STATUTORY AUTHORITY TO CONTRACT AND THE ROLE OF JUDICIAL REVIEW

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In the 2010 Garran Oration, James Spigelman, then Chief Justice of the New South Wales Supreme Court, seemed to welcome the recent drift in Australian public law to what he termed 'a positivist focus on textual analysis, both constitutional and statutory'.[1] The 'central unifying principle of administrative law', jurisdictional error, was based on the principles of statutory interpretation.[2] Even non-statutory executive power had been cut free from historical conceptions of the prerogative and subjected to 'a process of constitutional interpretation'.[3] This focus on interpretation allows public law to place greater emphasis on the 'way the institutionalised governance system generates power, rather than focusing … on the way in which power is constrained.'[4] The scope and legitimacy of judicial power depended on fidelity to its constitutional genesis, and particularly to 'the primacy which that very Constitution gives to the political processes of responsible government'.[5]

The processes of responsible government Spigelman was referring to emphasise the representative nature of the institutions of government: the parliament through the ballot box; the executive through responsibility to parliament; and the courts through enforcing the textual limits on executive and legislative authority. One role of judicial review therefore is to enhance the representative aspect of our political institutions by declaring and enforcing the limits of authority conferred on the executive by parliament and forcing the parliament to take responsibility for expressing those limits and the exercise of discretion they permit.

This paper explores this role of judicial review in the context of government contracting. The use of government contracting – both the decision to contract and decisions made under contract – has long generated concern as a means of implementing regulatory reform without the accountability of parliamentary and judicial oversight that accompanies the design, implementation and administration of statutory powers.[6] The responsibility *to* parliament for government contracting decisions has been gradually enhanced through increased obligations of disclosure, scrutiny and transparency[7] but the courts have generally declined to subject government contracting to judicial review in the same way as other exercises of government power.

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1 James Spigelman, 'Public Law and the Executive' (2010) 69 *Australian Journal of Public Administration* 345 at 346.

2 Ibid 349.

3 Ibid 351.

4 Ibid 347.

5 Ibid.

6 It has been over 30 years since Terence Daintith labelled government contracting as the 'new prerogative' ('Regulation by Contract: The New Prerogative' (1979) 32 *Current Legal Problems* 41). For a comprehensive examination of the law relating to government contracting in Australia see: Nick Seddon, *Government Contracts: Federal, State and Local* (Federation Press, 5th ed, 2013).

7 See the discussion below under Accountability and Responsibility.

This reluctance on the part of the Courts has been explained through classifying government contracting, along with other forms of government activity such as forming a corporation[8] or owning property,[9] as a 'private', as opposed to a 'public', activity: it involves a capacity enjoyed by other, private, legal persons, subject to 'private' law norms and means of enforcement; private individuals are subjected to obligations based on their consent rather than the coercive power of the state; and the decisions are, appropriately perhaps, removed from 'public' scrutiny of compliance with the norms and values traditionally associated with judicial review of government decision-making.[10] At least at the Commonwealth level, [11] the conclusion that government contracting largely lies beyond the reach of judicial review has been due to a focus on jurisdictional requirements such as the need for an exercise of statutory power (under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act)) – or that there be a 'matter' referable to the exercise of Commonwealth authority (to ground 'constitutional' remedies under s 75(v) of the Constitution and section 39B of the *Judiciary Act 1903* (Cth)). Decisions may be held to be non-reviewable if that exercise of authority does not affect rights, obligations or legally protected interests.[12]

In *Williams v Commonwealth*[13] the High Court limited the range of permissible Commonwealth government contracting and funding programs without statutory authorisation. In response, legislation was passed to provide statutory authority for a large number of government programs and other activities previously assumed to be authorised as within the executive power of the Commonwealth. *Williams* increases the responsibility *of* Parliament for approving the use of government contracting, though the degree of oversight that necessarily entails has been questioned.[14] This paper considers what effect this shift in the roles of parliament and the executive in relation to government contracting might have on the availability and role of judicial review. Does the change in the way that the power to contract is generated change the role of the Court, and to what extent can that be seen to enhance the representative aspect of our political institutions?

After setting out the doctrinal basis for the substantial exclusion from judicial review of government contracting decisions, this article considers the extent to which

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8 See e.g. the discussion of government owned corporations in Nick Seddon and Stephen Bottomley, 'Commonwealth Companies and the Constitution' (1998) 26 *Federal Law Review* 271.

9 E.g. *Re "Sydney" Training Depot Snapper Island Limited v Brown* [1987] FCA 377.

10 What constitutes Administrative Law values are, it is recognised, highly contested – see Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2012) 303-319. I am using the term here merely to suggest there is a substantive role and impact of judicial review through administrative law challenges.

11 The inapplicability of judicial review to government contracting rests on different doctrinal bases in different judicial review jurisdictions. In the UK the issue is approached through the public function elaborated in *R v Panel on Take-overs & Mergers: Ex parte Datafin plc* [1987] QB 815 (*Datafin*). The application of *Datafin* in Australia continues to generate considerable comment. For recent examples see Emilios Kyrou, 'Judicial Review of decisions of non-governmental bodies exercising governmental power: Is Datafin part of Australian Law?' (2012) 86 *Australian Law Journal* 1; Janina Boughey and Greg Weeks, '"Officers of the Commonwealth" in the Private Sector: Can the High Court Review Outsourced Exercises of Power?' (2013) 36(1) *University of New South Wales Law Journal* 316.

12 See the discussion below relating to *Griffith University v Tang* (2005) 221 CLR 99; [2005] HCA 7.

13 [2012] HCA 23; (2012) 288 ALR 410; (2012) 86 ALJR 713 ('*Williams'*).

14 See e.g. Amanda Sapienza, 'Comment: Using representative government to bypass representative government' (2012) 23 *Public Law Review* 161.

Williams and its legislative aftermath increase the scope for judicial scrutiny. Statutory authorisation may provide a surer basis for judicial constraint of the authority and exercise of contractual power. Other recent judicial review cases also seem to relax the requirement that a decision have an immediate effect on legally protected rights or obligations which might have ruled out judicial review of contracting decisions. There has been an expansion of the circumstances in which obligations of procedural fairness are imposed, a matter constituted or standing demonstrated. However, this paper concludes that the availability of judicial review remains limited, restricted to the authority to contract rather than regulating the content and enforcement of contractual obligations, and its impact is reduced by the utility of the range of remedies available. The role of alternative forms of accountability for government contracting remains important.

Once the courts remove reliance on the protection of rights and obligations in establishing the availability of judicial review they have to confront complex and uncertain questions about the role of judicial scrutiny. Recognising that judicial review may have only a limited role to play in providing accountability for government contracting decisions places that responsibility more squarely on other arms of government, holding parliament to account for the selection of contracting out of the set of regulatory tools available, and the executive for the means by which that choice is implemented.

I SOURCE OF EFFECT ON RIGHTS AND OBLIGATIONS

The need to identify the rights and obligations affected by a decision before subjecting the decision to judicial review was confirmed in *Griffith University v Tang*.[15] As has been well documented, and criticised,[16] the majority of the High Court[17] concluded that availability of review under the ADJR Act, which depends on whether a decision is 'made under' relevant legislation, requires:

> first, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment. A decision will only be "made ... under an enactment" if both these criteria are met.[18]

Thus the relevant statute must authorise decisions which either 'affect or alter existing rights or obligations' or 'from which new rights or obligations arise'.[19]

In the context of government contracting, it was suggested in *Tang* that any effect on legal rights and obligations may not be sufficiently derived from legislation:

> a statutory grant of a bare capacity to contract does not suffice to endow subsequent contracts with the character of having been made under that enactment. A legislative grant of capacity to contract to a statutory body will not, without more, be sufficient to empower that body unilaterally to affect the rights or liabilities of any other party. The power to affect the other party's rights and obligations will be derived not from the enactment but from such agreement as has been made between the parties. A decision to enter into a contract would have no legal effect without the consent of the other

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15 (2005) 221 CLR 99; [2005] HCA 7 (*Tang*).

16 See, for example, the list of articles set out in Mark Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1 at fn 6.

17 Gummow, Callinan and Heydon JJ.

18 *Griffith University v Tang* (2005) 221 CLR 99, 130-1 [89].

19 Ibid.

> party; the agreement between the parties is the origin of the rights and liabilities as between the parties.[20]

This approach reflected, if not expressly adopted, cases where the courts have been hesitant to use the ADJR Act to interfere with the contractual nature of any rights and obligations of the parties to a government contract.[21] But the conclusion in *Tang* drew 'support' outside of the ADJR Act context from requirements relating to identifying a 'matter' for judicial resolution. For a decision to give rise to judicial review in federal jurisdiction, it must give rise to a matter, or some 'immediate right, duty or liability to be established by the court dealing with an application for review'.[22] Thus, the reasoning adopted by the Court in *Tang* suggested that decisions relating to government contracts would not be subject to judicial scrutiny outside of the enforcement of the contract, even where the authority to enter into contracts is derived from legislation.[23]

There are, however, a number of contexts where judicial review relating to government contracting is arguably left open by the decision in *Tang*.[24]

In *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd*,[25] Gibbs ACJ stated:

> [t]here are four main ways in which the enforceability of a contract may be affected by a statutory provision which renders particular conduct unlawful: (1) The contract may be to do something which the statute forbids; (2) The contract may be one which the statute expressly or impliedly prohibits; (3) The contract, although lawful on its face, may be made in order to effect a purpose which the statute renders unlawful; or

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20 Ibid 129 [82].

21 E.g. *General Newspapers Pty Ltd v Telstra Corporation* [1993] FCA 473. For an application at the State level see *Khuu & Lee Pty Ltd v Corporation of the City of Adelaide* [2011] SASCFC 70, where the Full Court of the South Australian Supreme Court refused judicial review of a leasing decision by the Adelaide City Council, which was characterised as a commercial decision, rather than an administrative one. Special Leave to appeal the decision to the High Court was refused due to the 'the generality of the statutory power to grant a licence over community land' suggesting there was insufficient prospects of success (*Khuu & Lee Pty Limited v Corporation of the City of Adelaide* [2012] *HCATrans* 108 (11 May 2012)).

22 *Griffith University v Tang* (2005) 221 CLR 99*,* [90] citing *In re Judiciary and Navigation Acts* [1921] HCA 20; (1921) 29 CLR 257 at 265. Note that similar concerns are reflected in other elements of judicial review, including standing and the availability of prerogative remedies. For a discussion of the various ways that rights, duties and liabilities plays in the various elements of a judicial review action at the Commonwealth level see generally Daniel Stewart, 'Non-Statutory Review of Private Decisions by Public Bodies' (2005) 47 *AIAL Forum* 17.

23 For a discussion of the assumptions seemingly implicit in this use of 'matter' in limiting the availability of the ADJR Act see Aronson, M. above n 16; Daniel Stewart, '*Griffith University v Tang*, "Under an Enactment" and Limiting Access to Judicial Review' (2005) 33(3) *Federal Law Review* 525; Graeme Hill, 'Griffith University v Tang - comparison With Neat Domestic, and The Relevance of Constitutional Factors' (2005) *AIAL Forum* 19; Christos Mantziaris and Leighton McDonald, 'Federal Judicial Review Jurisdiction after *Griffith University v Tang*' (2006) 17 *Public Law Review* 22.

24 The possibility of judicial review of decisions prior to contracts being entered into was left open by the Full Court of the Federal Court in *General Newspapers*, above n 21, 173 (Davies and Einfield JJ). See also Anthony Cassimatis, 'Judicial Attitudes to Judicial Review: A comparative examination of justifications offered for restricting the scope of judicial review in Australia, Canada and England' (2010) 34 *Melbourne University Law Review* 1, and Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) 94.

25 (1978) 139 CLR 410.

> (4) The contract, although lawful according to its own terms, may be performed in a manner which the statute prohibits.

In each of these four ways the relevant statute may limit the enforceability of a contract. In each it is the statute which either provides the basis for any right or interest in the relevant statutory condition being adhered to, or imposes obligations on the entering into or performance of contracts. The statute operates to restrict the operation or enforceability of contracts entered into, but it doesn't necessarily establish, and in the process limit, the authority of the government to enter into contracts.

In *Australian Broadcasting Corporation v Redmore Pty Ltd*[26] the legislation establishing the ABC as a body corporate and conferring the capacity to enter into contracts also provided that the ABC shall not 'without the approval of the Minister, enter into a contract under which the Corporation is to pay or receive an amount exceeding $500,000'.[27] The question arose whether this requirement limited the authority of the ABC to enter into a contract, which would mean that any contract that in fact breached this condition was invalid. This was held to be a matter of statutory construction. The High Court held that the language of the statute, the extent to which third parties would be expected to know about and be affected by compliance with the requirement, and the availability of mechanisms other than judicial review for enforcing the statutory conditions led to the conclusion that breach of the condition was not intended to invalidate the contracts.

This distinction between limiting the authority to contract and limits on the way that authority is exercised was confirmed in *Project Blue Sky v Australian Broadcasting Authority*.[28] The High Court reinforced the role of statutory construction in determining whether the legislative intent was to render decisions made in breach of statutory conditions invalid, or of no legal effect. This involved looking not only at the statutory language but also the nature of the conditions and interests affected, consequences for third parties and the role of judicial review in achieving the regulatory objective of the statute as a whole. The majority in *Project Blue Sky* also recognised that even where there is no invalid exercise of statutory authority, the court may still remedy any unlawfulness through declaratory or injunctive relief. The prerogative remedy of prohibition may also be available.[29]

These decisions suggest that breach of statutory conditions on government contracts can be remedied through judicial review – if not through use of the ADJR Act at least through the availability of prohibition or equitable remedies. They suggest that statutory authorisation can impose conditions relating to any contractual agreement in at least three ways: by conferring legal authority to contract only in limited circumstances, breach of which invalidates any contract; by establishing distinct interests in the content or enforcement of any contracts without affecting the validity of any contracts in question; or by imposing conditions as an element of any

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26 (1989) 166 CLR 454.

27 Ibid 548.

28 (1998) 194 CLR 358 (*Project Blue Sky*).

29 See *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 where the High Court held that certiorari was not available to quash the issue of a report by a statutory body as that report did not affect the applicants' 'legal rights or liabilities'. However, the statutory power to issue the report was held to be conditioned by obligations of natural justice. The court issued a declaration to that effect, but also referred to the possibility of prohibition being available if the application had been brought in time to prevent any reputational effect upon the report's release. Whether similar remedies would have been available in the absence of statutory authority for the decision was left unclear: For a discussion of the doubts of Brennan J over any capacity to review in the absence of statutory authority see Aronson, above n 16, 18.

contractual relationship which arises. The invalidity of a contract can give rise to obligations to reconsider the issue, or prevent any acts that rely on the validity of the contract. Breach of conditions imposed by statute in the contracting context might, given sufficient standing, provide access to judicial remedies. It is only in the third scenario that judicial review, as distinct from remedies based on contract law, will not be available.

A statutory source of authority to contract therefore brings with it the possible imposition of statutory conditions whose enforcement depends on statutory construction. The consensual nature of any contractual obligations may support a statutory construction that imposes few conditions on the validity of government contracting decisions. However, it is not clear if it is possible to establish statutory authority to enter into contracts without imposing some conditions capable of judicial enforcement.[30] In *Plaintiff S157/2002 v Commonwealth*[31] the majority of the High Court reiterated the minimal requirements for any statutory authorisation: legislative authority must determine 'the content of a law as a rule of conduct or a declaration as to power, right or duty'[32] and sufficiently delineate the 'factual requirements to connect any given state of affairs with the constitutional head of power'.[33] A 'rule of conduct or declaration as to power, right or duty' might rule out an interpretation that does nott involve any of the three types of conditions referred to above. As cases like *Redmore* establish, statutory conditions that do not necessarily limit the validity of contracts entered into may still be considered 'rules of conduct' subject to declaratory or other forms of relief in appropriate circumstances. It remains uncertain whether it is possible to authorise the entry into contractual obligations without establishing limits to that authority.

It is in this context that recent developments which have expanded the need for, and use of, statutory authorisation for government contracting and other funding programs are significant.

II WILLIAMS AND THE NEED FOR STATUTORY AUTHORITY

A majority in *Williams*[34] held that the Commonwealth executive did not enjoy the power or capacity of a natural person to enter into contracts,[35] nor any authority under s 61 of the *Constitution* co-extensive with the subject matter of the legislative heads of power. The executive power of the Commonwealth was limited. It extended only to: the exercise of the prerogative powers solely reserved to the executive in right of the Crown; executive powers incidental to the administration of departments of state or to the execution of the laws of the Commonwealth; or the exercise of inherent authority derived from the character and status of the Commonwealth as a national government.[36] Otherwise statutory authority was needed.

Various judges in *Williams* accepted that the role of government in the expenditure of public funds was substantively different from consensual arrangements

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30 I am not concerned here with the circumstances in which the capacity to contract might be derived from elsewhere and referenced in the operation of legislation: e.g. *Neat Domestic Trading v AWB* [2003] HCA 35; (2003) 216 CLR 277.

31 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476; [2003] HCA 2.

32 Citing *The Commonwealth v Grunseit* (943) 67 CLR 58, 62.

33 *Plaintiff S157/2002* 67 CLR, 514 [102].

34 French CJ, Gummow and Bell JJ, and Crennan J.

35 Under the Commonwealth Government's National School Chaplaincy Programme ('the NSCP'), the Scripture Union Queensland ('SUQ'), a public company incorporated under the *Corporations Act 2001* (Cth), was contracted to provide chaplaincy services to State Primary Schools in Queensland ('the Agreement').

36 See e.g. French CJ at [4], [34]; Crennan J at [484].

entered into by non-government persons. Government contracts were powerful regulatory tools[37] which gave rise to a 'need to protect the community from arbitrary government action'[38] '[B]y contract the Commonwealth may fetter future executive action in a matter of public interest.'[39] It was not a question of whether there was 'interference with what would otherwise be the legal rights and duties of others'.[40] Whatever the capacity of the Crown, the Constitution placed limits on the authority of the Commonwealth executive to exercise that capacity.[41]

The requirement for legislative authorisation for many forms of Commonwealth government contracting was primarily based on the requirements of federalism. The roles of the states, in administration of Commonwealth government grants, and the Senate, as representative of state interests, had to be maintained.[42] However, several judgments also referenced the importance of the relationship between the executive and legislative branches of Commonwealth government in establishing the parameters of the authority to contract under the Constitution. Gummow and Bell JJ stated that reliance on just the *possibility* of statutory support would 'undermine the basal assumption of legislative predominance inherited from the United Kingdom'.[43] The responsibility of Ministers to Parliament is not sufficient to satisfy the needs of representative government, at least 'where an executive spending scheme has no legislative engagement for its creation or operation beyond the appropriation process' and where that appropriation process involves limited involvement of the Senate.[44]

Crennan J also recognised the rise of 'responsible government' in the sense of a government which is responsive to public opinion and the electorate as much as Parliament. However, she refers to the various forms of accountability beyond direct legislative implementation as permitting 'the ventilation, accommodation and *effective* authorisation of political decisions'.[45]

> The principles of accountability of the Executive to Parliament and the Parliament's control over supply and expenditure operate inevitably to constrain the Commonwealth's capacities to contract and to spend.[46]

The freedom to contract enjoyed by non-governmental juristic persons was not so constrained.[47]

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37 Ibid [38] per French CJ, citing Seddon, above n 6, 65.

38 Ibid, Crennan J at [521], Gummow and Bell JJ agreeing at [152]. Particularly as the capacity to legislate for more coercive measures under s 51(xxxix) that might be then permitted. See [521] per Crennan J; [581] per Kiefel J; but cf. French CJ at [63] discussing the extent to which the executive power to undertake inquiries could authorize legislation compelling the giving of evidence outside of Commonwealth legislative competence.

39 Ibid [152] per Gummow and Bell JJ.

40 *Williams v Commonwealth* (2012) 248 *CLR* 156, [150] per Gummow and Bell JJ. See [151] per Gummow and Bell JJ, drawing comparisons with *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 51; [21] and [38] per French CJ; [200] – [203] per Hayne J; [577] and [595] per Kiefel J.

41 Capacity is used here to suggest the inherent power of the body to enter into the contract in question, rather than questions of disability or competence. See further the discussion in *Williams v Commonwealth* (2012) 248 *CLR* 156 at [200] – [203] per Hayne J.

42 See the discussion in Daniel Stewart, '*Williams v Commonwealth* and the shift from responsible to representative government' (2013) 72 *AIAL Forum* 71.

43 *Williams v Commonwealth* (2012) 248 *CLR* 156, [136].

44 Ibid [136].

45 Ibid [516] emphasis added.

46 Ibid [516].

47 Ibid.

Similarly Kiefel J, in also refuting an unlimited authority to contract, referred to notions of Ministerial responsibility as establishing the relationship between Parliament and the Executive. This required only that the scope of Commonwealth executive power be susceptible of control by statute. Parliament could therefore oversee executive action through the possibility of disapproval as well as positive authorisation.[48] On this view the potential influence or impact of the executive action in question is not sufficient in itself to invoke representative concerns.

These various judgments of the majority reflect a concern to subject government contracting to parliamentary scrutiny due to representative concerns rather than the need to protect individual interests in the contracting process. There is no direct reference to the role of judicial scrutiny. The references by Gummow and Bell JJ to the need for parliamentary engagement with the 'formulation, amendment or termination' of expenditure programs, or Crennan J's references to a parliamentary process of 'scrutiny and debate'[49] and the need for 'some details about the policy being authorised'[50] are unlikely to indicate justiciable criteria by which the adequacy of the legislative process could be judged. Indeed there is little in *Williams* that suggests any minimal content to the procedure or substance of statutory authorisation of government contracting.

As part of the legislative response to the *Williams* decision, the Commonwealth Parliament amended the *Financial Management and Accountability Act 1997* (Cth) (FMA Act).[51] Section 32B was introduced to provide that the 'Commonwealth has power to make, vary or administer the arrangement (which includes contracts, agreement or deed) or grant, as the case may be, subject to compliance with this Act, the regulations, Finance Minister's Orders, Special Instructions and any other law.' By expressing the conferral of power to contract as subject to compliance with other provisions, this new section raises the question of whether non-compliance affects the

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48 Ibid [579].

49 Ibid [532].

50 Ibid [531].

51 For a discussion of the legislative response to *Williams* see Amanda Sapienza, 'Comment: Using representative government to bypass representative government' (2012) 23 *Public Law Review* 153, 161. Note that the legislative response has also involved providing statutory authority for the incorporation of government-owned corporations. The *Financial Framework Legislation Amendment Act (No. 2) 2013* (Cth) amended the FMA Act to insert s 39B to (according to the Explanatory Memorandum at 1), authorise the Commonwealth [through the Finance Minister] to form or participate in forming companies and to acquire shares in, or become a member of a company, so long as the proposed company is specified in the *Financial Management and Accountability Regulations 1997* (FMA Regulations) and the objects or proposed activities of the company are specified in the Regulations. The Explanatory Memorandum accompanying the Bill also provides: 'The Commonwealth has always believed and still believes that it may, without legislative authority, form or participate in the formation of a company and acquire shares in or become a member of a company to carry out activities within a head of legislative power. However, in the interests of abundant caution following the High Court's decision in *Williams v Commonwealth* [2012] HCA 23 (which involved argument about the outer limits of Commonwealth executive power), the proposed amendments are designed to put beyond any argument the capacity of the Executive Government to form or participate in the formation of companies.' These decisions are not reviewable under the ADJR Act. The explanatory memorandum justified this as follows: 'Decisions under the proposed amendment to the FMA Act to form or participate in forming companies would be policy decisions regarding how the Commonwealth organises its bodies and governance arrangements. These decisions would not be administrative in nature and would not impact upon the interests of an individual. Accordingly, it is appropriate to exempt decisions under the proposed section 39B of the FMA Act from review under the ADJR Act.'

validity of any contracts entered into or gives rise to other forms of enforcement.[52] Under the approach adopted in cases following *Project Blue Sky*, we can speculate that the many and varied nature of the obligations referred to in s32B, the difficulties of establishing whether these obligations have been complied with, and the impact of any uncertainty arising from the potential invalidity that might arise from non-compliance would combine to make it unlikely that the 'purpose of the legislation' would be that the intended consequence of breach is invalidity.[53]

However, there is another possible textual limit on the capacity to contract. Section 32B grants power to make or administer the arrangement or grant where directly specified or 'for the purposes of a program specified in the regulations'.[54] The description of the program is then specified in amendments to the regulations: eg.

> 407.013 National School Chaplaincy and Student Welfare Program (NSCSWP)
>
> Objective: To assist school communities to support the wellbeing of their students, including by strengthening values, providing pastoral care and enhancing engagement with the broader community.

The authority to enter into government contracts in s 32B therefore seems to limit the authority to contract in various ways including 'for the purposes of a program.' While it is not clear how 'purposes of a program' will be identified, they could be interpreted as denying the authority to enter into contracts for other purposes. The objective which accompanies the program title in the regulations, though broad, may provide a basis to establish limitations on the conferral of authority on which judicial review could proceed. Alternatively, it is possible that the purposes of a program can be identified by other extrinsic material including guidelines establishing the operation of the program, leaving the question of whether compliance with those guidelines may also go to the authority to contract or otherwise establish conditions subject to judicial review.

The FMA Act and *Commonwealth Authorities and Companies Act 1997* (Cth) are set to be replaced by the *Public Governance, Performance and Accountability Act 2013* (Cth) (PGPA Act) by July 2014. There is no equivalent of s 32B conferring authority to enter into contracts.[55] Provision of authority for government contracting is

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[52] Note that the ADJR Act was amended to ensure the new authority to enter into contracts and make grants under the FMA Act were not subject to review under the ADJR Act (see Schedule 1, s 1 *Financial Framework Legislation Amendment Act (No 3) 2012*. However, the Explanatory Memorandum for the amendments states that review under s 75 of the *Constitution* and s 39B of the *Judiciary Act 1903* would still be available (*Financial Framework Legislation Amendment Bill (No3) 2012, Explanatory Memorandum*, 5).

[53] For some consideration of the impact of the FMA Act on government contracts see Seddon, above n 6, ch 8.

[54] *Financial Management and Accountability Act* (1997) section 32B(1)(b)(iii).

[55] There is an equivalent to s 39B (s 85 PGPA Act) which establishes statutory authority for the incorporation of government-owned corporations (see discussion in fn 51 above). Section 71 of the PGPA Act provides that 'A Minister must not approve a proposed expenditure of relevant money unless the Minister is satisfied, after making reasonable inquiries, that the expenditure would be a proper use of relevant money.' But it is unlikely that this is intended to effect a general authority to contracts or merely, as s 44 of the FMA Act at the date of the decision in Williams was held to do, goes to the 'prudent conduct of financial administration, not to the conferral of power to spend that which is to be so administered.' (*Williams v Commonwealth* (2012) 248 *CLR* 156, [103]).

therefore likely to be set out in rules or other subordinate legislation.[56] It is not clear what form these rules will take and whether program guidelines or other details will be included.

III PROCEDURAL FAIRNESS BEYOND RIGHTS, INTERESTS AND LEGITIMATE EXPECTATIONS

In *Tang* the Court did not have to consider whether there was a breach of natural justice, but only whether any such obligation was created or affected by a decision 'under an enactment' for the purposes of the equivalent of the ADJR Act. The court held that any obligations stemmed from the consensual nature of the relationship between the university and its student. The university's academic misconduct policies and processes for appeals were not issued as statutes, and hence decisions made under them did not involve exercises of statutory authority.[57] Any expectations of compliance that might have arisen from the policies and which, if breached, might have resulted in unfairness unless the student was notified and given a chance to respond, might therefore have also altered the content of any natural justice obligation. However, it did not alter the non-statutory source of any such obligation.[58]

There remains considerable uncertainty over when natural justice will be implied as a contractual term, either directly or as an incident of integrity or good faith.[59] Similarly the extent to which natural justice will be implied in the exercise of executive power under s 61 of the *Constitution* remains to be explored. However, the requirement after *Williams* that the power to enter into contracts be authorised by statute means obligations of natural justice may arise as matter of statutory implication in considering whether to enter into contract.

The implication of natural justice has often been framed as arising from the statutory conferral of a power to destroy, defeat or prejudice a person's rights, interests or legitimate expectations is conditioned by obligations of natural justice.[60] However, it is now clear that an effect on rights, interests or legitimate expectations is sufficient, but not necessary, for natural justice obligations to arise. In *Saeed v Minister for Immigration and Citizenship,*[61] for example, the conferral of a legislative privilege, in that case eligibility for a skilled migration visa, gave rise to natural justice obligations where the Minister had a duty to consider the application for a legislative privilege, the legislative privilege had to be granted once the Minister was satisfied that the legislative criteria had been met, and the criteria in question related to considerations personal to the applicant. The question remained whether an exercise of discretion in considering the conferral of a statutory benefit (such as the entry into a contract) could give rise to obligations of natural justice.

That question arose in *Plaintiff S10/2011 v Minister for Immigration and Citizenship.*[62] *S10* involved various dispensation powers under the *Migration Act 1958* (Cth) allowing otherwise non-qualified applicants to be considered for a visa. The dispensing powers were expressly conditioned only on the Minister being satisfied that

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56 See s 52 (which states: 'The rules may prescribe matters relating to the commitment or expenditure of relevant money by the Commonwealth or a Commonwealth entity') and Part 4-1 of the PGPA Act.

57 See Aronson, above n 16, 15.

58 See discussion above around footnote 15.

59 See generally discussion in Aronson and Groves, above n 24, 487.

60 See *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319; [2010] HCA 41 ('*M61*'), referring to *Annetts v McCann* [1990] HCA 57; (1990) 170 CLR 596, [74].

61 [2010] HCA 23; (2010) 241 CLR 252.

62 [2012] HCA 31; (2012) 86 ALJR 1019; (2012) 290 ALR 616 (*S10*).

conferring the benefit in question would be in the public interest, they had to be exercised by the Minister personally, and there was no duty on the Minister to consider their exercise. *S10* involved a number of challenges to the refusal by the Minister to consider exercising these dispensing powers after departmental officers had determined the cases did not meet Ministerial guidelines.

The majority of the High Court[63] did not accept the submission that the department's preliminary determination was merely an inquiry based on the executive power of the Commonwealth, and given it had no direct effect on the rights, interests or legitimate expectations of the applicants it was argued not to be subject to natural justice considerations. They regarded the 'measure of relaxation of what otherwise would be the operation upon non-citizens of the visa system' – in this case allowing further consideration of their case by the Minister – was enough to attract the requirements of natural justice. While doing so, the majority finally rejected use of the term 'legitimate expectations' when discussing the implication of natural justice obligations.[64] They accepted Brennan J's statement in *Kioa* that procedural fairness attached to any exercise of statutory power which was apt to affect any interest, whether it be a legal right or otherwise, including 'regimes for the regulation of social interests' and the provision of 'privileges and benefits at the discretion of Ministers'.[65] Thus in *S10* the substantive power involved a beneficial relaxation of the requirements that otherwise had to be overcome before the prohibition upon entry and continued presence in Australia could be lifted. By not considering whether to exercise the statutory power in question the Minister denied the applicant that benefit. This meant that the applicants had a sufficient interest to give rise to an obligation of natural justice.

However, the majority also held that the implied obligation of procedural fairness in the exercise of the dispensing powers was excluded by the intended operation of the legislation. The majority pointed to the 'distinctive nature of the powers conferred on the Minister (as personal, non-compellable, broadly defined "public interest" powers)', where the personal circumstances of the individual applicant are not a mandatory relevant consideration, were previously taken into account in unsuccessful attempts to secure a visa, and the subject of both merits and judicial review.[66]

The majority's rejection of the need to characterise the nature of the power as affecting rights, interests or legitimate expectations before it is possibly subject to natural justice obligations[67] means that conferral or denial of a privilege in the exercise of legislative authority, such as entering into a contract or grant, could therefore also give rise to obligations of natural justice. But the statutory setting in which the decision took place is crucial. The lack of any statutory duty to consider the decision, the possibility of refusing to consider a decision without regard to the circumstances of the individual case, and the availability of alternative avenues for participation provided prior to the decision in question may together mean that any participation obligation is intended to be excluded.

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63 Gummow, Hayne, Crennan and Bell JJ.

64 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* [2012] HCA 31, [65]: 'It should, however, first be noted that for the reasons given in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* by McHugh and Gummow JJ, Hayne J and Callinan J, the phrase "legitimate expectation" when used in the field of public law either adds nothing or poses more questions than it answers and thus is an unfortunate expression which should be disregarded.' Note however that it is not clear how any legitimate expectation had been denied in the circumstances presented given the guidelines issued by the Minister had been followed.

65 Ibid [66], citing *Kioa v West* (1985) 159 CLR 55, 616-17, 619; [1985] HCA 81.

66 Ibid [100].

67 Ibid [66].

The nature of the interests affected would also be considered as part of any ameliorating statutory context. However, the mere characterisation of the decision as being private in nature, or having an effect on legal rights only due to the consensual submission of the parties to the contract, would seem unlikely in themselves to be sufficient to prevent any natural justice obligations arising. Considerations personal to individuals utilised as part of the assessment process leading to the entry into contracts may have to be disclosed.

Government contracting decisions such as those now authorised under the FMA Act typically involve guidelines outlining the elements of the funding programs, including the circumstances in which contracts might be issued and the intended content and enforcement of contractual obligations. In *S10* the preliminary assessment of applications carried out by departmental officers was conducted on the basis of guidelines issued by the Minister. Only applicants who were assessed as meeting those guidelines were put before the Minister for consideration. Any unsuccessful application was therefore 'not considered' by the Minister. French CJ and Kiefel J point out[68] that any denial of procedural fairness in the application of the guidelines will mean that there has been a denial of procedural fairness in 'connection with' the decision not to exercise the dispensation power. For the majority, however, any obligation of natural justice adhered to the substantive power conferred by legislation and there was no need to characterise the source of power and nature of the interests affected by any preliminary assessment.[69] They stated 'the assessment processes required by the Minister under the guidelines were not divorced from the exercise of authority conferred by statute'.[70] The guidelines did not in themselves create or ameliorate any natural justice obligations distinct from those that arose under the statute authorising the dispensing powers in question.

In *M61*, in contrast, the High Court held that considering whether to allow a dispensation similar to that in *S10* was itself authorised by legislation, in that case largely because such consideration prolonged the detention of the applicants. Guidelines issued by the Minister in that case were held to form part of the consideration by departmental and contracted officers under that statutory authority and hence, if departed from, may have added to the content of any natural justice obligations. In the context of government contracting, the absence of any clear legislative separation in the FMA Act between the consideration of the exercise of statutory authority to enter into contracts and the exercise of that power means guidelines will likely be interpreted as setting out the intended basis on which the authority to contract will be exercised.

There are therefore a number of ways in which guidelines might affect any obligation of procedural fairness that might arise in relation to government contracting. The guidelines might lead to the obligation of natural justice being implied as a contractual term but this is subject to the actual terms of any contract entered into. Depending on how the authority to contract is expressed in future legislation they might themselves be considered an exercise of statutory authority, although their generalised, legislative nature and their likely context would likely suggest an intention to exclude any natural justice obligations. Finally the guidelines, as 'not divorced from the exercise of' statutory power to enter into the contracts, the denial of which could be

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68 Ibid [48] citing *Re Yaa Akyaa and Rita Kufo v The Minister for Immigration and Ethnic Affairs* [1987] FCA 137 (Gummow J).

69 Ibid [93].

70 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* [2012] HCA 31, [93].

sufficiently unfair,[71] might extend the content of any natural justice obligation implied in the exercise of the statutory power to contract.

The extent of any natural justice obligations involved in the exercise of statutory authority to enter into a contract is therefore highly uncertain. An individual requesting a contract may have to have an opportunity to participate, but this may be satisfied through an application process and compliance with any reasonable expectations produced through application of the guidelines. The lack of any statutory obligation to consider contracting with particular individuals and the broad criteria applicable suggests that the content of any such obligation could be minimal.

IV REMEDIES, STANDING AND JURISDICTION

The majority in *S10* agreed with Brennan J in *Kioa* that 'the interest which tends to attract the protection of the principles of natural justice may be equated with the interest which, if affected, gives "standing" at common law (and, one might add, in equity) to seek as public law remedy.'[72] They added:

> the term "standing" is but "a metaphor to describe the interest required, apart from a cause of action as understood at common law, to obtain various common law, equitable and constitutional remedies". Further, in federal jurisdiction, questions of standing are subsumed within the constitutional requirement of a "matter".[73]

A 'matter' has been defined as requiring 'some immediate right, duty or liability to be established by the determination of the Court.'[74] As suggested by *S10*, conferral of statutory authority to confer a benefit on the applicant, even if it does not amount to a right, duty or liability, could still require that an opportunity be given to participate in the decision. Those owed that opportunity would have standing to challenge its denial, and a matter would arise in which it the court can declare the duties and liabilities associated with the exercise of statutory authority.

Even where mandamus and certiorari are denied due to the absence of any obligation to consider an exercise of statutory power[75] declaratory relief may still be available. In *M61* the Court accepted that a declaration would have foreseeable consequences for the parties (namely that the government would likely act to correct any defect identified by the Court) and that each plaintiff had a 'real interest' in raising the questions that any such correction would bring.[76] However, it is not clear why the criteria adopted in *M61* would not be likely to apply in most cases in which a declaration was sought challenging a government decision. The majority also stated there was considerable public interest in procedural fairness requirements being observed, but the declaration went further to include reference to the error of law committed. Tran has suggested that the declaration would be sufficient to resolve the 'matter' before the court, and in particular determine the authorisation of detention

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71 See *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1; [2003] HCA 6.

72 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* [2012] HCA 31, [68].

73 Ibid [68].

74 *In re Judiciary and Navigation Act* (1921) 29 CLR 257, 264.

75 See *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441, 461 [48]; [2003] HCA 1 and *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319, [100].

76 Ibid [103].

which resulted from the exercise of power in question.[77] Therefore it might have been considered that the declaration was sufficiently connected with the clear effect on rights (namely detention) in issue in the matter. None of the judgments in *S10* had to consider the issue of whether a declaration could issue although presumably remedying a breach of natural justice would have been sufficient.[78]

It is clear that matters involved with the negotiation or enforcement of contracts can also give rise to a matter within federal jurisdiction. In *LNC Industries v BMW (Australia)*[79] the High Court accepted that enforcement of a contract can involve a matter arising under Commonwealth legislation where the subject matter of the contract exists as a result of that legislation. This was taken further in the recent decision of *Edwards v Santos Ltd*[80] where the High Court was prepared to issue a declaration interpreting the meaning and application of statutory provisions which only affected the willingness of the parties to enter into a contract rather than impacting on current rights and obligations. Therefore, after *Edwards*, interpretation of a Commonwealth statute might be sufficient to give rise to a matter if it could have an effect on the negotiations leading to the entry into a contract. Commonwealth legislation that limits the authority to enter into contracts would provide the necessary link with federal jurisdiction and enable anyone sufficiently interested in the content of those contracts to have standing to challenge. Breach of statutory conditions that do not necessarily condition the authority to enter into the contact but which might affect the manner of their exercise would also seem to be sufficient to give rise to a 'matter' determined by the grant of a declaration.

This conclusion is also supported by the finding in *Williams* that someone who was affected by the performance of the funding agreements in a way distinct from the community at large also had standing to challenge their constitutional validity. All of the judges except Heydon J agreed with the conclusion of Gummow and Bell JJ that standing was established to challenge the validity of the contractual agreements and the making of payments under it.[81] However, Gummow and Bell JJ avoided detailed consideration of the question, relying on the standing of any state to challenge 'the observance by the Commonwealth of the bounds of the executive power assigned to by the Constitution'.[82] It appears that the grant of standing was therefore based on the acceptance by the Commonwealth of the plaintiff's standing to challenge funding arrangements which affected the plaintiff's children while they attended the school and which continued in operation at the time proceedings were commenced. Only Heydon J examined this point at any length, concluding that the direct involvement of the chaplains in the applicant's children's school, funded, at least in part, by the Commonwealth, was sufficient to give rise to a special, if non-material, interest in the Agreement.[83] The funding agreement was therefore subject to challenge due to the direct involvement of the plaintiff in the activities funded by the agreement. How far that involvement might include other third parties disgruntled with the awarding, or possibly non-award, of contracts was not considered.

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77 Christopher Tran, 'The Fatal Conundrum of No-Consideration Clauses after Plaintiff M61' (2011) 39 *Federal Law Review* 303, 319-320.

78 See also *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

79 (1983) 151 CLR 575.

80 [2011] HCA 8; (2011) 242 CLR 421.

81 *Williams v Commonwealth* (2012) 248 CLR 156, [112] per Gummow and Bell JJ (French CJ at [9]; Hayne J at [168]; [475] per Crennan J; [557] per Kiefel J agreeing).

82 Ibid [112].

83 Ibid [327]-[331].

V ACCOUNTABILITY AND RESPONSIBILITY

One of the aspects of the shift to statutory interpretation as the basis for judicial review identified by Spigleman was the limits it imposed. He stated:

> The constitutional doctrine of the separation of powers is a two-way street. Indeed, one of its most important constraints is on the judiciary. … [T]here is a fundamental differentiation between matters which are properly subject to the exercise of judicial power and the matters which must be subject to the institutions of political accountability.[84]

In other words, the availability of judicial review is appropriately subject to a consideration of the appropriateness of other forms of political accountability. The role of any judicial review of government contracting therefore should recognise that the Parliament as an institution also provides various forms of scrutiny and transparency provided by parliamentary processes.

As this article has attempted to demonstrate, the shift to statutory authority for government contracting brings with it increased possibilities of judicial review. Prior to this shift, the Administrative Review Council, in its most recent report *Federal Judicial Review in Australia*,[85] suggested that extending the availability of judicial review of government commercial or non-statutory decisions was unlikely to significantly increase accountability for government action.[86] The ARC recommended that the scope of review under the ADJR Act be extended to include review otherwise available under s 75(v) of the *Constitution*, ie where constitutional writs are sought against an officer of the Commonwealth.[87] The ARC recognised that this would leave the development of judicial review of non-statutory power to the courts but 'grounds of review would be limited, and remedies likely to be ineffectual'. The polycentric nature of many government programs means that 'a finding that a particular decision not to give a grant to a person was invalid is unlikely to lead to the money being granted to that person'.[88] In others the urgency of payment or widespread eligibility will mean judicial review remedies are unlikely to be particularly useful.[89] The ARC also pointed to the range of other accountability mechanisms applied to commercial decisions of government, along with concerns about the flexibility, timeliness and cost-effectiveness of having to go through the legislative process. They recognised however that, given that constitutional review remained available, there were advantages of also providing for the procedures and remedial flexibility available under the ADJR Act.

In rejecting any suggestion that opportunities for judicial review should be increased, the legislative response to *Williams* included a provision excluding decisions made under the new and amended provisions of the FMA Act from review under the ADJR Act.[90] The explanatory memorandum to the *Financial Framework Legislation Amendment Act (No 3) 2012* states that:

> [e]xempting decisions made under [the new provisions of the FMA Act] would ensure that the status quo is maintained. Importantly however, the guaranteed right of review

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84 Spigelman, above n 1, 350.
85 Administrative Review Council, *Federal Judicial Review in Australia, Report No. 50,* 2012.
86 Ibid 89-91.
87 Ibid 77.
88 Ibid 88-89
89 Ibid 89
90 See footnote 52 above.

> under section 75 of the Australian Constitution, and review under section 39B of the Judiciary Act 1903, would still be available.[91]

The cases discussed in this paper suggest that review under s75(v) and s39B might indeed be possible, though the extent of that review is far from clear. While on one view of *Tang* review of Commonwealth government contracting under the ADJR Act might have remained limited despite the shift to statutory authority, in other avenues of review the necessity for a non-consensual effect on rights and obligations is perhaps not as crucial.

The cases analysed above demonstrate how the availability of judicial review of an exercise of statutory authority involves a process of construction: the capacity to contract may be limited through interpretation of the purposes of the relevant program; the obligation of procedural fairness arises through statutory implication, excluded through inconsistency with the intended operation of the legislation; jurisdiction hurdles associated with standing and matter requirements can (sometimes at least) be overcome without resorting to contractual remedies through demonstrating how questions of statutory interpretation can have an individual effect. Therefore, the terms and context of statutory authority to contract may indicate that there are judicially enforceable public law limits to the exercise of government's contracting powers – the existence and nature of such limitations determined through the principles of statutory interpretation.

One of the interesting questions for the availability and grounds of judicial review that will likely arise in the construction of statutory powers to contract is the role and significance of alternative forms of accountability. Breach of the statutory provision in *Redmore* did not result in the invalidation of the contract because of the uncertainty and adverse impact on third parties that would result and, importantly, the availability of other forums of accountability to scrutinise compliance with those terms and encourage their compliance. Similarly, the reasons for the exclusion of any obligation of procedural fairness in *S10* included the role of previous opportunities for participation through merits and legality review that was provided for in the statutory scheme.

In *Federal Commissioner of Taxation v Futuris*[92] the majority of the High Court[93] held that judicial review of breach of a statutory provision may be precluded through a no-invalidity clause, at least where the jurisdiction of the court was premised on the existence of a jurisdictional error. By expressly setting out the consequences of breach of any statutory conditions, something that in *Redmore* or *S10* the court had to imply, the legislature was able to effectively exclude judicial review. But it has been suggested that it was possible to limit the general availability of judicial review of statutory conditions because there was an alternative basis for scrutiny of the lawfulness of the decision.[94] In comparison, in *Neat Domestic Trading v AWB*,[95] where the question before the court was whether the decision in question was subject to statutory authorisation at all, the Court was willing to recognise the incompatibility of judicial review with the alternative forms of accountability built into the regulatory scheme. The availability of judicial review depended upon its perceived role in enhancing the perceived role that judicial review could play in enforcing statutory intention.

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91 *Financial Framework Legislation Amendment Bill (No. 3) 2012 Explanatory Memorandum,* 5.

92 [2008] HCA 32; (2008) 237 CLR 146.

93 Gummow, Hayne, Heydon and Crennan JJ, Kirby J agreeing in part.

94 See Leighton McDonald, 'The Entrenched Minimum Provision of Judicial Review and the Rule of Law' (2010) 21 *Public Law Review* 14.

95 *Neat Domestic Trading v AWB* [2003] HCA 35; (2003) 216 CLR 277.

In *Zheng v Cai* it was stated:

> [i]t has been said that to attribute an intention to the legislature is to apply something of a fiction. However, what is involved here is not the attribution of a collective mental state to legislators. That would be a misleading use of metaphor. Rather, judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws.[96]

This reliance on the constitutional interaction between the three branches of government was relied on in *S10* to imply obligations of procedural fairness as a principle of statutory construction. Other grounds of review which can give rise to jurisdictional and other errors, including requiring exercises of discretion to be reasonable, are similarly grounded in 'the true construction of the statute'.[97]

If judicial review reflects the relationship between the arms of government then the question arises whether a different standard of review is implied depending on whether the decision in question involved statutory or executive power. It is not clear whether similar access to judicial review might not have been available had the authority to enter into contracts remained based on the executive power under s 61 of the *Constitution*.[98] The courts may interpret s 61 of the *Constitution* as incorporating requirements of procedural fairness, or reasonableness, or other grounds of review more usually founded on statutory implication. The principles of constitutional and statutory interpretation may lead to similar results. In both the issue is how the process of interpretation, and the limits to power that process generates, affects the interaction between the three arms of government. Does the availability of judicial review of government contracting decisions serve to enhance that interaction through increasing the accountability of the executive to parliament?

Government contracting is subject to many forms of accountability. The ordinary law of contract applies (with some modification to take into account the nature of the government party, such as limits on the ability to fetter statutory discretionary powers[99] and implied obligations of good faith subject to express contractual restriction).[100] There are general government requirements relating to financial supervision and auditing.[101] The *Ombudsman Act 1976* (Cth)[102] and *Freedom of Information Act 1982*

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96 (2009) 239 CLR 446; [2009] HCA 52, [28].

97 *Minister for Immigration and Citizenship v Li* [2013] HCA18, [67]. See also [63] where the majority held 'The legislature is taken to intend that a discretionary power, statutorily conferred, will be exercised reasonably'.

98 See Administrative Review Council, above n 85, 79: 'It is therefore still unclear how review for jurisdictional error under constitutional judicial review would apply to a decision made in exercise of a power that does not derive from legislation and that may involve a broad discretionary choice.' See also Aronson and Groves, above n 24, 123-128.

99 See Cane and McDonald, above n 10, 296.

100 *Hughes Aircraft Systems International v Airservices Australia* [1997] FCA 558; 76 FCR 151. For a more recent discussion of the application of contract law to government see *NSW Rifle Association Inc v Commonwealth of Australia* [2012] NSWSC 818; (2012) 293 ALR 158.

101 See the discussion in Australian National Audit Office, *Audit Report No.4 2012-13 Performance Audit, Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calender Year 2011 Compliance)* 2012, 28-9.

102 See *Migration and Ombudsman Legislation Amendment Act 2005* (Cth) which added the ability of the Commonwealth ombudsman to investigate complaints relating to Commonwealth Service Providers who provides services to the public under a government contract (see s 3BA *Ombudsman Act 1976* (Cth)).

(Cth)[103] now provide for increased scrutiny and transparency of performance under government contracts. The Senate requires disclosure of confidentiality clauses in contracts.[104]

However, the accountability of government for its contracting decisions has traditionally been understood in political as opposed to legal terms, principally relying on conceptions of Ministerial responsibility to Parliament. Thus, Lawson has suggested:

> the location of responsibility remains with Ministers, with the Public Service Act, Financial Management and Accountability Act and Commonwealth Authorities and Companies Act merely formally establishing the avenues of performance and accountability between Ministers and their Agency Heads/Chief Executives/Directors. Thus, the great advance of these public administration reforms has been to formally articulate the roles of Ministers and their Agency Heads/Chief Executives/Directors, giving clearer content to the conception of responsible government and ministerial responsibility. These reforms confirm that it is the Ministers who are the conduit between the Parliament and the executive and that the Ministers are, in practice, answerable to Parliament for both their own decisions and actions and those of the APS hierarchy (that is in turn answerable to the Minister).[105]

But this form of accountability was not sufficient in *Williams* – Parliament can always legislative to override executive power, though there might be some uncertainty over the extent to which a government would be willing to override contractual obligations through legislation without some form of compensation or transition.[106]

The accountability of government contracting decisions based on statutory authorisation, when compared to those reliant on executive power, therefore includes the legislative process and the role of scrutiny bodies and opportunities to participate in the formation of legislative instruments. While the approach taken to date in the legislative response to *Williams* suggests that this may not always be extensive, future additions to the range of government programs authorised under the FMA Act or included in subordinate legislation under the PGPA Act may be subject to more individualised scrutiny: even adding a government program listed only by heading and broad purposes requires an explanatory statement, including explanation for any consultation and regulatory impact, and scrutiny by the Regulations and Ordinances Committee. Guidelines governing the implementation of a new program could be classified as instruments of legislative character made in the exercise of a power delegated by parliament and hence subject to the explanatory requirements of the *Legislative Instruments Act 2003* (Cth). Questions remain, however, over whether the indirect parliamentary approval involved with non-disallowance of legislative instruments will be sufficient to meet the various concerns discussed in *Williams*. The role of judicial review would appear largely unchanged whether the authority to contract is provided for in primary or secondary legislation.

The result of *Williams* is to subject the choice of contract as a regulatory mechanism to direct parliamentary scrutiny. The implementation of that choice remains the responsibility of the executive arm of government. The breadth of

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[103] *Freedom of Information Amendment (Reform) Act 2010* (Cth) Schedule 6 which inserted provisions relating to access to documents held by contracted service providers who provide services to the public under government contracts (see s 4(1) and s 6C, *Freedom of Information Act 1982* (Cth)).

[104] Senate Procedural Orders of Continuing Effect, No.11, Departmental and Agency Contracts. For more information see Australian National Audit Office above n 101.

[105] Charles Lawson, 'The Legal Structures of Responsible Government and Ministerial Responsibility' (2011) 35 *University of Melbourne Law Review* 1005, 1037.

[106] See Seddon, above n 6, ch 5: 'Executive Necessity, the Rule against Fettering, and Legislative Overriding of Contract'.

discretion provided to the executive in that implementation suggests a very limited role for judicial scrutiny even if it is not precluded due to the consensual nature of government contracting. It remains to be seen whether the accountability mechanisms currently involved with government contracting will be referenced by the courts in implying limits on the scope of the authority to enter into contracts or whether government contracting will largely remain a matter of political accountability.

VI CONCLUSION

This paper has explored how requiring statutory authorisation for government contracting limits the authority to contract by legislative provision, express or implied, rather than through the confines of executive power under the *Constitution*. It may be possible to provide for authority to contract through a General Contracts Act co-extensive with the limits of Commonwealth legislative power.[107] Certainly the initial legislative response to *Williams,* if it survives scrutiny, expresses authority to contract in broad terms. Particular authorisation, whether needed constitutionally or politically, changes the default from the possibility of parliamentary interference to more direct forms of legislative scrutiny. The government is forced to seek direct parliamentary approval of not only the objectives sought through use of government contracting, but also the choice of regulatory mechanism to achieve these objectives. Utilising government contracts therefore brings with it similar hurdles to many other regulatory choices.

The process of interpretation used by the courts in establishing limits to the capacity to contract and establishing other conditions on the pre-contracting process may reflect the view that parliament is appropriately responsible for the breadth of discretion granted in the administration of government programs. This paper has attempted to demonstrate that the availability of judicial review is largely limited to the exercise of the power to contract, and not subsequent authority that might arise under the contract including monitoring, disclosure and enforcement. Obligations of procedural fairness, or notions of reasonableness, might be imposed on the decision-making process leading to contracts being formed, but this will be affected by direct legislative expression as well as the consensual nature of the contract and guidelines issued by the agency administering the scheme. Extending the range of interests protected through judicial review does not directly require greater consultation and participation of those interests in the implementation of government programs or the policy formation process.

It is unlikely, therefore, that the mere possibility of judicial review will encourage legislation which places clear limits on the discretion granted in government contracting. As this article has argued, recent cases have confirmed the reduced emphasis on identifying legally protected rights and obligations as a formal hurdle to judicial review. However, it remains unlikely that the courts will interpret statutory authorisation to enter into contracts as imposing substantial conditions enforced through judicial scrutiny. The flexibility and responsiveness that makes government contracting an attractive regulatory device also makes it unlikely that the legislature will impose extensive conditions under which it must be carried out. The influence of the executive arm of government over the degree of scrutiny provided by parliament is also an element of our parliamentary system, and even a purely representative system is dependent on the interests, and interest, of those being represented. Recognising that government contracting has an important regulatory role should bring with it an

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[107] As suggested by Owen Dixon KC at the Royal Commission on the Constitution of the Commonwealth in 1927, referred to in *Williams v Commonwealth* (2012) 248 CLR 156, [68].

examination of how that role is scrutinised within our system of government. As this paper has tried to suggest, recognising that judicial review may have a limited role to play renews the responsibility of Parliament to ensure accountability of government contracting.