DISCUSSION
The Future Direction of Specialist Advice in the Public Sector

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Introduction

In March 1998, there was a near complete electricity breakdown in the fuel-cycle section of the Dounreay Nuclear Plant in Scotland. Fortunately, a serious incident was averted. The UK Government subsequently appointed a team of 16 inspectors to conduct a safety audit of the Dounreay site. The outcome of the multi-agency audit included a number of recommendations, some of direct relevance to recent fatal events in Australia with which I have been involved. I refer to the fire on HMAS *Westralia*, [an Australian Navy vessel], the landslide tragedy at Thredbo [an Alpine resort in Australia] and the botched Royal Canberra Hospital Demolition [an intended implosion for the demolition of a community hospital]. For myself, and more importantly, for the survivors and families, the topic of discussion is deeply personal. At this time, convention requires one to avoid any direct analysis of these tragedies – the author leaves the reader to draw the parallels.

The Dounreay incident indicated that out-sourcing of key functions had 'weakened the management and technical base at the site' – in-house specialist skill had been eroded. The auditors also referred to the Atomic Energy Authority's mindset that it was compelled to accept lowest tenders. The auditors believe that this mindset was influenced by the fact that fines for occupational health and safety (OH and S) breaches were substantially lower than civil damages awards for breaches of Government competitive tendering rules.

In referring to the weakening of management and technical skills at the site, the auditors bring to mind my own experience of finding that Government and Government Corporations progressively divest themselves of specialists, with consequent loss of corporate memory, thereby eroding their ability to set effective tender criteria and to assess tenderers against, among other concerns, risk management issues. With the weakened ability to set performance parameters goes the lack of institutional foresight and, in legal terms, foreseeability of risk and the imposition of duties of care. This has proved a bonanza for lawyers, at great cost to shareholders and the community.

Lest one takes Dounreay as an absolute indictment of out-sourcing, let one say that one of Energy Australia's senior managers [Mervyn Davies] recently acknowledged that while out-sourcing attracts its own special 'risks', it can actually enhance controls if task-specific financial rates and quality output standards are devised and implemented. Davies said that managers should assess the increased risks associated with loss of in-house skills and take steps to ensure that exposure to public liability risks by indifferent contractors and sub-contractors is borne in mind. Energy Australia had, for example, out-sourced core activities, such as electricity pole inspections, pole replacements, tree trimming and so forth. With this, went ensuring that contractors employed teams of specialists and that Energy Australia recruited in-house supervisors to monitor and control contractors and employees. Davies acknowledged that contractors, at least in the cable laying area, had worked in ways some would say unacceptable by internal (in-house) standards (*The Risk Report*, 1998).

The experience of another agency which out-sourced, in this case, building maintenance services, is also positive. Building maintenance for the Queensland Workers' Compensation Board's two Brisbane buildings was out-sourced to Honeywell in October 1995. The Board has reported that they previously had to audit their contractors to keep them honest, however, it knew that if Honeywell is to achieve its guaranteed savings (under an incentive plan) it would have to ensure that everything is performing at optimum level (*The Risk Report*, 1997b).

Nevertheless, not all work is out-sourced to giant corporations with international and national quality assurance standing. Typical out-sourcing occurs at work levels in local government and from larger corporations. Quality Assurance status is usually a pre-

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qualification for tenderers. This needs critical review. One can only look at local experience, where the requirement by Australian Capital Territory Works or Totalcare for architectural services to be tendered for, by quality assured architects, excludes the vast bulk of sole and smaller practice practitioners who, though they may never have had a professional indemnity claim, may have won awards and may have migrated from a quality assured enterprise. They are not structured for quality assurance assessment. Incidentally, there is anecdotal evidence that more women architects, at least in the ACT, practice in the sole or small firm configuration, excluding them, thus, from representative involvement in Government tender work.

Tom Brennan, a partner of Corrs Chambers Westgarth, in Canberra, recently observed that scant attention has been paid to certain aspects of out-sourcing (Brennan, 1998). Notably, the implications for the executive power of the Commonwealth, the States and, the Territories. Brennan (1998) has argued that undertakings of confidence by the Commonwealth to private tenderers with respect to the provision of commercial in-confidence pricing data, for example, may not be solid and that the Commonwealth's capacity to enter into binding obligations of commercial confidence with commercial contractors is limited, under free speech and other Constitutional limitations. Brennan (1998) argues, impliedly, that out-sourcing has outpaced the structures of responsible Government and that legislative amendments to the *Freedom of Information Act*, for instance, may be required (ARC, 1998).

Seddon (AIAL, 1998) has also queried whether Federal Court decisions limiting the application of the Trade Practices laws in out-sourced contracting are consistent with community expectations. He also argues that there are 'hidden' costs of government contracting out:

- Because a contract can be made by a government using its executive power, contract is a form of *de facto* legislation without the same checks and balances that apply to laws passed by Parliament.
- Contract may 'lock in' both the present and future governments so that policy formulation and changes are fettered.
- Contract, as a mechanism for carrying out government functions, is far less flexible than the traditional command and control model. Failure to perform precipitates delicate contract negotiations, whereas, under the traditional model, the problem could be fixed by command.
- There are some serious 'public' costs which are not acknowledged, such as the diminution of accountability to citizens who sue contracted-out services and the blurring of the traditional lines of accountability to Parliament and the people.
- The use of the contract increases the risk of litigation.
- The use of contract increases the risk of loss of control over public expenditure because of informal contracting or because of variations to the original contract.
- Public servants have become 'contract administrators' without adequate training or skills.
- The whole process is often hidden behind commercial-in-confidence claims

The author's recent interest in out-sourcing has related more to Coronial inquiries and resultant civil litigation. The out-sourcing of government functions which impact on *public safety* raises profound questions about the proper role of the Executive in ensuring the peace, order and good government of our communities. Whether it is a Navy fuel hose, a submarine software package, a reactor pressure vessel, a road maintenance contract or a government-inspired public demolition spectacle, it has, at its base, Ministerial responsibility and public confidence and trust in elected government.

When trust fails, the loss is not just in personal terms. Last year, at least one local Council was facing a A$60 million public liability/negligence claim. As footpath engineering is out-sourced, Councils have tripped themselves up by not implementing in-house systematized risk-audit controls or insisting on internal, risk-management-internal-audits by contractors. A key factor had been poor technical insight by those involved in contracting out key functions in the mining and building construction (and demolition) industries – roles formerly performed by in-house or in-house regulated specialists. As Seddon (AIAL, 1998), says 'many public servants ... are now contract administrators'.

Out-sourcing has driven wide new legal avenues to the doors of plaintiff lawyers' practices. In the construction industry, the employment of in-house engineers and other specialists has declined, allowing new frontiers of litigation to be 'blazed' for plaintiff lawyers. In economic terms, out-sourcing has not been whole-of-life measured – whilst there is often an apparent saving at the 'gate' – the cost in decreased product life, maintenance, unnecessary duplication of resources and so forth has not been measured. The cost in civil claims is yet to be measured. The human cost has been researched. Sub-contracting/out-sourcing can, and does, have significant adverse effects on OH and S (IRRC, 1996). Interestingly, the study also showed that workers for sub-contractors

and self-employed sub-contractors felt similarly insecure and stressed and suffered similar OH and S impacts.

I fear that only when the public and insurers are sufficiently hurt, will the expression 'When cheap is nasty' be understood by some tender selection committees which have, for too long, equated value for money, public accountability and lowest tender as *co-extensive* concepts. Out-sourcing needs to go with a number of key developments:

1 There must be compulsory risk audits imposed on public and private sector organizations out-sourcing work. Those risk audits must be based on adequate bench marks across industry, such as AS/NZ 4360-1995; Risk audits must be accessible to external audit and subjected to mandatory specialist advice where public safety hazards are identified. It may be too late when Risk Management Reports surface in Court.[1]
2 Occupational Health and Safety laws in Australia should be uniform and must impose strong primary duties of care. This is particularly important considering the mobility of enterprise within Australia and increasing resort to project-managed and superintended works. Occupational Health and Safety laws, which impose a duty of care on anyone who, to any extent, has control of the workplace, diffuse and neutralize the concept of responsibility and promote litigation and cross-claims (*The Risk Report*, 1997a). Confusion about responsibility contributes to delayed prosecutions, sometimes long after project-management teams have been disbanded. Corporate memory and learning, is thus, impaired.
3 Tender assessment must go behind Quality Assurance status. Pre-qualification and quality manuals replicated in one form or another and used by shires, councils and government works offices across our nation should not become instruments of abdication. The fact that some organization has quality assurance status is no longer an adequate defence for those who contract out work, particularly hazardous work. Tragically, Quality Assurance has, in some instances, become a prescription for resting on laurels. Laurels properly earnt, but not refreshed by continuing education and research and development, are positively dangerous. Quality Assurance status has allowed Government bureaucrats to abdicate responsibility for assessing the *current* technical skills and capacity of tenderers. Quality Assurance does not always signify continuing critical self assessment.
4 Tenderers should be able to demonstrate a capacity to build strong and effective partnerships between contractors and sub-contractors. The owner should ensure that teams are put together in the construction ladder and that there is not a progressive abdication by reference to Quality Assurance or prior experience or reputation. Evidence of continuing education and research should be a tender requirement. Professor Michael Quinlan, of the Industrial Research Centre at the University of New South Wales, has recommended that the head-long rush to out-sourcing, in both public and private sectors, should have prompted OH and S Authorities to develop user-friendly safety information for contractors and sub-contractors. Professor Quinlan says that whilst there is a place for penalty systems, these can only work in tandem with incentives and an improved safety culture. 'Standardised workplace rules are an important element, especially if the connections to specific hazards like chemical storage, forklifts or trucks on site are explained' (ACT, 1989:29).
5 The insurance industry, particularly public liability and professional indemnity insurers, must be proactive in requiring policy holders to evidence the acquisition of sufficient technical resources to manage tasks. Audit reports on the existence of such skill resources must, along with insurance, be a pre-qualification element. Governments now insure and, as such, should not be exempt from providing evidence that, for example, their tender assessors and contract administrators have appropriate technical skills.
6 External Audit Reports should identify substantial out-sourced business, the risk factors identified therein and any adverse risk audit of the contractor. Boards, and, where commercial in-confidence issues are not engaged, consumers and shareholders should know this information.
7 Effective document collection and archiving by those who out-source has become highly relevant in maintenance dispute and litigation issues.[2]

When the cost of replicating all that Government and large corporations formally did is added up, public and private sector out-sourcing may be seen to be less financially attractive.

When the *Challenger* blew up, the O-Ring started to tighten around the neck of those who have rendered their in-house specialists redundant; who wash their hands at 5.00pm and drive home past job sites.

Out-sourcing's learning curve abroad, has now reached Australia. There is now sufficient evidence to justify a pause in the move to out-sourcing, whilst the full cost to the community and shareholders is properly assessed. That cost

should include the immeasurable emotional factors associated with tragedy, loss of professional and corporate morale and the move away from excellence in favour of questionable economic benefits. I also predict that the move by governments away from responsibility for what they were constitutionally created to do, promises constitutional lawyers their next banquet.

Notes

1. Evidence at the Thredbo Inquest indicates that certain risk management assessments had been made some years before the tragedy.
2. Records Management Standard AS 4390 is rarely stipulated in contracts.

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