A QUESTION OF BALANCE:

Principles, contracts and the government–not-for-profit relationship

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FOREWORD

The subject of the contracts that exist between government and not-for-profit organisations for the delivery of services is not one likely to excite: it is in many respects a tedious matter. Yet, the importance of these contractual relationships is reflected in the quite considerable support given to this modest project.

The project is a partnership between the Social Justice & Social Change Research Centre, University of Western Sydney (SJSC), the Public Interest Advocacy Centre (PIAC) and the Whitlam Institute within the University of Western Sydney.

The project was developed under the University of Western Sydney Research Partnerships Program and supported by Jobs Australia.

In addition to its financial support, Jobs Australia has lent considerable practical support, including providing introductions to its own members and opportunities to discuss the project research as it developed.

We are particularly grateful to those who agreed to be formally interviewed. They were generous of their time and their knowledge, and very open and honest in sharing their experiences.

This generosity was also evident among colleagues from other academic institutions who willingly shared their own research and made time to speak with us.

The project team is indebted to the Parliamentary Secretary for Social Inclusion and the Voluntary Sector, Senator The Hon Ursula Stephens, and her staff. Senator Stephens has shown considerable interest in the project as it has developed and offered practical support, providing copies of the various Commonwealth contacts currently in use.

This project commenced when all the talk was of Australia's unprecedented period of sustained prosperity and the prospect of it continuing well into the future on the back of the commodities boom and China's stunning growth. The dramatic changes in our economic circumstances and the seemingly inescapable surge in the numbers of our unemployed compatriots will be turning/focusing an even brighter light on employment services just as certainly.

It is our hope that this report will provide some small contribution to ensuring that we work together more productively, more co-operatively and more effectively to support those who will be in need of work.

We recommend this report for your consideration and we would welcome your feedback.

Assoc Prof Rosemary Leonard	Robin Banks	Eric Sidoti
Director	Chief Executive Officer	Director
SJSC Research Centre	PIAC	Whitlam Institute

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PART I EXECUTIVE SUMMARY

Overview

The provision of human services in Australia is now built upon a complex set of relationships between governments as funders, the not-for-profit (NFP) and for-profit providers of the services, and those for whose benefit the services are intended.

There have been dramatic changes to the provision of these services over the last two decades and the relationship between governments and not-for-profit organisations (NFPOs) in their delivery will inevitably continue to attract attention as the forms of public administration evolve further. This is being driven in part by the change of government at the federal level. However, other factors are also at play. One factor is the mounting evidence on the limitations and inadequacies of the forms of public administration (the so-called 'new contractualism' and 'new public management') that came to dominate reforms over the past two decades. A second factor is the return of government intervention in the wake of the global financial (now economic) crisis, allied with the collapse of high-profile, for-profit providers of government-funded human services.

It is timely therefore to re-visit the contractual relationship that embodies these particular areas of the government–NFPO relationship.

The body of this report situates the contract within the broader context of public administration and the 'contractual regime'. It identifies a range of issues, informed by existing research and the new research conducted in the course of this project. These issues include a number of fundamental matters, including: the need for clarity of purpose and agreement on that purpose; confusion over just where the beneficiaries 'fit' in the human services systems (for example, is government the purchaser in its own right or as agent of the beneficiaries?); recognising and managing the power imbalance that exists; balancing important tensions such as those between competition and co-operation, or between control and accountability; and appropriately sharing risk.

While the contract sits within a broader context, the conclusion reached here is that the contract in effect codifies the government–NFPO relationship in respect of the delivery of services. As such, its importance has been understated; redeveloping the contractual relationship from core principles down will have a significant and positive impact on both the government–NFPO relationship and on the delivery of quality services to those in relying upon them.

Recommendations

1. That a set of common principles for government–not-for-profit contracts and government contracted service delivery programs (as outlined in Part 7 of this report) be adopted.

The proposed principles can be summarised as follows:

A. Foundations

(i) All parties should enter into the contract in *Good Faith.*

(ii) There is a presumption of *Good Will*.

B. The relationship between the contracting parties
(i) The relationship between the contracting parties is one of *Trust*
(ii) The contracting parties will accord each other *Proper Respect.*
(iii) The relationship between the contracting parties is *Supportive and Collaborative.*

C. Nature of the contract
(i) The contract should be *Clear and Readily Understood*.
(ii) The requirements in the contract should be guided by *Proportionality*.
(iii) The terms of the contract should be *Responsible and Reasonable*
(iv) The contract should establish *Meaningful Outcomes*

D. Operation of the contract
(i) The contract should allow for *Decisions* to be made at the *Appropriate Level*.
(ii) The contract should operate *Consistent* with the presumption of Good Will and Trust
(iii) The contract should be based on *Full and Fair Costing.*
(iv) The contract should allow that *Risk* exists, cannot be eliminated and will be *Shared*.
(v) The contract should be administered in a *Timely Manner.*

2. That the principle that there is no justification for unfair contract terms in standardised contracts be applied to the contracts regulating the arrangements between government and the not-for-profit sector in the area of service provision.

3. That the contractual principles (set out in detail in Part 7 of this report) be reflected in enforceable contractual provisions in terms of obligations on both parties and effective remedies for breach.

4. That governments give priority to developing shorter-form framework agreements that are not unduly legally complex to better reflect the range in size, risk and complexity of government–not-for-profit service delivery programs and funding arrangements.

5. That governments remove from all funding and service delivery contracts any interpretive or other provisions that exclude the operation of the *contra proferentum rule.*

6: That all funding and service delivery contracts between government and the not-for-profit sector include preliminary clauses that clearly:
(a) set out the purpose and objectives of the contract so that performance can be measured primarily against achievement of that purpose and those objectives; and
(b) set out the basis of selection of the not-for-profit party for the contact, including listing its particular expertise and skills relevant to the government program.

7. That Australian governments adopt standard form provisions (as set out in Part 7 of this report) to improve fairness and transparency and the overall contractual relationships. Such provisions should deal with the following matters in all funding and service delivery contracts between government and the not-for-profit sector:

a. Intellectual property and moral rights
b. Employment issues: Removal and Replacement of Specified Personnel
c. Use of income generated
d. Acknowledgment of funding
e. Freedom of speech: no limit on public statements
f. Prevention of fraud
g. Reporting obligations: keeping of records, independent audits and access

8. That all Australian governments collaborate to adopt a standard chart of accounts for funding and reporting for not-for-profit organisations in receipt of government funds.

PART 2 INTRODUCTION

The last two decades have seen a radical transformation in the way that governments do their business. This is especially the case when it comes to the delivery of 'government services': in education and in health, in the delivery of employment support and placement and when it comes to welfare programs more generally.

'New public management' (George and Wilding 2002; Melville 2005) is characterised by explicitly market-oriented practices involving, in some cases, competitive tendering, and at the very least 'service purchase' agreements and contracts. Often the client also has some type of 'mutual obligation' responsibility in order to 'purchase' these services from the community service/sector organisation (McDonald and Marston 2002).

The introduction of 'new public management' has markedly increased the outsourcing of government services and seen dramatic changes in the relationship between government as purchaser and not-for-profit organisations (NFPOs) as providers of 'government' services (HRSC 1998; Nowland-Foreman 1998; Neville 1999; DoCS 2001; Darcy 2002; Brown and Keast 2005; O'Shea 2006).

These developments have been profound. They have changed the way government works most notably perhaps in increasing the distance between government and the people using government services which are now mediated by third parties; initially, not for profit organisations but increasingly by for-profit companies. In the process the role of public servants in the line agencies—such as health, education, employment and community services—has centred on program oversight and contract management. NFPOs now delivering these human services have become increasingly—in many cases almost entirely—dependent on government funding that, in turn, has transformed the sector.

While views were mixed about the new directions, it is true to say that tensions emerged, particularly at the federal level during the Coalition's period in government (1996-2007).

One response from NFPOs has been the effort invested in developing broad, sector-wide agreements with governments, sometimes referred to as 'compacts'.

It is over a decade since the first 'compacts' were developed in the United Kingdom. The UK remains the epicentre of such activity with national and local agreements having been adopted. The Canadians picked up on the idea, though preferring to call them 'accords'.

Here in Australia similar discussions were mooted as far back as 1996. Since then several compacts have been negotiated at state level. They exist in various forms and are at differing stages of development.[1]

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[1] The *Partnership in Practice* under the Victorian Department of Human Services was adopted in 2002. In the ACT, the *Social Compact* between the Community Sector and the ACT Government was adopted in 2004 (Casey and Dalton 2006).

In NSW, *Working Together for NSW*, billed as an agreement between the NSW Government and NSW 'Non-Government Human Services Organisations' was adopted in June 2006. The agreement, drawing largely on the UK model, was first proposed by the Council of Social Service of NSW (NCOSS) in 1997 with the NSW Government committing to negotiate a compact in March 1999.

The Australian Labor Party (ALP) went to the 2007 Federal election committed to developing a compact with the community sector to guide the development and delivery of welfare services. Progress is being made towards that end with the conduct of a series of national, government-supported consultations convened by the Australian Council of Social Services (ACOSS). The proposed compact will be between the 'government and third sector'; that is, it will extend well beyond the welfare sector to embrace a broad range of not-for-profit and community organisations. Drafting of the compact is being undertaken by the National Compact Joint Task Force comprising 18 members from not-for-profit organisations, Commonwealth government agencies, local government and the Australian Council of Trade Unions.

These developments have been, and continue to be, the subject of much debate.

The radical changes in public administration over the last two decades need to be appreciated as the contextual environment for the construction of the 'contracting regime'—the operational framework—within which contracts between governments and not-for-profit organisations exist.

While this report does not attempt to provide a detailed analysis of the desirability or otherwise of such developments, it is necessary to situate this particular research within that context. The report also makes certain observations arising from the research without embarking upon a critique of the current provision of employment services. In both respects, the report draws upon the extensive body of existing research.

The real starting point for this report is a conviction that the relationship between the government and not-for-profit parties in the delivery of government services is largely defined in the actual contracts they may enter into to. It is here that the rubber hits the road.

The nature of these new contractual relationships has given rise to several major concerns, including: the lack of consultation and negotiation; the actual terms of the contracts; the monitoring of services; the impact on the role and efficacy of NFPOs; and the limitation on advocacy and legitimate dissent (Maddison and Hamilton 2007; O'Shea 2006; O'Shea, Leonard *et al* 2007). O'Shea *et al* (2007) found that "workers and managers in community organisations were concerned about the complexity of the contracting system and the way that bureaucratisation takes time away from service provision and other activities". O'Shea (2006) also found that many organisations are unsure of their continued ability to meet their community's needs, as they perceived that the government was becoming more prescriptive and that this prescription emphasised service delivery and current clients, which "compels organisations to be reactive rather than proactive in regards to community needs assessment" (O'Shea *et al* 2007).

At the same time, there are several widely recognised improvements arising from these developments. O'Shea (2006) found, for example, that many NFPOs reported that some of the new accountability requirements are necessary and useful in effectively managing their

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The stated intent of *Working Together* is to 'act as a framework for consultation and negotiation between government and the NGOs'. It states explicitly that it is not a legal agreement but a set of shared goals, values and principles to 'guide working relationships'.

In November 2008, *The Queensland Compact: Towards a fairer Queensland* was signed.

organisations. It was not the concept of contracting per se but the apparent 'one-sidedness' and 'prescriptiveness' of the contracts that was most concerning to NFPOs.

It is in this context that the contractual relationship between government and NFPOs is worthy of attention, particularly with respect to the principles that should underpin this relationship, and the nature of the contracts themselves.

In focusing on the practical question of the specific nature of contracts under the contemporary purchaser-provider model of government service delivery, this research departed from past approaches that have sought to establish sector-wide compacts or framework agreements. The intention throughout has been to supplement existing research, explore an innovative model of change based on NFPO-initiated micro-reform and more specifically to consider the potential to re-write the terms under which governments and the community sector relate in matters specific to NFPO independence, advocacy and democratic 'value'.

Moreover, it may allow for a wider range of government–not-for-profit relationships not only to be recognised but also to be given contractual effect while adhering to a common set of principles.

The particular focus of the present research is employment services. The reason for this is that the current Australian model of employment services remains the most dramatic example of the explicitly market-oriented practices of competitive tendering and contracting between government and not-for-profit organisations to provide services to community. As Considine put it, the current system is "one of the most radical and comprehensive manifestations of the new welfare state model", which seeks, among other things, to bring markets and entrepreneurial elements into play within the conduct of social welfare programmes (2000:275-276).

According to Marston and McDonald (2006:1):

> The introduction of the Job Network in 1998 represented a radical experiment in the policy and delivery of employment services to unemployed Australians… The Job Network arrangement was 'deliberately designed in accordance with the principles of New Public Management (NPM). In fact, it serves as an exemplar of how NPM can be applied to the complex business of governing (Carroll and Steane 2002)'

The new approach was characterised by government as:

> … flexible, innovative and competitive and proponents frequently contrasted these claims with the alleged weaknesses of the old welfare state with its universal provision of a highly standardized and centrally controlled group of services (Considine 2000:277).

Employment services, therefore, have been at the cutting edge. While they provide the most appropriate point of entry for consideration of the issues canvassed in this report, the findings, the principles and related recommendations are relevant to many other services.

PART 3 THE PROJECT METHODOLOGY

The project consisted of four broad components:

(1) Review of existing research

This review comprised both a formal literature review and consideration of additional primary sources such as submissions to the Employment Services Review initiated by the Federal Labor Government, and Partnership Agreements between the Victorian Department of Human Services and the Victorian community sector.

(2) Primary research

This research had two components:

- The conduct of interviews with senior staff (primarily, CEOs) of 24 not-for-profit organisations.

- The legal analysis of a range of existing contracts between a number of NFPOs and Commonwealth government departments; principally employment services contracts but not limited to them.

(3) Sector discussions

This involved participation in relevant fora canvassing the ideas and materials developed during the course of the project.

(4) Consultation with experts

This involved discussions with and review by selected experts of the draft paper during the drafting process.

Methods for primary research[2]

The primary research had two components: interviews with senior staff of NFPOs; and a legal analysis of existing contracts between NFPOs and Commonwealth government departments.

Interviews with staff members of not-for-profit organisations

Interviewees: Of the 24 participating organisations, fourteen were providers of employment services within Job Network. A further two were not Job Network organisations but had a number of other employment service contracts with the Department of Education, Employment and Workplace Relations (DEEWR)[3], such as the Disability Employment Network (DEN) and the Personal Support Program (PSP). Three organisations were neither involved in Job Network nor had other DEEWR contracts but offered a range of employment services, typically funded by state/territory or local government or by the agency itself. That is, 19 of the 24 organisations were directly involved in the provision of employment services in Australia.

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2 Note: The project was approved by the University of Western Sydney Human Ethics Research Committee.

3 The authors have used the current name of the department, Department of Education, Employment and Workplace Relations (DEEWR) here to refer to the current Department and its predecessor, the Department of Employment and Workplace Relations (DEWR).

Five other organisations were peak bodies or national offices of larger organisations with knowledge of, and a policy interest in, both the Job Network and the broader issue of government–NFPO contracting.

While some organisations were neither employment service providers nor Job Network participants, others were involved in all three dimensions of employment service provision, namely, as members of Job Network, as participants in other DEEWR-funded programs and as providers of employment services funded from other sources.

Though the organisations interviewed constituted a diverse set, there were two characteristics common to all project participants:

Firstly, all had e*xperience of contracting* with different government departments in the broad human services sector, often at both federal and state/territory levels and, in a smaller number of cases, with local government. This experience went hand-in-hand with a substantial interest in questions, issues and dilemmas associated with government–NFPO contracts and contracting.

Second, all had either *direct experience* of Job Network and/or DEEWR as a funding body **or**, as in the case of the peak bodies, *close contact* with organisations involved in employment service provision, **and/or** a *serious and substantial interest* in the policies, structures and processes involved in the provision of employment services in Australia.

Recruitment of participants: The databases of peak bodies were used to invite participation from relevant organisations across Australia. The distribution across Australia was: NSW 9; Victoria 8; ACT 2; Queensland 1; Tasmania 2; WA 2. Six were from rural or regional centres.

Interview process: The interviews were semi-structured individual interviews. The interview schedule included a number of questions focused on participants' experience of contracts and contracting before moving to questions directly eliciting participants' views on possible contract principles.

The standard interview covered:

- the size, nature and scope of the organisation;
- the interviewee's experience with contracting both with DEEWR and with other government departments;
- the interviewee's perception of the costs and benefits of contracts generally;
- sections of the contracts that have posed a problem for the organisation, with examples of their effects;
- suggestions for alternatives that would be an improvement;
- general reflections related to policy and practice.

Interviews were conducted by telephone or face-to-face, were audio-recorded, and fully transcribed.

Analysis: The 24 interviews were analysed initially using content analysis to identify contractual problems and possible alternatives, both those that are widely shared and those that are specific to particular types of services. The emphasis was on the detail and the effects

of particular contractual provisions on practice. Examples and suggested alternatives were also identified. The findings of the content analysis were then organised by the major themes.

As stated previously, the project sought to identify proto-typical contract principles that could be used to inform the development of future government–NFPO contracts, especially within the employment services sector. The result was a wealth of data related to interviewees' experience of the Job Network, DEEWR, and other federal and state/territory funders of human (including employment) services. This was very useful and allowed a larger set of possible contract principles to emerge, via a process of inference from the experiential material, than the set of principles generated by the more direct and specific questions at the end of the interview alone.

The Legal Analysis

Seven existing contracts between non-government organisations and Commonwealth government departments—principally employment services contracts but not limited to them—were subjected to legal analysis. De-identified copies of such contracts had been obtained primarily from the Government and also from organisations that agreed to participate in the interview and to make the contracts available to the project for research purposes.

The Commonwealth funding agreements and service contracts that were reviewed in formulating the advice are described as follows:

- Department of Families, Community Services and Indigenous Affairs (FCSIA) Long Form Funding Agreement (Long Form Funding Agreement): this agreement provides funding for applicant organisations to provide services under the Commonwealth Government's Family Relationship Services Program at Family Relationship Centres.

- Department of Families, Housing, Community Services and Indigenous Affairs (FHCSIA) Minimalist Agreement: this agreement provides up to $10,000 of funding for applicant organisations to provide services to the Government under certain programs.

- FHCSIA Short Form Funding Agreement (Short Form Funding Agreement): this agreement provides funding for applicant organisations to provide services to the Government under certain programs.

- FHCSIA Standard Funding Agreement (FHCSIA Standard Funding Agreement): this agreement is one of a suite of four new agreement to operate from 1 July 2009 to be used depending on 'the nature of the Activity, the assessed Activity risk level, the length of the Activity and the value of the Activity'.

- The Department of Infrastructure, Transport, Regional Development and Local Government (formerly called the Department of Transport and Regional Services) (DTRS) Funding Agreement between the Commonwealth of Australia and Applicant Organisations: this agreement provides funding for applicant organisations under the DTRS Regional Partnership programme. We note that the DTRS website states that the Regional Partnerships program has now closed for new and unapproved projects.

- Indigenous Co-ordination Centre (ICC) Funding Agreement Relating to Indigenous Programs (ICC Funding Agreement): this agreement provides funding for a Women's

Centre to provide the women and children of the Aboriginal community with certain services.

- Department of Employment and Workplace relations (DEWR) Employment Services Contract 2006-2009 (Job Network) (Employment Services Contract 2006-09): the contract includes general terms and conditions applying to all Job Network Services; as well as program-specific schedules for the Job Network Services, New Enterprise Incentive Scheme, Harvest Labour Services, Community Work Coordinator and Vocational Rehabilitation Service.

- DEEWR Exposure Draft of the New Employment Services 2009-2012 Purchasing Arrangements (Exposure Draft 2009-12): this is an exposure draft of purchasing arrangements and requests for tender for the new Employment Services Scheme for 2009-12 and for the purpose of obtaining feedback from stakeholders and persons intending to lodge tenders.

Procedure

A formal brief was prepared by the Public Interest Advocacy Centre (PIAC) on behalf of the project partners with the primary legal analysis being conducted by Holding Redlich Lawyers.

The brief was informed by the themes identified in the literature review and the preliminary findings emerging from the interview process.

The brief asked that consideration be given to relevant principles for government funding and, more specifically, sought a review of certain standard-form contracts to identify any provisions in the contracts that:

- are unusually onerous;
- provide some advantage to for-profit organisations that are not available to not-for-profit organisations;
- have the potential to interfere with the independence of the organisations contracting with the government;
- outsource a government activity and require the organisation credit the government party as opposed to the organisation providing the service; or
- provide limited or no certainty of payment to the organisation contracting with government.

Consideration was given to key provisions in the government contracts such as:

a) reporting obligations;
b) the right to involvement of the relevant government department or agency;
c) impediments on the applicant organisation;
d) intellectual property and moral rights;
e) confidentiality; and
f) dishonour clauses.

Supplementary advice was sought as the project matured.

PART 4 OBSERVATIONS FROM THE EXISTING LITERATURE

'New public management' and the contracting regime

As indicated above, the specific focus of this report is the contractual relationship between government and not-for-profit organisations, particularly with respect to the principles that should underpin this relationship, and the nature of the contracts themselves.

That said, it is important to situate this particular line of inquiry within the broader context of changes in public sector management and the evolving role of not-for-profit organisations. In this respect, there is a substantial body of existing research upon which to draw.

The discussion below, drawn from a review of that literature, identifies several themes that have a direct bearing on the contractual relationships that have developed between governments and NFPOs.

Unsurprisingly, the complexity of inter-connected influences becomes immediately apparent.

The 'new public management' framework

Much has been written about the association of 'new public management' with the emergence of more conservative politics embodied in neo-liberal economic policy (Marston and McDonald 2002:6; Darcy 2002:35-36, 38; see also O'Shea 2007:488 and Kenny 2001).

There is little argument that 'new public management' has accompanied the introduction of market imperatives into the public services (Carroll and Steane 2002, cited in Marston and McDonald 2006:1). The research identifies the underlying principles of 'new public management'. These include a greater focus on quantifiable outcomes, emphasis on efficiency, contracting out of services that are tightly specified and momentary incentives, all of which are exemplified in the current system of employment services provision (Ramia and Carney 2000:62). In the most explicit process of what Considine has referred to as 'network governance' (2001), community organisations as well as private organisations are effectively hired by the government to provide employment services.

There is an evident tension between the terms 'new public management' imposes on NFPOs working within the realm of government-sponsored service provision and their traditional adherence to an organisational mission and culture premised upon social justice.

Moreover, the emphasis on short-term horizons, a strong outcomes focus and cost-efficiency (or 'service constraints') can be discerned in the "considerable strain on some agencies and their staff" (Eardley *et al* 2000:19).

These tensions have seen an alignment of public and private organisational behaviour such that Considine (2003:74) argues that the distinctive role of non-profit organisations is eroded. He found that "by 1999 the non-profits appear little different from other agency types" as a result of financial incentives, the quasi-market system, the number of contractors and poor communication in the sector (2003:75).

Critical areas of impact of 'new public management'

The literature highlights several critical areas of 'new public management' impact.

High on the list is the tension between competitive funding and collaboration.

Marston and McDonald suggest competitive funding has a negative effect on collaboration between organisations (Marston and McDonald 2006:10), which others contend can help to better serve a client's needs (see Fowkes 2008:7-8). According to Fowkes, who provides a first-hand account of the working of a not-for-profit Job Network organisation, Job Futures, there is little interest in co-ordinating efforts in this tactical environment in which organisational health and even survival dictates a search for competitive advantage (2008:4). Eardley *et al* (2000:61-62) found that competition:

> … creates a conflict between the traditional impulses within the community-based employment sector for information sharing and co-operation as a means to offer the best opportunities for job seekers, and the need to jealously guard market knowledge and powers.

Although this competitive environment has also been claimed to standardise services and homogenise organisations, research has shown NFPOs to be strategically responsive (Onyx *et al* 2007:8-9; O'Shea 2007:487; Eardley 2000:61).

O'Shea's analysis determined some evidence of consciousness of discourse, challenging concerns about homogenisation, which is arguably stronger where organisations are unaware of it (O'Shea 2007:487).

A third area of high impact identified within the literature is on NFPOs' advocacy.

NFPOs perceive themselves as advocates: a voice for the marginalised; a means to make claims on government; and as intermediaries between communities and government; advocacy by community organisations "supports the robust functioning of democracy" (Onyx *et al* 2007:2).

The gagging of NFPOs became an increasingly prominent concern and debate during the Coalition's extended period in government. The current Labor Government adopted the issue as a point of rapprochement with the not-for-profit sector and has removed the most overt 'gagging provisions'. However, the issues identified in the research are somewhat more profound, going well beyond explicit limitations to the effect of a range of other, less direct limitations: the use of confidentiality clauses; self censorship flowing from funding dependence; and the punitive application of contract provisions.

The contractual nature of recent forms of public administration

The potential benefits and dangers of government agencies contracting with not-for-profit organisations to provide services to individuals and communities, or 'purchase of service contracting', have been debated in social science and public administration literature since the 1980s.

In the USA, according to Kramer (1994) governmental contracting emerged as "the primary method of delivering personal social services" during the last quarter of the last century,

signalling the transformation of the welfare state into a 'post-bureaucratic', 'enabling' state. 'Purchase of service contracting' is distinguished from "simply subsidising voluntary organisations to continue their good works" insofar as it requires contracted organisations to deliver services in line with the requirements and responsibilities of government, that is, to be standardised, equitable and accountable. Many of these organisations previously prided themselves on provision of personalised and responsive services that relied on their relative autonomy.

As outlined above, these developments occurred within a wider context of change in public administration, partly influenced by 'new institutionalist economics'.

The 'new contractualism', as it was termed, also extended to relations between governments and individual citizens, especially where receipt of government benefits was at stake. During the 1990s various forms of contract or agreement became a feature of welfare provision particularly in the area of services to unemployed people. Some welcomed a contractualist model for delivery of state responsibilities as the expression of a more robust form of liberalism, which exposes the operation of power inherent in status and solidarity based modes of governance, and forces attention on anti-discrimination and redress measures required to make contracting work (Yeatman 1997).

However, Eardley (1997:20) argued that, not only were job-seekers "in a weak position to assert such [participatory citizenship] status in the quasi contractual employment assistance regime", but that "with a high volume of clients the possibilities of genuinely individualised treatment are limited". Michael Lipsky, writing in Australia in 1990, warned that not-for-profit organisations acting as contractors to government should not expect to be able to bring the same level of sensitivity or creativity to service provision, or to be able to tailor their interventions to local conditions or according to organisational values (Lipsky and Smith 1990:6).

Lipsky (1990, 1993) suggested that simply examining the terms of contracts would not reveal the full extent of their impact on the structure, culture and practices of not-for-profit organisations. Rather it is necessary to contracting "as a understand regime", that is:

> The notion of a regime reminds us that normal systems of interaction, with their own rules, values and sanctioned expectations, can and do emerge outside the regularised interactions that ultimately are sustained by force of law … governments and voluntary organisation operate on different internal values and often seek different objectives, but with respect to each other still act according to expectations generated by the contracting regime. (Lipsky and Smith 1990:2)

In other words, participating in the contracting regime does not entail simply performing specified services but changes the practices, relationships and dependencies of contractors in fundamental ways.

The relationships between government, providers and the unemployed under 'new public management' and the 'new contractualism'

In a number of respects employment services generally, and the Job Network more specifically, became the social laboratory in which 'new public management' and the 'new contractualism' have been put to the test in Australia.

As 'new public management' took hold in the employment services sector, the "core target of activity was often perceived to be meeting government requirements not meeting the needs of unemployed people" (Marston and McDonald 2006:7; see also Eardley *et al* 2002).

The point of employment services is to provide equitable access to employment (Eardley *et al* 2000:13); however, current practices lead to the exclusion of the disadvantaged (Ramia and Carney 2000:63; Fowkes 2008:6). The outcomes focus, heavy administrative loads imposed by the government contracts and the large caseloads needed to keep their service provision feasible lead to practices such as "creaming", which refers to concentrating on those easiest to place (Ramia and Carney 2000:69; Marston and McDonald 2006:9; Considine 2003:70). Indigenous people, and those for whom participation is voluntary, for example, sole parents and disability support pensioners and young people, were underrepresented in Intensive Assistance (Eardley *et al* 2000:20).

More fundamentally, it has become clear that the mediation of government services in this 'new public management' framework through a third party—the 'provider'—has displaced those individuals, and groups for whom the service is intended. In effect, in this construction government has become the NFPOs' customer: it is government that purchases the services, it is government's needs that must be met first and foremost; indeed, not to do so incurs substantial penalties. By extension, the needs of the unemployed person will be met to the extent that they coincide with those of the government rather than in their own right.

In this set of relationships, the terms of the agreement (the contract) between the government and the provider are critical as these will set the boundaries on what might be done for the unemployed person. The research conducted for this project, and discussed below, strongly reinforces this conclusion.

However, possible alternatives do emerge from the available research.

According to Considine (2005:2), there is a need for transparency, respectful diversity, co-ordination and interdependency in order to "tackle problems in a multi-dimensional and locally flexible way". Kenny (2001:6) adds that there should be genuine exchange without fear, a reconstruction of accountability, trust and clarity of purpose to translate rhetoric into action. While, at present, network governance is no more than a black box (Considine 2005:6), we need to "consider how the different *strategies*, *institutions* and *instruments* of partnership offer alternative possibilities" (Considine 2005:16).

Goddard (2006:1) argues that despite the longstanding tensions "within existing structures, processes and frameworks of power", partnerships can be a "tool for change". Goddard (2006:3, 5-6, 8, 12) undertook case studies and interviews with job seekers and determined that the lack of integration between the government and the not-for-profit sector, the lack of clarity in their roles, the ad hoc implementation of partnerships and the fact that principal/agent relationships are at their heart is counterproductive and unsustainable for not-for-profit organisations. She argues for a revised conceptual framework (Goddard 2006:16).

Sidoti's keynote address to the Jobs Australia National Conference in 2007 goes further to canvas a set of principles that could apply to contacts between government and not-for-profit, defining their partnership (Sidoti 2007:6-8).

The rising burden on the individual job seeker

There has been brief discussion above of an associated impact the new forms of public management have had on the operating culture of the participating not-for-profit organisations. However, the structural developments inherent in the newly dominant forms have also shifted the onus of responsibility markedly towards the individual job seeker.

The transition into the Job Network employment services system in 1998 was also a "transition from 'passive' to 'active' welfare provision" (Ramia and Carney 2000:60; see also Marston and McDonald 2003:294-95). Mutual obligation, introduced first under 'Work for the Dole', "sought to capitalise on the communitarian characteristics of mutuality, reciprocity and voluntariness", making individuals responsible for their own welfare (Brown and Keast 2005:513; see also Darcy 2002:35). In an extension on the previous Labor Government's 'Working Nation', the Coalition Government placed an onus on unemployed people "to enhance their employability" through various Job Network organisations (Ramia and Carney 2000:60). Unemployed individuals have been obliged to actively seek employment in order to receive benefits.

Within the new system, the job seeker is required to be proactive; they receive minimal advice, guidance and access to facilities from Centrelink (Ramia and Carney 2000:67). They must demonstrate active job searching, including being case-managed (Ramia and Carney 2000:63). In addition to making an economic contribution in their job search efforts, unemployment benefit recipients are required to make moral contributions to society through case-management (Ramia and Carney 2000:63). This moral contribution lies at the heart of the construction of unemployment as an individual behaviour issue.

The management of unemployment through the Job Network:

> … is achieved through a range of techniques that seek to govern *with* the moral, social and psychological dimensions of the 'unemployed' in the name of active and mutually obligated citizen. (Marston and McDonald 2003:295)

The basis of this is discourse that highlights the deficits of the unemployed as the source of the problem of unemployment (Marston and McDonald 2003:295). Unemployment is represented as a "pathology that holds the person back from achieving fullness, freedom, independence, happiness and autonomy" (Dean 1997, cited in Marston and McDonald 2003:300). Thus, their self-governing practices are enlisted to seek an ethical self: the ideal job seeker who longs for and works towards independence from the state and yet eschews humility in that they would be accepting of even the most humble position (Marston and McDonald 2003:299).

The literature details the ways that, in the name of the ideal job seeker, the unemployed are forced, coerced, manipulated and enticed to fulfil their 'obligations'.

Job seeking becomes an 'identity project' (Marston and McDonald 2003:312). By establishing trust and rapport with their clients, the path to self-realisation becomes therapeutic (Marston and McDonald 2003:302). Case managers themselves are also governed by being set monthly targets and being made to enlist both therapeutic and disciplinary measures (Marston and McDonald 2003:310).

In this way, case management acts as a 'gate keeper' (Ramia and Carney 2000:66), aligning people's sense of bettering themselves with political and economic objectives (Marston and McDonald 2003:300).

Conclusion

There has been considerable research arguing the effects of competitive funding on the vision and aims of not-for-profit organisations, their ability to advocate and contribute to community development, and their collaborative efforts. As Considine (2001:36) has argued, "a greater range of strategies is now possible, while at the same time the objective of the work effort is ever more narrowly scripted".

While much of the research paints a somewhat grim picture, the existing structures and associated relationships are not a given. A new government inevitably brings with it new opportunities.

It may well be that the lines of communications that have been opened around consultations on a 'national compact' will lend themselves to constructive dialogue on the way in which partnerships between government and not-for-profit organisations are framed, opening the way for alternatives that maintain the integrity of not-for-profit organisations with social justice at their heart and deliver more durable outcomes for those needing their support.

It may be that the rising tide of unemployment in the wake of the global financial crisis will give renewed attention to structural unemployment while retaining the more positive elements of personal responsibility and support.

As this reports goes on to argue, however, whatever the new possibilities may be they will be constrained and limited in their realisation unless due attention is paid not just to the contractual regime but to the contracts themselves.

PART 5 FINDINGS FROM THE RESEARCH: THE INTERVIEWS

Overview

Quite early in the life of this project it became clear that there was strong agreement that the contracts between governments and NFPOs have a significant impact on the relationship between the contracting parties and on the operation and culture of the not-for-profit party in particular. In effect, the contract's impact extends well beyond the ostensible purpose of articulating the terms and conditions for the purchase of services.

While the research concentrated on the identification of desired contract principles, the rich nature of the data collected also sheds light on other important aspects of organisations' experience of service provision. This included challenges to organisational mission and values, the perceived net transfer of risk away from government to service providers, and limitations placed on organisational functioning and behaviour via both direct and indirect means. That is, the diversity of organisations that participated in the project, together with the relatively large number and wide range of questions asked, allowed a rich set of data to be collected that could usefully be analysed in relation to a number of research questions and be of continuing relevance to related research projects.

Those interviewed constantly cited experiences and identified issues that referred back to the broader context of the competitive tendering environment and the contracting regime. There has been no escaping the critical importance of this context: the interplay between the dominant framework of public administration and the nature of the contracts through which that framework has been given effect in the delivery of government services.

While the discussion that follows reflects these broader contextual issues—and this research will be canvassed in more detail elsewhere by members of the project team—this paper confines itself to the consideration of those factors directly bearing on the delineation of contract principles and the possibility of formulating standard clauses for use in future contracts.

Clarity of purpose provides the foundations

The most basic issue emerging from the research was that any contract needs to clearly articulate the purpose for which it exists and ensure both agreement on and a common understanding of this purpose.

The research points to the importance of establishing clear objectives that inform the contractual provisions and their interpretation.

> [The employment services contracts] describe a set of rules, but what they don't describe, or enable providers to readily understand, is what it is going to mean on the ground or what some of the risks might be.

The point was made that the contracts need to establish clear objectives so that the focus remains on the (social) outcomes rather than on the process for achieving outcomes or administrative requirements. The argument goes that the better articulated the objectives and

the stronger the parties' agreement on these, the less need there will to be prescriptive in how these outcomes are to be delivered.

Even for the one or two among those interviewed who were less perturbed by contractual detail, the issue of interpretation loomed large.

> Oh, they clearly define what you have to do in regard to the contract, with your draft, your RFT [Request for Tender] and so on. They clearly indicate, and in great detail, they have it so you understand what you have to do. I don't think that is an issue so much. But you have got to interpret it.
>
> It was incredibly difficult from the documents to get your head around exactly what they were asking.

Underlying much of the commentary from those interviewed was a struggle to determine whether the contractual relationship with government was best understood as a financial agreement in which the NFPO was essentially an extension of the government, "basically an arm of government", or whether the NFPO was an independent provider of government services.

While contracts do not capture motivations—nor should they necessarily do so—they can reflect (or suppress) the philosophical position of the respective parties. As one of those interviewed commented: "A lot of the regulation actually … comes back to a basic set of philosophies about what is right or wrong for unemployed people to do". The parties do not need to share a philosophical view, however, if they do not, then achieving/reaching a common understanding of the intent, objectives, expectations and anticipated outcomes is all the more critical.

Contractual forms are important but not well understood

The word 'contract' tends to be used by NFPOs to cover agreements in both tender and grant contexts.

Some saw grants as more suited to the nature and needs of NFPOs while at the same time arguing that contracts offered greater certainty as to permitted uses and obligations with respect to the funds. This offered a degree of freedom. Contracts were also thought to offer "value for money from a public purse perspective".

A common view was that grants were less prescriptive and, as a consequence, offered greater flexibility for the NFPO to design and deliver what was required. One interviewee, consistent with this, suggested that grants tended to be more suitable for seeding projects whereas tender-based contracts suited large, national, service-delivery programs.

The distinction for at least one of those interviewed was very clear:

> [The Job Network contract] is a licence to operate in the marketplace… If we get it wrong, your normal market forces apply; if we get it wrong, we get removed. If we get it wrong, we go bankrupt. There is no funding to support what we do.

Comments such as these suggest that NFPOs do not have an issue with the use of contracts per se, but in the contractual provisions and in their application.

For others, the source of concern was the need to distinguish contracting for human services and contracts governing government purchase of goods, equipment, or infrastructure. They questioned what they saw as a narrow, inflexible approach to contracting:

> How do you quantify the social development … over five years you have worked with a fourteen-year-old girl to the point where she has returned to school; she is no longer using opportunity sex; she is using condoms, the use of condoms has gone from 50 a week to 20; … she has done [her] certificate…; they cannot quantify that. What is the impact in terms of long-term health, mental and physical health; the fact that she is now working and not on allowances? The fact that society does not see someone on the streets … we really need to look at a social purchasing policy. I don't know how it works but we have got to work it [out].

Not all contracts are developed, exercised, or implemented in the same way. A number of those interviewed contrasted the different approaches to the contractual relationship from different Commonwealth government departments. One characterised the difference with the comment that "[the Department] will assume you are not being fraudulent". Others contrasted their experience of Commonwealth government contracts with state, territory or local government contracts.

One interviewee cited their experience with a territory government contract for the delivery of training:

> The tender process was really interesting because they did not have any criteria. They said 'How will you deliver'… 'So tell us how you will do this and how you will engage them and what you will do'. So there was no criteria per se. There were some broad, broad terms. It took a little while for the whole process to happen. Then we won the tender. So we went to contract time and they sent us out a draft contract, which we had a look at and changed quite a lot, which they accepted. We then went into negotiation and we sat down with the Contract Manager and we negotiated the contract, literally… Face-to-face, yes... So this contract was actually agreed upon and negotiated with genuine changes made on both sides to meet the needs of both organisations, and it was just a wonderful experience.

Another of those interviewed highlighted the positive experience they have had in contracting with local government, "You usually have contact with the people that you are tendering with or negotiating with". Local government officials were described as being much more down-to-earth and open:

> … with local government it is more like 'This is what we want, this is what we need and can you provide it?' They are just straightforward, down to earth, and not trying to hide anything. They just want the service.

There were a number of views on the distinction between contracts and grants.

For some the distinction held little practical meaning.

For one NFPO, the distinction was thought to be largely irrelevant:

> I don't know if there's really much difference… You have got to go through very similar processes. The outcomes are that you have documents that bind you to certain outcomes.

The bigger issue for that NFPO, and for most small organisations, is the burden of preparing submissions and, if successful, the costs of meeting the reporting and compliance requirements.

Another interviewee posited that although the not-for-profit sector does not distinguish between 'funding agreements' and 'grants', governments do; this, in turn, has operational implications for the NFPO that is left to 'patch' the funding streams to cover the recurrent and project-based funding streams.

Other interviewees favoured contracts. The most cited advantage was that contracts allowed the organisation to retain any savings that may have been made rather than the standard requirement in grants that unspent funds be returned.

> The contract system at least allows us to charge them for the service and we keep the surplus, if we are able to do it at a cheaper rate than what they have contracted us to do. Well then, that is to our benefit.

Several interviewees recognised that the contractual discipline had led to improvements: improved performance; better systems; and organisational efficiencies. And, in one case, a interviewee expressed the view that contracts "can protect people".

Some, while expressing a general degree of comfort with contracts, qualified their comments by charting an incremental change in the relationships between the contracting parties and in the contracts themselves over time.

> I like that [contracting] opened the door to wider thinking about how we do things. The Government became less intrusive for a period of time as to how we actually got the results that we got. But it's turned on itself, in the latter years of the Howard Government getting worse again. Because they were becoming so much focussed on contract compliance and taking every penny back that they could get from us. All the benefits that we had gained in the interim were gone…

The question arises as to whether the contractual form per se is limiting or whether it can be constructed in such a way as to provide the recognised benefits (such as certainty and efficiencies) without the identified impediments (over-prescription and inflexibility).

It also needs to be borne in mind that the formal contractual documentation includes not only the contract itself but also all of the related instruments. Some of the related instruments, such as the schedules, are included in the contracts; others, such as guidelines, supplement the specific contract and are created by government unilaterally after the tender has been awarded and the contract executed. These are often numerous and subject to further unilateral variation. When such changes are made, the onus remains on the NFPO to manage the changes and related administrative processes: "… if the provider does not meet those guidelines, their particular payments can be recovered and they can be recovered with interest".

A common complaint was the difficulty in getting agreement in advance: "… they won't say 'Yes'. So we can't mitigate our risk by getting endorsement for a particular practice". Yet a

determination made *ex post facto* through the audit process can have substantial financial consequences.

> … we put together an activity that actually resulted in fifteen long-term unemployed people gaining employment in [a particular] industry; an industry which is obviously one of the industries the government has a skills shortage area these days [2008], and it is quite an innovative, creative project. We, to the best of our knowledge, did move forward with that project in good faith. We used some government money that we have capacity to access to underpin elements of that program and underpin elements of the employment of that program. After that program had finished, a dozen of the fifteen people were in employment. A year later, ten of those fifteen people were still in employment. Yet we were called to pay back some money from that project on the basis that a later guideline was put into place about the use of that funding source… It has always left a little bit of a sour taste in my mouth in that we really tried hard to consult as best we could and it was a really successful program, but because technically it did not match up to some later guidelines…

Need to recognise and balance government's inevitable dominance

The government's role as architect and purchaser, and its responsibilities to ensure the proper use of public funds was accepted without demur. While a number of those interviewed made the point that better use could be made of the NFPOs' knowledge and experience in program design, all recognised that the responsibilities and decisions rightly remained with government.

The acknowledged reality is that the government party to the arrangements is the architect of the programs, the drafter of the contract, the sole purchaser of the services and the compliance agent. As such, government is inevitably in a dominant position; a core issue is the extent of that dominance and the consequences of it.

Those interviewed were universally conscious of the disparity of power that exists between 'government' (more particularly the department concerned) and themselves. Below are comments from three separate organisations that are examples of this concern:

> They are 100% in control and they don't want it anything but 100% in control.

> [They] hold all the power. You as an individual organisation do not hold any power at all. It is really a take it or leave it situation.

> The contracts are usually very, very, one-sided, very much a master-servant relationship and with penalty clause after penalty clause after penalty clause for non-compliance; including the ability to withdraw the contract after 14 days' notice for reasons determined by the Commonwealth. :

The latter organisation had taken a deliberate decision to move away from government contracts to avoid 'contract capture'. As noted elsewhere, it was not alone in this respect.

This power imbalance—"Liken it to a 12-lane freeway going their way, and a one-way bike track going our way"—was evident in a number of ways: in the terms governing the relationship; and, more fundamentally (as discussed below), in the deviation from legal

norms. It is also evident in matters canvassed elsewhere in this report: in the actual terms of the contract; and in issues relating to accountability and compliance.

The power imbalance and its impact were apparent in descriptions of the relationship when those interviewed spoke of their experiences. The description above of this being a 'master-servant' relationship aroused, when reported at workshops, some understandably heated responses, among government and NFPO participants alike. It is admittedly strong—and historically loaded—language, but was a phrase commonly used by a number of those interviewed.

The research also revealed that none of those interviewed thought that their organisation had in any sense negotiated the contract, its terms or conditions, even to the extent of being unable to suggest amendments either at the point of entering into the agreement or during the life of the contract (see below).

Several highlighted the government's ability to vary the contract at any time free of any constraint:

> … you will see … that [the government has] the ability to change it when it suits them… And the real game that goes on is you either accept what they are doing or run the risk of not getting another one.

In one case cited, a state government agency sought through the contract to require the not-for-profit party to seek its permission for any change in its constitution or organisational 'directives' as a condition of a relatively small housing grant.

The power imbalance is further evident in the government party's scope to act unilaterally within the terms of the contract. This is dealt with in detail in the legal analysis that follows, but is worth noting here from the NFPOs' experience by way of counterpoint. This was raised by a number of those interviewed both as examples in the exercise of power but also as a significant factor in exacerbating the NFPOs' risk exposure.

> There is a contract at the beginning then there are guidelines, which are issued by the Department, which essentially form part of the contract that can be changed at any time by government. They are changed frequently.
>
> Then if the provider does not meet those guidelines, their particular payments can be recovered and they can be recovered with interest. So the provider has to manage the constant change in the documentation requirements or the requirements for particular administrative processes and then if we fail to meet the expectations of the contract then we can have funds recovered.
>
> At the same time, if we say to government, 'Look, here is our form, or here is our policy, or here is our proposal, do you agree that it meets your guidelines?' they won't say, 'Yes'. So we can't mitigate our risk by getting endorsement for a particular practice; they just say, 'Well, when we come and audit, we will make a decision about whether it is in the circumstances right or wrong'.

One organisation had sought to re-negotiate the terms of a particular service over a period of more than a year. Despite the organisation's transparency and its regular communication with the Department, it received a:

> …'Show cause letter', which was a letter that said, 'Show cause why we should not take your contract'. We received that and had 15 business days to do a whole range of things, which were very substantial things, like sign up a thousand people or do various actions. We met those timeframes. However, six months later, we still had not received a formal response from the Department about what they thought about those things. So they had not written to us to say 'that is good, bad or indifferent'.

The take-it-or-leave-it approach also appears to have led to questionable practices in the legal process with several examples cited of the NFPO signing contracts that had key provisions left open or with key dates yet to be entered.

The perception that the imbalance is intentional is supported by government's efforts to exercise its powers and by the lengths to which it has gone to preserve them. One organisation gave an example of the department refusing to consider alternative and reasonable interpretations of obligations until it was presented with a strong argument backed up by expert legal advice.

This experience is indicative of a number of examples given with respect to the government party's exercise of its powers. However, it is interesting because it is one of the few cases (within those organisations interviewed) in which legal advice was sought and, as it happens, to some effect.[4]

Most of those interviewed had not sought legal advice and they had not sought legal redress for perceived failures or cost impacts arising from the actions of the government party. Even when legal avenues were contemplated, there was no confidence in their efficacy.

Yet there may be a hint of attitudes changing in these respects. It may be that NFPOs will adopt a more litigious approach or at least a more legally cautious and formal approach themselves in the absence of a perceived capacity to negotiate or in other ways influence the contractual relationship. As one of the larger organisations put it: "From here on we will be taking a different approach to tendering [obtaining legal advice] … but if I was a small agency I would not be able to".

In summary, the government's dominance in the service-delivery contracting relationship is accepted to the extent that it is derived from the government's duties. The question that arises is whether this disparity in power is recognised in the contract itself and whether this imbalance is mitigated in such a way as to ensure that the minor party's interests are properly protected.

The legal analysis of the contracts suggest that, on the contrary, not only is this not recognised, the contracts as drafted exacerbate the imbalance by removing protections that are accepted norms in contract law.

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[4] Contrast this experience with the more commonly held opinion provided: *I don't bother having the contracts read by a solicitor because I think 'what is the point?' No right to question it; if we want the money, we do as they say. We have said in this organisation for many years that we succeed in spite of their guidelines. That is what it feels like sometimes.* Or another: *We can certainly seek and receive (independent) legal and financial advice. I just can't think of a situation where it has made any difference.*

There is little or no room to negotiate

Symptomatic of the power imbalance is the evident lack of any negotiating power by an NFPO when entering into a contract.

A distinction needs to be drawn between the consultations that may—or may not—take place in the process of developing a funding or service delivery program or tender documents and the actual contracting process. It was recognised that a process did exist for consultation on the development, for example, of the employment services contracts. This was principally between government officials and the relevant peak organisations and the largest providers. Usually, there are also opportunities for direct discussions between these NFPO representatives and the relevant Minister. In addition, there is the option for any interested party to comment on the Exposure Draft 2009-12.

The point was made that there are inherent difficulties even in the consultative process associated with tendering: short timelines; limited opportunities; and information sessions that do not allow for the exchange of information. Fear of breaching the process guidelines, for example, meant that officials were not prepared to speak beyond the written scripts making any exchange effectively impossible.

When it comes to entering into the contract itself there is no opportunity offered for negotiation or variation of the terms. The overwhelming view was that any attempt to do so would be futile.

> I don't get a sense that there is any purpose to having an opinion with the Federal government about their contracts other than a collective opinion. I don't think you can do it; you just don't get a sense of any capacity for individual amendments. You just don't get a sense of it.

Some of those interviewed had indeed sought to amend the terms of the contract.

> I guess my experience has been pretty awful really. It has just been a blatant refusal to hear proposals around how the service might be adapted to achieve better outcomes for the client.

Others aired their frustration in the way that even where the contract did provide some protection, the power imbalance made such protection illusory.

> The Department decided retrospectively that a whole lot of money that somebody had claimed for getting people jobs was inappropriately claimed, and unilaterally recovered it. The organisation had acted in good faith and in accordance with its understanding and interpretation of the various rules…They sought to invoke the dispute resolution procedures and [the Department] just ignored them.

There were again differences between departments in how they responded to NFPOs in these matters. Where a department was perceived to have listened and, even to a small degree, shown a willingness to bend or adapt, this was acknowledged and welcomed.

By way of contrast, one example given showed that negotiation is not only possible but can deliver a much-improved program:

> [We] had a very specific framework that we knew would work, which was at complete odds with what the Department wanted. We applied for the pilot funding and were not successful. We stuck to our guns [and applied] for the funding, we had fantastic support from our local regional director of staff, who backed it and we got funded for it and it became State's Best Practice. It was a program where we were achieving two hundred and fifty percent outcomes against the contract… the best result in trials was fifty percent of contracted outcomes. We are doing it because it is individualised, it involves young people in the process and it's flexible. That was fantastic and in fact out of that and the way we were doing it ... it actually led to them two years ago changing the nature of the way they ran their breaking unemployment cycle programs. So that was actually quite a really good case. We had fantastic relationships. We had the support but we had twenty or thirty years of history of doing this. And, we stuck to our guns and said 'If you are not going to let us deliver the way we want to deliver it, we are not interested in delivering the program'.

Considerable importance is placed on relationships

The NFPO interviewees highlighted the importance of relationships and personal contact (beyond compliance) in constructing a collaborative approach to implementing programs. This is apparent, for example, in the comparison reported above of dealing with local government. The value lies, in part, in the fact that the NFPO is also dealing with a locally based person who is in a position to make a decision:

> … there is a lot more going back and forth but you can negotiate some contracts [face to face] … they still want the … best price and best specifications, but you can get a lot more information from them and submit supplementary information.

At the same time a number of those interviewed stressed the sympathy and frustration they shared with local department staff: "That person is as much a slave to that contract in terms of monitoring as I am in terms of delivering".

At presentations and workshops during the course of this project, the point was made on several occasions that there would be benefit in complementary research with government officials. The research team accepts this and suggests it is a fertile area for future work. That said, some insights may be gleaned from other work that has been done.

In 2003 and 2005, a 'partnership survey' (Ipsos 2005) was conducted with participants in the partnership agreement between the Victorian Department of Human Services (DHS) and the health, housing and the community services sector, including local government. Three hundred and fourteen DHS staff completed the survey (a 50 percent response rate). Eighty-two percent of staff indicated overall satisfaction with sector organisations ('moderately' to 'very satisfied'). Sixty-five percent of DHS staff rated effectiveness of service delivery by sector organisations as 'very effective' or 'effective'. A slight increase from 2003 in dissatisfaction by DHS staff with sector organisations was noted in the 2005 survey.

Interestingly, in 2005 DHS staff satisfaction with sector organisations was higher than the sector organisations' satisfaction with DHS. This finding was consistent with 2003 results. DHS staff rated the sector organisations' effectiveness of service delivery higher than the sector's rating of DHS effectiveness (consistent with 2003). The report notes that at the top of the DHS staff list for improvements in the partnerships was the relationship and communication between DHS and sector organisations. They maintained that the key to this was more personal contact, such as face-to-face meetings and site visits.

Consistent with the discussion above regarding the distinction between relationships at the local level and those with the central office, the point was made that the distance from central office to coalface service delivery hampers negotiation. The relationships are also hampered by lack of discretionary authority vested in the local office.

> Well, look, the people that we are dealing with—and I have been around for a long time so I know some of them quite well—and they will also shrug their shoulders and say, 'Well, you know that is what the rules are', like they are caught in the middle of it as well. There are rules being made from wherever—from Canberra—and the local state reps that we see are only implementing and interpreting what is required.

Comments of this ilk appear to be a reflection of their frustration as it was very clear that the preferred path for all is what most generally spoke of as a 'genuine partnership'.

The impact of the contract regime on the operations of not-for-profit organisations

The impact on operational detail and organisational mission

While the focus here is on contracts rather than on the competitive tendering regime, those interviewed did stray into related areas where the approach, for example, seems incapable of addressing some critical needs.

> I think sometimes the competitive tendering model can miss out on what infrastructure needs to be built either in terms of co-ordination or in terms of physical infrastructure or training people; those sort of things.

For some, the contract allows for the government to probe deeply into the individual organisation's management and operating methods.

> Well, I think it's an extraordinary thing that under these programs—and I have seen it happen really—a Minister of the Commonwealth is able to reach all the way down to affect the individual relationship between an individual job seeker and a Job Network consultant.

Three other interviewees suggested that the contractual relationship had affected the culture of the not-for-profit organisation.

> The biggest challenge has been to manage the clash of values.

> Of the change in the work culture that goes on in providers it becomes focussed on process management, and it becomes focussed on performance. And the soft skills and the soft areas get totally ignored because of the performance requirements and just the need to survive. So I have seen a total cultural annihilation of the employment services industry over ten years as a result of this mentality of performance or die.

> … our focus has gone from the actual direct service delivery to one of compliance... It's all the procedural stuff now. It is not about how to get a person a job; that is irrelevant. It's about the procedures required by [the Department] to justify your money.

For many, this was evident in changes in the relationship with their clients or with the local community: "A staff member used to spend two hours with the clients and now s/he spends one hour and the other hour is spent on paperwork".

The changing staff profile was cited as one piece of evidence with many organisations hiring staff or appointing Board members with commercial, corporate backgrounds and managerial experience, rather than community development or community management backgrounds.

This may account in part for the increasing sophistication among some organisations in structuring their organisations to include specialist units for preparing tenders, and centralising the data collection and reporting across the contract portfolio. This could be a significant investment involving a unit of three or more staff in at least one of the organisations interviewed.

The changing profile, however, extends right down to frontline staff. It is no longer enough, for example, for frontline staff to be really good with clients if they don't also have strong computer skills. While the expanding skills range is common throughout the modern workplace, the concern raised here is that the human interaction essential to effective employment services is adversely affected by the administrative demands.

Two other interviewees indicated that 'contract capture' left their organisations struggling to remain true to their mission.

> As a non-profit we have another purpose. We are not a business; we are a service organisation servicing these clients. And we are in this constant stress and pressure between what stakeholders want and what the clients want and what we in our heart know that these people deserve.
>
> That gap between what you were set up to do and what you are currently doing can be a tension for organisations.

For several organisations, this impact on organisational culture and values had led to a decision to stop tendering for certain government contracts altogether.

The examples given here are illustrative of the comments made and experiences cited by those interviewed. It is striking that the impacts range so broadly, affecting an organisation from its basic operations through to its organisational mission and culture.

For not-for-profit organisations advocacy is a watershed issue

The most spoken of limitation has been that on the advocacy done by NFPOs.

Those interviewed shared a number of stories and experiences. It is important that this particular issue is accorded its proper significance. To than end, we offer one extract by way of illustration

> … there is a whole culture around keeping quiet … there were two legal things hidden in there … well certainly you had to seek permission for any time you wanted to say anything about a program, you would have to get written formal permission, you had to send publicity material for checking off before you could distribute them... Even to just hold a launch or something.

> A couple of years back now, at a major briefing with hundreds of people present, a [Department] bloke got up and he said, 'The biggest thing that you can do is the Ray Martin thing'. And that means, 'Make sure you are never for any reason on *A Current Affair*; if you ever appear on *A Current Affair* because you get up and you criticise the government'… 'You will never cause embarrassment in any manner because of one of your clients'…

Among the numerous experiences recounted was one in which contracts worth millions of dollars were threatened with a 'Show Cause' letter following the organisation making a submission to a government inquiry.

These restrictions had come to be explicitly enshrined in contracts over the preceding decade and in the management of those contracts. Any criticism was seen to be unacceptable: "apart from attracting their spleen and the rest of it, it brings the whole system into disrepute". In such an environment, a culture of silence takes effect:

> … a lot of providers who privately agreed that what I was saying was right were cross because—we call it the world of grins—everyone pretends that everything is okay, when in fact it is not.

The current Federal Government, consistent with its election commitment, has overturned the express contractual gagging of NFPO advocacy. It has done so in broad recognition of an NFPO's right to advocate, dissent or otherwise express its disagreement with government policy without fear of retribution, whether that manifests in action under existing contracts or jeopardising future contracts.

The Government's undertaking is primarily to remove restrictions on advocacy through removing the so-called gagging clause from government contracts. There has also been an explicit recognition of the positive right of NFPOs to advocate in the form of a new provision in the most recent employment services contract.

Our research strongly supports earlier work indicating that the culture in which the contractual relationship existed was a powerful factor in how the contract itself was interpreted. A number of those interviewed spoke of the intimidation and 'bullying' they experienced from government officials (advisers as well as bureaucrats). This took various forms: frequent (at times almost daily) phone calls questioning actions or statements made by NFPO staff; repeated arguments about the figures: "even when it was [the Department's] figures or even when it was [another Department's] figures"; and last minute withdrawals from meetings/events due to unwanted publicity.

It is important to note again that those interviewed also spoke of the constraints that are placed on public servants by the present contractual approach. Examples were frequently given of supportive local officials who understood the situation and were sympathetic, but who themselves had little or no discretion.

Where officials had or assumed a degree of discretion and exercised it, this was seen to have delivered tangible benefits.

Government micro-management under the contractual umbrella

There was a universal concern raised by those interviewed not just with the possibility (under the contracts) of the government party intervening in the detail of the NFPO's operations, but

with the reality of such interventions that was highlighted by their recounting of numerous examples (two of which are provided below):

> … we had an audit and we had [the Department] come out and there was a $21 payment that, from their perspective, there was not enough substantial evidence so we had to give back the $21… There was not much dispute that we had spent the money and we had provided the service.

> … Suddenly you have got people who are concentrating on, 'Why did you get them to sign it', 'Is it appropriate to spend? Look you spent $10 to feed them at McDonalds', 'Well yeah, that is how you get them to the interview'. They actually have not eaten so you feed them. Suddenly you get people who do not understand the fabric of what youth work and engagement with marginalised people is; they are questioning you on the very reasons the program can be successful.

Several contrasted the capacity for this degree of direct intervention in the detail with the scale of the overall operations.

> I mean that is the subject of file reviews; it is also the subject of desktop auditing. To the extent that someone will ring and say, 'Jo Bloggs …'—and this is in the context of [thousands of] people on our caseloads—someone will ring and say, 'Jo Bloggs failed to turn up twice for an appointment where you had scheduled him or you have said "did not attend". Why is that the case, why did you not submit a participation report?' So the micro-management there is very extreme…

For some, the reality outstripped their expectations notwithstanding recognition of the powers available to government under the contract. Comments from two separate interviewees evidence this:

> [T]he Commonwealth … really do manage the implementation of a contract at a very micro level in my view and right down to individual claims and payments and activities for individual clients that can be questioned by the Commonwealth; which does not get any more micro than that…

> … People were certainly aware of the contracts because they are tabled ahead of time, but I don't think people were aware of the extent to which the Commonwealth would set about to actually micro-manage them.

> They came in … but they were very pedantic on how we administer the files. They took a point off one of our quality evaluations because we used metal instead of plastic clips on our files… And the cost of going through a thousand files and removing a whole series of clips just because they are made of one material or another…

Interviewees found the extent and reach of these powers disturbing. They highlighted the administrative impost, the costs, the negative impact on relationships with the clients, and the climate of 'policing' that infected their work. The root of the issue for many was what this behaviour said about the nature of the relationship between the contracting parties.

> So you know, nobody trusts anybody. Therefore they all build into these systems check and counter-check and all that which leads through to 50% of your money being wasted on administration costs. It just means that they did not trust us…

The sheer volume and consistency of these stories suggest a system that has become rule-bound to the detriment of fulfilling its intended purpose. The contract itself—its complexity, detailed prescriptions, penalty regime—provides a key part of the foundations on which such behaviours are constructed.

Contracts impose a rigidity that stifles local responsiveness

It was apparent from the interviews that NFPOs afford significance to the circumstances of geography, place and local history. Typically, they held a strong view that NFPOs knew their communities: "not-for-profit organisations … know better; they know best". They expected the strengths of NFPOs in this regard to be acknowledged and respected in the contracts, in the behaviours of, and in their relationships with, government officials.

They contend that their services are more effective when they are able to design and deliver those services in a way that recognises the particularities of the community in which they operate.

While the policy rhetoric acknowledges the importance of local circumstance, those interviewed maintain that contracts make no such allowance.

> It is not that they are ignoring what's going on, it's just simply what they have actually rolled out from a policy perspective almost bears no resemblance sometimes to what happens on the ground.

The contracts fail to encourage flexibility to respond either to individual need or the characteristics of a particular community. A number went further and suggested that the prescriptive nature of the contracts and the way they are enforced are an impediment.

> Our ability to say, 'Well, Jo Blow is a new job seeker, we think we can really make some in-roads in a short period of time, for four hours every week for the first three weeks, because we really think we can get you an outcome really quickly'. We lost the ability to do that. So in terms of your organisation's uniqueness and what you want to do is where everyone does it very similarly now because of the prescription that has come into [the] contract.

The general view emerging from those interviewed was that a contractual relationship that would recognise local competence and allow for that would be a win for all concerned: allowing government officials to concentrate on meeting the objectives, on the relationship and program oversight; allowing the NFPO the discretion to tailor their services to local needs and circumstances; and providing those needing the service with a more dignified and personal experience (while still allowing for penalties where necessary). One interviewee made a simple distinction: "[the Department] should manage the contract, not the process".

There were clearly practical ramifications arising from an apparent lack of understanding or appreciation of how policy or the strict application the contractual agreement might play out on the ground:

> … a whole group of people who had not been required to participate in employment services were put into those employment services and it happened within a very, very short space of time. It was very politically sensitive, so the pressure on providers to do things quickly was enormous. For our organisation, for example, we went from having to deliver [a relatively small number of places] to ten times that in the space of a few weeks.

> The reality for a provider trying to do that is that you have to get staff, you have to get facilities, you have to gear up, you have to have cash flow, you have to have all of those things. [The Department's] approach was to hold us to the letter of the contract, even though the circumstances had changed substantially and that those changes were of their own making.

A number saw this lack of recognition as a lost opportunity: "In all of our major contracts there is virtually nothing … that … specifically refers … to the value added of the providing organisation".

For this manager, the NFPO brought a history of understanding the issues, strong local networks, a capacity to work co-operatively (including with local government); none of which were really utilised to the advantage of the program beyond the terms defined in the government's standard-form contract.

There emerges in this a tension for some at least who maintain that the not-for-profit sector is capable of doing more in addressing structural unemployment: "Where it is not just about providing an efficient market place, but actually addressing inherent problems … structural problems".

The determination of price needs to take account of the full costs

Several issues were raised with respect to costs that resulted from the contractual terms.

The most far-reaching issue was the basis for determining price. A number of those interviewed contended that the pricing reflected a very narrow interpretation of what was required in delivering a quality service meeting the program objectives.

> … if you are solely price-focused you are not really running commercially at all, because quality is just as important. You have got to find the balance between quality and getting the work that you need done with the cost that is actually relative to it. Going for the cheapest product—like if I choose the cheapest computer—it may save me money in the short term, but it's going to blow up and I'm going to have to replace it in six months.

Contracts need to reflect full cost recovery. Such recovery should take account of: the cost of partnership and collaboration; the cost of accountability and accreditation systems; direct costs of program development and service delivery; and infrastructure and administrative overheads. It was suggested that a proper determination of *real* costs would recognise variables such as the effects of CPI, oil price, and regional variations.

Ranking high among the more contract-specific issues that were raised were the costs associated with the contract's compliance provisions. There was a very strong, and consistent, view that these are excessive. Most of those interviewed spoke in terms of the time spent in meeting contractual requirements rather than the dollar-cost. They estimated this at anywhere between 40 and 60 percent of their administrative load.

The more specific study of the 'paperwork reporting' cost conducted with 14 Queensland not-for-profit grant recipients (Ryan, Newton and McGregor-Lowndes 2008) found that the cost of government-generated paperwork (excluding volunteer time) in this case study was an average of 1.74 percent of an organisation's total revenue. An average of 143.57 hours was required to complete the paperwork over the course of the year. That study concluded that these are significant costs.

For organisations delivering employment services it is reasonable to suggest that the level of administration is more significant still than those in the Queensland study. The employment services contract mandates specific accountability activities—such as the collection of detailed data for individual interviews and operational processes—that are in effect a non-negotiable compliance burden.

> We are funded for a … range of administrative procedures and processes that are monitored very closely. It costs the government an enormous amount to monitor, it costs us an enormous amount to [administer] and it has nothing to do with the outcomes.

Some made specific reference to the information systems (in the case of employment services: EA3000). The mandated use of these systems creates an administrative burden that, for a number of participants, was seen as disproportionate to the need for effective and accountable service delivery and the capacity of providers. It was also seen to exacerbate the problems of micro-management.

> They [the Department] have the ability to [undertake surveillance of] the actions of individual workers in agencies with this system. And so there is a lot of time and money spent on creating, storing and retrieving evidence and justifying really quite small amounts of money, just a ridiculous amount of money.

At the same time, the strength of this perception of unnecessary administrative burden of itself poses several challenges in striking an appropriate balance in the contractual relationship between trust and accountability, central control and local discretion, administrative efficiency and delivery of the service.

> We used to get 12 payments per year. We have gone from 12 payments a year to about 5,000 invoices… So the costs are enormous in indirect service and administrative functions.

Several of the matters canvassed above also have direct cost implications. The one-sided nature of the current contractual regime, the ability of government to unilaterally vary the contract (or associated guidelines) and then enforce the changes, the too-common disregard of the operational implications of such variations, and the burden of risk carried by the NFPO party, were all cited in the NFPOs' experiences of carrying additional program costs.

The reasonable conclusion to be drawn from the research is that price needs to reflect the full costs inherent in delivering the service as it is described in the contractual agreement. At the same time, keeping prescription, administration and compliance reporting to the necessary minimum could reduce current costs. According to those interviewed the additional benefit would be an improved service.

Balancing accountability and compliance costs

A number of the issues that were raised during the course of this research—compliance costs and micro-management for example—can be distilled down to a tussle between accountability and control.

The research highlights the connection between the clarity of the stated objectives, the degree of flexibility in delivering against those objectives, and accountability. Where the objectives (and related outcomes) are clear and agreed, then accountability should focus on the

achievement of those agreed outcomes while ensuring probity and the proper use of public funds. The means and the specifics of the particular service are less important and indeed serve only to clutter the contract and limit the capacity of those entrusted to provide the service to design a service that most effectively and efficiently meets individual and local needs.

Those interviewed raise a number of questions around benchmarking and the assessment of performance. Their experience reinforced a view that the key performance indicators, as stipulated in contracts, were being used by government as a tool for measuring comparative performance (linked to the star-ratings system that operated in employment services) rather than as a means for improving organisational performance or program outcomes.

Compliance can also become unnecessarily difficult as a consequence of the contractual language and the complexity of specific provisions. Several of those interviewed, for example, cited examples dealing with program quality, key performance indicators and measurement.

A strong thread emerging from the research was the question of proportionality.

> … it is a mismatch between the amount of money and the amount of reporting… there should be accountability for the use of public money, absolutely and that is critical. But that can be done without placing a lot of onus on organisations.

The desired balance could be based on proportionality between the quantum of funding and the monitoring and compliance obligations; or between the needs of individual job seekers and the demands placed on them; or again between the level of supervision and the degree of risk.

Apportioning risk lies at the heart of the contractual challenge

The nature and apportioning of risk lie at the heart of the challenge to fashion fair and reasonable contracts that are conducive to delivering the stated outcomes.

This research follows valuable work in the area. Work by Myles McGregor-Lowndes and his colleagues at the Centre for Philanthropy and Nonprofit Studies is particularly relevant to the matters explored here. McGregor-Lowndes (2006) adopts, as a working definition, the Australian and New Zealand Standard definition of risk as "the chance of something happening that will have an impact on objectives".

There is no suggestion that governments are, or can ever be, free of risk.

At the most basic level, governments outlay billions of dollars through contracted services: $5.8 billion for the next three years for employment services alone. These outlays come with the public expectation that the money will be spent effectively and be properly accounted for.

On several occasions at workshops and presentations during the course of this project, both government officials and NFPO workers quite rightly made the point that governments do retain some exposure to risk. One such risk is the political risk arising, for example, from failed programs, misuse of public funds or individual cases that may attract unwanted attention:

> … even if it's one in a thousand sites that maybe has done something wrong, they are worried that the public perception is that is painting the whole employment services with the same brush.

The consideration here is of the nature of the risks that lie in the particular relationship between the government and the individual NFPO that exists under a contract.

The picture that emerges from the research is of a system that over time has significantly shifted risk from government to the contracted NFPOs. Indeed, there was universal agreement among respondents that a net transfer of risk from government to service providers had occurred:

> There is an enormous risk-shifting going on, where [governments] are using contracts from the purchasing process to shift more and more risk to the providers/suppliers. [Governments] are paying [NFPOs] no more money to take on those risks. Again it all makes very pragmatic sense to the purchaser.

The shifting of risk has directly impacted on NFPOs. Other research lends support to this.

Previous research has considered the particularities of the market in human services whereby governments occupy a dominant and powerful contractual bargaining position in relation to not-for-profit organisations. The market for human service funding is a monopsony market (opposite of a monopoly) where it is the only significant funder (Lyons 1997)

Others recognised that not-for-profit organisations are price and condition takers. The great majority of them are small and poorly resourced and reliant on government funding as their main source of revenue (Lyons 2001). It is not surprising in this situation there is a tendency for governments to impose broad indemnity clauses and specific insurance requirements to shift as much of the risk as possible to non-profit organisations. The cost of such risks is then borne by the not-for-profit organisations. Unlike 'public private partnership' infrastructure development contracts with the for-profit sector, such risks are not costed in contractual negotiations, largely due to the absence of external financiers, such as banks, that insist on risk pricing (McGregor-Lowndes 2006).

A number of those interviewed in this research cited how they were increasingly exposed financially. In a number of cases, the NFPO found itself in effect cross-subsidising the ostensibly government-funded program. As one interviewee succinctly put it:

> … we will work for the best outcomes for the clients… what that does is leave us exposed either financially or contractually, because our intention is to achieve the best result for the client, whether that is what the contract requires or no. It most often leaves us financially worse off. We are chewing up our reserves to do that [ensure the quality of service and outcomes for clients].

Though, as noted above, some NFPOs do find themselves able to generate surpluses from the efficient performance of their contracts, for others the inherited risk proves fatal. This may be due to non-financial factors, as even financially viable or successful organisations have come unstuck: "… you see [it] all the time, regularly, very regularly, non-profit organisations failing".

A number also identified organisational risks accruing from the nature of the contractual relationship:

> … if our company is not performing well or we start to make a loss, it is our decision to re-structure and build again. Whereas if a Job Network provider starts to perform badly they have the contract taken away from them, they don't necessarily have the chance to recover.

Most of the issues raised by those interviewed have direct implications for the level of risks being borne by NFPOs: the loss of capacity to negotiate or amend contracts; the loss of control over definitions of quality; the shifts in organisational culture, mission and staffing; the threat to organisational governance; the loss of or threat to the advocacy function; the loss or threat to prior ethical-philosophical understandings and commitments; the loss of or threats to flexibility, innovation and holistic approaches to service delivery; the loss of time for service delivery (in favour of administrative compliance); the risk of being seen by local communities, and other job-seekers, as either a part or agent of (a punitive) government; and the human and professional impact, particularly on senior management.

Risk management itself has become a burden for the not-for-profit party: financially, due to increased insurance and compliance costs; administratively; and through the accompanying sense of insecurity.

Many spoke of the financial risk built into the process used to allocate the tenders for employment services. There are the 'normal' risks associated with any tender process, the risks arising from the pricing regime, risks inherent in operation of the rating system (and possible loss of business), risks arising from unanticipated variations in the contract, risks due to penalties, disputed or deferred payments, and ultimately risks from a lack of continuity in or renewal of the contract.

> You need to put in a large capital outlay, so you need to come up with that cash to do it. You are not guaranteed that income to actually recover it… So a lot of organisations will hire too many people and lay out a lot of cash, have a lot of facilities. A lot of money is also invested in setting up offices and facilities. So you win a tender, you set up a facility and in four years you lose that. So you don't win another tender for another year, so you have got to close that office and re-open the office. The amount of money you spend just on setting up offices is really a complete waste because there is no continuity.

The lack of predictability heightens the risk exposure.

The burden of risk is further exacerbated when the contract is strictly applied in the absence of recourse for the NFPO to seek sensible variations.

> We have had an example of a site where it became unviable and it became unviable for a range of reasons [beyond our control]… We could not keep up because we could not pay enough to keep people. So we went to the government and said, 'The service is not viable for us to do it this way'. [We] came up with a range of alternatives and they said, 'You signed up for it, you are stuck with it, you have to deliver it for the full three years, and any movement away from that is a breach of the contract.'... It's the provider's risk; yes … the risk is that the contract will become unviable.
>
> The risk is that government policy changes, the nature of the caseload might change. The government also sets the criteria by which clients are referred to different services, so

> they can adjust the value of those clients, if you like, so the amount of money we get for them, without actually changing the contract.

Mention has been made above about behaviours that seek to circumvent the contractually erected barriers. Indeed, one of those interviewed suggested that program innovation was now most evident in finding ways round the constraints imposed on organisations through the contracts and related documents. These practices however also have implications for risk and they are not restricted to the not-for-profit personnel.

The gap between the contract settings and operational reality can also pose problems for those government officials working in-the-field so to speak: "Certainly in our region, we have very good people to work with [who] try to do everything they can to by-pass the system to make it work for you".

Notwithstanding the expressed desire for greater trust, several of those interviewed cited examples whereby their organisation was expected to take much on faith:

> We have had situations where there has been a fundamental issue of the contract and we have been told that it will be sorted, but it can't be sorted prior to the signature on the contract. So we just sort of had to live with that risk.

The contract, its terms and application, lies at the heart of these matters. Though resolving the contractual issues will not be a total solution it would go a long way towards redressing the present imbalance.

Intellectual property rights are an emerging issue

Intellectual property rights and protection is a largely unexplored but emerging issue.

The issue was raised by one of those interviewed that there is a need to articulate property rights more clearly:

> We have heard [stories] anecdotally from the sector on a number occasions, but we have had personal experience recently of being invited to put up proposals and then having the concepts 'nicked' I guess is the word … I was gob-smacked... I had been dragging the project around for about twelve months trying to get funding for it … I just couldn't believe it… We were approached and poached.

The legal analysis highlighted the stranglehold that the government party to the contract has on intellectual property.

The role of contracts in reconciling the three Cs: competition, co-operation, collaboration

The tensions between a funding system predicated on competitive tendering in a market for services and the advantages of like-minded organisations working collaboratively (particularly when in the same community or region) for the common good is a recurring motif throughout the research.

> The downside… [is an] incredible competition climate. You are hamstrung in working with people honestly and transparently on issues and solutions often because of the competition principle.

One of those interviewed, from a major national organisation, argued that the competitive environment was itself distorted, describing it as a monopsony (or a buyers' monopoly) reflecting the research referred to above:

> It is a competitive market that [government has] artificially created, it's an artificial market that they went and created and they manage. It is stringently controlled… It's their market; they can control what they want to buy, from whom they want to buy and how and where they want to buy it.

Those interviewed cited numerous examples ranging from the negative impact competition had on local relations through to the ways in which some NFPO networks operated an arrangement whereby tenders were distributed within the network, in effect, circumventing competition policy.

Some lament the barriers that competition sets up between providers:

> … creating an artificial market, like they have done in Australia, has resulted in [the situation that] no-one shares with anyone anything about best practise because it inhibits their competitive position in relation to performance.

As noted elsewhere, some also acknowledged the genuine benefits of competition including with respect to improved organisational performance.

It was suggested that there should be scope for a more productive government–NFPO relationship. A number of those interviewed, for example, highlighted the value of being involved in the analysis of the situation (the needs to be addressed and potential responses) prior to the determination of the scope and terms of a tender. This was not expressed as an exercise in blame, for it was freely acknowledged that the NFPOs themselves should complain less and propose more.

> … if I am saying, 'Well, I would like to tender in this area and I propose to establish sites in these three locations', you can't actually have a conversation with the government where you say, 'Look, I'd like to do it in these three locations, but if you prefer, I'm really happy to do it over here'. You can't have that dialogue… I actually think that gives government a bad result too... if we had a chance to have the dialogue with them, [government] might be able to say, 'Well look actually we would really love it if you could put a site over here, that might be very easy for us to accommodate'.

What emerges is a picture of system that is being stretched this way and that by countervailing impulses.

The contracts themselves, however, give no hint of such tensions nor do they make any allowance for them. The contracts are exclusive in the sense that they only recognise the relationship between the government purchaser and the NFPO provider. The one exception is the complicated provision for consortia bids.

The research indicates a strong desire among the not-for-profit parties for the contracts to acknowledge and allow for (if not encourage) richer relationships and a broader range of relationships.

Further observations

Before concluding this discussion of the most relevant research findings, it would be worthwhile to offer some very brief, additional observations on related matters that emerged from the interviews.

The research team were struck but the openness and, at times, brutal honesty of those participating in the research. A strong commitment to their work and to their organisations was evident; for some there is clearly a degree of anxiety and for others disappointment. All were, without exception, looking for something better in the relationship with government.

> You kind of have this feeling that they can … wrap up the contract and take the contract off you if they want to. That probably flies in the face of the partnership language that gets bandied about from time to time.

At the same time there was ample evidence of a willingness on the part of these senior NFPO managers to be self critical, sometimes candidly so:

> My own view is that sometimes perhaps [not-for-profit] organisations may be their own worst enemy. What have you to lose by treating government people as humans?

Another felt that NFPOs themselves had not done sufficient work in backing their claims to offer more:

> One thing that I think we should do more of—which we have not done, but have tried to do and it is a very difficult task—is understanding our social impact and being able to measure it.

NFPOs plead to be allowed to deliver "a human service to people, as well as a service that fits nicely within budgets and processes and things".

Despite all the limitations imposed on organisations, and the substantial risks entailed in entering into government contracts, it is clear that a great deal of time, energy and ingenuity has been devoted not just to economic and organisational survival but to ensuring these organisations flourish.

Numerous strategies for achieving this were identified by those interviewed during the course of the research project. These included:

- **Ensuring the funding base is diversified**: pursuing more than one federal contract, and/or contracts with state/territory and/or local governments.
- **Building financial insurance**: accumulating savings and reserves, in some cases, over a long period of time and involving millions of dollars.
- **Diversifying the service offering**: providing related services, most frequently training and adult education services, that can attract separate sources of funding.
- **Maintaining strong external links to enhance organisational security**: building connections with philanthropic organisations, businesses, local churches, etc.
- **Introducing fee-for-service options**: most frequently in relation to training and education services.

- **Adapting organisational structures and expanding staff development**: developing and implementing multi-skilling, team-based approaches to support flexibility, promote innovation and allow for a more holistic approach to service delivery.
- **Maintaining collaborative relationships with other service providers**: identified as valuable notwithstanding the competitive environment.
- **Actively participating in the relevant 'peaks' and other strong organisations**: to extend capacity and strengthen the organisation's position.
- **Quarantining**: large organisations have 'quarantined' creative and innovative sub-projects alongside the major government-funded programs.

At the same time, there were several among those interviewed who continued to provide a variety of services, including employment services, but had chosen not to participate in Job Network. One successful 'social enterprise' operating a budget in excess of $17 million per annum put it this way:

> We found that basically, going for any government contracts that are specifically employment orientated … there are so many restrictions... The actual outcomes that you have in the community are really nowhere as good as they can be because you are organising your organisation to fit a contract.

There is a substantial opportunity lost, from a more systemic perspective, when the contractual noose inhibits organisations such that creativity and innovation were not simply diminished or eliminated but 're-routed' in a number of ways. Significant effort was being put into the management of complex external systems of relations with government and other organisations, and into the internal management of resources. In addition, considerable effort was being directed into ensuring positive and effective relationships with clients.

PART 6 FINDINGS FROM THE RESEARCH: ANALYSIS OF THE CONTRACTS

As indicated at the outset, this project's particular interest lies in the impact of government contracts in human services on the NFPO providers of those services. In doing so it has proved necessary to consider contracts within the context of the broader 'contracting regime' informed both by extant research and the findings of the interviews reported above. Those interviews were also designed to elicit input from-the-field on the nature, operation and experience of both the contractual relationship and contracts from the perspective of senior NFPO executives and managers.

At this point our attention turns to a detailed legal analysis of the selected contracts, principally the employment services contracts.

Overview

Even the briefest review of the current contracts used by the Federal Government in respect of employment services leads quickly to the conclusion that the power in the contractual relationship is one-sided, the obligations on not-for-profit parties are onerous and often unclear, and the program has lost sight of its overall purpose and got caught up in micro-management of service provision. This conclusion certainly reflects strongly the input from those interviewed. Many of those interviewed indicated that:

- the contractual relationship is unequal and lacks any acknowledgement of the skills and experience that the not-for-profit parties bring to the delivery of services;
- the scope of obligations on not-for-profit organisations is extensive and does not seem to be linked to ensuring the effective delivery of program outcomes;
- there is little or no scope for negotiating on contractual terms prior to the contract being finalised, even where some of the terms are not concluded;
- the right vested in the government to unilaterally vary the extent of services under the contract is exercised and can have extremely serious impacts on the viability of services;
- their organisations lack both staff members with the skills and access to the skills to be properly informed about the rights and obligations under the contract.

While this is particularly true of the employment services contract, it reflects more broadly the experience of many in the not-for-profit sector in relation to government service delivery contracts, be they state/territory or federal government contracts.

As noted above, those interviewed were asked to identify principles that they felt should be included in future contracts with government. Many of the principles identified are more broadly applicable to the actual development of government funding and service delivery programs. However, a number of principles were identified that would reflect a significant improvement in the actual contractual relationship. While this section of this report discusses the current contracts and identifies concerns with the actual contractual design and specific provisions, the next section sets out some principles for future contracting. That is followed by a set of proposed model clauses to address some of those principles and the concerns identified in this section.

The employment services contract

The primary focus of this analysis is the Employment Services Contract 2006-09, the contract that was in place when this research commenced. During the course of the research, the Federal Government released an exposure draft of the contract to be used for the period 2009-12 in the same program (Exposure Draft 2009-12). The analysis provided is of the Employment Services Contract 2006-09 and the Exposure Draft 2009-12. The researchers note that a finalised contract is now in place and operational for the period 2009-12.

One aspect of the Employment Services Contract 2006-09, the Exposure Draft 2009-12 and, indeed, many other government contracts that is immediately apparent is the sheer size, complexity and level of detail in the contract documents, and the extent of hidden obligations.

Sheer size: The Employment Services Contract 2006-09, including all of the different parts, annexures, schedules, etc, comprises 280 pages. The Exposure Draft 2009-12 saw some improvement in the sheer size of the document, with a reduction to 115 pages. However, in terms of the number of clauses, of schedules and annexures, and of defined terms there was little in the way of improvement. The number of clauses increased from about 170 to 190, the number of schedules and annexures dropped from 13 to 9 and the number of defined terms dropped from 293 to 269. Certainly, the drafting of the Exposure Draft 2009-12 indicates that there has been some effort made to simplify the structure of the contract and ensure that some key aspects, such as defined terms, are more readily locatable.

Complexity: In considering how easy or otherwise the contracts are to read, the researchers undertook a simple exercise: reading the first six paragraphs of substantive clause 2 of Part B of the Employment Services Contract 2006-09, referring to the definitions clauses to ensure the correct interpretation of the text.

The six sub-clauses are less than 20 lines in length. However, in order to understand all of the terms used in those paragraphs, it is necessary to refer back to 31 defined terms, which run, in total to an additional three pages of text.[5] This exercise dealt with less than one full clause in the Employment Services Contract 2006-09, yet clearly illustrates just how complex the contract would be for anyone trying to understand their obligations as a not-for-profit party.

Hidden obligations: Another aspect of the employment services contract arrangements is the fact that, in addition to the up-front documents provided in the contract package, the not-for-profit party is required to comply with other requirements set out in a range of documents that sit behind the contracts. The researchers were informed that these can be as much as four times as extensive as the actual contracts and can be changed unilaterally at any time during the contract period by the Government. This aspect of the employment services contract arrangements does not, from the research conducted, appear to be common to other government contracting arrangements.

Other contracting arrangements

The researchers considered a range of other contracts used by government in respect of service delivery by not-for-profit organisations. While some of these were large and complex, one positive aspect of some of the other contracts was the fact that in some programs different standard-form contracts were being used for service delivery or grants of different scale,

[5] A copy of this exercise is provided in Appendix 1.

reflecting something of a proportional approach being taken to the management of the contracts and risks.

Nature of the relationships reflected in the contracts

The employment services contract arrangements in particular provides a clear illustration of two concerns about the approach government seems to increasingly adopt when contracting-out human services.

The first of these is that the focus is on the purchase of services rather than the achievement of outcomes and the recipient of service is very much a third party to the arrangements with few if any rights.

The second is that government has little or no concern about the ongoing viability of the party with which it is contracting. This seems inconsistent with the premise that being a quality and effective service provider in the employment support field requires specialist expertise and (often) local knowledge of the community being serviced. Such expertise and knowledge includes understanding the economic and social characteristics of the community and external impacts on that community. The apparent lack of concern suggests that government believes that the work being contracted out is purely technical in nature and that there will always be providers in the market place seeking to compete for the contracts.

Resolving contractual disputes and enabling mutually agreed variation

There is little in the contracts that deals with negotiation for variations or for resolving disputes. The employment services contract arrangements are particularly one-sided in this regard with a number of provisions giving rise to potential action by the government party and few by the non-government party.

From discussions with experts and through the interviews, it is clear that most not-for-profit organisations have limited experience in and expertise to appropriately engage legal professionals to advise on the contracting arrangements, and few if any have in-house capacity to do this. To this extent they are often distinct from equivalent-sized private sector, for-profit organisations.

The absence of accessible, affordable and effective dispute resolution mechanisms in government contracts tends to mitigate against not-for-profit organisations seeking to resolve any disputes or seek amendments.

Principles of contracting

There are established principles that underpin the law of contracts that should be considered when analysing contracts between parties such as those analysed in this research.

The research suggests that the elaboration of standard contractual principles would be beneficial to contracting arrangements between government and not-for-profit organisations. In addition, the imbalance of power between government and NFPOs suggests it would be useful to apply emerging consumer law protections in respect of contractual fairness and unfair terms as well as specific mechanisms for redress. These changes would afford an opportunity to re-cast contracts for significantly improved government–not-for-profit relationships with the ultimate benefit being the more effective delivery of human services. The researchers note that DEEWR has recently released a draft Employment Services Charter of Contract Management. While this is an important development, unless the Charter

becomes part of the formal contractual relationship and is significantly strengthened, it is likely to have limited impact and will not result in binding obligations on government.

It is worth simply noting at this point that a key principle is that a contract is a bargain struck between the parties; an agreement that reflects their negotiated position. It is clear from the interviews that this is not the way the contracts involved have developed nor how they are implemented. Many of the interviewees stated very clearly their view that there was no negotiation possible and that there was no point in attempting to negotiate. The contention here is that the abrogation of this—and other—principles unfairly entrenches the inherent disparity in power between the contracting parties.

The analysis that follows interrogates that proposition in more detail.

Key issues

As noted above in the methodology section, the legal analysis of the contracts focused on identification of provisions in the contracts that:

- are unusually onerous;
- provide some advantage to for-profit organisations that is not available to not-for-profit organisations;
- have the potential to interfere with the independence of the organisations contracting with the government;
- outsource a government activity and require that the organisation credit the government party for the work done and any innovation as opposed to the organisation providing the service;
- provide limited or no certainty of payment to the organisation contracting with government.

These points of focus were identified through the experience of the research partners, concerns raised by NFPOs about government contracting practices in the human services area, an initial review of the range of contracts, and the early interviews conducted within this research project.

An aspect of the contracts or contracting arrangements that was the subject of much comment in the interviews is the lack of recognition or acknowledgment of the provider's particular skills and expertise. There are certainly no provisions in either the Employment Services Contract 2006-09 or the Exposure Draft 2009-12 that expressly give such recognition. Indeed, the level of detail of obligations in the both contracts in respect of the delivery of services by providers effectively removes any scope for delivery in tailored ways or ways that reflect special expertise. While Part A of the Employment Services Contract 2006-09 provides for general obligations on providers, each of the other parts goes to extraordinary lengths to specify how providers are to work with participants, what meetings are to be conducted, what services or supports are to be provided and what details are to be recorded. This level of detail suggests that the Commonwealth is seeking to micro-manage the process, as was indicated in the interviews, and to remove any scope for differentiation between providers.

Specific aspects of the contracts that were considered in detail were:

- reporting obligations;

- the right of the relevant government department or agency to be involved in various aspects of the other contracting parties' governance or service delivery, including decisions about employment and corporate control;
- impediments on the not-for-profit party;
- intellectual property and moral rights;
- confidentiality; and
- termination, suspension and other remedies.

Reporting obligations

In respect of reporting obligations, the contract analysis recognised up front (as did those interviewed) the underlying principle that because the contracts deal with money ultimately derived from taxpayers there should be controls and accountability mechanisms to enable government to ensure that the grant monies or funding are spent appropriately.

That said, the independent contracts review identified a number of provisions that fell outside the scope of that principle and that may be onerous on not-for-profit parties, in particular smaller NFPOs. It also identified that the obligations should be drafted in plain English with milestones that are fair and achievable. Some of the identified contract clauses included:

- reporting requirements such that the cost of compliance would, for a smaller NFPO, constitute a large portion of the grant/payment;
- the lack of notice or reasonable notice for inspection by the government party;
- the lack of the requirement that the government party be 'acting reasonably' in respect of its determination that a not-for-profit party is acting in breach of the law and/or a contractual obligation;
- independent audit obligations irrespective of the size of either the grant or funding, or of the not-for-profit party (usefully compared to the limited independent audit obligations under the *Corporations Act 2001* (Cth)), and the absence of clear guidelines on what is required to be verified by the independent audit report.

Alternative provisions that address these concerns were proposed and are considered below.

Government involvement in governance or service delivery

Of particular note in the review of the contracts was the fact that many of the contracts reviewed included provisions that give the government party the right to:

(a) remove and replace employees of the not-for-profit party with employees satisfactory to the government party (see Text Box 2 below);
(b) impose detailed recruitment requirements in respect of staff employed using the government funds under the contract (see Text Box 3 below);
(c) only make contractual payments if the government is satisfied with performance (see Text Box 1 below);
(d) unilaterally determine whether or not to make the payment or not make the payment, or issue guidelines—after the contract is finalised—binding on the parties that set out the circumstances in which the payment will be made (see Text Box 1 below);
(e) withhold approval required under the contract without any requirement of reasonableness and at the government party's sole discretion;

(f) have direct and controlling input to the nature of the governance arrangements for the NFPO or consortium (see Text Box 4 below); and
(g) impose detailed obligations in respect of the use of information technology (see discussion under 'Information technology and data requirements' below).

The rights vested in government identified in (a) to (d) above are likely to impinge upon the autonomy of the not-for-profit party to manage and operate its organisation.

Payment

In respect of clause (c) above, the independent contract review identified that the issue of payment on satisfactory performance would be better dealt with through the identification of measurable outcomes or milestones so that achievement could be measured as a matter of fact rather than in the subjective view of the government party. The review recommended the inclusion in all contracts of a model dispute resolution clause involving an independent expert to determine objectively whether or not the performance met the contractual obligation. This of course requires the contracts to be much clearer in terms of what the performance outcomes to be achieved are and how they are to be measured.

The core provision of the Employment Services Contract 2006-09 dealing with payment—clause 7 (see Text Box 1 below)—makes payment subject to a number of preconditions, including that there are sufficient funds available to the government to pay for the service. The sufficiency of funding available to the Commonwealth for any particular program is a matter completely outside the control of the NFPO and for the NFPO to bear some (indeed all) of the risk in this regard seems inappropriate. It appears possible under the Employment Services Contract 2006-09 that a provider could provide all of the services required of it, to the standards required of it, in the manner required of it, and within any timeframes imposed on it, and still not receive payment for those services.

TEXT BOX 1 – PAYMENT

Employment Services Contract 2006-09

Clause 7 – Payment

7.1 Payments made under this Contract are comprised of Fees or Funds or both. **Subject to sufficient Fees or Funds being available for a Service**, and compliance by the Provider with the Contract to DEWR's satisfaction, DEWR will provide the Provider with the Fees and Funds at the times and in the manner specified in the Specific Conditions.

7.2 It is a precondition of the Provider's entitlement to the Fees and Funds under this Contract, that it:

(a) has, at the time it makes a claim for a payment, sufficient documentary evidence, in a form as may be required by DEWR from time to time, that is sufficient to provide proof that the Provider has delivered the Services in accordance with this Contract;
(b) has a valid ABN;
(c) immediately notifies DEWR if it ceases to have a valid ABN;
(d) correctly quotes its ABN on all documentation provided to DEWR;
(e) supplies proof of its GST registration, if requested by DEWR; and
(f) immediately notifies DEWR of any changes to its GST status.

7.3 The Provider must submit Tax Invoices to DEWR for payment, if required by and in accordance with the manner set out in the Specific Conditions.

7.4 [Reserved]

7.5 The Provider must retain sufficient documentary evidence to support its claim for payment under this Contract for such period as is required under subclause 24.3 [not less than 7 years, unless otherwise specified in the Specific Conditions, relevant Records Management Instructions or as otherwise notified by DEWR].

7.6 The Provider must, if requested by DEWR to do so, provide to DEWR documentary evidence to support a claim by the Provider for payment under this Contract within 10 Business Days of DEWR's request.

7.7 If:

(a) the Provider does not comply with a request by DEWR under clause 7.6; and
(b) DEWR has already paid the Provider in relation to the claim for payment,

then that payment amount becomes a debt due to DEWR in accordance with clause 9, until such time DEWR, at its absolute discretion, is satisfied with the documentary evidence that supports the Provider's claims for payment.

7.8 If, at any time, an overpayment occurs, including where a Tax Invoice is found to have been incorrectly rendered after payment, then this amount is a debt owed to DEWR, which:

(a) must be repaid to DEWR; or
(b) DEWR may offset or deduct;

in accordance with clause 9.

7.9 DEWR is not responsible for the provision of any additional money in excess of the Fees or the Funds set out in the Specific Conditions.

7.10 The Provider acknowledges it is not entitled to payment from other Commonwealth sources or State, Territory or local government bodies for undertaking a Service. DEWR may require the Provider to provide evidence, in a form acceptable to DEWR, that evidences proof that the Provider is not entitled to a payment for the provision of the same or similar service from DEWR or another Commonwealth, State, Territory or local government body for the same Participant or the same Service.

7.11 If DEWR determines, at its absolute discretion, that the Provider is entitled to a payment for the provision of the same or similar service from DEWR or another Commonwealth, State, Territory or local government body, DEWR may:

(a) make the payments of Fees or Funds;
(b) decide not to make the payment of Fees or Funds; or
(c) issue Guidelines setting out the circumstances where DEWR will or will not make the payments of Fees or Funds.

7.12 Unless otherwise expressly agreed in writing, the Provider must not demand or receive any payment or any other consideration either directly from any Participant for, or in connection with, the Services.

7.13 DEWR may vary the payments under the Contract, the number of Participants allocated to the Provider and/or the business levels of the Provider for all or part of the Service Period at any time by written notice, based on DEWR's assessment of projected changes to labour market conditions in an

ESA or LMR (including past and/or future project Participant demand), or any other reason as determined by DEWR at its absolute discretion.

Largely equivalent provisions are found in the Exposure Draft 2009-12, in Section 2C, at clauses 19 to 23, which are set out below. It is of note that clause 23 of the Exposure Draft 2009-12 imports a requirement of reasonableness in respect only of the variation of payments, number of Participants or business share for a reason other than assessment of labour market conditions (see bolded text):

Exposure Draft 2009-12

Clause 23 – DEEWR may vary payments, Participants or ESA Business Share

23.1 DEEWR may vary the payments under this Contract, the number of Participants receiving Services from the Provider and/or the ESA Business Share or any other business levels of the Provider for all or part of the Term of this Contract at any time by written notice:
(a) based on DEEWR's assessment of projected changes to labour market conditions in an ESA or LMR (including past and/or future projected Fully Eligible Participant demands); or
(b) **acting reasonably**, for any other reason as determined by DEEWR at its absolute discretion.

23.2 If DEEWR exercises its rights under clause 23.1, the Provider must continue to perform all of its obligations under this Contact, as varied by DEEWR, unless DEEWR agrees otherwise in writing.

Employees

The Employment Services Contract 2006-09 permits the Commonwealth to have direct involvement in decisions about staffing and what staff are allocated to undertake work under the contract (see Text box 2 below). While such involvement may be reasonable in respect of Specified Personnel (often included in contracts where personnel with specific expertise were identified in the tender or application process as being core to effective delivery under the contract), it is extraordinary for such a level of involvement to extend to all other personnel.

TEXT BOX 2 – REMOVE AND REPLACE PERSONNEL AT THE BEHEST OF THE GOVERNMENT PARTY

Employment Services Contract 2006-09

Clause 6 – Specified Personnel

6.1 The Provider must ensure that the Specified Personnel, if any, listed in the Specific Conditions are used to conduct the Services and that those persons do so in accordance with the terms of this Contract.

6.2 When Specified Personnel are unable to undertake work in respect of the Service, the Provider must notify DEWR immediately. The Provider must, if notified by DEWR, provide replacement personnel acceptable to DEWR without additional payment and at the earliest opportunity.

6.3 **DEWR may give notice requiring the Provider to remove personnel (including Specified Personnel) from work on the Services**. The Provider must, at its own cost, promptly arrange for the removal of the personnel from work on the Service and their replacement with personnel acceptable to DEWR.

6.4 If the Provider is unable to provide acceptable replacement personnel who are acceptable to DEWR, DEWR may terminate this Contract under clause 28 [Termination for Default].

A provision in largely similar terms is found at clause 97 of the Exposure Draft 2009-12. However, it is of note that there is a change to that clause, in that clause 97.3 imports the requirement of reasonableness in respect of the Department's actions (see bolded text):

Exposure Draft 2009-12

Clause 97 – Provider's Personnel

97.3 DEWR may give Notice, **on reasonable grounds related to the performance of the Services**, requiring the Provider to remove personnel (including Specified Personnel) from work on the Services. The Provider must, at its own cost, promptly arrange for the removal of the personnel from work on the Service and their replacement with personnel acceptable to DEWR.

While this is an improvement, there is no similar requirement in terms of the Department's reasonableness in respect of whether or not the replacement personnel are acceptable under clause 6.4 or 97.4. The failure to replace removed personnel (not just Specified Personnel) with personnel who are acceptable to the Department, whether or not the Department's view is reasonable, is grounds for termination of the contract under this same sub-clause.

In both cases, the provision goes further than the equivalent provision in the FCSIA Long Form Funding Agreement, which limits the scope of the Department's power in respect of the removal of personnel to 'Specified Personnel':

FCSIA Long Form Funding Agreement

Clause 3.4 – Removal and Replacement of Specified Personnel

(a) If We require You to do so by notice in writing You must remove any Specified Personnel specified in that notice, and replace such person with other Specified Personnel satisfactory to Us.

(b) If any Specified Personnel is unavailable or unable to undertake the Services, You must notify Us in writing and You must replace that person with another Specified Personnel satisfactory to us.

The Employment Services Contract 2006-09 also implicitly obliges the not-for-profit party to make a range of enquires in relation to members of its government body—whether a board of directors or management committee—and employees involved in management and financial administration that would not generally be conducted by an NFPO as a matter of course. For example, such member and employees must not have an outstanding judgment debt against them, or have been found guilty of an offence, even where the court has ordered that no conviction be recorded (see Text Box 3 below). This effectively imposes an obligation on not-for-profit parties to conduct employment and management checks that is onerous and which applies irrespective of the nature of any offence and its relevance or otherwise to the nature of the employment or management role.

TEXT BOX 3 – MANAGEMENT PARTICIPANTS AND FINANCIAL ADMINISTRATION EMPLOYEES

Employment Services Contract 2006-09

Clause 31 – Corporate governance

31.3 The Provider must not employ, engage or elect any person who would have a role in its management, financial administration or, if notified by DEWR, the conduct of its services if:

(a) the person is an undischarged bankrupt;

(b) there is in operation a composition, deed of arrangement or deed of assignment with the person's creditors under the law relating to bankruptcy;

(c) the person has suffered final judgment for a debt and the judgment has not been satisfied;

(d) subject to Part VIIC of the *Crimes Act 1914* (Cth), the person has been convicted of an offence within the meaning of paragraph 85ZM(1) of that Act unless:

(i) that conviction is regarded as spent under paragraph 85ZM(2) (taking into consideration the application of Division 4 of Part VIIC);

(ii) the person was granted a free and absolute pardon because the person was wrongly convicted of the offence; or
(iii) the person's conviction for the offence has been quashed.

(e) the person is or was a Director or occupied an influential position in the management or financial administration of an organisation that had failed to comply with funding requirements of the Commonwealth; or

(f) the person is otherwise prohibited from being a member or Director or employee or responsible officer of the organisation of the Provider.

31.4 Where a person falls or is discovered as falling within any of clauses 31.3(a) to (f) while employed or engaged with the Provider, or is elected as an officer of the Provider, the Provider will be in breach of clause 31.3, if the Provider does not:

(a) transfer the person to a position which does not have a role in its management, financial administration or performances of the Services; or

(b) terminate the employment or engagement of the person or remove the person from office;

as the case may be, and immediately notify DEWR of its action.

***Crimes Act 1914* (Cth)**

Section 85ZM – Meaning of conviction and spent conviction

(1) For the purposes of this Part, a person shall be taken to have been convicted of an offence if:

(a) the person has been convicted, whether summarily or on indictment, of the offence;

(b) the person has been charged with, and found guilty of, the offence but discharged without conviction; or

(c) the person has not been found guilty of the offence, but a court has taken it into account in passing sentence on the person for another offence.

(2) For the purposes of this Part, a person's conviction of an offence is spent if:

(a) the person has been granted a pardon for a reason other than that the person was wrongly convicted of the offence; or

(b) the person was not sentenced to imprisonment for the offence, or was not sentenced to imprisonment for the offence for more than 30 months, and the waiting period for the offence has ended.

These obligations are effectively replicated in clauses 96.2 and 96.3 of the Exposure Draft 2009-12.

Corporate control

The Employment Services Contract 2006-09 also prohibits a not-for-profit party from changing the composition of its governing body without the prior consent of the Department (see Text Box 4 below). This is an extraordinary imposition on an independent not-for-profit entity and imposes an onerous burden on the not-for-profit party. While such limits may be appropriate in relation to major project agreements with publicly listed companies, they are not appropriate in relation a not-for-profit company or incorporated association.

TEXT BOX 4 – CORPORATE GOVERNANCE

Employment Services Contract 2006-09

Clause 31 – Corporate governance

31.8 The Provider must not, without DEWR's prior written consent, cause or permit to occur a Change in Control of:
- (a) the Provider;
- (b) if the Provider is a Consortium, the Consortium, or any member of the Consortium; or
- (c) any Material Subcontractor.

Change of Control is defined in clause 1.1:

'**Change in Control**' means:
- (a) subject to paragraph (b) below, in relation to a Corporation, **a change in any of the following**:
  - (i) the composition of the Board of Directors;
  - (ii) control of more than one half of the voting rights attaching to shares in the Corporation, whether due to one or a series of transactions occurring together or on different occasions; or
  - (iii) control of more than one half of the issued share capital of the Corporation, whether due to one or more of a series of transactions occurring together or on different occasions, excluding any part of the issued share capital which carries no right to participate beyond receipt of an amount in the distribution of either profit or capital;
- (b) in relation to a Corporation which is owned or controlled by a trustee company, any change as set out in paragraph (a) above in relation to either that Corporation or its corporate trustee;

Corporation is defined in clause 1.1 as having 'the meaning given to that term in section 57A of the *Corporations Act 2001* (Cth)'. This meaning includes companies, bodies corporate, etc, including companies limited by guarantee and incorporated associations.

Again, the substantive provision is effectively replicated in the Exposure Draft 2009-12 at clause 96.6. However, the definition of 'Change of Control' excludes changes to the composition of the governing body, but does include significant changes to voting rights.

Clause 96.10 requires the Provider to notify the Department within five business days of any changes to the 'membership of its board of directors, board of management or executive' during the term of the contract and provide a 'completed credentials information form' on request.

The penalty for breach, through not seeking consent, is set out clause 31.11 of the Employment Services Contract 2006-09 and in clause 96.9 of the Exposure Draft 2009-12 and includes immediate termination of the contract without need to provide notice.

Information technology and data requirements

As a result of comments in many of the interviews, it was seen as appropriate for the contract analysis to include consideration of the provisions dealing with use of information technology. A number of those interviewed were of the view that they were required to use the Department's information technology (IT) systems and commented on the extent of obligations in respect of IT

Clause 14 in Part A of the Employment Services Contract 2006-09 seems to indicate that there may be times when the provider is not required to use the Department's IT systems

(defined in clause 1.1 as "DEWR's IT computer system accessible by a Provider, through which information is exchanged between the Provider, sub-contractors, Centrelink and DEWR in relation to Services").

The 25 paragraphs of Clause 14 set out a number of quite detailed requirements in respect of the use of those systems. These provisions include a recommendation on which computer operating system to use, and permits the provider to seek approval to use an alternative system. Chapter 5 of the Exposure Draft 2009-12 contains similar provisions.

The Department's IT system is central to the referral mechanism, being the system through which referrals are notified to the provider. This is done by Centrelink accessing and making an appointment directly into the provider's electronic diary.

Further, the remaining parts of the Employment Services Contract 2006-09 require a number of matters to be recorded on the Department's IT Systems in respect of various categories of Participants, making that information independently accessible to the Department. These include, for example, from Part B:

- a summary of the Participant's resumé and his or her resumé (clauses 3.4(b) and 4.13(h));
- details of contacts with Participants (clause 4.6(c));
- changes in the Participants' circumstances (clauses 4.6(d), 4.13(k) and 4.16A(b));
- referral of Participants to Work for the Dole or Community Work placement (clause 4.36);
- details of Participant's work experience placements (clause 4B.3(f));
- details of Training Account training (clauses 8.1(f) and (h));
- Training Account Costs (clause 8.3);
- failure of a Participant to attend an appointment with the provider (clause 11A.4).

This obligation to record a range of details and activities in relation to Participants is also found in the Exposure Draft 2009-12.

Impediments on the not-for-profit party

There are a number of ways in which the Employment Services Contract 2006-09 impedes the NFPO party or interferes with usual rights.

Overturning usual rule of interpretation

A serious concern—a concern that goes to the clear imbalance in power in the contract—is the exclusion in some of contracts reviewed of the operation of what is referred to as the '*contra proferentum*' rule (see Text Box 5). This is a rule of interpretation that provides that, where a clause is ambiguous, it will be construed against the party in whose benefit it is intended to operate (see *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377). The rule effectively acknowledges the need to mitigate unfairness where a contract is the product of bargaining/contracting between parties of uneven positions; precisely the position seen in respect of governments contracting with NFPOs.

While it is true that parties to contracts can agree to contract out of this rule, to do so through what is effectively a non-negotiable, standard-form contract is an inappropriate use of the government's much greater power in the contract formation period.

TEXT BOX 5 – *CONTRA PROFERENTUM* RULE

Employment Services Contract 2006-09

Clause 1 – Interpretation

1.5 In this Contract, unless the contrary intention appears:

…

(i) an uncertainly or ambiguity in the meaning of a provision of this Contract will not be interpreted against a Party just because that Party prepared the provision;

This provision is effectively replicated in clause 2.2(h) of the Exposure Draft 2009-12.

While it may not be deliberate, the fact that this critically important provision is set out in the ninth paragraph of the fifth sub-clause of the interpretation provision makes it relatively easy for it to be overlooked. It follows innocuous paragraphs dealing with interpretation such as 'words in the singular include the plural and vice versa', 'words importing a gender include the other gender', 'all references to clauses are to clauses in this Contract', etc.

Protection of government reputation and limits on advocacy

Much has been written and spoken about limits on what NFPOs are permitted to say publicly when they are parties to government contracts. This was a matter of some concern to many of those interviewed. The Employment Services Contract 2006-09 does, in broad and simple terms, limit the actions and words of the provider through clause 3.4, which reads, "The Provider must not act in such a way that may bring the Commonwealth or the Services into disrepute".

The contract also requires the provider to comply with government requirements in respect of communicating about the program, such as through clause 14.6: "The Provider must: (a) comply with any standards (as notified by DEWR from time to time) DEWR may set in relation to the presentation of material on the Internet".

One positive aspect of the Employment Services Contract 2006-09 is that it does not require the provider to seek prior approval of any promotional material, statements, etc. Such a requirement is a relatively common feature of other funding agreements and adds to the burden on NFPO providers and can have the effect of providers trying to double guess what will be acceptable communication about the program or services.

This issue has been dealt with expressly in clause 11 of the Exposure Draft 2009-12 by clarifying the right of not-for-profit parties to engage in advocacy:

> For the avoidance of doubt, no right or obligation arising under this Contract is to be read or understood as limiting the Provider's right to enter into public debate regarding policies of the Australian Government, including agencies, employees, servants or agents.

Level of uncertainty

There are several provisions in the Employment Services Contract 2006-09 that lead to a lack of certainty for the provider.

An example is the payment provision that permits the Department to withhold payment if funds are not available (see clause 7.1 in Text Box 1 above), thereby shifting the risk of any budgetary shortfall or failure to achieve passage of Budget Bills to the provider.

Another such provision is clause 34, which deals with the level of work (and therefore funds and fees) available to the provider under the contact (see Text Box 6 below).

Such provisions, as noted above, operate to shift risk from the Commonwealth to the provider, with the provider having to ensure its business is set up in such a way as to have capacity to provide the services demanded of it by the Department from time to time without delay. This is likely to lead to employees of providers having very uncertain employment terms as avoidance of employment security is one way in which the provider can limit the cost impact of the shifting of risk.

Indeed, the Employment Services Contact 2006-09 specifically excludes the Commonwealth being liable, on its termination of the contract, for any employment liabilities such as redundancy, notice, etc.

TEXT BOX 6 – UNCERTAINTY AND RISK

Employment Services Contract 2006-09

Clause 34 – No Guarantees by DEWR

34.1 DEWR provides no guarantee of:

(a) the volume or type of business the Provider will receive;
(b) the numbers of Participants for any Service under the Contract;
(c) the numbers of Participants for any ESA in relation to any Service under this Contract; or
(d) the market and other information provided in the relevant request for tender.

Exposure Draft 2009-12

Clause 18 – Business level expectations

18.1 DEEWR provides no guarantee of:

(a) the volume or type of business the Provider will receive;
(b) the numbers of Participants for any Stream under this Contract;
(c) the numbers of Participants for any ESA in relation to any Stream under this Contract; or
(d) the market and other information provided in the relevant request for tender.

Related to this concern with the contracts is the use of unilateral variation clauses.

Unilateral variation clauses

There are a number of clauses in the Employment Services Contract 2006-09 that permit unilateral variation at the will of the Department and none that permit unilateral variation at the will of the provider. Such unilateral variation can, and does (as is seen by some of the interviews above), impose additional service provision burdens on the provider as well as creating a significant level of uncertainty in terms of income earned under the contract.

Even the provision that permits the Department to unilaterally extend the service period (see clause 2.3 in Text Box 7 below) has the very real potential to create operational difficulties for the provider. The clause requires only 20 business days' notice to the provider of an extension. This situation is likely to arise where the Commonwealth has not yet determined the next round of funding. Many employees of service providers, faced by lack of certainty about whether or not their employment is continuing (as no employer could guarantee this in the circumstances), would have been looking for and possibly have gained alternative

employment. This would leave the provider with an ongoing obligation to the Commonwealth and reduced capacity to fulfil its obligations.

Text Box 7 shows just a few of the provisions that permit unilateral variation by the Department.

TEXT BOX 7 – UNILATERAL VARIATION - EXAMPLES

Employment Services Contract 2006-09

Clause 2 – Term of this Contract

2.3 Subject to any contrary stipulation in the Specific Conditions, **DEWR may, at is sole option, extend the Service Period for one or more Services, for one or more periods of time up to a total of three years**, by giving notice to the Provider not less than 20 Business Days prior to the end of the Service Period for the relevant Service…

Clause 7 – Payment

7.14 **DEWR may vary the payments** under the Contract, the **number of Participants allocated** to the Provider and/or the **business levels of the Provider for all or part of the Service Period at any time by written notice**, based on DEWR's assessment of projected changes to labour market conditions in an ESA or LMR (including past and/or future project Participant demand), **or any other reason as determined by DEWR at its absolute discretion**.

Clause 14 – Information Technology

14.9 **DEWR reserves the right to introduce any other forms of authentication technology during this contract**. If DEWR introduces other forms of authentication technology during this Contract, DEWR will provide the Provider with 180 calendar days notice.

A comparison with the same provisions in the Exposure Draft 2009-12 demonstrates that the Department has retained an emphasis on unilateral variations of contract terms.

Exposure Draft 2009-12

Clause 5 – Extension of this Contract

5.1 DEEWR may, at its sole option, extend the Term of this Contract for one or more Extended Service Periods up to an additional maximum of 6 years by giving Notice to the Provider not less than 20 Business Days prior to end of the Service Period or any Extended Service Period, as relevant.

Clause 23 – DEEWR may vary payments, participants or ESA Business Share

23.1 DEEWR may vary the payments under this Contract, the number of Participants and/or the ESA Business Share or any other business levels of the Provider for all or part of the Term of this Contract at any time by written Notice:
- (a) based on DEEWR's assessment of projected changes to labour market conditions in an ESA or LMR (including past and/or future projected Fully Eligible Participant demand); or
- (b) acting reasonably, for any other reason as determined by DEEWR in its absolute discretion.

23.2 If DEEWR exercises its rights under clause 23.1, the Provider must continue to perform all of its obligations under this Contract, as varied by DEEWR, unless DEEWR agrees otherwise in writing.

Clause 81 – Access and Security

81.6 DEEWR may introduce other forms of authentication technology during the Term of this Contract, and the Provider must make use of such technology as required by DEEWR.

81.7 If DEEWR introduces other forms of authentication technology during this Contract, DEEWR will provide the Provider with 120 Business Days Notice.

By contrast there is only one clause in the Employment Services Contract 2006-09 and only two in the Exposure Draft 2009-12, set out in Text Box 8 below, that expressly provide for mutual agreement on a variation.

TEXT BOX 8 – MUTUAL AGREEMENT ON VARIATION

Employment services contract 2006-09

Clause 18 – Performance Management

18.4 Where, following a Performance Review, DEWR considers that the performance of the Provider warrants it, DEWR may, **with the agreement of the Provider**:

(a) increase permanently or temporarily and for all or any part or parts of the remaining Service Period:

(i) the Participant numbers;

(ii) the Fees or Funds;

(iii) the Provider's share of available places; and

(iv) the Provider's business levels; and

(b) take any other relevant action set out in the Specific Conditions.

Exposure Draft 2009-12

Clause 30 – Performance reviews

30.6 Where DEEWR considers that the performance of the Provider warrants it, DEEWR may, **with the agreement of the Provider** increase permanently or temporarily, and for all or any part or parts of the remaining Service Period, the Provider's ESA Business Share.

Clause 74 – Gap filling

74.1 For the purposes of filling gaps in the employment services, DEEWR may, **with the agreement of the Provider**, require the Provider to provide additional Services, on the same terms as specified in this Contract at the times requested by DEEWR.

Termination and suspension clauses

Some of the clauses in the Employment Services Contract 2006-09, the breach of which by the provider gives rise to a right of termination by the Department, are listed above. However, it is separately notable the extent to which termination is used as a remedy for the Department for breach by the provider. Text Box 9 below sets out provisions that provide for termination by the Department. These are in addition to clause 38, which provides for termination for (among other things) default where the default is either not capable of being remedied or the provider has failed to remedy it within **10 business days**.

Of note also is the fact that, while there is a dispute resolution clause that requires the parties to seek to resolve any dispute arising under the contract through mediated or similar outcomes, the relevant clause precludes its own application in relation to actions taken by the Department in relation to clauses **4**, **5**, 7, 8, 9, **15**, **18**, 26, 27, **30**, **31**, 36, 37, and 38. Of these, those in bold all provide for the Department to terminate the contract.

The Employment Services Contract 2006-09 also permits (clause 35) the Department to suspend the referral of Participants and any payment if the Department is of the opinion that there has been any breach of obligations by the provider, the provider may be engaged in fraudulent activity or any performance is less than satisfactory. In the case of the first two of these, the suspension can continue while the Department is investigating the matters. While the Department must notify the provider of its action, it can do this up to 10 business days **after** taking this action and the provider must continue to perform all of its contractual

obligations. There is no time limit set on how long any investigation should take and, as such, it is possible that a provider could be without either clients (in respect of whom fees and funds are earned) or payment for work done.

The existence of such extensive rights exercisable by the Department creates a strong sense of the imbalance of power in respect of the contract and certainly explains many of the concerns with the contracting regime identified through the interviews. There is little a provider can do, other than fit in with all and any requests or demands of the Department as it is not unreasonable for a provider to be extremely concerned about the risk of termination (with or without notice and with few if any remedies to the provider) by the Department.

TEXT BOX 8 – TERMINATION CLAUSES

Employment Services Contract 2006-09

Clause 4 – Service Guarantee

4.4 If, following a notification given under clause 4.3 (Provider not conducting Services in accordance with Service Guarantee), the Provider fails to remedy the breach within the period of time specified by DEWR, DEWR may, at its absolute discretion:
(a) take action under clause 36 [Remedies]; or
(b) **immediately terminate this Contract without the need to provide notice** to the Provider and clauses 38.2 and 38.3 apply, as if the Contract was terminated under clause 38 [Termination for Default].

Clause 5 – Code of Practice

5.5 If a breach of the Code of Practice is not remedied within the time specified in the notice under clause 5.4 [notification of suspected breach with Provider to remedy], DEWR may
(a) take action under clause 36 [Remedies]; or
(b) **immediately terminate this Contract without the need to provide notice** to the Provider and clauses 38.2 and 38.3 apply, as if the Contract was terminated under clause 38 [Termination for Default].

Clause 6 – Specified Personnel

6.4 If the Provider is not able to provide acceptable replacement personnel who are acceptable to DEWR, **DEWR may terminate this Contract** under clause 38 [Termination for Default].

Clause 11 – Fraud

11.2 If DEWR determines that the Provider has been engaged in fraudulent activity, DEWR may:
…
(b) **immediately terminate this Contract without the need to provide notice** to the Provider and clauses 38.2 and 38.3 apply, as if the Contract was terminated under clause 38 [Termination for Default].

Clause 12 – Financial Records

12.5 **DEWR** may take action under clause 36 [Remedies] or **elect to terminate this Contract** in accordance with clause 38 [Termination for Default], if the Provider is more than 1 month overdue in providing its financial statements to DEWR.

Clause 15 – Delay

15.5 If the Provider does not notify DEWR of any such delay in accordance with clause 15.2 or on receipt of a notice of delay, **DEWR may at DEWR's absolute discretion:**
…
(c) **terminate this Contract** under clause 38 [Termination for Default];
…

Clause 18 – Performance Management

18.6 If, following a notification given under clause 18.5, DEWR determines that the Provider's performance has not improved to DEWR's satisfaction within the period of time specified in the notice, **DEWR may:**

…

(b) **immediately terminate this Contract without the need to provide notice** to the Provider and clauses 38.2 and 38.3 apply, as if the Contract was terminated under clause 38 [Termination for Default].

Clause 30 – Subcontracting

30.16 DEWR may:

…

(b) **immediately terminate this Contract without the need to provide notice** to the Provider and clauses 38.2 and 38.3 apply, as if the Contract was terminated under clause 38 [Termination for Default], if the Provider does not comply with this clause 30.

Clause 31 – Corporate governance

31.11 If the Provider does not:

(a) obtain DEWR's consent as required by clause 31.8 [prior consent for change in control]; or;

(b) provide DEWR with the information as required by clause 31.10 [information on a range of governance issues];

DEWR may:

…

(ii) **immediately terminate this Contract without the need to provide notice** to the Provider and clauses 38.2 and 38.3 apply, as if the Contract was terminated under clause 38 [Termination for Default].

…

31.13 If the Provider breaches clause 31.12 [no change to consortium or partnership without prior consent] DEWR may:

…

(b) **immediately terminate this Contract** under clause 38 [Termination for Default] by providing notice to the Provider.

Clause 41 – Conflict of Interest

41.4 If the Provider

(a) fails to notify DEWR in accordance with this clause 41; or

(b) is unable or unwilling to resolve or deal with the Conflict as reasonably required by DEWR,

DEWR may terminate this Contract under clause 38 [Termination for Default].

Similar powers and rights to terminate are found in the Exposure Draft 2009-12, with at least 15 provisions identified that permit the Department to terminate.

Other remedies

While the Employment Services Contract 2006-9 provides for a number of remedies available to the Department at its absolute discretion (clause 36), it provides no remedies for the provider. The remedies available include, for example, imposition of additional conditions on funding use or payment of fees and/or of additional reporting requirements, reducing or not paying fees or funds that would otherwise be payable, reducing fees or funds permanently or temporarily, and reducing Participant numbers.

Under the same clause, the provider must (unless otherwise notified) continue to perform all of its obligations under the contract.

An equivalent provision is retained in the Exposure Draft 2009-12 at clause 103.

Intellectual property and moral rights

The Employment Services Contract 2006-09 vests ownership of all intellectual property created under the contract with the Department (clause 19.1), with a licence granted to the provider to utilise that material for the purposes of the contract only (clause 19.2). The contract also includes a provision whereby the provider's intellectual property rights in respect of pre-existing material specific in the contract are subject to a wide-ranging grant to the Commonwealth (see Text Box 10 below). This provision not only allows for the Commonwealth's exploitation, for any purpose whether related to the contract or not, of those materials and, through the grant of the right to sublicense, effectively removes control of that intellectual property from the provider. There is no apparent justification for the fact that the grants of rights in intellectual property is not reciprocal in scope and that the grant by the Commonwealth is limited to use for the contract and is revocable by the Commonwealth while the grant by the provider to the Commonwealth is not similarly limited or revocable.

The provision also requires the provider to effectively waive or require the waiver of any moral rights in the specified pre-existing material. While this not clear on the face of the provision, the effect of the right being granted to the Commonwealth to 'adapt' material in clause 19.4 and of the consents required in clause 19.5(b)(ii) suggests that the Commonwealth could change material without a specific consent or attribution. This would be inconsistent with moral rights of the author, that is, the right to be attributed as the author, and the right of integrity of authorship and the right not to have authorship falsely attributed.

TEXT BOX 10 – INTELLECTUAL PROPERTY

Employment Services Contract 2006-09

Clause 19 – Intellectual Property

19.4 This clause 19 does not affect the ownership of any Intellectual Property Right in any Existing Material that is specified in the Specific Conditions. **The Provider**, however, **grants to DEWR** or must arrange for the grant to DEWR of **a permanent, irrevocable, free, world-wide, non-exclusive licence (including a right to sublicense) to use, reproduce, communicate, adapt and exploit the Intellectual Property Rights in Existing Material for any Commonwealth purpose**.

19.5 The Provider warrants that:

…

(b) it has obtained valid written consents from all authors (including approved subcontractors) involved in creating the Contract Material and Existing Material so that DEWR's use of that Material in accordance with this clause 19 will not infringe:

…

(ii) any author's Moral Rights under the *Copyright Act 1968* (Cth).

The Exposure Draft 2009-12 contains effectively the same rights and obligations in clauses 82 to 84.

Provisions of concern in other funding agreements or contracts

The section above focuses particularly on the Employment Services Contract 2006-09 and the Exposure Draft 2009-12 . However, as noted above the contract review process also involved review of a range of other contracts. Some had provisions that reflected those identified above as being of concern. Some also had other provisions that significantly disadvantaged the not-for-profit party, placed on them an unreasonable burden or had a different effect

depending on whether the non-government party was a for-profit or not-for profit organisation.

Differential treatment on the basis of profit status

An example of an agreement that gave preferential treatment to for-profit entities is the FCSIA Long Form Funding Agreement. In that agreement, item F2(b) (see Text Box 11 below) of the Schedule requires a not-for-profit applicant to utilise any income generated from the funding only on the activity and in accordance with the agreement. Significantly, this provision is deleted (see bold text in Text Box 11) when the agreement is with a for-profit party, allowing any income generated to be recorded and treated as revenue.

TEXT BOX 11 - INCOME GENERATED FROM FUNDING

FCSIA Long Form Funding Agreement

Schedule 1, Clause F2 – Amounts which You must treat as Funding for certain purposes

Any income earned or generated by You from Your use of the Funding including:

(a) interest earned from the investment of the Funds;

(b) any fees paid to You by other persons for the provision of services to those persons for which You receive the Funding [**Delete in agreements with for-profit organisations**]; and

(c) if clause 10 applies:

  (i) where the proceeds of insurance paid to You to replace an Asset exceed the amount actually paid by You to replace the Asset; and

  (ii) any income received by You as a result of Your use of any Asset that reflects the proportion of the total cost of acquiring the Asset that was met by the Funding;

must be spent by You only on the Activity and in accordance with the Agreement, and You must comply with clause 7 in respect of that income as if that income was Funding paid to You under the Agreement.

Such provisions effectively require different funding grants to be dealt with separately and reported on separately. This may involve need to hold the funds in separate accounts or for interest to be separately calculated. It may also require the not-for-profit organisation to be able to ascertain whether funds have been generated solely as a result of the funding or through a combination of that and other organisational capacity, and to apportion income from asset use according to the source of the funding used to purchase that asset. This is a significant burden on organisations and, in respect of interest, can have the effect of reducing the capacity of the organisation to optimise the interest earned on unexpended grants and funding.

Unduly burdensome obligations

An example of a provision that is unduly burdensome is the provision that requires the not-for-profit party to prevent fraud on the government (see Text Box 12 below). While it is clearly in the public interest that fraud not occur, it is beyond the capacity of any party—government or otherwise—to absolutely prevent fraud. Rather, it is possible for a party to make all reasonable endeavours to prevent fraud. The Employment Services Contract 2006-09 takes this latter approach (again, see Text Box 12 below).

TEXT BOX 12 - PREVENTION OF FRAUD

FCSIA Long Form Funding Agreement

Clause 6 – You must comply with all relevant laws and policies and prevent fraud upon Us

You must, in carrying out Your obligations under this Agreement:

…

(c) prevent fraud upon Us.

As noted above, the Employment Services Contract 2006-09 takes a more moderate and balanced approach to the prevention of fraud (see bolded text):

Employment Services Contract 2006-09

Clause 11 - Fraud

11.1 The Provider **must take all reasonable steps to prevent fraud** upon the Commonwealth, including the implementation of an appropriate fraud control plan, a copy of which must be made available to DEWR on request.

This provision is effectively duplicated in clause 26.2 of the Exposure Draft 2009-12 .

Another example is of provisions that require the not-for-profit party to provide the government with an unconditional financial security from a financial institution (see Text Box 13 below). Such provisions are onerous for not-for-profit organisations that may also have similar financial security requirements imposed by landlords in respect of their lease on premises. Such securities require the not-for-profit party to have a specified level of funds set aside with the financial institution, thereby reducing the funds available for the organisation's operational needs.

TEXT BOX 13 - FINANCIAL SECURITY

FHCSIA Standard Funding Agreement

Clause 7 – Financial Security

At any time we may require you to provide an unconditional financial security for an amount we specify, from a financial institution that we approve, using a form that we provide. You must do this within 10 Business Days of our request.

FCSIA Long Form Funding Agreement

Clause 8.7 – Financial Security

If at any time We require You to do so, You must provide an unconditional financial security from a financial institution We approve in the form We provide You with and for an amount acceptable to Us, within 10 Business Days.

Intellectual property and moral rights

Most, if not all, funding and service delivery contracts with government include provisions dealing with ownership of intellectual property (including the employment services contracts, see discussion above). Some include provisions dealing with moral rights, that is, the right to be attributed as the author, and the right of integrity of authorship, and the right not to have authorship falsely attributed. The Employment Services Contract 2006-09 excludes from the definition of intellectual property, moral rights, but deals with such rights separately.

While the employment services contracts deal with intellectual property and moral rights in relatively short form (and somewhat obscure language), this is not always the case. For example, the FCSIA Long Form Funding Agreement requires the not-for-profit party to obtain the consent of moral rights' holders to any acts or omissions by the government party that would otherwise infringe the right of attribution and the right of integrity of ownership (see Text Box 14).

TEXT BOX 14 - INTELLECTUAL PROPERTY AND MORAL RIGHTS

FCSIA Long Form Funding Agreement

Clause 13 – Intellectual Property Rights

13.1 What is the meaning of particular terms used in this clause 13?

"Intellectual Property Rights" or "IPR" means all copyright (including Moral Rights), neighbouring rights, rights in relation to inventions (including patent rights), registered and unregistered trademarks (including service marks), registered designs, and other rights resulting from the intellectual activity in the industrial, scientific, literary or artistic fields.

"Licence" means a permanent, irrevocable, free, world-wide non-exclusive licence and includes a right to sublicense.

"Moral Rights" means the right of attribution of authorship, the right not to have authorship falsely attributed and the right of integrity of authorship granted to authors under the *Copyright Act 1968*.

"Use" includes reproducing, publishing, adapting and exploiting.

…

13.3 Licensing of Intellectual Property Rights

(a) If You are the IPR [Intellectual Property Rights] Owner then You grant Us a Licence to Use the IPR in Agreement Material and in Existing Material owned or controlled by You or a subcontractor for any Commonwealth purpose.

(b) If We are the IPR Owner then:

(i) You grant Us a Licence to Use Existing Material owned or controlled by You or a subcontractor for any Commonwealth purpose;

(ii) We grant You a royalty free, non-exclusive licence (excluding the right to sublicense) to Use the IPR in Agreement Material and in Existing Material owned or controlled by Us for the purposes of performing this Agreement and any other purposes approved in writing by Us under clause 13.3(c), but not for any other purpose.

13.4 You must arrange for third parties to license Intellectual Property Rights to Us

Whether or not You or We are the IPR Owner, if a third party has IPR in Existing Material (not owned or controlled by You or a subcontractor):

(a) You must notify Us of this before providing Agreement Material to Us (including providing all details We require of such a third party and the nature of their IPR) and use Your best efforts to arrange for that third party to grant to Us a licence on the same terms as the Licence You grant to Us to Existing Material under clause 13.3(a); and

(b) If You cannot obtain all the rights from a third party to Existing Material in accordance with clause 13.4(a), You must:

…

(ii) arrange for the third party to grant Us a licence which:

A. as a minimum includes a right for Us to Use the Existing Materials in conjunction with the Agreement Material so that We can enjoy the full benefit of Our rights to the Agreement Material; and

B. is otherwise on the same terms as the third party licenses its IPR in the Existing Material to You.

PART 7 RECOMMENDATIONS

The relationship between governments and NFPOs in the delivery of human services will inevitably continue to attract attention as the forms of public administration evolve further. This is being driven in part by the change of Government at the federal level. However, other factors are also at play. One factor is the mounting evidence on the limitations and inadequacies of the forms of public administration (the so-called 'new contractualism' and 'new public management') that came to dominate reforms over the past two decades. A second factor is the return of government intervention in the wake of the Global Financial Crisis, allied with the collapse of high-profile, for-profit providers of government-funded human services.

It is timely therefore to re-visit the contractual relationship that embodies these particular areas of the government–NFPO relationship.

The body of this report situates the contract within the broader context of public administration and the 'contractual regime'. It identifies a range of issues, informed by existing research and the new research conducted in the course of this project. These issues include a number of fundamental matters, including: the need for clarity of purpose and agreement on that purpose; confusion over just where the beneficiaries 'fit' in the human services systems (for example, is government the purchaser in its own right or as agent of the beneficiaries?); recognising and managing the power imbalance that exists; balancing important tensions such as those between competition and co-operation, or between control and accountability; and appropriately sharing risk.

While the contract sits within a broader context, the conclusion reached here is that the contract in effect codifies the government–NFPO relationship in respect of the delivery of services. As such, its importance has been understated; redeveloping the contractual relationship from core principles down will have a significant and positive impact on both the government–NFPO relationship and on the delivery of quality services to those in relying upon them.

Common principles for government–not-for-profit organisation contracts

Recommendation 1.	**That a set of common principles for government–not-for-profit contracts and government contracted service delivery programs (as outlined below in this Part) be adopted.**

The principles set out below are offered to the Commonwealth, state and territory governments and the not-for-profit sector as a basis for agreement on the standards that should apply in contracts—or other forms of funding agreement—for the provision of human services. It may be that these 'common principles' will have wider application.

The principles are organised under four key aspects:

A. The *foundations* on which the contract is constructed
B. The nature of the *relationship between the contracting parties*
C. The *nature of the contract*
D. The *operation* of the contract

Each broad principle is supplemented by several constituent elements. The reason for doing so is to move beyond more abstract concepts in such as way as to ensure that the intent is clearly articulated for those negotiating and/or drafting relevant contracts. Similarly, these elements should assist in determining whether a particular contract meets the intended standard and provide a sound basis for the appropriate interpretation of relevant contracts.

A. The foundations on which the contract is constructed

(i) All parties should enter into the contract in *Good Faith.*

Good Faith is characterised by:

- A process that provides for the involvement of parties to the contract in its development.
- A genuine opportunity to negotiate on the terms of a proposed contract to take account of the attributes of a particular service.
- Recognition that there is an inherent power imbalance between the government and not-for-profit parties with such recognition to include an appropriate interpretation provision.
- Explicit recognition that the parties are contracting in a joint endeavour *primarily* for the benefit of the clients and the broader community.

(ii) There is a presumption of *Good Will.*

Good Will is characterised by:

- Processes that give priority to the dignity of the people involved: officials, service staff and beneficiaries.
- An emphasis on willing and voluntary participation with compulsion limited to necessity and/or as an option of last resort.
- A presumption of *good faith* in the absence of evidence to the contrary.
- Dispute resolution processes and grievance procedures that emphasise mediation rather than arbitration as the preferred course.

B. The nature of the relationship between the contracting parties

(i) The relationship between the contracting parties is one of *Trust.*

Trust is characterised by:

- A process of due diligence prior to entering into the contract that builds confidence in the other party and is the basis of future relations.
- Mutuality whereby the expectations of each party are articulated and where what is reasonable to expect of one is expected of the other; specifically with respect to sharing information, reporting, appraisal and performance review.
- Communications and reporting systems that promote confidence between the parties.
- Reporting and compliance measures that presume that each party has the capacity to perform its obligations in the absence of evidence to the contrary.

(ii) The contracting parties will accord each other *Proper Respect.*

Proper Respect is characterised by:

- Recognition of the distinctive nature and character of the respective parties, such that the government party has ultimate responsibility for overall policy and program architecture, and the not-for-profit party is bound by its own mission with obligations beyond those arising from the specific contract.
- Recognition that the respective parties have different and complementary roles and responsibilities in the performance of the contract.
- Recognition that each party may benefit from the other's expertise in exercising their responsibilities beyond the terms of the particular contract.
- Explicit recognition of the independence and autonomy of the not-for-profit party and that party's freedom to act as individual and systemic advocates.

(iii) The relationship between the contracting parties is *Supportive and Collaborative.*

This Supportive and Collaborative relationship is characterised by:

- Processes that support knowledge transfer and strengthen understanding between the parties.
- An emphasis on consultation in key areas such as the design, delivery and development of the broader program and the contracted service.
- Opportunities for constructive interaction (including face-to-face) between relevant staff of the respective parties.
- Access to decision-makers beyond those staff of the respective parties who may be engaged in the delivery of the service.

C. The nature of the contract

(i) The contract should be *Clear and Readily Understood.*

A Clear and Readily Understood contract is characterised by:

- A clearly stated purpose and the articulation of shared goals.
- A statement of the type of contractual relationship: partnership, joint venture, purchase of service, franchise.
- Articulation of the expectations of the respective parties.
- All obligations and terms to be apparent on the face of the contract.
- The minimisation of jargon and technical language and the provision of explanatory notes where necessary.
- An emphasis on simplicity whereby the content of the contract is restricted as far as possible to the purpose and nature of the agreement, the parties concerned, the essential terms and conditions, and the procedures for varying the contract, dispute resolution and the like.
- Transparency in the link between the contractual requirements and the purpose/s to be achieved in meeting those requirements.
- Clear and agreed reasons for the gathering of information and reporting.

(ii) The requirements in the contract should be guided by *Proportionality.*

Proportionality is characterised by:

- Information gathering and reporting requirements that are proportional to the need for and intended uses of the information.
- Operational requirements and related costs that are consistent with the level of funding being allocated to the not-for-profit party.

- Monitoring and compliance requirements that reflect the level of risk.

(iii) The terms of the contract should be *Responsible and Reasonable.*

A Responsible and Reasonable contract is characterised by:

- Goals, targets, and milestones that are agreed by the contracting parties to be fair, reasonable and achievable.
- Provision for the proper management of and accountability for public funds.
- An expectation of a (valued and/or valuable) return on public investment.
- Provision for enabling interpretation of the contract on the basis of 'reasonableness'.
- A requirement that reasons will be given for decisions—such as variation, deviation or termination—that materially affect the contract or impact on either of the contracting parties.
- The imposition of adverse findings and/or penalties subject to evidence.
- Provision for addressing performance within the life of the contract with a view, where possible, to improving poor performance prior to the imposition of a penalty or termination.

(iv) The contract should establish *Meaningful Outcomes.*

Meaningful Outcomes are characterised by:

- An evident connection to the stated purpose and aims.
- Recognition of outcomes that are valued by the respective parties.
- Recognition of the 'public good' sought through benefit to individuals and also community benefit.
- Outcomes that are either directly measurable or for which effective proxy measures are available.
- Numeric targets that, if used, clearly relate to demonstrating the achievement of agreed outcomes.

D. The operation of the contract

(i) The contract should allow for *Appropriate Decision-Making.*

Appropriate Decision-making is characterised by:

- Agreed outcomes and related targets, measures and milestones as proposed above.
- Provision for discretion in determining how the agreed outcomes might be best achieved in light of the individual client's needs, the knowledge and expertise of the not-for-profit party, and/or local circumstances.
- Delegation of appropriate decisions to those local or regional government officials working with the not-for-profit party.
- Minimal prescription in the manner and methods for delivering the contracted service.

(ii) The contract should operate *Consistent* with the presumption of Good Will and Trust.

Consistency with Good Will and Trust is characterised by:

- Provision for early alert of difficulties without fear of penalty.

- Technical requirements (reporting, processes, forms, IT) that meet the agreed need to be *responsible and reasonable* without imposing unnecessary burden on either contracting party.
- Provision for the exchange of information and feedback on reports.
- Incentives for innovation and additional public benefit such as community building where this can be demonstrated.

(iii) The contract should be based on *Full and Fair Costing.*

Full and Fair Costing is characterised by:

- A process for jointly determining and agreeing on costs that reflect the reasonable full cost of providing the service including direct and indirect costs, and office overheads, etc.
- Costing of the intended quality of the service.
- Costing of covering risk exposure (see below).
- Provision for variables—such as changes in CPI and oil prices—that flow on to operational costs.
- Provision for adjusting costs to take account of particular circumstances such as delivering services in regional or remote areas, working with higher-need clients or the employment of specialist staff.
- Provision for either Party to seek a variation on costs—including costs due to variation in the contracts terms such as price or client demand—and an agreed procedure for appeal.

(iv) The contract should allow that *Risk* exists, *cannot be eliminated* and *will be Shared.*

Shared Risk is characterised by:

- The identification of the principal risks.
- Provision for agreement on risk minimisation.
- Measures for monitoring and compliance that are proportional to the level and scale of identified risk.
- Cost structures that recognise the importance of both proper maintenance of infrastructure and systems and the provision of quality services in limiting risk.

(v) The contract should be administered in a *Timely Manner.*

Timely administration is characterised by:

- Adequate time between the finalisation of the tendering or application process and the commencement of the contract.
- An agreed reporting schedule that allows for resolution of any questions and remediation of identified shortcomings where feasible.
- Allowance of sufficient time to implement and achieve the agreed outcomes.
- Contract renewal procedures that allow for continuity of the service or managed wind-down where necessary.

Establishing contractual fairness

Recommendation 2: That the principle that there is no justification for unfair contract terms in standardised contracts be applied to the contracts regulating the arrangements between government and the not-for-profit sector in the area of service provision.

There are established principles that underpin the law of contracts that should be properly reflected in government–NFPO contracts.

There is increasing recognition by the Federal and other governments that standard-form contracts can result in serious unfairness between the parties to a contract, particularly where one party has far superior bargaining power. This recognition is reflected in the development of protections in consumer law against unfair contract terms. Such protections were first introduced in Australia by the Victorian Government in 2003, reflecting the development in Europe and the United Kingdom. In the current review and redevelopment of Australian consumer law, the introduction of such protections are a central feature (Australian Treasury 2009a:29-43; see also, Australian Treasury 2009b). This development seeks to identify classes of clauses in standard-form contracts that create or are likely to create unfairness to the consumer.

In seeking to regulate to prevent the use of unfair terms in contracts at a national level, The Hon Chris Bowen MP, (then) Minister for Competition Policy and Consumer Affairs (Australian Treasury 2009b:iii) stated:

> Unfair contract terms harm and exploit customers, whether they are ordinary people, institutions or businesses. They are common and exist in many contracts for the provision of everyday goods and services. They reduce competition by making contracts difficult to understand, and by limiting a customer's choices and ability to seek out alternative options.
>
> They are used by some businesses to transfer all of the risk in a transaction away from themselves and onto the customer. There is no justification for their use in an effective and efficient market.

While this relates specific to consumer contracts, the researchers consider that these developments may be a useful guide to the development of future contracts/funding agreements between government and NFPOs as a key feature of the relationship is the imbalance of power and the fact that it is the government party that prepares and provides the contract. Of particular relevance is the principle (Australian Treasury 2009b:4) that a term is 'unfair when it causes a significant imbalance in the parties' rights and obligations arising under the contract and it is not reasonably necessary to protect the legitimate interests of the supplier'.

One potential impact of such guidance is to consider the extent to which there should be rigid adherence to standard-form contracts. While these may serve a purpose for situations where there is a high volume of contracts to be prepared (such as mobile phone services, electricity, etc) it is not so clear why rigid adherence to a standard-form contract is appropriate in the development and delivery of government-funded service delivery programs. While it may be useful to have a standardised framework with some core provisions, adopting an approach that allows for negotiation of terms provides a more effective way of reflecting in the

contractual arrangements the particular characteristics of the NFPO party that resulted in it being chosen over others for the service delivery.

Remedies

Recommendation 3:	**That the contractual principles (set out above in this Part) be reflected in enforceable contractual provisions in terms of obligations on both parties and effective remedies for breach.**

As noted in the legal analysis above, while contracts provide for a number of remedies available to government (mostly clearly to DEEWR under the Employment Services Contract 2006-09 (clause 36) and the Exposure Draft 2009-12 at it absolute discretion, they provide no remedies for the provider. It has also been observed that the limited remedies that may be available to NFPOs remain essentially untested in law.

The current situation not only further entrenches the power imbalance, it undermines the integrity of the contract itself as well as the capacity of NFPOs and their clients to utilise the protections that should otherwise be available to them. This need not and should not be the case. In the United Kingdom, for example, contracts are enforceable; their National Audit Office has been active in this respect and the option ultimately remains for action in the courts.

In establishing a common set of Contract Principles, as proposed above, it is recommended that these be accompanied by measures that provide for redress by either party where those principles are shown to be disregarded. This is no more than proper provision for the parties to a contract to be able to assert their rights.

Limiting the impacts and improving the contractual relationships

This section seeks to identify ways to limit or remove those concerns regarding existing contractual provisions canvassed in this report without undermining or downplaying the reasonable expectations of government and the broader community in respect of the expenditure of government funds. In the main these are dealt with under separate headings below. However, there are three matters that are considered up front.

Recommendation 4:	**That governments give priority to developing shorter-form framework agreements that are not unduly legally complex to better reflect the range in size, risk and complexity of government–not-for-profit service delivery programs and funding arrangements.**

The first of these is the size and complexity of contracts or agreements. It is recommended that significant effort be put into developing shorter-form framework agreements that are not unduly legally complex. Many NFPOs that are parties to agreements with government have limited if any capacity to engage solicitors to advise them on the meaning of agreements and the extent of their obligations under those agreements. Without such advice, many NFPOs can inadvertently be in breach of obligations or can be overly cautious in their work through fear that they may inadvertently breach their obligations.

The second is that both the actual contracts and the overall program design be guided by core principles. These are set out above.

Recommendation 5:	**That governments remove from all funding and service delivery contracts any interpretive or other provisions that exclude the operation of the *contra proferentum* rule.**

The third is the removal of any interpretive provisions that exclude the operation of the *contra proferentum* rule. It is not reasonable for the government to seek a waiver of the usual contract interpretation rule where they are in a significant position of power in respect of the contract and are the party that prepares the contract.

Purpose of contract and recognition of expertise of parties

Recommendation 6:	**That all funding and service delivery contracts between government and the not-for-profit sector include preliminary clauses that clearly:** **(a) set out the purpose and objectives of the contract so that performance can be measured primarily against achievement of that purpose and those objectives; and** **(b) set out the basis of selection of the not-for-profit party for the contact, including listing its particular expertise and skills relevant to the government program.**

It is proposed that all contracts have preliminary clauses that set out clearly the purpose and objectives of the contract or agreement so that performance can be measured primarily against achievement of that purpose and those objectives.

It is also proposed that there be preliminary clauses in funding and service agreements that set out the background to selection of the not-for-profit party, acknowledging the particular skills and expertise they bring to the contractual relationship and broader program.

Use of standard-form provisions

Recommendation 7:	**That Australian governments adopt standard-form provisions (as set out below in this Part) to improve fairness and transparency and the overall contractual relationships. Such provisions should deal with the following matters in all funding and service delivery contracts between government and the not-for-profit sector:** **a. Intellectual property and moral rights** **b. Employment issues: Removal and Replacement of Specified Personnel** **c. Use of income generated** **d. Acknowledgment of funding** **e. Freedom of speech: no limit on public statements** **f. Prevention of fraud** **g. Reporting obligations: keeping of records, independent audits and access**

The following sections set out discussion and include proposals (in text boxes 15 to 20) for standard-form clauses in respect of the matters listed in Recommendation 7. The researchers consider that these represent an appropriate balance of risk and power in contracts between government and not-for-profit organisations.

Intellectual property and moral rights

A more appropriate approach to dealing with intellectual property rights (other than moral rights) is to retain ownership with the party creating the intellectual property and provide for equivalent licensing between the parties. That is, the NFP party to grant to the government party the same licence as the government party grant to the NFP party:

TEXT BOX 15: PROPOSED STANDARD-FORM CLAUSES: INTELLECTUAL PROPERTY AND MORAL RIGHTS

1. Ownership of intellectual property rrights

Intellectual property rights (IPR) in the Existing Material and in any Agreement Material created by the [non-government party], or its employees and contractors, under this contract will be retained by the [non-government party], or relevant third parties as the case may be.

2. Licensing of intellectual property rights

(a) The [non-government party] grants to the [government party] a royalty free, non-exclusive licence (excluding the right to sublicense) to use the IPR in the Agreement Material and in Existing Material owned or controlled by the [non-government party] for the Purpose of this Agreement and purposes directly ancillary, or related, to the Purpose of this Agreement, but not for any other purpose.

(b) The [government party] grants to the [non-government party] a royalty free, non-exclusive licence (excluding the right to sublicense) to use the IPR in the Government Material owned or controlled by the Government for the Purpose of this Agreement and purposes directly ancillary, or related, to the Purpose of this Agreement, but not for any other purpose.

3. Third-party ownership of IPR

The [non-government party] must arrange for third parties to licence any IPR in the Agreement Materials or Existing Materials not owned by, or licensed (with a right to sublicense) to, the [non-government party] to the [government party]. The [non-government party] must provide a list to the [government party] that sets out:

(a) whether there is any IPR in any Existing Material that is held by any third parties;
(b) the names, ABN and addresses of those third parties; and
(c) whether the [non-government party] has obtained the right (whether by assignment or licence) to use the IPR in the Existing Material owned by that third party

4. If the [non-government party] cannot obtain all of the IPR from a third party to Existing Material in accordance with clause 3, it must:

(a) promptly notify the [government party] of this in writing; and
(b) arrange for the third party to grant to the [government party] a licence that:
  (i) at minimum includes a right for the [government party] to use the Existing Materials in conjunction with the Project Material so that the [government party] can enjoy the full benefit of its rights to the Existing Material and Agreement Material; and
  (ii) is otherwise in the same terms as the terms under which the third party licences its IPR in the Existing Material to the [non-government party].

5. Intellectual property warranty

(a) The [non-government party] warrants that it is entitled to deal with the IPR in Existing Material and Agreement Material.
(a) The [government party] warrants that it is entitled to deal with the IPR in Government Material.

6. Interpretation

"Agreement Material" means all Material (a) brought into existence for the purposes of the performance of this Agreement; (b) incorporated in, supplied or required to be supplied along with the Material referred to in (a); or (c) copied or derived from Material referred to in (a) and (b).

"Existing Material" means all Material, other than Government Material, in existence prior to the commencement of this Agreement that is incorporated in, supplied with or as part of, or required to be supplied with or as part of the Agreement Material.
"Government Material" means any Material provided by the [government party] to the [non-government party] for the purposes of this Agreement and material that is copied or derived from Material that is so provided.
"Intellectual Property Rights" or "IPR" means all copyright (excluding Moral Rights), neighbouring rights, rights in relation to inventions (including patent rights), registered and unregistered trademarks (including service marks), registered designs, and other rights resulting from the intellectual activity in the industrial, scientific, literary or artistic fields.
"Material" includes documents, equipment, software (including source code and object code), goods, information and data stored by any means including all copies and extracts of the same.

Employment issues

As noted above, the Employment Services Contract 2006-09 imposes significant constraints on the NFPO party in respect of who can work on the delivery of services and who can be employed or involved in management more broadly. These provisions are not apparently tailored to reflect the needs of the parties or what might be appropriate limits in the context of the type of agreements.

It is recommended that, where a contract or funding grant has been awarded on the basis that particular people with specialised skills and expertise will be involved in delivering under the agreement, a standard clause be included requiring those personnel to be involved and the government party to be notified of any change to those arrangements (due, for example, to a particular employee leaving employment and having to be replaced). A proposed clause is set out below.

In respect of all other employees and all other agreements there should be no specification of who is to be employed or do work under the agreement.

In relation to any limits on employees, members of governance bodies or managers based on prior criminal or other record, such limits should be tailored and proportional. That is, they should be specifically tailored to deal with a real risk arising from a prior or criminal record in respect of particular roles within the NFPO. So, the provisions in the employment services contract that absolutely preclude the NFPO from employing or involving certain people in its operations based on prior record (on pain of termination of the agreement) go far beyond what is reasonable and proportional to deal with any risk. It may be appropriate to require approval from the government party if the NFPO is seeking to employ in a financial management role a person with a prior criminal record involving fraud or theft of funds or similar offences. Even this, however, removes control from the NFPO as the employer and imposes an additional burden and delays on them in the recruitment process; it should only be required in respect of agreements that involve significant funding allocations.

TEXT BOX 16: PROPOSED STANDARD-FORM CLAUSES: REMOVAL AND REPLACEMENT OF SPECIFIED PERSONNEL

(a) If there are Specified Personnel listed in the Schedule to this Agreement, the [non-government party] must ensure those Specified Personnel are involved in the performance of its obligations under this Agreement.

(b) If the [government party] reasonably requires the [non-government party] to do so by notice in writing, the [non-government party] must remove any Specified Personnel specified in that notice, and replace such person with other Specified Personnel who are suitably qualified and notify the [government party] of those replacement personnel.

(b)	If any Specified Personnel is unavailable or unable to undertake the Services, the [non-government party] must notify the [government party] in writing, must replace that person with another suitably qualified person and notify the [government party] of that replacement person.

Use of income generated

As noted above many of the contracts require any income (including interest) generated from government funding to be spent only on the specific activity.

It is proposed that an alternative clause be used in all contracts and agreements that gives greater flexibility and limits the burden in terms of accounting and reporting.

TEXT BOX 17: PROPOSED STANDARD-FORM CLAUSES: INCOME

Any income generated by the [non-government party] from its use of the funding [or fees and funds], including any interest or fees permitted to be paid to the [non-government party] by other persons for the provision of services to those persons for which the [non-government party] receives funding, must be spent by the [non-government party] in accordance with its constitution.

Acknowledgment of funding and freedom of speech

As noted, there are both express terms in funding agreements as well as aspects of the funding relationships that effectively limit the freedom of the NFPOs to undertake advocacy in respect of issues affecting them as an organisation and the communities they work with and serve.

While it is an appropriate and, indeed, positive aspect of agreements that NFPOs be required to properly acknowledge funding support from government (and other funding bodies), it is important that this is easy to do and facilitated by the contract.

It is also vital that government contract arrangements expressly recognise the important role of the NFPO sector in advocating on issues and for program changes to better serve the needs of specific communities and the broader society. Indeed, contracts and programs should go further to make it clear that such input to processes is encouraged.

TEXT BOX 18: PROPOSED STANDARD-FORM CLAUSES: ACKNOWLEDGMENT OF FUNDING AND FREEDOM OF SPEECH

Acknowledgement of funding

1. Wherever reasonable, in all publications, promotional materials, signage and activities relating to the Agreement, the [non-government party] will acknowledge the financial and other support it has received from the [government party] by including the words 'This project is supported by funding from the [specify] Government under its [specify] program' or such other words as are agreed between the parties.
2. The [government party] may advise the [non-government party] that the Authority's logo must be included in specified publications and promotional materials and it must provide the [non-government party] with an approved logo not less than five (5) business days prior to the deadline for the relevant materials or such other time as agreed between the parties.
3. The [non-government party] must advise the [government party] of any proposed public event, including a launch, related to this Agreement and may seek involvement from relevant government officials with or without assistance from the [government party].

No limit on public statements

For the avoidance of doubt, no right or obligation arising under this Agreement is to be read or understood as limiting the [non-government party]'s right to enter into public debate regarding policies of the [government

party] or the [specify] Government more broadly, including agencies, elected officials, employees, servants or agents.

Prevention of fraud

The following standard clause is proposed as an appropriate balance of the obligations of not-for-profit parties:

TEXT BOX 19: PROPOSED STANDARD-FORM CLAUSES: PREVENTION OF FRAUD

The [non-government party] must, in carrying out its obligations under this Agreement, use its reasonable endeavours to prevent fraud on the [government party].

Reporting obligations

Many of the contracts considered had extensive and onerous reporting obligations and this is a common feature complained about by NFPOs. The interviews demonstrate that for many NFPOs the level of reporting is seen as unduly burdensome and that it takes away from the delivery of services or performance of substantive obligations under the agreement.

Governments increasingly are recognising that it is important to restrict the 'red tape' involved in regulation, particularly of the private sector. Recently, this recognition has extended to the imposition of 'red tape' obligations on NFPOs. To be appropriate, reporting and other obligations should be carefully tailored to ensure they allow for the government party to effectively monitor performance and report to the legislature. Some more extensive data collection or reporting, etc, may be required from time to time in order to investigate specific problems or report to the legislature to respond to unusual information requests. Such extraordinary requirements should be dealt with through additional obligations to respond to reasonable requests from the government party within a reasonable time frame. Set out below are proposed reporting obligations that are sensitive and able to be modified to respond to differences that arise between different contractual arrangements such as size of the NFPO, amount of funding, etc.

Many funding agreements require financial reports to be independently audited by a qualified auditor at the expense of the not-for-profit party. Such an audit requirement should be used only where the size of the funding allocation or the size of the not-for-profit party warrants it. In the case of larger funding allocations an independent audit of separate financial reports for that specific funding is reasonable. Similarly, where the funding allocation is smaller but the organisation is of significant size, then a requirement for an independent audit of the organisation's consolidated financial records may be appropriate and reasonable. However, independent audits of relatively small funding allocations in addition to an overall audit may not be reasonable.

By way of illustration and useful comparison, section 301 of the *Corporations Act 2001* (Cth) only requires large proprietary companies to audit their financial reports. A large proprietary company is a company that satisfies two of the following criteria: the entity's consolidated financial revenue is greater than $25 million; its consolidated gross assets are greater than $12.5 million; or it has more than 50 employees.

TEXT BOX 20: PROPOSED STANDARD-FORM CLAUSES: REPORTING OBLIGATIONS

1. The [non-government party] must:
   (a) keep complete and accurate records and accounts of its expenditure of the funding;
   OR
   keep completed and accurate records of its service provision under this Agreement and accounts of its expenditure relevant to the payment of fees or funding under this Agreement;
   (b) keep a copy of all Records for at least seven (7) years from the end date of the Agreement;
   (c) commencing on [insert date], for the duration of this Agreement, provide the [government party] with a copy of its annual financial statements within four months of the end of the relevant financial year;
   (d) provide the [government party] with reports, in an agreed form, on the progress of the activity measures against the milestones on a [quarterly/six-monthly/annual] basis within one calendar month of the end of the relevant reporting period.
2. The [government party] may inspect the [non-government party]'s records.
   (a) The [non-government party] must provide the [government party], or an authorized representative or the Auditor-General, with the right to enter the premises of the [non-government party] and inspect and make copies of the records relating to the activity for the purposes of this Agreement, or (subject to any third party consent to protect privacy and/or confidentiality) to observe the non-government's performance of the Activity.
   (b) For the purposes of paragraph (a), the [non-government party] must give the [government party], or an authorized representative or the Auditor-General, access to its premises, and such assistance as may be needed to conduct the inspection.
   (c) The [government party] must:
      (i) give the [non-government party] ten (10) business days' written notice before carrying out the inspection under paragraph (a); and
      (ii) inspect the [non-government party]'s premises during usual business hours; and
      (iii) to the extent possible, arrange the inspection at a time that is mutually available so as not to unduly interfere with the normal business operations and prior appointments, etc, of the relevant staff of the [non-government party].
3. Audited reports

   Where:
   (a) the amount of the funding exceeds [insert value]; or
   (b) the amount of the [non-government party]'s aggregate funding from all sources exceeds [insert value]; and
   (c) the [non-government party] has greater than [insert number] employees;

   The [non-government party] must ensure that its consolidated annual financial reports are independently audited by a qualified auditor and, in the case of paragraph (a) above, must provide a separate set of audited accounts in respect of the funding provided under this Agreement. The [non-government party] is responsible for paying for such audits

Recommendation 8: That all Australian governments collaborate to adopt a standard chart of accounts for funding and reporting for not-for-profit organisations in receipt of government funds.

It would also be an extremely useful development if governments were to adopt a standard chart of accounts (Australian Centre for Philanthropy and Nonprofit Studies 2006) for all programs involving funding allocations to NFPOs that require financial reporting by those NFPOs. This would enable NFPOs to simplify their internal processes through allowing data to be collected using common categories across funding programs.

PART 8 CONCLUDING COMMENTS

The primary intent of this report is to offer to both governments and NFPOs a considered analysis of the nature of contracts in human services, the principles upon which they are built and the implications of their actual terms.

In putting forward the recommendations above, it is also appreciated that there are other ideas, avenues for development and related issues worthy of investigation and debate. It would be possible, for example, for contracts (even for large national programs) to consist of a standard core specifying the key, common provisions (such as objectives, expectations and accountability requirements) plus a more open section based on standard areas to be dealt with but leaving the details subject to discussion/negotiation. There may be other ways to support such an arrangement; for example, providing regional offices of government departments with greater discretion in negotiating terms of certain aspects of the contract.

There are clearly several associated questions that have not been interrogated. One, mentioned already, is complementary research with government officials. Another, which one of those interviewed described as the 'elephant in to the room', is the place of for-profit companies in the provision of human services. With the onset of the Global Financial Crisis and the demise of companies such as ABC Learning Centres, the elephant could be said to be jumping on the couch and demanding more attention.

These are timely matters.

The analysis and the ideas offered here recognise that there is renewed preparedness on the part of all concerned to consider new approaches to delivering a healthier, more co-operative and more productive relationship between governments and NFPOs. It is hoped that this report proves to be a useful contribution to that endeavour as it is central to better meeting the needs of our compatriots.

PART 9 REFERENCES

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PART 10 GLOSSARY

ACOSS	Australian Council of Social Services
ALP	Australian Labor Party
Coalition Government	Refers to the Liberal Party-National Party coalition that held Government at a federal level in Australia from 1996 to 2007.
DEEWR	Department of Education, Employment and Workplace Relations (formerly DEWR)
DEN	Disability Employment Network
DEWR	Department of Employment and Workplace Relations (now DEEWR)
DHS	Victorian Department of Human Services
DoCS	Department of Community Services (NSW Government)
DTRS	Department of Transport and Regional Services (now the Department of Infrastructure, Transport, Regional Development and Local Government)
Employment Services Contract 2006-09	DEWR standard-form contract for the provision of employment services for the period 2006-09
ESA	Employment Service Area, used in the Employment Services Contract 2006-09 and the Exposure Draft 2009-12
Exposure Draft 2009-12	Exposure Draft of the proposed DEEWR standard-form contract for the provision of employment services for the period 2009-12
FCSIA	Department of Families, Community Services and Indigenous Affairs (now FHCSIA)
FHCSIA	Department of Families, Housing, Community Services and Indigenous Affairs (formerly FCSIA)
ICC	Indigenous Co-ordination Centre
Independent Contract Review	The review conducted by Holding Redlich of a set of standard-form contracts (see Part 6)
Interviewees	the senior staff of the 24 NFPOs who were interviewed as part of the project (see Part 5)
LMR	Labour Market Region, used in the Employment Services Contract 2006-09 and the Exposure Draft 2009-12
NCOSS	Council of Social Services of New South Wales
NFP	not-for-profit
NFPO	not-for-profit organisation
NGO	non-government organisation
Participants	job seekers participating in employment services programs under the Employment Services Contract 2006-09 and the Exposure Draft 2009-12
PIAC	Public Interest Advocacy Centre
PSP	Personal Support Program
SJSC	Social Justice & Social Change Research Centre, UWS
UWS	University of Western Sydney

PART 11 APPENDIX 1 – EXPANDED SAMPLE CLAUSE

The following text sets out the first six paragraphs of clause 2 of Part B (Specific Conditions for Job Network of the Employment Services Contract 2006-09. Where definitions are provided in the text of the paragraph, these are highlighted in bold. The text immediately after each paragraph unpacks each of those definitions and any further definitions embedded in the definitions.

2.1 The **Job Network Services** will consist of two services:

Job Network Services is defined in Part B clause 1.1(ah) as 'the services that the **Provider** is required to provide under clause 2'

Job Network Services is defined in Part B clause 1.1(ah) as 'the services that the **Provider** is required to provide under clause 2'

Consortium is defined in Part A clause 1.1 as 'two or more entities who have entered into arrangement for the purpose of jointly delivering the **Services**, and who have appointed a lead member of the consortium with authority to act on behalf of all members of the consortium'.

(a) **Job Search Support Services**; and

Job Search Support Services is defined in Part B clause 1.1(ap) as 'the **Service** that the **Provider** is required to provide under *clause 3* …'

Service is defined in Part A clause 1.1 as 'the service or each of the services, as set out in the **Specific Conditions**, which the **Provider** is required to provide in accordance with this **Contract** and includes the provision of **Contract Material**'.

Provider is defined in Part A clause 1.1 as 'the Provider's officers, employees, agents, volunteers and subcontractors, its successors and assigns, and any constituent entities of the Provider's organisation and includes reference to the lead member of a Consortium contracted under this Contract, where appropriate.'

Specific Conditions is defined in Part A clause 1.1 as 'those terms and conditions, other than in Part A (General Conditions) and the Annexure(s), which are set out in the separate parts of this Contract for each Service for which the **Provider** may receive **Fees** and **Funds** from **DEWR**'.

Contract is defined in Part A clause 1.1 as 'this document and includes and **Parts**, **Annexure**(s), and any other documents attached or incorporated by reference, including **Guidelines**'.

Fees is defined in Part A clause 1.1 as 'any amount payable by **DEWR** under this **Contract** specified in the **Specific Conditions** to be Fees, and any amounts not expressly identified as **Funds** or **Funding**'.

Funds or **Funding** is defined in Part A clause 1.1 as 'any amounts (in cash or kind) payable by **DEWR** under this **Contract** specified in the **Specific Conditions** to be **Funds** or **Funding**'.

DEWR is defined in Part A clause 1.1 as 'the Commonwealth Department of Employment and Workplace Relations or such other agency or Department as may administer this **Contract** on behalf of the **Commonwealth** and, where the context so admits, includes the relevant Commonwealth's officers, delegates, employees and agents'.

Part or **Parts** is defined in Part A clause 1.1 as 'a part of this **Contract** and may include schedules, attachments and documents incorporated by reference'.

Annexure is defined in Part A clause 1.1 as 'any annexure to this **Contract**'.

Guidelines is defined in Part A clause 1.1 as 'the guidelines for a **Service** or Services, if any, as described in the **Specific Conditions**, and as amended from time to time by **DEWR** and notified to the **Provider**'.

Commonwealth is defined in Part A clause 1.1 as 'the Commonwealth of Australia and includes officers, delegates, employees and agents of the Commonwealth of Australia'.

(b) **Intensive Support Services.**

Intensive Support Services is defined in Part B clause 1.1(ae) as 'the **Services** that the **Provider** is required to provide under *clause 4*…'

2.1A The **Service Start Date** is set out in *Item B3.3 of Schedule B3* and the **Service Period** is set out in *Item B3.4 of Schedule B3*.

Service Start Date is defined in Part A clause 1.1 as 'in relation to any **Service**, the date on which that **Service** commences as set out in the **Specific Conditions**'.

Service Period is defined in Part A clause 1.1 as 'in relation to a **Service**, the period specified in the **Specific Conditions** during which the **Provider** must provide the **Services**'.

2.2 Where the **Provider** is providing **Job Network Services**, the **Provider** will also be a **Job Placement Organisation**'.

Job Placement Organisation is defined in Part B clause 1.1(ak) as 'an organisation contracted to the **Commonwealth** to provide **Job Placement Services**.

Job Placement Services is defined in Part B clause 1.1(al) as 'the services set out in the *Job Placement Licence*'.

No definition is provided of Job Placement Licence or where that licence is to be found.

2.2A If the *Job Placement Licence* between the **Provider** and the **Commonwealth** expired or is terminated prior to the completion of the **Service Period**, **DEWR** may terminate this Part B, in accordance with *clause 27 of Part A*.

2.3 The **Provider** will provide the job search facilities for use by **Eligible Job Seekers** as set out in *clause 5*.

Eligible Job Seeker is defined in Part B clause 1.1(o) as 'a **Fully Job Network Eligible Job Seeker**, a **Job Search Support Only Job Seeker** and an **EP Job Seeker**'.

Fully Job Network Eligible Job Seeker or **FJNE Job Seeker** is defined in Part B clause 1.1(t) as 'a person who is identified by **Centrelink** or other relevant organisation on **DEWR IT Systems** as eligible for the full range of **Job Network Services**'.

Job Search Support Only Job Seeker or **JSSO Job Seeker** is defined in Part B clause 1.1(ao) as 'a person who registers with either **Centrelink** or the **Provider** and who will receive **Job Search Support Services** only from the **Provider**, and is not: (i) a full-time student; (ii) working in paid employment for 15 hours or more each week; (iii) an overseas visitor on a working holiday visa; or (iv) prohibited by law from working in Australia; but includes (v) a person who is seeking an apprenticeship or traineeship; or (vi) any other person **DEWR** may notify the **Provider**, from time to time, as being a **Job Search Support Only Job Seeker**'.

EP Job Seeker is defined in Part B clause 1.1(oa) as '(i) a **JSSO Job Seeker** or a **FJNE Job Seeker** who is: (A) a parent with a dependent child aged less than 16 years; (B) a person aged 50 years or older; or (C) in receipt of Carer Payment or a carer as defined by

the **Guidelines**; and (ii) any other person identified by **DEWR** as eligible for **EP Services**; but does not include a **JSSO Job Seeker** who: (iii) has been employed for at least 15 hours per week for at least 13 weeks in each year of the two years immediately preceding referral or **Registration** of the **JSSO Job Seeker**; (iv) is in receipt of an Age Pension; or (v) otherwise, is in a class of persons identified by **DEWR** as being ineligible for **EP Services**;

> **Centrelink** is defined in Part A clause 1.1 as 'the Commonwealth Services Delivery Agency established by the *Commonwealth Services Delivery Agency Act 1997* (Cth)'.
>
> **DEWR IT Systems** is defined in Part A clause 1.1 as 'DEWR's IT computer system accessible by a **Provider**, through which information is exchanged between the **Provider**, subcontractors, **Centrelink** and **DEWR** in relation to **Services**'.
>
> **Job Search Support Services** and **Job Search Support** is defined in clause 1.1(ap) as 'the **Service** that the **Provider** is required to provide under *clause 3* …'
>
> **Registration** is defined in Part B clause 1.1(azaa) as 'the registration by **Centrelink** or other party notified by **DEWR** of an **Eligible Job Seeker** as looking for work and requiring **Job Network Services** as recorded on **DEWR IT Systems**, following which, the **Eligible Job Seeker** remains registered on **DEWR IT Systems** whilst receiving **Job Network Services**, and terms such as 'duration of Registration' and 'period of Registration' refer to the amount of time that the Eligible Job Seeker has been registered.
>
> **EP Services** is defined in Part B clause 1.1(ob) as 'the Employment Preparation Services specified at *clauses 3.4A-3.4J*'.

2.4 The **Provider** must provide **Job Network Services** only in the **Employment Service Area(s)** and at the **Sites** set out in *Items B3.11* and *B3.14* of *Schedule B3*, respectively to:

> **Employment Service Area** or **ESA** is defined in Part A clause 1.1 as 'a geographical area, within a **Labour Market Region**, identified in the **Specific Conditions** and described at www.workplace.gov.au, in which the **Provider** must provide the specified **Services**.
> **Site** is defined in Part A clause 1.1 as 'the one or more physical locations in an **ESA** specified in the relevant **Specific Conditions**, at which the **Provider** must conduct the **Services** in relation to this **Contract**'.
>
> > **Labour Market Region** or **LMR** is defined in Part A clause 1.1 as 'one of 19 geographical regions, each containing a number of **ESAs**, as set out at www.workplace.gov.au'.