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INTRODUCTION

In 1998 Australia's public employment service was replaced with a national network of public, private and community agencies—the Job Network—which compete for contracts to deliver services to unemployed people. This development represents the encroachment of competition policy and market ideology into one of the most fundamental areas of government responsibility—the welfare of citizens. The broader ramifications of the contracting out of employment services in terms of quality, efficiency, social costs and accountability are only beginning to be explored. This article examines the impact these changes have had upon one important feature of the social security system—the accessibility and effectiveness of external merits review.

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Before 1998, unemployed people could seek merits review of decisions by government officers to cancel or suspend unemployment payments for breaches of the 'social security law'. For instance, an unemployed person whose Newstart Allowance had been suspended or reduced could seek external merits review of that decision from the Social Security Appeals Tribunal (SSAT). If either party was dissatisfied with the SSAT's decision, review could then be sought from the Administrative Appeals Tribunal (AAT). This provided unemployed people with an avenue of redress when faced with bad or uninformed decision-making. Furthermore, it ensured that those responsible for making decisions affecting the rights and interests of unemployed people were held accountable. Review by the SSAT and AAT, symbolising the ever-present possibility of external scrutiny, also arguably encouraged better decision-making within government departments (the normative impact).

Under the current arrangements, decisions affecting unemployed people are more difficult to review. The SSAT and AAT have retained their jurisdiction to review decisions made by officers of Centrelink, the government body responsible for suspending or reducing unemployment payments. However, these decisions are now made on the basis of information provided by Job Network agencies. The complex public/private matrix within which decision-making now occurs has erected a number of barriers to effective merits review.

The aim of this article is to explore how the contracting out of employment services has affected the ability of unemployed people to seek merits review of adverse decisions. It outlines the changes to the delivery of employment services that have taken place in the last 10 years, and provides a brief overview of the debate surrounding the contracting out of government services. This debate often assumes that the retention of administrative review mechanisms will ensure some measure of accountability in a deregulated environment. The article challenges these assumptions by examining the role of the SSAT and AAT in conducting external merits review, and identifying those features of the present scheme that undermine the effectiveness, accessibility and normative impact of tribunal review. These features include the inability of Job Network agencies to explain and provide information about the appeals system, poor record-keeping, and the fragmented structure of the Job Network itself.

It appears that the division of responsibility for decision-making between public and private agencies has reduced the ability of merits review tribunals to provide effective, efficient and accessible review. This suggests that, even if attempts are made to retain accountability mechanisms such as external merits review, there may be hidden 'structural' barriers to accountability that arise when core government functions are contracted out to the private sector. This article explores some solutions that might obviate the difficulties faced by the SSAT and AAT in the social security jurisdiction. The inevitable conclusion, however, is that there needs to be greater

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3 The statutes that currently form the 'social security law' are the Social Security Act 1991 (Cth), the Social Security (Administration) Act 1999 (Cth) ('Administration Act') and the Social Security (International Agreements) Act 1999 (Cth).

4 The parties to a proceeding before the SSAT are, generally speaking, the applicant and the Secretary of the Department—s 156(1) of the Administration Act. Note, however, that the Secretary does not participate in hearings before the SSAT.
awareness of these hidden barriers in assessing the impact of contracting out on accountability, and on the ability of citizens to check excesses of government power.

**DEVELOPMENTS IN EMPLOYMENT SERVICES IN AUSTRALIA**

Until the 1990s, social security decisions were made and implemented by government officials working within a centralised bureaucracy. Decisions were made on the basis of information obtained directly from the unemployed person. It is generally agreed that merits review by the SSAT and AAT in this context acted as an effective check on bad decision-making. Moreover, decision-making occurred within a bureaucratised, rule-based climate that was more susceptible to the normative impact of tribunal decision-making. With the advent of the Job Network there have been dramatic changes to the context within which decision-making occurs.

Commentators on the Australian social security system describe the developments of the last decade as part of a world-wide trend for states to withdraw from the direct provision of employment services, to deregulate and contract out service delivery, and to dismantle the traditional forms of bureaucratic hierarchy. Australia started down this path in 1994 with the Working Nation reforms. Under this package all recipients of the Newstart Allowance were referred to case management. Recipients could choose between public sector case managers, and private and community sector providers who were contracted by government to provide case management services. A new government agency—the Employment Services Regulatory Agency—was established to encourage and regulate competition amongst case management providers. All case managers were authorised to recommend reduction or suspension of unemployment benefits for non-compliance with the case management process. Commentators report that appeals to the SSAT and AAT increased during this period, and that concerns were expressed about hardship resulting from the reforms.

A study by Mark Considine looks at the contracting out of case management services during the Working Nation program. Similarly to the Job Network, case management was contracted out to community (non-profit) organisations and private (for-profit) firms, as well as being provided by government agencies. His research revealed the different approaches of private firms and government agencies to resolving problems, particularly regarding their willingness to avoid applying rules in order to avert subsequent appeals. He reported that:

Rather than use official sanctions, however, the private agencies prefer to issue strong cautions, threats and positive reinforcement of their roles as social security agents. A number of private providers also use the computer classification 'no longer requires assistance' to cut clients off benefits without a formal sanction. This allows them to

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5 See below n 53 and n 63.
7 O’Donnell, above n 6, 157.
manage the compliance issue in-house without the difficulties associated with semi-judicial sanctions and appeals.\footnote{Considine, 'Markets, Networks and the New Welfare State', above n 2, 194.}

Considine also reported that private case management providers were the most strategic in their behaviour. They tended to focus upon selected clients and limit other transactions. Their lower rates of sanctioning may reflect the fact that this activity is time consuming, has reputation risks, and does not generate income.\footnote{Ibid 201.}

The Labor Government's brief experiment in the contracting out of case management hinted at the types of difficulties that might arise if employment services were privatised. In particular, the preference for non-government case managers to use non-legal (and occasionally illegal) methods to control or sanction unemployed people makes it harder for those affected to seek legal forms of redress, such as external merits review. These features were intensified during the next phase of reforms. The move towards the contracting out of employment services, which began with Working Nation, gathered momentum under the Coalition Government. As the UK Select Committee on Education and Employment observed:

The Coalition Government's alternative to the Working Nation strategy has been to introduce some of the most radical reforms to the delivery of services to unemployed people seen in any OECD country. They have created a competitive job market in job broking and intensive employment assistance, with a network of private sector and other providers, known collectively as the Job Network, who are paid to place clients into jobs.\footnote{Select Committee on Education and Employment, Active Labour Market Policies and Their Delivery: Lessons from Australia (1999) paragraph 14.}

As part of these reforms the former Commonwealth Employment Service (CES) was abolished and replaced by a number of agencies—government corporations and private or community Job Network agencies performing functions previously undertaken by the CES. Following the latest round of contracts, the Job Network is constituted by 8% government-run, 45% private and 47% community-based agencies.\footnote{Eardley, Abello and Macdonald, above n 1, 9.}

The Commonwealth Services Delivery Agency, known as Centrelink, acts as the initial point of contact for people in need of employment services and income support. Centrelink registers job seekers and refers them to Job Network agencies after assessing their needs using a 'Job Seeker Classification Instrument'. Job seekers are classified according to 3 levels of need.\footnote{Flex 1 job seekers are deemed job ready and simply require job matching services. Flex 2 job seekers have appropriate work-related skills but require training in job searching skills, such as CV writing and interview techniques. Flex 3 job seekers require intensive, individualised employment assistance and are further classified into 3 levels of disadvantage. Flex 3.1 is the classification given to those who are recently unemployed but face a strong risk of becoming long-term unemployed; flex 3.2 job seekers are long-term unemployed; and flex 3.3 is the classification given to people with disabilities or who come from Aboriginal and Torres Strait Islander backgrounds. See Carney and Ramia, 'Contractualism, Managerialism and Welfare', above n 2, 67; O'Donnell, above n 6, 159–60.}Job Network agencies are paid when they successfully place unemployed people in jobs for minimum periods of time, with the fees increasing according to the job seeker's classification. Agencies providing Flex 3
services to job seekers who require intensive employment assistance are paid partly on referral, receiving further payments if the person is employed for a minimum period.

Despite the dramatic changes that have taken place, the Job Network itself does not have a legislative basis. Rather, the scheme is based upon a complex web of administrative and contractual arrangements. Agencies are contracted by the Department of Employment and Workplace Relations (DEWR) to provide Flex 1, 2 or 3 services. Under the Job Network Scheme, DEWR is responsible for awarding contracts to Job Network agencies requiring agencies to provide 'outcomes', that is, people placed into jobs. DEWR retains responsibility for monitoring the performance of contracted agencies and imposing sanctions, such as reduced referral of job seekers, if agencies fail to comply with the terms of their contract. DEWR has also established a complaints mechanism whereby job seekers and employers can complain about the behaviour of agencies. Resolution of complaints is dealt with by DEWR, which may investigate complaints, negotiate with the agency concerned, and impose sanctions if an agreed resolution is not reached.

Employment National, the Government's Job Network agency, was created to ensure access to employment assistance in rural or remote areas where there was difficulty in creating a viable market for employment services. All agencies compete against each other to find vacancies for job seekers in what has been described as a 'market bureaucracy'. The underlying theory is that competition will drive down costs, enhance accountability, diminish reliance on breach action, and provide job seekers with a greater range of choice and individualised service. In practice, however, Centrelink staff are not allowed to advise clients on their choice of provider and unemployed people report difficulties in obtaining information about the performance of Job Network agencies. Moreover, the vast majority of vacancies posted to the national jobs database are now 'owned' by specific providers; job seekers must be registered with that provider in order to apply for their vacancies.

15 O'Donnell, above n 6, 160.
16 This is because the Reform of Employment Services Bill 1996 (Cth) and the Reform of Employment Services (Consequential Provisions) Bill 1996 (Cth), which contained many of the Government's Job Network reforms in legislative form (including revised accountability measures) were held up by Parliament—see Tom Brennan, 'Newstart Activity Agreements: Are They Contracts?' in Robin Creyke and Michael Sessalla, (eds), Targeting Accountability and Review: Current Issues in Income Support Law (1998) 87, 88. In response, the Government announced it would proceed with its reforms without legislative amendment—Senator Amanda Vanstone, Senate Won't Delay Government's Reforms to Employment Assistance, Media Release, (1 July 1997) 1.
18 Select Committee on Education and Employment, above n 12, Annex A.
19 Eardley, Abello and Macdonald, above n 1, 12.
20 Terry Carney and Gaby Ramia, 'Mutuality, Mead and McClure: More 'big M's' for the Unemployed?' (Paper presented at Mutual Obligations and Welfare States in Transition in Australia, the US and the UK, Session 5, a conference organised by Australian Academy of Social Sciences, Sydney University, 2001) 12; Owens, above n 17, 59.
21 Select Committee on Education and Employment, above n 12, paragraph 35.
22 Eardley, Abello and Macdonald, above n 1, 12; Considine, 'Selling the Unemployed', above n 2, 290.
23 Select Committee on Education and Employment, above n 12, paragraph 22.
The non-statutory status of the present system is reflected in its mode of operating. For instance, Job Network agencies have a significant amount of discretion in how they use government funds. Although the nature of Flex 3 assistance is specified to some extent in Activity Agreements, agencies are not required to provide any specific programs or to spend fees paid for intensive assistance on those who need it.\(^{24}\) Indeed, recent studies have shown that fees received for the provision of intensive employment assistance have been spent on job matching services, often in an attempt to keep an agency afloat.\(^{25}\)

Providers also have a significant degree of latitude in their dealings with job seekers following the abolition of the CES and the reduced role of Centrelink. Agencies (as opposed to government officers) now have almost exclusive contact with recipients, much of which is unregulated.\(^{26}\) In relation to Flex 3 Newstart recipients, for instance, Job Network agencies are required to negotiate a Newstart Activity Agreement in accordance with s 606 of the Social Security Act 1991 (Cth) (the Social Security Act). This Agreement must require a person to undertake one or more activities such as job search, vocational training, paid work experience or participation in programs.\(^{27}\) While the terms of each individual agreement must be approved by the Secretary of the Department, providers take a central role in subsequently determining the contents of agreements and monitoring compliance with its requirements. In practice, studies have shown that the most successful Job Network agencies did not use the formal agreement-making process as anything more than a form of registration necessary to generate the first progress payment from government. As a result agreements tended to be extremely brief and generic.\(^{28}\)

In relation to the monitoring and sanctioning of Newstart recipients, agencies are contractually obliged to recommend breaches for non-compliance with Agreements, the activity test and other legislative or administrative requirements. In practice, studies have reported significant variation in agencies' willingness to recommend breaches.\(^{29}\) Considine found that a number of private Job Network agencies were reluctant to recommend sanctions as they were unwilling to become engaged in a legal process of sanctions and appeals.\(^{30}\) Rather, the pressure they put on clients to comply was more likely to flow from informal warnings and 'name and shame' group sessions. In addition:

Some case managers also reported that when clients failed to appear for interview or did not attend designated group sessions they used the official computer system to classify the client as 'no longer requiring assistance (NRA)'. This resulted in a client's benefit being stopped immediately and forced him or her to immediately contact the agency in order to regain income support. This strategy was not allowed under the rules established by government and as such was a form of illegal sanctioning. Nevertheless,

\(^{24}\) O'Donnell, above n 6, 160, and Select Committee on Education and Employment, above n 12, paragraph 19.
\(^{25}\) Considine, 'Selling the Unemployed', above n 2, 292; Eardley, Abello and Macdonald, above n 1, 42-3.
\(^{26}\) Goodman, above n 9, 35.
\(^{27}\) Social Security Act s 606(1).
\(^{28}\) Considine, 'Selling the Unemployed', above n 2, 189.
\(^{29}\) Eardley, Abello and Macdonald, above n 1, 52.
\(^{30}\) Considine, 'Selling the Unemployed', above n 2, 290.
when used in moderation it was virtually undetectable and showed the sophistication of
the compliance strategies used by the private agencies.\footnote{31}

Clearly, there are a number of Job Network agencies which are culturally more
comfortable with, or who find it more financially rewarding to rely upon, informal,
non-legal methods of sanctioning.

The discretionary choices made by providers may or may not have an adverse
impact upon the interests or entitlements of unemployed people. Where they do, Newstart
recipients should be able to hold providers accountable and seek redress for bad
decision-making. Before 1998 there were a number of administrative law
mechanisms available to unemployed people seeking accountability and fairness in
decision-making under the social security law. These included the Ombudsman,
privacy legislation, the Freedom of Information Act 1982 (Cth), judicial review, and
external merits review by the SSAT and AAT. However, many of these mechanisms
are unavailable or less available in the brave new world of the Job Network.

Decisions to suspend or reduce the allowance of Newstart recipients, and to
approve Activity Agreements, are decisions 'of an administrative character made
under an enactment' within the meaning of the Administrative Decisions ((Judicial Review)
Act 1977 (Cth) (ADJR Act). However, the decisions, choices and behaviour of providers,
made in the 'private negotiating spaces' created by the Job Network, do not fall within
this definition.\footnote{32} Although remedies under freedom of information and Ombudsman
legislation were available in relation to case managers under the 1994 scheme,\footnote{33}
these Acts do not extend to Job Network agencies. While the Privacy Act 1988 (Cth) has been
amended to extend in some circumstances to private sector organisations, its
application to Job Network providers is arguably limited.\footnote{34}

\footnote{31 Ibid 289-90.}
Social Security Law 18, 32; Owens, above n 17, 56.}
\footnote{33 As set out in Owens, ibid, n 141:}
\footnote{34 The Freedom of Information Act 1982 (Cth) applies to government departments,
prescribed authorities or eligible case managers: ss 4(1) and 11. An eligible case
manager is a case manager contracted under the Employment Services Act. A ‘prescribed
authority’ is defined in a similar way as under the Ombudsman Act and is largely
confined to bodies established for a public purpose under an enactment.

The provisions introduced by the Privacy Amendment (Private Sector) Act 2000 (Cth) (the
Privacy Amendment Act) came into effect on 21 December 2001. The effect of these
provisions is to extend the operation of privacy law to organisations operating in the
private sector. ‘Organisation’ is defined to include individuals, bodies corporate,
partnerships, unincorporated associations and trusts—Privacy Amendment Act s 6C(1).
Significantly, s 6C(1) states that the term ‘organisation’ does not include ‘small business
operators’—that is, businesses that have an annual turnover of less than $3 million (Privacy
Amendment Act s 6D). Thus, the new private sector provisions do not apply (except on a
voluntary basis) to organisations falling within the ‘small business’ exemption. This
exemption would presumably have applied to most Job Network providers, were it not for
a further exemption to the definition of ‘small business operator’. Section 6D(4)(e) provides
that organisations that are contracted service providers for a Commonwealth contract are
not ‘small business operators’. ‘Contracted service provider’ is defined in s 6(1) as ‘an
organisation that is or was a party to the government contract and that is or was
responsible for the provision of services to an agency or a State or Territory authority
under the government contract’. While it seems clear that Job Network providers should
CONTRACTING OUT GOVERNMENT SERVICES: THE UNDERLYING DILEMMA

This diminution of administrative law remedies epitomises the types of problems which arise when governments divest their responsibility for carrying out essential functions onto the private sector by way of contract. The underlying dilemma is how citizens should seek to check abuses of public or government power when the core functions of government are being performed by private providers. It is generally not disputed that, where essential services are contracted out, government should remain accountable both for the expenditure of public money, and for the impact of bad ‘privatised’ decision-making on the lives of its citizens. The question is: how can citizens seek redress for bad decision-making or inadequate service delivery when those decisions or services are provided under a contract which, due to the privity of contract doctrine, only the government can enforce?

Proponents of contracting out would argue that administrative law remedies are unnecessary in a market-based environment. They claim that the contracting out of government services actually enhances accountability by requiring contracting agencies to clearly specify required outcomes, the nature of the service to be delivered, and the allocation of responsibility. Another central justification for the contracting out of government services is that, as well as promoting efficiency, greater competition gives service recipients more choice and results in the most worthy providers succeeding in the market-place. However, recent studies contradict this reasoning in relation to the delivery of job search and training services to the unemployed. For instance, Considine reported that many clients in his study had not exercised any choice in regard to the selection of their agency and said they had been directly referred by the Commonwealth Employment Service. Those who made a choice most often said this was based on one or both of two factors: they did not want to be case-managed by the government office, or wished to go to the agency which was...
closest to where they lived. No job seeker in the twenty focus groups cited knowledge of
the agency or information about its performance as a reason for their choice.37

More fundamentally, the very rationale behind the delivery of many public services
is to remedy market failures such as structural unemployment and social injustice, in
order to counteract distributional inequity.38 Clearly, the market itself will not
guarantee good decision-making in the delivery of employment services, nor will it
empower unemployed people to select competent Job Network agencies.

Others have argued that, where government services are delivered by the private
sector, citizens can rely upon private law remedies to ensure their needs are met.39
Remedies developed to deal with private law disputes between citizen and citizen
include tort and contract law remedies. However, the utility of private law remedies is
limited in the hybrid public/private situation where essential government services are
delivered by contracted private providers. Citizens requiring the service will generally
have less money, resources and power than the provider. Moreover, tort law remedies
will generally not be available if the quality of the service is the problem, as opposed to
complete non-delivery causing loss or damage. In relation to contractual remedies,
there may be no contract between the citizen and the provider, there may be no other
provider capable of providing the service that the citizen needs, and the contract itself
may not have envisaged the particular types of problems which have arisen.40 Under
the Job Network scheme agencies are contractually bound by a code of conduct
contained in their contracts with DEWR, which is designed to encourage providers to
treat job seekers in an ethical, fair and professional manner. Yet while sanctions may be
imposed for breaches of the code41 this remedy lies with DEWR rather than with the
individual job seekers affected.

Given the limitations of market-based and private law remedies, the better
approach may be to adjust existing administrative law remedies, or to create hybrid
remedies, in order to deal with the types of problems which arise when essential
services are contracted out.42 However, there is a debate over whether administrative
law itself will survive the roll-back of the state and the trend for government to
contract out its functions. One view is that government's increasing use of contract as a

37 Considine, 'Selling the Unemployed', above n 2, 290.
38 Linda McGuire, 'Service Delivery Contracts: Quality for Customers, Clients and Citizens' in
Glyn Davis, Barbara Sullivan, and Anna Yeatman (eds), The New Contractualism? (1997) 102,
112.
40 The limitations of private law remedies are discussed in more detail in ibid 38-40.
41 Select Committee on Education and Employment, above n 12, Annex A. The type of
sanction referred to in agencies' contracts with DEWR involves suspending referrals of job
seekers, reducing the contracted capacity of an agency, or termination of the contract—
Owens, above n 17, 56.
42 Schoombee has argued that hybrid public/private law remedies would be the most
effective in providing citizens with a means of redress in circumstances where government
functions are contracted out to the private sector. See Hannes Schoombee, 'Privatisation
and Contracting Out—Where Are We Going?' (1998) 87 Canberra Bulletin of Public
Administration 89, 92-3. See also Prosser, above n 36, for an example of how this kind of
hybrid model has emerged in the United Kingdom in relation to privatised utilities and the
role of industry regulators.
means of delivering essential services will diminish the relevance and usefulness of administrative law. For instance, Murray Hunt has warned that:

If government chooses to constitute the delivery of a particular service by way of contractual arrangements with private bodies, there must be very real danger that courts will treat such activity as being beyond the reach of public law, and regulated by the private law of contract only. The fear is of the total transfer of public activity into the private sphere and thereby into the realm of private rather than public law.43

The concern is that administrative law is intrinsically linked to the function of administrative decision-making by government, such that there is no place for public law when government divests itself of this responsibility.44 As one commentator has pointed out:

Administrative law was not designed to deal with contracts, which by definition are instruments of exchange, rather than of command.45

The other view is that, eventually, the phenomenon of contracting out will actually lead to an expansion of the scope of administrative law:

[O]ver time, contracting will produce more, rather than less administrative law. The general public will want to be reassured that contractors are subject to the same processes of review that apply to decisions made within an agency. Moreover, I think contractors themselves will eventually demand some form of review process for public sector purchasing, to ensure that procedural fairness is followed. That would be an ironic result, given the motivations underlying contracting out. But accountability problems cannot be wished away or restructured away. They always pop up somewhere else. This suggests a continuing and even expanded role for administrative law.46

This view is supported by Prosser's study of private utility regulators in the United Kingdom, which demonstrates that privatisation can, in fact, lead to an increase in regulation and the emergence of new public law remedies.47

A strong argument for retaining administrative law remedies is that to do otherwise would upset the delicate balance of the separation of powers in our system of constitutional government—namely, between the Executive, the Legislature and the Judiciary.48 It is generally accepted that the Executive has power to contract out under

46 Ibid 155. See also Hunt, above n 43, 38 who talks of the increased opportunities of courts to assert general public law principles over all exercises of power, regardless of whether the source of that power is the public or private sector.
47 Prosser, above n 42, 63, 72.
48 The 'separation of powers' doctrine, which is implicit in the structure of the Constitution, is one means by which official power is controlled and managed within our Westminster system of government. The tasks of making laws, exercising the powers conferred by those laws, and reviewing the legality of that activity are each performed by the separate branches of government. Thus, only the courts may exercise judicial power. The separation of powers doctrine was reaffirmed in R v Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254. See also, Kevin Ryan QC, 'Judges, Courts and Tribunals', (Paper presented at The Australian Judicial Conference Symposium on Judicial Independence and
s 61 of the Constitution without legislative authority—indeed, this was largely the basis upon which the Coalition Government implemented its Job Network scheme. However, the overuse of the Executive’s power under s 61 to contract out government functions to the private sector has the potential to radically restructure the Australian system of government. It does so by taking away from the courts the jurisdiction to oversee the exercise of public power through judicial review. Moreover, because this would occur via the exercise of Executive power, it bypasses any involvement by the Legislature thereby threatening notions of representative democracy.

Perhaps the most comforting solution to a public lawyer would be to extend existing administrative law remedies to the private sector. For instance, statutes such as the Ombudsman Act 1976 (Cth), the Freedom of Information Act 1982 (Cth) and the Privacy Act 1988 (Cth) could simply be amended to make these mechanisms available in disputes involving private sector bodies. The Administrative Review Council has suggested that using existing administrative law remedies where government services are contracted out may be cheaper and more efficient than creating new mechanisms. Moreover, many commentators have suggested various types of arguments which could be run in the Federal and High Courts justifying the extension of judicial review into the private sector context.

Yet the question remains: even if existing public law remedies were made available in the private sphere, would these mechanisms be effective in ensuring accountability and fairness where government services are contracted out? The experience of SSAT and AAT review in the Job Network context suggests there are a range of hidden barriers which must be overcome before public law remedies can be effective in the private sphere.

In order to assess the impact of the Job Network developments upon the operation of these Tribunals, it is necessary to first examine their success in reviewing social security decisions under the old scheme.

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50 There is some precedent for this concept in the extension of privacy legislation to the private sector—see the Privacy Amendment (Private Sector) Act 2000 (Cth) which came into effect on 21 December 2001—12 months after receiving the Royal Assent. Privacy Amendment (Private Sector) Act 2000 (Cth) s 2(1)(a). Graham Greenleaf, ‘Private sector privacy Act passed (at last)’ (2000) 7 Privacy Law and Policy Reporter 125. See n 34 for an explanation of how the amended legislation applies to Job Network agencies.


52 For instance, it could be argued that providers such as Job Network agencies are acting as agents for the Commonwealth (Owens, above n 17, 56; Nick Seddon, ‘Public Accountability of Government Services Provided by Private Contractors’, Submission to the Senate Finance and Public Administration References Committee, 13); that Courts should imply terms in contracts relating to remedies for unfair dealing or unconscionable conduct (Hughes Aircraft Systems International v Airservices Australia (1997) 146 ALR 1); or that the arbitrary distinctions between powers exercised under statute and powers exercised under contract should simply be collapsed (Sue Arrowsmith, ‘Judicial Review and the Contractual Powers of Public Authorities’ (1990) 106 Law Quarterly Review 277, 291, 292).
MERITS REVIEW OF SOCIAL SECURITY DECISIONS

An overview of the merits review system in place in the social security jurisdiction indicates that, prior to the advent of the Job Network, review by the SSAT and AAT was effective in improving the accountability of decision-makers, the quality of decisions, and the fair and efficient operation of the system as a whole. In particular, review by the SSAT and AAT was important in correcting errors in decisions to reduce or suspend Newstart Allowances—an area of decision-making that has been significantly affected by the Job Network reforms.

Interestingly, the statutory provisions providing for merits review of social security decisions have remained largely unchanged, despite the Job Network reforms.

There are two tiers of external merits review for decisions made by officers under the social security law. Following internal review by an authorised review officer, an applicant may appeal a decision to the SSAT under Part 4, Division 3 of the Social Security (Administration) Act 1999 (Cth) (the Administration Act). The SSAT conducts de novo merits review of primary decisions and exercises all the powers conferred upon the Secretary by the social security law. Where the SSAT affirms, varies or sets aside the decision, the applicant or the Secretary of the Department of Family and Community Services may then appeal that decision to the AAT under s 179 of the Administration Act. Like the SSAT, the role of the AAT is to conduct de novo merits review of the operative decision exercising all the powers and discretions of the


54 The term ‘officer’ is not restricted to employees of a government department or body. An ‘officer’ is defined in the Social Security Act as:

[A] person performing duties, or exercising powers or functions under or in relation to this Act, the Farm Household Support Act 1992 or subsection 91A(3) of the Child Support (Assessment) Act 1989 and, in the case of sections 1312 to 1321 of this Act, includes:

(a) a person who has been such a person; and

(b) a person who is or has been appointed, or employed by the Commonwealth and who, as a result of that appointment or employment may acquire or has acquired information concerning a person under this Act or the Farm Household Support Act 1992; and

(c) a person who, although not appointed or employed by the Commonwealth, performs or did perform services for the Commonwealth and who, as a result of performing those services may acquire or has acquired information concerning a person under this Act or the Farm Household Support Act 1992.

This means that remedies such as merits review are not necessarily restricted to decisions made by Commonwealth employees.

55 Allars, above n 2, 94.

56 Section 151 of the Administration Act.

57 There is some debate over whether the task of the AAT is to review the original decision, or the decision of the SSAT to affirm, vary or set aside the original decision—see Re Hawat and SDSS (1992) 28 ALD 805; Re Beigman and SDSS (1992) 29 ALD 332; Re Trewin
Both the SSAT and the AAT have, to varying extents, a duty to make inquiries in order to arrive at the correct or preferable decision. In order to make them more accessible to applicants, both Tribunals are intended to operate in an informal manner, and are not bound by the rules of evidence. In fact, it would be safe to say that the SSAT is one of the least formal of any Commonwealth administrative tribunal. For example, its hearing rooms are more like conference rooms than court rooms, and Departmental decision-makers are not represented, members generally do their own photocopying and most of their own research, and the rules of evidence are rarely strictly applied. Also, the fact that each matter is heard by a multi-member panel means that hearings are more like discussions or formal meetings than adversarial legal proceedings. The Tribunal’s lack of focus on hearings as the culmination of the administrative review process contributes to its less formal, ‘non-adversarial’ approach to review.

Undoubtedly the AAT’s approach to merits review is more ‘adversarial’ and formal than this. In contrast to the SSAT, Departmental decision-makers are represented during AAT hearings, many members adhere to some degree to the rules of evidence, and it is rare for more than one member to sit on social security matters. However, the AAT is clearly less adversarial than a court. It has also implemented a number of mechanisms such as client outreach programs, compulsory conferences and mediation, which are designed to make the Tribunal more accessible, user-friendly and efficient. Overall, many commentators have applauded the SSAT and AAT for providing vulnerable applicants with a comprehensive and effective system of merits review.

Users and commentators appreciate an administrative review process which at first-tier is informal, accessible and quick, and which at second-tier is focused upon qualities such as fairness and justice, and has more of a normative impact on decision-making. Thus, to date, the objectives of merits review by administrative tribunals have arguably been met in the social security jurisdiction, namely:

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58 AAT Act s 43(1).
59 Drake v Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577.
60 See s 33 of the AAT Act and s 141 of the Administration Act.
61 Rachel Bacon, ‘Are the Babies being Thrown Out with the Bathwater? Retaining the Benefits of Specialist Tribunals within the ART’ in Chris Finn, Sunrise or Sunset? Administrative Law for the New Millennium (2000) 150, 160-161. Other aspects of SSAT procedure, such as the ability to make oral applications for review by telephone (Administration Act s 154(1)(c)), the ability to reimburse some costs to applicants—for instance travel and accommodation costs—which are incurred in connection with the review (Administration Act s 177), and the fact that hearings are conducted in private (Administration Act s 168(1)) contribute to the accessibility and informality of SSAT review.
62 Bacon, ibid, 158.
• to make administrative review accessible and responsive to applicants;
• to achieve correct or preferable decisions;
• to promote better quality decision-making by agencies (the normative effect);
• to be coherent and help uphold the Rule of Law;
• to make efficient use of resources;
• to promote public confidence in the administration of the unemployment benefits system; and
• to hold decision-makers accountable and responsible for decisions affecting the rights and interests of some of our most vulnerable citizens.

How SSAT and AAT review has operated in practice

To give a sense of how this system of external merits review has operated in practice, it is helpful to track the course of a matter through the appeals process. The type of matter most relevant to this article involves the situation where a person's unemployment benefits have been reduced or suspended in response to alleged breaches of obligations under the *Social Security Act*. These matters are of particular interest under the Job Network scheme, as the decision-making process now involves employees of non-government Job Network agencies making choices about the provision of information to Centrelink officers, who then decide whether to reduce or suspend a person's unemployment benefits.

One of the benefits that may be received by an unemployed person is a 'Newstart Allowance'. A person is generally eligible to receive a Newstart Allowance if they are unemployed, satisfy the activity test, and are prepared to enter and comply with the terms of a Newstart Activity Agreement if required. There are a number of statutory penalties that apply if a person is found not to be complying with their obligations under the Act. For instance, if a Newstart recipient commits an administrative breach, such as failing to attend appointments or contact the Department, the penalty is an 'administrative breach rate reduction' for a period of 13 weeks. If the Secretary or their delegate decides that a person has refused or failed to enter an Agreement, they are disqualified from receiving a Newstart Allowance. Similarly, if an officer decides that a person has failed to satisfy the activity test or has failed to comply with their Newstart Activity Agreement they will not be paid their Newstart Allowance. Section 593(2A) sets out some of the circumstances in which a person may be found to be in breach of their Newstart Activity Agreement:

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65 That is, the person is actively seeking and willing to undertake suitable paid employment—*Social Security Act* s 601.
66 *Social Security Act* s 593(1).
67 *Administration Act* s 63(3).
68 *Social Security Act* ss 631 and 644B.
69 See *Social Security Act* ss 593(1)(e) and 607.
70 *Social Security Act* ss 624(1) and 626(1).
For the purposes of paragraph (1)(f) or (2)(f), a person is taking reasonable steps to comply with the terms of a Newstart Activity Agreement unless the person has failed to comply with the terms of the agreement and:

(a) the main reason for failing to comply involved a matter that was within the person's control; or

(b) the circumstances that prevented the person from complying were reasonably foreseeable by the person.\(^71\)

If the failure in question represents the first or second breach in a 2 year period, the person's allowance will be reduced for a specified period; if it is the third or subsequent breach, their allowance will be 'suspended' or stopped for a period.\(^72\) As one commentator has observed, the penalties for breaches of Activity Agreements can be more severe than the penalties imposed by criminal courts for crimes such as malicious destruction of property or actual bodily harm.\(^73\)

Generally, unemployed people are able to seek merits review of decisions made by officers to suspend or reduce Newstart Allowance payments.\(^74\) An unemployed person who feels that a decision to reduce or suspend their Newstart Allowance is flawed may apply to have that decision reviewed internally, and then externally by the SSAT and AAT. To apply for review an applicant must lodge an application in writing or orally with the SSAT (or, following review by the SSAT, in writing with the AAT) identifying the decision to be reviewed. Applications to the AAT must be accompanied by a fee, although there are a number of exemptions which commonly apply to social security recipients.\(^75\)

Once a valid application for review is received, the SSAT or AAT must proceed to conduct a review in accordance with the procedures laid down in the social security law or the Administrative Appeals Tribunal Act 1975 (Cth) (the AAT Act).\(^76\) In general, both Tribunals have a significant degree of latitude in pursuing lines of inquiry and gathering evidence. Neither Tribunal is constrained by the approach taken by the decision-maker at primary level. Once hearings and inquiries are completed, the SSAT and AAT may make a decision affirming, varying or setting aside and substituting the original decision, or remitting it to the original decision-maker for reconsideration with directions or recommendations.\(^77\) Tribunal decisions have a binding effect on

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71 This is not an exhaustive statement of the circumstances in which a Newstart recipient may nonetheless be found to be taking reasonable steps to comply with the terms of their Agreement—Secretary, DEETYA v Ferguson (1997) 76 FCR 426.

72 Social Security Act ss 624(1A), 625(1A) and 626(1A). In 1999 the penalties for failing to meet obligations were an 18% reduction in allowance for a period of 26 weeks for the first breach in a 2 year period; a 24% reduction over 26 weeks for the second breach; and 8 weeks non-payment of benefit for any further breach in that 2 year period. (Select Committee on Education and Employment, above n 12, Annex A; see also ss 644AE, 644 B Social Security Act.)

73 Goodman, above n 9, 30.

74 Similar provisions were in place prior to the amendments contained in the Administration Act. See, for instance, Social Security Act s 660A, which was in place prior to 20 March 2000.

75 See Regulation 19(6) of the Administrative Appeals Tribunal Regulations 1976 (Cth).

76 Note that the AAT's procedures are modified to some extent by the social security law—see Subdivision C, Part 4 of the Administration Act.

77 Administration Act s 149(1); AAT Act s 43(1).
Departments and will be implemented, unless a successful appeal is subsequently made to the Federal or High Courts.  

While decisions to suspend or reduce payments may be reviewed in this way, since 1999 there have been restrictions on the ability of applicants to seek external merits review of Newstart Activity Agreements formed under s 606 of the Social Security Act. Section 143(2) of the Administration Act provides that the SSAT may only review a decision under s 606 if the application is expressed to be an application for review of that decision. There is no such requirement in relation to other types of decisions. Moreover, the SSAT's powers are curtailed in reviewing Agreements made under s 606. In reviewing decisions under s 606, the SSAT may only affirm the decision or set it aside and remit the matter for reconsideration in accordance with recommendations. Section 179 appears to limit review by the AAT in a similar way. The rationale for these restrictions is apparently that merits review tribunals do not have the case management skills required to make negotiated agreements.

These restrictions have an adverse impact on the ability of the SSAT and AAT to provide effective merits review. While the SSAT and AAT may still comprehensively review decisions to reduce or suspend payments, the nature of the Newstart Activity Agreement which an unemployed person is required to enter, and the process by which the 'agreement' is forged, potentially impact upon a person's ability to comply with the Agreement as required. In particular, an Agreement that is made quickly in circumstances where an unemployed person feels pressured or disempowered could be unrealistic or even unfair. Under the current scheme, where Agreements are negotiated by Job Network agencies, it is not uncommon for Agreements to be negotiated and concluded in the course of one meeting, giving the unemployed person 'no opportunity to consider their options nor their real capacity to perform the agreement.'

Clearly, there are aspects of Australia's social security legislation that undermine the effectiveness of external merits review, and some commentators have identified a growing trend to exempt decisions from review. Overall, however, most decisions have hitherto been subject to effective review by the SSAT and AAT. This has been a vital element of the decision-making process in the social security jurisdiction, given that the consequences of adverse decisions are potentially very serious for people relying upon unemployment benefits as their sole source of income.

In theory, external merits review of decisions to reduce or suspend a person's Newstart Allowance remains available following the implementation of the Job Network reforms. Retaining review by the SSAT and AAT is particularly important given that social security is such a high volume jurisdiction with thousands of decisions being made each year.

Between mid-1998 and mid-2000, more than 302,000 breach penalties were imposed, of which just under one-quarter derived from the Job Network and these represented less

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78 AAT Act s 44; ADJR Act; Judiciary Act 1901 (Cth) s 39B; Australian Constitution s 75(v).
79 Social Security Act s 143(2).
80 Social Security Act s 150. The power to substitute a new decision or make directions is not available.
81 Koller, 'The Holes but not The Cheese', above n 63, 64.
82 Ibid 65.
than half of all breaches recommended by Job Network agencies. Nearly half the breaches imposed were for failing to attend an interview with a provider agency.83

Indeed, breach action has increased dramatically since the advent of the Job Network, with an increase of 80% by 1999–2000.84 Moreover, assessments about whether a person is 'willing' to undertake paid employment or whether they have taken 'reasonable steps' to comply with an Agreement, require officers and providers to exercise some degree of personal judgment in categorising an unemployed person's behaviour. In these circumstances the potential for error is high, and the system relies upon effective review by the SSAT and AAT as an important safeguard. The significance of external merits review is highlighted by the fact that in the 1997–1998 financial year, and again in 1998–1999, a quarter of all applications received by the SSAT resulted in the decision under review being set aside.85

It may be argued that the retention of legislative provisions relating to merits review ensures accountability in the context of the Job Network. However, before accepting such an argument, it is necessary to examine the practical impact which recent reforms have had on the availability and effectiveness of SSAT and AAT review.

**BARRIERS TO EXTERNAL MERITS REVIEW IN THE JOB NETWORK**

An obvious point to make about the creation of the Job Network is that review by the SSAT and AAT remains a feature of the statutory social security regime. Freedom of information, Ombudsman and privacy legislation hasn't been amended to take account of the changes, leaving gaps in accountability mechanisms in a number of areas. However, the SSAT and AAT still have jurisdiction to review decisions made under the social security law to suspend or reduce benefits.

Thus, the immediate question is not whether an accountability mechanism should be introduced. Rather, it is whether the existing mechanism of external merits review is effective and adequate in the Job Network context. This article identifies five ways in which the structure and inherent features of the Job Network impede effective merits review of decisions under the social security law. These are:

- increased difficulty for unemployed people in accessing review systems;
- the fragmentation of responsibility for delivering employment services amongst over 300 contracted private, community and government agencies;
- the bifurcation of the decision-making process between contracted providers and government;
- bad record-keeping; and

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83 Eardley, Abello and Macdonald, above n 1, 52.
84 Statistics from the Australian Council of Social Services and DEWR, cited in Carney and Ramia, above n 20, 13.
86 This is largely because the legislation, which was drafted to give effect to the Job Network reforms and which included provisions expanding the application of freedom of information and privacy legislation, was not passed by Parliament. Instead, the scheme was implemented on the basis of administrative and contractual arrangements—see the Reform of Employment Services Bill 1996 (Cth) and Owens, above n 17, 50–1. Interestingly, the Bill would have dramatically narrowed the scope of external merits review.
• the culture of non-government organisations unfamiliar with the merits review process.

Questions of access
A fundamental difficulty is that the structure of the new social security system is potentially very confusing for job seekers who are dissatisfied with a decision to impose a breach penalty. This has significant implications for the accessibility of external merits review. For instance, job seekers may not realise that the imposition of a penalty is a reviewable decision made by an officer of Centrelink which may be appealed to the SSAT. Rather, job seekers may be understandably preoccupied with the actions and choices of their case manager, with whom they have an ongoing relationship. As Carney and Ramia have found:

Clients are prone to becoming so bound up with attempting to sort out their grievances with their job provider—the agency with whom they have the bulk of their dealings and potential angst—that they overlook advice about other avenues of complaint, such as ... the appeals system if it concerns the merits of a decision.87

These barriers to initiating appeal action are compounded by the fact that job seekers are reportedly reluctant to complain about case managers with whom they have ongoing personal relationships, for fear that it might create more trouble for themselves.88

It is highly unlikely that this reluctance would be overcome by the provision of information to job seekers explaining the appeals process. On the contrary, job seekers now interact almost exclusively with non-government agencies who may often lack understanding and information about the appeals system. Many providers don't come from a culture which is used to being held accountable for decision-making through merits review. Moreover, providers may perceive there to be financial disincentives against providing information and facilitating appeals to the SSAT and AAT. Considine has reported the preference for agencies to deal with problems in a non-legal manner, as there is a perception that becoming involved in legal processes is bad for business.89 The fact that potential applicants lack information about the merits review system is borne out by recently conducted fieldwork:

Most job seekers were unaware of either Centrelink grievance and appeals processes, or of those attached to the Job Network. Very few reported having tried to have adverse decisions reviewed. There was a common perception that the processes were difficult, that Centrelink would be obstructive, and that anyone who complained might be victimised later. Job seekers often felt powerless to complain about poor treatment either from Centrelink or from a Job Network agency.90

In addition, in a context where private and community providers are largely responsible for negotiating Newstart Activity Agreements, the restrictions on the SSAT’s ability to review decisions under s 606 is of increased concern. As before, applicants must specifically request the SSAT to review their Agreement, and the SSAT can only remit Agreements with recommendations, not directions. According to Sandra Koller from the Welfare Rights Centre, express requests are ‘infrequent given

87 Carney and Ramia, ‘Contractualism, Managerialism and Welfare’, above n 2, 71.
88 Carney and Ramia, above n 20, 20; Eardley, Abello and Macdonald, above n 1, 36.
90 Eardley, Abello and Macdonald, above n 1, 36.
that consumers are usually unaware of the requirement. These difficulties are likely to increase in a context where job seekers rely almost exclusively on providers for information about the appeals process.

Clearly, there are features of the Job Network which prevent people from accessing the merits review system in the first place. Although merits review of decisions to suspend or reduce Newstart Allowances are still reviewable by the SSAT and AAT, the realities of the Job Network undermine these rights in practical, subtle ways.

**Fragmentation of the system**

While there are some legislative restrictions to external merits review—in particular under s 606 of the *Social Security Act*—the most significant restrictions do not lie within the legislation. Rather, many difficulties stem from the structure of the Job Network itself, and the fact that significant choices and decisions are now made behind the scenes—in 'private negotiating spaces'—by staff working for private agencies, rather than by government officers exercising statutory power in accordance with rules.

Contact between Newstart recipients and the state now occurs largely through the intermediary of the Job Network provider who is responsible for providing assistance or negotiating Agreements with job seekers. In practice, providers have a large amount of discretion to choose what services to provide to individual 'clients', how to spend their fees, and to decide whether to pass information on to Centrelink to initiate sanctions. Much decision-making which was previously undertaken by government officers applying legislative rules now takes place as 'negotiation' and occurs within the context of a 'relationship'. Indeed, the Job Network is structured around relationships, rather than on the application of rules to citizens. The private spaces within which Job Network providers can negotiate and determine the obligations of unemployed people and the types of services they are entitled to, is vast.

The fact that so many aspects of the case management relationship, and the choices which are made within that relationship, are not regulated by statute means that the very structure of the system precludes effective merits review by the SSAT and AAT. As Carney has pointed out:

> Merits review of welfare services has been extremely rare for instance: social casework relationships have generally been exempt from external merits review. This does not appear to have been simple oversight; review systems have not easily accommodated casework relationships. As social security payment arrangements take on casework

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91 Koller, 'The Holes but not The Cheese', above n 63, 64.
92 Carney, above n 32, 32.
93 It may be that discretion enhances the ability of decision-makers to deal with difficult cases where strict legislative criteria fail to make provision for the unique and otherwise legitimate circumstances of individuals. Indeed, discretion is often included in legislation precisely because it is impossible 'to foresee accurately all the permutations and combinations of circumstance which might arise for decision'. (Stephen Skehill, 'The Impact of the AAT on Commonwealth Administration: A View from the Administration' in John McMillan (ed), *The AAT—Twenty Years Forward* (1998) 56, 62.) However, the extent to which the creation of the Job Network opens up 'private negotiating spaces' goes well beyond simply providing decision-makers with the flexibility to make better decisions.
characteristics, access to review rights may therefore come into question, either for this reason or because government doubts the amenability of such decisions to review.94

In addition, the structure of the Job Network—a loosely affiliated Network of over 300 separate agencies—undermines the ability of government to ensure that standards are met, and proper processes followed, in the decisions and choices made by providers.95 While an emphasis on the coordination or education of providers could alleviate the fragmentation caused by geographical and noetic isolation, such measures have not yet been adopted. Studies have reported that individual job seekers are happier with the individualised service and personalised relationship that they can experience with case managers at a small Job Network agency, in contrast to their experience of the former CES.96 However, the flip-side of individualisation and flexibility is a loss of control over how things are done, and a lack of consistency in decision-making. Carney and Ramia have observed 'a loss of control over program quality'97 and the fact that 'services have become fragmented, disjointed, and beholden to uncoordinated program outcomes.'98

In these circumstances it is difficult to imagine that individual Job Network agencies know what each other is doing, let alone learn from each other's mistakes as these are corrected by external merits review. Indeed, an inquiry by the House of Representatives Standing Committee on Family and Community Affairs discovered that competitive tendering had undermined relationships between community agencies, which had hitherto involved the sharing of information, experience and resources.99 As well as undermining collegiality, the tender process results in reduced continuity and knowledge amongst employment service providers. As demonstrated by the last round of Job Network tenders, those who were awarded contracts last time will not necessarily have them renewed.100

Thus, the situation now is that decision-makers are scattered throughout a wide variety of competing organisations, each doing things in their own way, with significant numbers of agencies being replaced by inexperienced organisations following each tender round. This scenario stands in stark contrast to a 'traditional' state-centred bureaucracy where decision-makers were situated together in a single government department. In a bureaucratic environment decision-makers had the chance to build up at least some cohesive corporate knowledge, to learn from the bad decision-making of others, and to be trained and monitored by more experienced staff. The current fragmentation and resulting lack of continuity in decision-making by Job

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96 Carney and Ramia, above n 20.
97 Ibid 17.
98 Ibid 25.
100 Eardley, Abello and Macdonald, above n 1, 11.
Network agencies inevitably leads to inconsistencies—a feature which threatens the application of the rule of law in this area.101 More particularly, this fragmentation undermines the effectiveness of any normative impact which external merits review by the SSAT and AAT might otherwise have had. This is compounded by the restrictions on review of decisions under s 606 of the Social Security Act and the inability of the SSAT or AAT to remake Newstart Activity Agreements. This leaves less scope for tribunals to provide guidance to agencies about what agreements should look like. The likelihood that small private or community agencies will be less receptive to ‘normative’ guidance and administrative rule-making than government departments has a number of consequences. It increases the probability that the same types of errors will recur, thereby undermining the overall quality of decision-making, and placing the onus upon individual applicants to protect their own entitlements.

**Bifurcation of the decision-making process**

A further feature of the Job Network which undermines effective tribunal review is the two-stage process by which reviewable decisions under the social security law are reached. More specifically, the structure of the Job Network results in a ‘two-step’ decision-making process where responsibility for a decision is shared between a provider acting in a private sector setting, and a government employee acting in accordance with public law principles.

Providers are contractually responsible for recommending breaches when they decide a recipient has failed to fulfill their obligations, but it is actually Centrelink officers who make decisions about whether to apply breach penalties under the Social Security Act. These decisions are made by officers who don’t have any direct contact with the job seeker concerned, or any first-hand experience in the delivery of employment services.102 As Carney and Ramia have explained:

> It remains true that only Centrelink can authorise breach action or penalties. But it now operates more as a cipher; albeit an assiduous one in terms of seeking to satisfy itself of the correctness of the factual information supplied to it by the job network providers. The real centre of ‘action’ has arguably shifted to the service providers, who are considerably less publicly accountable. ... This trend represents a partial deregulation of the system, mainly in that the law now plays a less prominent role in the administration of breaches and rights review. This is consistent with the more universally applicable research finding that part of the changing pattern of welfare provision has been a shift in the mix between rules, law and discretion.103

Another Australian commentator has argued that, while officers of the Department make decisions under the social security law to impose breach penalties, it is the decision of the provider which seems to be being implemented.104 This bifurcation of the decision-making process between public and private agencies raises a host of questions about responsibility for bad decision-making, and the ability to hold decision-makers accountable via traditional mechanisms like external merits review.

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101 Freedland, above n 49, 104. Discussion about whether this is a good or a bad thing in the context of the delivery of employment services is beyond the scope of this article.

102 Carney and Ramia, 'From Citizenship to Contractualism', above n 2, 133.

103 Carney and Ramia, 'Contractualism, Managerialism and Welfare', above n 2, 70-1.

104 Tom Brennan, quoted in ibid, 71.
For instance, decisions to recommend the imposition of breach penalties will rarely be the result of a simple application of the rules to a given fact situation. Rather, the operative 'decision' may be an amalgam of choices and assumptions made by public and private sector agents with differing (even conflicting) motives and expectations. To further complicate matters, Job Network agencies make the choice to initiate breach action in the context of a personalised relationship with the job seeker. These choices cannot be described as unilateral administrative acts involving the application of defined rules or policies. As studies have shown, the choices made by Job Network agencies are not guided by 'rules' or even by government policy. They are made in the context of fluid relationships which will vary from agency to agency, and which will change over time.

Reviewing bad decision-making in these circumstances may be difficult for a merits review tribunal that is arguably not suited to scrutinising behaviour that occurs within the context of a personal relationship. Nor are administrative tribunals experienced in reviewing the multi-faceted series of choices that, in the Job Network context, lead to breach recommendations by providers.

The review process itself may also be complicated by the bifurcated nature of the decision-making process. In particular, there are likely to be conceptual difficulties in identifying the 'decision' under review, and in determining whether there is jurisdiction to review that decision. In terms of judicial review, the conduct of private providers leading to breach action by Centrelink officers is arguably reviewable under the ADJR Act.105 In terms of merits review, the jurisdiction conferred upon the SSAT and AAT is to review decisions made under the social security law. However, the final decision to impose a breach penalty may often not be the relevant or 'operative' decision.

For instance, the error that the applicant seeks to have corrected may have been the provider's decision to recommend breach action where the job seeker failed to turn up for an interview, without realising that there were circumstances beyond the person's control excusing them of the obligation to attend. The erroneous decision may be classified as the Centrelink officer's decision to impose a breach penalty without substantiating whether or not a breach had in fact occurred. Alternatively, the operative decision may be described as the provider's erroneous recommendation of the breach. Either way, in order to conduct effective merits review of the imposition of a breach penalty in these circumstances, the SSAT and AAT will need to look behind the 'decision' on review to examine the circumstances or choices that caused that decision to be made. In effect, the SSAT and AAT are reviewing two decisions made by two very different decision-makers, in different contexts.

Merits review under these conditions will presumably be slower and more expensive, and there may well be difficulty in gathering necessary evidence. Not only is the decision-making process more complex, but evidence must be gathered from two different sources—Job Network providers and Centrelink officers. The provision of

105 The activity of Job Network agencies in negotiating Agreements with job seekers, or in deciding to recommend breaches, may constitute 'conduct' within the meaning of s 6 of the ADJR Act. Arguably, this kind of activity constitutes steps or findings made in the process of reaching a final or operative decision under the Social Security Act—see Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321. See Owens, above n 17, 57-8 for a more detailed discussion of this issue.
information by non-government providers could be expected to be less reliable, in light of the reluctance of some private providers to comply with rules. The practices reported by researchers such as Considine arguably reflect a cultural attitude which would discourage active cooperation with external merits review processes, particularly if such processes were perceived to be potentially harmful to the interests of providers. This may be contrasted to the predominant culture within government agencies— that is, to facilitate the conduct of administrative review, even if the outcome may be adverse to the agency. The culture within government agencies arguably encourages participants to ensure that all relevant information is provided to a reviewing body.

Moreover, given the structure of the employment services market and the financial interests of providers, their ability to give impartial and comprehensive evidence to the SSAT and AAT is arguably compromised. From an agency perspective, having to become involved in merits review processes will no doubt cost time and money. This may make providers, many of whom who are reportedly already struggling to maintain viable businesses, less inclined to cooperate with Tribunal processes.

**Problems with record-keeping**

Clearly, the bifurcation of the decision-making process poses difficulties for the SSAT and AAT in getting to the heart of matters. These difficulties are exacerbated by bad record-keeping, which seems to be prevalent amongst Job Network agencies. A recent study by Carney and Ramia reports that Centrelink’s own documentation has diminished as it no longer has meaningful contact with job seekers requiring employment services. Therefore, in determining whether a recipient has complied with their obligations, Centrelink relies upon information provided by Job Network agencies. However, there are problems with the quality and quantity of the information provided. In terms of quality, the study reports that the information provided tends to be 'snapshot' descriptions of isolated events such as:

- Failure to reply to correspondence, or failure to attend an interview. The richer, contextual information about reasons, causes and extenuating circumstances relating to the event is not recorded to the same extent as previously.

In relation to quantity, it appears the requirement to record information on the computer system used by Centrelink is followed in a ‘patchy’ way by providers, who have a limited understanding of what the information is used for. The prevalence of bad record-keeping is highlighted in DEWR’s evaluation report. DEWR recorded that there were 97,700 breach recommendations between July 1998 to August 1999, but that 13% of recommendations were not followed due to

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106 See Considine, ‘Selling the Unemployed’, above n 2, 289–90.
108 See below n 119.
109 Carney and Ramia, above n 20, 17.
110 Ibid 18.
inadequate documentation by Job Network providers (plus 20% due to erroneous advice or misdirected correspondence), and another 34% because the client was able to establish a reasonable explanation.\footnote{111}

The high incidence of inaccurate and inadequate record-keeping by Job Network agencies undoubtedly leads to worse decision-making by Centrelink.\footnote{112} Moreover, it reduces accountability by making it increasingly difficult for the SSAT and AAT to conduct comprehensive review. In particular, it makes it difficult for a merits review tribunal to gather the information required to reach the correct or preferable decision in the circumstances of a particular case.

For instance, if an unemployed person's Newstart Allowance has been reduced for failure to comply with the terms of their Activity Agreement, the SSAT or AAT would need to consider whether the main reason for that failure was within the person's control, or whether circumstances preventing compliance were reasonably foreseeable.\footnote{113} The SSAT can ask the Secretary for further information about these issues,\footnote{114} however, it is unlikely that the Secretary or his or her delegates would be in a better position to access information than the Tribunal. The SSAT does have a general power to 'take evidence on oath or affirmation for the purposes of a review.'\footnote{115} However, the overuse of the SSAT's power to question agency staff as witnesses is arguably inconsistent with its requirement to provide a mechanism of review that is informal, economical and quick.\footnote{116} While the AAT may be able to summon private providers as witnesses or require them to produce documents\footnote{117} this delays the review process and increases the cost to each party.

Bad record-keeping and file management not only makes it harder to hold providers and Centrelink officers accountable for bad decision-making. If it continues to occur consistently, it will impede the ability of the SSAT and AAT to establish a coherent approach to the review of social security decisions. In particular, it will restrict the AAT's capacity to contribute to the development of a comprehensive body of social security case law. As one commentator predicted in 1997:

\begin{quote}
[W]ith a proliferation of private companies determining eligibility, there is a parallel lurch into a decentralised, 'pre-modern' welfare model, where decisions are arbitrary and decision-makers are unaccountable. Coordination and accountability problems were intense under Working Nation; this residual coherence and public-service orientation will disappear under the Real Jobs initiative.\footnote{118}
\end{quote}

**Cultural barriers and the normative effect**

The final feature of the Job Network which hinders the effectiveness of external merits review is the culture of non-government Job Network agencies. In particular, the

\begin{footnotes}
\footnote{111} Ibid 13.
\footnote{112} Carney and Ramia cite an example where the SSAT overturned a breach penalty after telephoning the Job Network provider to find that no attempt had been made to ascertain why a job seeker failed to attend an appointment—see Carney and Ramia, above n 32, 18-19.
\footnote{113} Social Security Act s 593(2A).
\footnote{114} Administration Act s 165.
\footnote{115} Administration Act s 164.
\footnote{116} Administration Act s 141.
\footnote{117} AAT Act s 40.
\footnote{118} Goodman, above n 9, 39.
\end{footnotes}
normative impact of SSAT and AAT decisions is diminished due to non-government agencies' lack of experience and understanding of administrative review tribunal processes. Moreover, agencies in the market-place are likely to be less focused on the results of appeals, and more concerned with their financial implications. The diminished normative impact of tribunal review is compounded by the fragmentation of the Job Network, described above. Reviewable 'decisions' are made solely by Centrelink officers, who inadvertently become intermediaries between the Tribunal and providers. Both factors exacerbate the distance and lack of communication between providers and the SSAT and AAT, thereby reducing the effectiveness of external merits review in checking abuses of power and improving the overall quality of decision-making.

The reluctance of providers to engage in external merits review processes is in some ways understandable, given the resource implications that these processes have for agencies. Studies report that many agencies are having trouble making the delivery of employment services a viable business. As one commentator has pointed out, 'the presence of individuals or bodies with direct economic interests under contracts cannot be ignored.'

119 Eardley, Abello and Macdonald, above n 1, 19; House of Representatives Standing Committee on Family and Community Affairs, above n 99, 41–3.
120 Murphy, above n 44, 239.
121 Koller, 'The Holes but not The Cheese', above n 63, 64.
122 Eardley, Abello and Macdonald, above n 1, 51.
123 Ibid 47.
124 Considine, 'Selling the Unemployed', above n 2, 283.
125 Ibid 292.

Of particularly serious concern is the tendency of non-government Job Network agencies to classify difficult job seekers as 'no longer requiring assistance' to avoid the bother of initiating formal breach processes. The widespread incidence of non-legal or even illegal behaviour by providers will be difficult for job seekers to prove and almost impossible to rectify in a context where effective merits review by the SSAT and AAT is subject to so many other impediments. Moreover, the tendency of non-government Job Network agencies to bend or break the rules is a clear indication that good decision-making by the SSAT and AAT will have little normative value.

Overall, the continued existence of external merits review is to be welcomed. In light of increasing penalties and the tightening of the activity test it is more crucial than
ever that people receiving unemployment benefits have access to some form of review of adverse decisions. As one commentator has put it:

In a system which actually withdraws basic income support as a penalty, it is critical that all safeguards work both efficiently and beneficially, as the system tends to assume guilt until innocence is proven.\(^\text{126}\)

However, the advent of the Job Network has clearly impaired the ability of merits review tribunals to provide accountability and promote public confidence in the system of employment services delivery. This is of particular concern in light of evidence indicating that errors in decision-making are occurring more frequently than before.\(^\text{127}\) The final section of the article explores some possible solutions to these problems.

**SOLUTIONS**

The above discussion demonstrates that the provision of accountability mechanisms in a deregulated environment is not straightforward. There have been a number of suggestions about how to improve accountability mechanisms where government services are contracted out, however, most of these are about making judicial review, rather than merits review, more available.\(^\text{128}\) Nonetheless, there are a few things which might be done to make review by the SSAT and AAT more effective, such as greater use of investigative officers or alternative dispute resolution (ADR) techniques, as seen in the NSW Administrative Decisions Tribunal or the French civil law system.\(^\text{129}\)

Yet before these options are explored, the more fundamental question is whether merits review by the SSAT and AAT can serve any useful purpose in a market-based system. That is, whether there is any role for tribunal review in a system where government functions are contracted out.

**The continuing existence of merits review**

Historically, tribunals have been established as a check on Executive power in the growing range of areas into which government decision-making has expanded following the rise of the welfare state. Now that the welfare state is receding, and its functions are being increasingly reclaimed by the private sector, administrative tribunals may find it harder to justify their existence.

The aim of tribunals such as the SSAT and AAT is to remind officials that they are under public scrutiny, and to provide a remedy against bad decision-making. In relation to the AAT specifically:

The underlying force behind the introduction of the [Administrative Appeals] Tribunal was not some sudden realisation that performance of the public sector could be improved but rather a wide public consensus on the undesirability of large parts of government activity going unregulated or unaccountable. ... Now that the nature of government is

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126 Goodman, above n 9, 31.
127 Carney and Ramia, 'Mutuality, Mead and McClure, above n 20, 13.
128 See, for instance, Arrowsmith, above n 52; Freedland, above n 49.
changing again, the rationale behind the Tribunal, and other review tribunals, comes into
question. 130
This view appears to be borne out by the Job Network experiment, which indicates
that simply leaving existing tribunal mechanisms to deal with radically restructured
systems of decision-making is ineffective.

There are two options in the face of this—to abolish external merits review
altogether, or to make adjustments to the existing review system in order to maintain
its effectiveness. The first option is clearly problematic. 131 This is particularly so in the
present social security system where there is really no other mechanism available for
ensuring accountability or enabling unemployed people to seek redress for
incompetent or unfair decision-making. Indeed, abolishing merits review tribunals will
not improve accountability unless a completely new mechanism is established.

It may be that, in the medium to long-term, hybrid public/private accountability
mechanisms should be developed to deal more effectively with the types of problems
that arise when essential services are delivered to the public by private providers.
Commentators such as Schoombee, Prosser and Arrowsmith have hinted at what these
models might look like. For instance, Prosser points to the role of utility regulators in
the United Kingdom which perform a variety of functions including enforcing rights of
compensation for individual consumers, mounting campaigns to ensure universal
access to facilities, advising government and industry, and developing codes of
practice. 132 Similarly, Schoombee points to the regulator/industry Ombudsman model
in place in the Australian telecommunications industry as a viable 'hybrid' model 133
while Arrowsmith simply advocates the abolition of any legal distinction between
public and private activity. 134

In the short-term, however, the most viable option is to capitalise on existing merits
review tribunals.

**Improving the effectiveness of merits review**

Focusing on the present social security system, a number of things might be done to
improve the effectiveness of the SSAT and AAT in conducting external merits review
of decisions involving Job Network agencies. Most obviously, the statutory restrictions
on the ability of the tribunals to conduct *de novo* review of Newstart Activity
Agreements could be removed. This would enable the SSAT especially to become more
experienced in, and exercise closer supervision over, the Agreement making process—
something which would seem appropriate for a specialist merits review tribunal.
Removing the requirement for SSAT applicants to explicitly state that they want to

130 Murphy, above n 44, 243.
131 Indeed, Professor Margaret Allars has argued that the civil right to merits review of welfare
decisions by the SSAT and the AAT should be constitutionally entrenched—Allars, above n
2.
132 Prosser, above n 36.
133 Hannes Schoombee, 'Contracting Out and its Legal Implications'(Paper presented at Law
Society of Western Australia, Contracting with Government—Legal and Practical Implications,
134 Arrowsmith, above n 52.
have their Agreement reviewed would also improve the accessibility of external merits review.\(^{135}\)

Other straightforward improvements relate to the administration of the Job Network system and the communication between different entities within the system, including the SSAT and AAT. For instance, there could be a better flow of information and better training of providers. Information sessions and/or regular meetings could be conducted by the SSAT and AAT or the Department—in regional and suburban locations—concerning the role and purpose of external merits review, and how to keep track of decisions and other legal developments in this area. This could be part of an organised national campaign to educate providers. This would make Job Network agencies more aware of what others were doing, and would hopefully have some peer review or normative impact resulting in better quality decision-making.

Perhaps more importantly, administrative adjustments could be made to improve the record-keeping practices of providers. Linking payment of fees to the fulfillment of comprehensive reporting requirements would presumably operate as an incentive for agencies to keep better records and ensure that these records are made available to Centrelink officers and external merits review tribunals. Enforceable requirements to keep proper records may also lead to better decision-making and behaviour by officers and providers, as it would highlight obvious deficiencies in decision-making processes. This would be reinforced by the inclusion of a term in Job Network contracts requiring providers to co-operate in, and facilitate, merits review processes whenever required.

The use of ADR techniques such as conferences or mediations may enable the SSAT to conduct more effective merits review in certain types of matters.\(^{136}\) For instance, if the SSAT was given full powers to review Newstart Activity Agreements, the use of ADR techniques may assist in providing a more appropriate forum in which to supervise the negotiation of Agreements between an unemployed person and their case manager. Greater use of these techniques by the SSAT or AAT in appropriate matters would also make the Tribunals more effective and responsive in addressing the types of problems which can arise in the context of a case management relationship. While SSAT hearing processes are already particularly informal, the underlying objectives of an adjudicative decision-making model differ from the fundamental purpose of mediation or conciliation. As Carney has pointed out:

> It can be argued that the relational rights characteristic of new welfare may not be entirely suited to being secured by determinative adjudication alone. New forms of (supplementary) legal process might be needed, such as mediation and other techniques. These have been (rightly) rejected as inferior to adjudication for traditional income security claims, but they may have something to contribute here.\(^{137}\)

This is not to say that merits review should be replaced by ADR mechanisms. Koller has raised the following concerns in relation to providing ADR processes as a replacement to independent external merits review:

\(^{135}\) Koller, 'The Holes but not The Cheese', above n 63, 64.

\(^{136}\) Note that the AAT has already implemented mediation and conferencing processes as either optional or compulsory steps in the review process—see AAT General Practice Direction.

\(^{137}\) Carney, above n 94, 35.
[An ADR] model can complement, but cannot replace, independent external review based upon legislative rights where fundamental income security is concerned. The model is appropriate where the matters in dispute concern quality or quantity of service delivery or matters such as a breakdown in communication. ... (But) it is important that a mechanism be developed to ensure that those making decisions in relation to the allocation of employment assistance resources between consumers are accountable to the individual consumers affected.

Rather, it should be possible to find a mix of adjudication and negotiation that best meets the needs of users. The SSAT and AAT should be empowered and encouraged to employ the appropriate mix of techniques that would be most effective in resolving particular types of matters. The appropriate balance between ADR and adjudicated techniques would hopefully avoid the pitfalls of adjudication, such as damaging relationships, promoting bureaucratic rigidity and advantaging the best resourced. At the same time, a proper balance would avoid the problems associated with pure ADR processes, such as inconsistency and an undermining of the rule of law.

The SSAT and AAT might also be assisted by the appointment of case management experts to assist in reviewing matters involving ‘private’, ‘negotiated’ decision-making and case management relationships. This mechanism is available in some state tribunals. For instance, the NSW Administrative Decisions Tribunal Act 1997 (NSW) enables the Administrative Decisions Tribunal (ADT) to appoint assessors to assist in the investigation or hearing of matters. In the Job Network climate, where case management is seen as a specialist activity, the use of independent experts within the merits review process could provide the SSAT and AAT with the expertise they apparently need to review and remake negotiated Activity Agreements. Experts could also be used to investigate particular matters in ways that might be difficult for a multi-member panel or a more formalised review tribunal. Having independent tribunal officers visiting providers' premises to question them about Agreement making or decision-making processes could enhance the efficiency of tribunal review by allowing the SSAT or AAT to gather evidence out of session. It could also improve communication between Job Network agencies and the Tribunals, increase the scrutiny and subsequent normative impact of external merits review, save time and costs, and enhance the quality of evidence used in conducting reviews.

These kinds of adjustments could be complemented by an approach to external merits review which regards the various choices and decisions that are made by providers and Centrelink officers, as part of a single process. Reconceptualising traditional perceptions of ‘the decision’ is clearly important in a jurisdiction where much decision-making occurs behind the scenes in the context of fluid, unregulated case management relationships.

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139 Carney, above n 94, 35-6.
141 Administrative Decisions Tribunal Act 1997 (NSW), Chapter 2, Part 5.
142 For instance, costs could be reduced by engaging assessors who are paid at lower rates than Tribunal members. Time could be saved by clarifying issues in a flexible manner, with Tribunal officers dealing directly with the sources of relevant information.
143 See, by way of contrast, Freedland, above n 49, 101.
CONCLUSIONS

Before the establishment of the Job Network, it was generally agreed that external merits review by the SSAT and AAT provided an effective and accessible means of redressing bad decision-making in the social security jurisdiction. In theory, external merits review remains available to job seekers seeking to appeal decisions to reduce or suspend their entitlements. In practice, however, there are questions about the effectiveness of SSAT and AAT review in the current ‘market bureaucracy’. This is primarily because contracted Job Network agencies now play a significant role in the provision of employment services and associated decision-making processes.

The hybrid public/private nature of the Job Network raises a number of hidden, structural barriers to effective merits review. Administrative review is less accessible and responsive to applicants in a climate where communication between government bodies and job seekers occurs through the intermediary of a private provider with little understanding of review processes and concepts of accountability. The fragmentation and bifurcation of decision-making processes make external merits review less efficient, makes it harder for the SSAT and AAT to arrive at the correct and preferable decision, and undermines the normative impact of tribunal decision-making. The combination of these factors makes it harder to hold decision-makers accountable, to build up a coherent jurisprudence in social security law, and to uphold the rule of law. This can only result in diminished public confidence in the administration of the unemployment benefits system.

As the Job Network experience highlights, it cannot be assumed that traditional public law mechanisms will operate in the same way in a private sector context—it seems clear that something is lost in the translation. The difficulties which administrative law mechanisms face appear to have been underestimated or overlooked in the rush to contract out essential government functions to the private sector. There are certain measures which might circumvent these impediments. In the short-term, SSAT and AAT review would be enhanced if mechanisms such as ADR and investigative officers were more readily available and utilised. In the medium to long-term, however, hybrid public/private remedies may need to be created to supplement or even replace existing processes. It may be time to start thinking more creatively about how best to provide citizens with an effective means of redressing bad decision-making when questions such as the livelihood of citizens are at stake.