Cameron: Datafin* accepted in Canada and NZ.