

CONSTITUTIONAL ISSUES AFFECTING PUBLIC PRIVATE PARTNERSHIPS

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The reason why parliaments cannot bind their successors, said Dicey (quoting Alpheus Todd),¹ is that such legislation would ‘disable the Legislature from entire freedom of action at any future time when it might be needful ... to legislate for the public welfare’.² This postulate of continuing freedom of action – at every level of government – is fundamental to the Westminster system. A corollary to Dicey’s thesis was spelled out in *West Lakes Ltd v South Australia*:³ not even Ministers can make contracts on behalf of the State which

fetter their own freedom, or the freedom of their successors or the freedom of other members of parliament, to propose, consider and, if they think fit, vote for laws, even laws which are inconsistent with the contractual obligations ... [Such a contract would be] the clearest breach of the privileges of the parliament and of the members thereof.⁴

Similarly, at the operational level, no government agency can ‘fetter its discretion’ by contractual arrangements requiring that its powers be exercised in a particular way. In the case of powers conferred by statute, this may be simply because such a contract is not authorised by the statute; but, as Callaway JA has pointed out, ‘there is no reason why the same principle should not apply to common law powers’.⁵

Altogether Nicholas Seddon has identified five such rules.⁶ All of them are manifestations of the basic principle stated in *Rederiaktiebolaget Amphitrite v The King*,⁷ where Rowlatt J held that a Swedish vessel, entering British waters during World War I, was lawfully detained by the British Government despite an earlier promise of free passage:

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1 Alpheus Todd, *Parliamentary Government in the British Colonies* (1st ed, 1880) 192.

2 Albert Vern Dicey, *Introduction to the Study of the Law of the Constitution* (first published 1885, 10th ed, 1959) 67–8.

3 (1980) 25 SASR 389.

4 *Ibid* 390.

5 *A-G (NSW) v Quinn* (1990) 170 CLR 1, 17–18 in *L’Huillier v Victoria* [1996] 2 VR 465, 479 (Callaway JA).

6 Nicholas Seddon, *Government Contracts* (2nd ed, 1999) 167–8. The five rules relate to (1) the doctrine of executive necessity; (2) the limits on contractual capacity arising from existing legislation; (3) the rule against fettering future executive action; (4) the rule against fettering future legislative action; and (5) the doctrine of continuing parliamentary sovereignty.

7 [1921] 3 KB 500 (*‘The Amphitrite’*).

[I]t is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the state.⁸

Such principles are in obvious tension with the demands of contemporary economic praxis and ideology. In practice, the best way to deal with the tension may be simply to acknowledge that so long as contractual terms are commercially justified and not inconsistent with the public interest, governments will in fact honour them.

Analytically, the most common attempt to reconcile the conflicting demands is to stress that contractual obligations will bind government entities so long as they operate *simply* as commercial entities: that is, the constitutional principles do not apply to 'ordinary commercial contracts'. But the boundaries of that concept are notoriously unclear; and even an 'ordinary commercial contract' may purport to limit the exercise of government powers in an unacceptable way. As Callaway JA observed in *L'Huillier v Victoria*,⁹ what is decisive is not 'the character of the contract but ... the character of the discretion'.¹⁰

Another exception sometimes proposed to the rule against 'fetters on discretion' is that the very act of the government agency in entering into the contract may itself constitute an *exercise* of the relevant discretion, so that subsequent governmental conduct pursuant to the contract can be seen as merely the legitimate implementation of a discretionary decision that has already been validly made. The limits of that exception were discussed in *Watson's Bay and South Shore Ferry Company Ltd v Whitfield*,¹¹ where the Minister of Lands had agreed to resolve a dispute over compensation by revoking the dedication of the disputed lands, selling them at public auction, and transferring the proceeds to the claimants. The agreement was held to be unenforceable – in part because of an apparent element of sham in the proposed auction arrangements, but primarily because the agreement was an attempt to fetter *in advance* the Minister's discretions and duties. The promise could not be regarded as an exercise of the discretion because it was an *anticipatory* fetter on its *future* exercise; an undertaking about how a power *will* be exercised at some future time cannot be characterised as a present exercise of power having immediate effect. The point was elaborated in *L'Huillier v Victoria*: what is important is the point of time at which the relevant power is properly to be exercised. In *The Amphitrite*, for example, the power was one 'that could be exercised only when the time arrived for the release of the ship'.¹²

In 1977, the Ansett companies challenged a Commonwealth decision effectively allowing other airlines to compete with Ansett's interstate freight service, allegedly in breach of an implied term in the Commonwealth's agreements with Ansett implementing the 'two airlines' policy.¹³ The action

8 Ibid 503.

9 [1996] 2 VR 465.

10 Ibid 479.

11 (1919) 27 CLR 268, 277 ('*Watson's Bay Case*').

12 *L'Huillier v Victoria* [1996] 2 VR 465, 480.

13 *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54.

failed because a High Court majority (Gibbs, Mason and Murphy JJ) held that no such term was implied. A differently constituted majority (Barwick CJ, Gibbs and Aickin JJ) held that if such a term *had* been implied, it would have been enforceable: in their view, the agreements – as approved by statute – were a clear expression of government policy, by which government officers could legitimately be guided. By contrast, Mason and Murphy JJ held that such a term would have been wholly unenforceable. Acknowledging the tension between constitutional principles and commercial exigencies, Mason J sought an acceptable compromise by distinguishing three classes of case.¹⁴

First, where a public authority itself enters into a contract which purports to restrict or predetermine its own future exercise of a power conferred upon it by statute, the contract will be wholly invalid as an anticipatory fetter. (Justice Mason noted that in all the decided cases of this kind, including the *Watson's Bay Case*, it was possible to conclude that the contract 'was not ... authorised by the relevant legislation, or was incompatible with it',¹⁵ and was therefore 'invalid or ultra vires'¹⁶ on that ground as well.)¹⁷

Second, where a contract made at a higher level of government affects the powers of an agency which is not itself a contracting party, Mason J again thought that the contract must be ineffectual as a limit on the agency's future exercise of its powers; but he thought that the contract *might* be enforceable in the sense that a departure from its undertakings might give rise to an action for damages.

Third, where the contract has specifically been approved by statute, and specifically provides that a statutory power will be exercised in a particular way, Mason J thought that the contract may be fully enforceable, provided that it can be construed as putting an end to any continuing discretion. This may be because the statute can be analysed as impliedly amending the earlier statute by which the discretion was conferred; or because it can be analysed as imposing on the decision maker a statutory duty to exercise the power in a particular way.

The suggestion that an action for damages might lie in such cases, even when confined to the limited circumstances envisaged by Mason J, has been widely criticised on the ground that a public servant's awareness of a possible exposure to damages might effectively fetter his discretion just as much as a fully enforceable contract could do.¹⁸ On one version of this criticism, the objection to *damages* for contractual breach would not extend to *compensation* for actual loss.¹⁹ On that basis, rather than making a contractual promise that a statutory power will only be exercised in a particular way, a government party might agree

14 Ibid 76–7.

15 Ibid 76.

16 Ibid.

17 Ibid.

18 See, eg, Seddon, above n 6, 185–6. Seddon adds that if damages are available, the whole distinction between government contracts and private contracts would essentially disappear, since in any contract the parties have the option of either complying with the contract or paying damages.

19 Enid Campbell, 'Agreements about the Exercise of Statutory Powers' (1971) 45 *Australian Law Journal* 338, 340.

that, if the power is exercised in some other way, the developer will be compensated for any resulting losses.

This was the solution adopted in the recent case of Sydney's Cross City Tunnel. The detailed contractual terms in that case relating to road closures and other constraints did *not* impose legally impermissible 'fetters on discretion', since clause 2.3(a) of the Project Deed provided that 'nothing in this Deed ... will in any way unlawfully restrict or otherwise unlawfully affect the unfettered discretion of [the] RTA to exercise any of its functions and powers'. Instead, clause 19 established an elaborate compensation regime: if changes to the specified constraints had a 'material adverse effect' on profitability, the parties must embark on negotiations ultimately leading to compensation at a level enabling the consortium parties to maintain their anticipated 'equity return'.²⁰

However, the objections made to liability for damages seem equally cogent here, since the possibility of exposure to liability for compensation might constrain the government's freedom of action just as effectively as a directly enforceable legal obligation would do.

[W]ould not a term imposing such a liability be just as much a deterrent against the exercise of the statutory power as damages would be? And if an undertaking not to exercise the power would be contrary to the statute, should not an undertaking to pay money for loss resulting from the exercise of the power also be held contrary to the statute?²¹

Whether such a constraint is perceived as an impermissible 'fetter on discretion' may ultimately depend on the construction of the individual contract. In the Cross City Tunnel case, one factor supporting such a conclusion was the very high level of 'equity return' – based on estimates of daily usage of the Tunnel which, at least initially, seemed wholly unrealistic – that the compensation regime sought to maintain. On the other hand, the elaborate provisions for prior negotiations – replete with softening or mollifying language ('negotiate in good faith', 'use all reasonable endeavours', 'flexible approach') – might conceivably have made it possible to read down the maintenance of 'equity return' as merely a target to be worked towards, or no more than an ambit claim. To the extent that such a reading might tailor the contractual requirement more closely to reasonable compensation, the argument for treating it as a 'fetter on discretion' would become correspondingly weaker.

Any such 'reading down' would depend on constraints that might, in any event, be implied in expressions like 'flexible approach' and 'good faith': first, that any compensation must be fair and reasonable, and second, that the assessment of what is 'fair and reasonable' must include attention to what is 'fair and reasonable' from the viewpoint of the government and its taxpayers. While those requirements have been spelled out most fully in relation to acquisitions of

20 Cross City Tunnel Project Deed between the Roads and Traffic Authority of New South Wales, CrossCity Motorway Nominees No 2 Pty Ltd (the Trustee) and CrossCity Motorway Pty Ltd (the Company) (18 December 2002). For a summary of the Project Deed, see Roads and Traffic Authority, New South Wales, *Cross City Tunnel: Summary of Contracts* (2003) <http://www.treasury.nsw.gov.au/wwg/pdf/cct_contracts_summary_june03_2.pdf> at 1 November 2006.

21 Dennis Rose, 'The Government and Contract' in Paul Desmond Finn (ed), *Essays on Contract* (1987) 233, 243.

property under section 51(xxxi) of the *Constitution*,²² they would seem to be relevant in any case where a government must compensate private interests out of public funds.

In each case, the eventual outcome must depend on interpretation not only of the contract, but of any relevant statutes. Especially in cases where the terms of the contract are specifically approved by legislation, or even incorporated into legislation, the effect of the statutory provisions may be to immunise the contract against the normal operation of the constitutional rules, in ways that can probably not be confined to those particularised by Mason J in *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth*.²³ Clearly, therefore, the express incorporation of an agreement in statute gives developers the highest level of security that the constitutional principles permit. It seems also to be desirable from the public viewpoint, as tending to ensure that, before the statute is enacted, the proposed agreement is thoroughly scrutinised by the Crown Solicitor's office and parliamentary counsel.

Yet, of course, even then, a statute approving or replicating a contract can always be repealed, or simply overridden by later inconsistent legislation which operates as an implied repeal. The only way of excluding that possibility would be to 'entrench' the legislation by a 'manner and form' provision, enforceable nowadays under section 6 of the *Australia Act 1986* (Cth);²⁴ but cases like *Commonwealth Aluminium Corporation Ltd v Attorney-General*²⁵ and *West Lakes Ltd v South Australia* suggest that such attempts are unlikely to succeed. In particular, as King CJ observed in the latter case, an attempt 'to make the validity of legislation on a particular topic conditional upon the concurrence of an extra-parliamentary individual, group of individuals, organisation or corporation'²⁶ is likely to be characterised as pertaining not to manner and form but to substance – as 'a renunciation of the power to legislate on that topic unless the condition exists'.²⁷

One way of reconciling the constitutional position with the ordinary law of contract may be to say that governmental or legislative departure from an earlier contract simply brings the common law doctrine of frustration into play: 'the emergence of a fundamentally different situation' results in the complete 'termination of the contract by operation of law'.²⁸ That this doctrine can be applied to government contracts in Australia was made clear in *Brisbane City Council v Group Projects Pty Ltd*.²⁹ Indeed, Stephen J appeared to suggest that it might apply more readily to government contracts than to ordinary commercial

22 *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269, 280, 290–1.

23 (1977) 139 CLR 54.

24 See Kenneth MacDonald, 'The Negotiation and Enforcement of Agreements with State Governments Relating to the Development of Mineral Ventures' (1977) 1 *Australian Mining and Petroleum Law Journal* 29; Enid Campbell, 'Comment on State Government Agreements' (1977) 1 *Australian Mining and Petroleum Law Journal* 53.

25 [1976] Qd R 231.

26 *West Lakes Ltd v South Australia* (1980) 25 SASR 389, 397.

27 *Ibid.*

28 *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696, 723 (Lord Reid).

29 (1979) 145 CLR 143.

contracts, since what a government party has at stake is not merely its own financial gain, but some perceived public benefit.³⁰

That was a case where a contract entered into by *one* government agency was frustrated by the action of a *different* government agency; but there seems to be no reason why the very same government agency which has entered into a contract might not itself make a later decision which results in the contract being frustrated, and certainly no reason why a contract made at one level of government should not be frustrated by decisions made at a higher level of government.

This solution may seem to conflict with the *Constantine* rule:³¹ namely, that where the frustration of a contract is induced by the action of *one of the parties to the contract*, that party is not thereby relieved from its contractual obligations. However, Seddon has argued persuasively that this rule has no application. Its underlying rationale 'is that a party to a contract should not be allowed to benefit from his or her own *wrongdoing*',³² and the kind of government action envisaged involves 'no element of fault or wrongdoing',³³ since '[t]he frustrating event is one brought about for the public good'.³⁴ Accordingly,

the doctrine of frustration should operate to relieve both parties of further performance from the time when the government exercises its prerogative [in a way] which is incompatible with the obligations under the contract.³⁵

30 Ibid 156–63.

31 *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* [1942] AC 154.

32 Seddon, above n 6, 183.

33 Ibid.

34 Ibid.

35 Ibid 184.