THE LEGAL STRUCTURE OF THE SYDNEY OLYMPIC GAMES

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I. INTRODUCTION

It's not just the athletes who have to train hard, focus their minds and prepare their bodies for the ultimate struggle and glory of an Olympic Games; not only the sporting team selectors, trainers and managers have to ensure that their protégés are up to the game. So do the lawyers.

Staging an Olympic Games is not easy. There are venues to build and prepare, people to move, and house, electronic images to flash across the globe, all on a massive scale over two short weeks; fortunes and reputations to be made or lost; an event too big to be accommodated without a legal structure the size of an Olympic stadium.

Sydney's Olympic Games are to run from 15 September to 1 October, 2000. The legal preparation started long before. The participants, each with their own hopes and agendas: the International Olympic Committee (IOC), custodian of the Olympic Charter, whose reputation and future fortune depend on the success of each successive Games; the Australian Olympic Committee Inc (AOC), a non-profit, non-government organisation dedicated to Australian sport; the State Government of New South Wales, headed first by Liberal Premiers Nick Greiner and John Fahey but since 1995 by Labor's Bob Carr, each with a mandate to govern, a vision for their State, budgets to balance and a career on the greasy pole of politics; and the Council of the City of Sydney (the City).

At least part of the interest in the legal structure of the Games lies in the manoeuvrings of these participants and the way in which they have each sought to satisfy their own objectives. They are not adversaries; each needs the co-operation of the others because each needs the Games to be a success; but there are points at which their interests also diverge.

The purpose of this paper is partly descriptive, to document the major elements of the legal structure that has been built up to accommodate the Sydney Olympic Games, and partly critical, to comment positively or negatively on the

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appropriateness of some of the steps that have been taken in the process of creating the State-sponsored non-government public event that will be the Sydney Olympics.

The development of the legal structure is generally described chronologically; some legal milestones are summarised in Table 1. An exception is the section dealing with environmental planning law which is described as at the time of writing.

II. THE ENDORSEMENT CONTRACT

On 1 May 1991, the AOC contracted with the City and the State to endorse and support the City's candidature for the right to organise and conduct the 2000 Summer Olympic Games in accordance with the Olympic Charter. This Endorsement Contract was the first in a series of legal acts which created the present legal structure for the 2000 Olympic Games. Its consequences persist in continuing contractual and statutory provisions governing the Games.

AOC endorsement was conditional on the AOC approving both the proposal of the Bid Committee concerning the organisation and conduct of the Games, and the details, structure and senior personnel of the candidature. The Bid Committee was to be a company established by the State and the City, but the majority of its members were to be representatives of the AOC. In this way, and by requiring AOC consent to any structural or senior personnel changes, the Endorsement Contract ensured majority AOC control of the Bid Committee and the content of the bid.[1]

The State and the City for their part appointed the Bid Committee their sole agent for the carriage of the candidature which they agreed to fund,[2] but of greater significance were the terms agreed if the candidature should succeed:

- The AOC was to appoint "as the organising committee of the Games as the agent of the State, the City and the AOC" a particular "Company"[3] which the AOC then owned and controlled,[4] to be renamed 2000 Olympic Organising Committee Limited, subject to alterations to its structure and membership in accordance with the "reasonable request" of the City and State if communicated by 31 December 1991, and as required by the IOC.[5] No such request for alteration was made.[6]

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1 Endorsement Contract, cll 2, 3 and 4.

2 In an estimated sum of $20 million with the State also to bear agreed costs and expenses of the AOC in supporting the bid: *Ibid*, cll 3 and 6.

3 *Ibid*, cll 11 and 1.1. The company was ACN 006 651 903, then named 1996 Olympic Organising Committee Ltd, a company limited by guarantee which was originally incorporated as Brisbane Olympic Organising Committee Limited in connection with that city's bid for the 1996 Olympics.

4 AOC, *Release of Contracts and Other Documents on 22 January 1999*.

5 Note 1 *supra*, cl 11. If the State so requested by 31 December 1991, the "organising committee" was to be the Bid Committee, subject to approval of the AOC which approval was not to be unreasonably withheld if the AOC was satisfied that its constitution, membership and executive complied with certain IOC rules and principles: cl 1.1. No such request was made.

6 AOC, "Summary of the Creation and Structure of SOCOG" in note 4 *supra*.

- The Company was to be responsible in all respects for the organisation and conduct of the Games and to comply with all the requirements of the IOC, the Olympic Charter and any contract between the IOC, the AOC and the City.[7]
- The City and the AOC, and if required by the IOC, the Company, were obliged to "execute the contract with the IOC in such form as supplied by the IOC and by which the IOC will entrust the organisation and staging of the Games to the AOC and the City".[8]
- The State and the City were to be "liable to the fullest extent permitted by law for all actions, statements, representations or omissions by the Company"[9] and the State agreed to underwrite any revenue shortfall of the Company for the staging of the Games.[10]
- The State was to pay the AOC $60 million (less any funding from the Australian Sports Commission towards the 1998 Winter Olympics and the 2000 Olympics) over the four years 1997-2000[11] and to construct or upgrade the venues, Olympic village, media centre and other improvements referred to in the candidature.[12]

The Endorsement Contract left the State and to a lesser extent the City responsible for the full cost of staging the Olympic Games, committed to enter a contract in terms to be dictated by the IOC, and left the AOC in effective control of the entity charged with the running of the Games.

III. THE HOST CITY CONTRACT

Sydney's bid to host the 2000 Olympics was presented to the IOC at its 101st Session in Monte Carlo in September 1993. There, the IOC voted to elect Sydney as the host city of the Games of the XXVII Olympiad, and designated the AOC as the responsible National Olympic Committee (NOC) for the Games. The bid came officially from the City Council and the AOC, but it was made in the presence of the Premier and the Prime Minister and with the support of their respective Governments.

On 23 September 1993, the IOC, the AOC and the City executed the Host City Contract by which the IOC entrusted the organisation of the Games to the City and the AOC, and by which their bid documents were given contractual force.[13] As between the AOC and the City, this gave effect to their mutual obligation under the Endorsement Contract to execute a contract supplied by the IOC.

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7 Note 1 *supra*, cl 11.3.
8 *Ibid*, cl 10.2.
9 *Ibid*, cl 11.5.
10 *Ibid*, cl 12.1.
11 *Ibid*, cl 9.
12 *Ibid*, cl 10.4.
13 Host City Contract, s 8.

The format of the Host City Contract is venue-neutral. It makes no presuppositions about the constitutional structure of the host country or the level of government support for the Games beyond noting a 'covenant' from the country's government to respect the Olympic Charter (which provides for accredited persons to have free access to a host country - in our case, a matter within the competence of the Commonwealth) and assuming that the entity described in the contract as the "City" has legal personality and contractual capacity. The same terms could equally well apply to Games held in a federal or unitary state, privately or publicly funded, and privately or publicly organised - though as a matter of practicality, it would be impossible successfully to organise and conduct such a large event in compliance with the requirements of the contract without the active co-operation and support of Government.

The Host City Contract stated that "the Games [of the XXVII Olympiad]...are the exclusive property of the IOC" - an expression which is meaningless on its own, at least as a matter of Australian law, but which clearly indicates the commercial basis of the contract - and that "the IOC owns all rights concerning their organisation, exploitation, broadcasting, marketing and reproduction by any means whatsoever".[14]

The Contract required the NOC and the City to create a legal entity to be the Organising Committee for the Games (OCOG) with IOC, NOC and City representation on its board, subject to IOC approval of "all agreements relating to the incorporation and existence of the OCOG".[15] The OCOG was to be made party to the Contract after its creation.[16]

The City, the NOC and the OCOG for their part were to bear jointly and severally the entire financial responsibility and risk of the Games, including the indemnification of the IOC[17] and the provision of all-risks insurance for themselves and for the IOC.[18]

The OCOG was required to provide substantial infrastructure and facilities, including:

- a transport system for access to Games venues, to be free of charge for accredited athletes, coaches, officials and media;[19]
- the Olympic Village, in which room and board for athletes, officials and team personnel were to be free of charge;[20]
- media accommodation for an estimated 15 000 persons in a Media Village and/or hotels, the cost of which was to be subject to price controls;[21]

14 *Ibid*, s 33.
15 *Ibid*, s 5.
16 *Ibid*, s 11.
17 *Ibid*, ss 7 and 8.
18 *Ibid*, App J.
19 *Ibid*, s 14 and App C.
20 *Ibid*, s 22 and App D.
21 *Ibid*, s 23 and App E.

- media facilities and infrastructure including a Host Broadcast Organisation, the Main Press Centre and International Broadcasting Centre and a results and information service, some elements of which were to be provided free of charge, and the remainder subject to price controls or IOC approval;[22]
- accommodation for the IOC and other international officials as specified by the IOC in hotels designated by the IOC estimated at 1500 rooms, the cost of which was to be subject to price controls.[23]

The IOC was to retain a substantial measure of control over the organisation and conduct of the Games. Approval of the IOC Executive Board was required for:

- all contracts between any of the City, the NOC and the OCOG concerning financial responsibility for the Games;[24]
- any agreement having any connection with the Games between the OCOG and any government or non-government national organisation;[25]
- any contract of the City or the NOC directly or indirectly concerning the Games;[26]
- standard forms for contracts between the OCOG and third parties;[27]
- the system of transport to be provided for the "Olympic Family";[28]
- the OCOG's General Organisation Plan;[29]
- the Sports Program of the Games (which the IOC also retained the right unilaterally to change, subject to a right of the OCOG to "negotiate" with the IOC if the change would cause "material adverse effects");[30]
- any modification by the City or the NOC in the size, contents or location of Olympic venues from those proposed in the bid;[31]
- the ticketing system;[32]
- the marketing plans and programs for the Games;[33]
- contracts between the OCOG and the Host Broadcast Organisation;[34]
- the 'Rate Card' of prices charged by the OCOG to media organisations;[35]
- any television rights contract of the OCOG;[36]

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22 *Ibid*, App E.
23 *Ibid*, s 24 and App F.
24 *Ibid*, s 6.
25 *Ibid*, s 12.
26 *Ibid*, s 13(i).
27 *Ibid*, s 13(ii).
28 *Ibid*, s 14.
29 *Ibid*, s 16.
30 *Ibid*, s 27.
31 *Ibid*, s 29.
32 *Ibid*, s 38. Note in this context the recent furore concerning premium ticket packages not made available to the general public.
33 *Ibid*, s 40.
34 *Ibid*, s 42.
35 *Ibid*, s 44; *cf* s 42.
36 *Ibid*, App E, Pt 2, Ch II.

- the OCOG's appointment of an Olympic Broadcasting Organisation to produce television and radio signals of the Games;[37] and
- any assignment of rights or obligations under the contract by the City, the NOC or the OCOG.[38]

The IOC also retained the right directly to negotiate contracts for international television and radio broadcasting of the Games,[39] to conduct on its own account an international marketing program with precedence over those of the NOC and the OCOG,[40] and to designate the hotel accommodation to be provided and prices to be charged to the 'Olympic Family' of senior IOC and other international personnel to be specified by the IOC.[41]

The Host City Contract dealt with the substantial profits and revenue likely to be associated with the Games. Apart from giving the IOC considerable powers of price control, the contract provided that the IOC would be entitled to royalties of 5 per cent of NOC and OCOG marketing revenue, 3 per cent of the sale price of coins as part of any Olympic coin program, and 3 per cent of the face value of any commemorative circulating coin program of the Host Country (which suggests an interesting assumption concerning the authority of a sovereign State over its coinage, considering that the Host Country is not party to the contract - but perhaps this provision is only intended to have effect as a warranty by the City and/or the NOC to pay the specified amount to the IOC), and 40 per cent of on-screen sponsor identification revenue, all net of tax.[42] The IOC is also entitled to a 40 per cent share of net revenue from agreements relating to television and radio broadcasting of the Games, the remaining 60 per cent going to the OCOG.[43]

The contract also made provision to assure title over those rights 'owned' by the IOC and to require all copyright and intellectual property in emblems, badges, medals, pictograms, posters, mascots, music and other artistic and intellectual works pertaining to the 2000 Games, as well as international television signals produced by or on behalf of the Host Broadcasting Organisation to be assigned to the IOC.[44]

Against the possibility that the OCOG should turn a profit, the contract provided that any surplus resulting from the celebration of the Games should be divided and paid - 10 per cent to the NOC, 10 per cent to the IOC and 80 per cent "to be used for the general benefit of sport in the Host Country as may be determined by the OCOG in consultation with the NOC".[45]

The Host City Contract did not permit the City or the NOC to cancel the Games for any cause, but did permit the IOC to terminate the contract and

37 *Ibid*, App E, Pt 2, Ch II.
38 *Ibid*, s 52.
39 *Ibid*, s 41.
40 *Ibid*, s 40(e).
41 *Ibid*, s 24.
42 *Ibid*, s 40.
43 *Ibid*, s 41.
44 *Ibid*, ss 33-35 and 42.
45 *Ibid*, s 37.

withdraw the Games on grounds of war or civil disorder or for breach of contract by the City, NOC or OCOG or for non-observance of the covenant of the Government of the Host Country; and in the case of breach of contract, the IOC was permitted to nominate and withhold an amount of damages which it was willing accept to purge the breach in lieu of termination of the contract.[46]

Swiss law was nominated as the proper law of the Host City Contract, and any dispute concerning its validity, interpretation or performance was to be remitted for arbitration by the Court of Arbitration for Sport in Switzerland "to the exclusion of the ordinary courts of Switzerland or of the Host Country".[47] Whatever effect this may have in Swiss law, the common law in New South Wales does not permit complete exclusion of the jurisdiction of its courts and treats the ouster agreement as void;[48] nor is this a *Scott v Avery* clause that survives the doctrine by prescribing a condition precedent to litigation.

IV. SOCOG

Under the Endorsement Contract, 2000 Olympic Organising Committee Limited was set to be the OCOG, but the State proposed the creation of a statutory corporation for that purpose: the Sydney Organising Committee for the Olympic Games (SOCOG). The State Government discussed the proposal as it was then formulated with the AOC, which insisted on certain changes before it would give approval. As a result, the Government and the AOC agreed on the terms of draft legislation which was also approved by the IOC.[49] On 18 October 1993, the State, the City and the AOC signed an agreement by which the Endorsement Agreement was amended so that the 'Company' was redefined as SOCOG, to be established by an Act conforming to the draft Bill which the AOC and IOC had approved.[50] The Bill passed through Parliament and received royal assent on 9 November 1993, as the *Sydney Organising Committee for the Olympic Games Act* 1993 (the *SOCOG Act*).

Constitutionally, the State (Parliament and the Governor on the advice of his Ministers) had plenary power to legislate for the creation of SOCOG; practically and contractually, they needed the consent of the AOC to amend the Endorsement Contract, and of the IOC under the terms of the Host City Contract -for although the State was not a party to that contract, the imprimatur of the IOC was essential to an 'Olympic' Games and the IOC's contract with the AOC and the City gave it an effective veto over the constitution of the OCOG.

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46 *Ibid*, ss 48, 50.

47 *Ibid*, s 55.

48 *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432, 452; *Kill v Hollister* (1746) 95 ER 532; *Scott v Avery* (1856) 10 ER 1121, 1135.

49 AOC, "Summary of the Creation and Structure of SOCOG", in note 4 *supra*.

50 Agreement to Amend Endorsement Contract dated 18 October 1993, in AOC note 4 *supra*. Another "Agreement to Amend Endorsement Contract" was signed on 23 December 1993, to replace the 18 October agreement. It was in the same terms save that the Act took the place of the Bill: *idem*.

Under the terms agreed in the Endorsement Contract, the Sydney Olympics would have been privately run but publicly funded. Under the *SOCOG Act* the running of the Games (subject to the considerable rights reserved to the IOC) was effectively shifted to the public sector.

A. The *SOCOG Act*

SOCOG was constituted as a body corporate under the *SOCOG Act* 1993.[51] Its primary objective is "to organise and stage the Games of the XXVII Olympiad in Sydney in the year 2000, in accordance with the rights and obligations conferred and imposed under the Host City Contract".[52] SOCOG formally became a party to the Host City Contract on 4 February 1994.[53]

The functions, powers and duties[54] of SOCOG include:

- becoming a party to the Host City Contract; and
- performing its obligations under the Host City Contract and the Endorsement Contract, including obligations that are jointly and severally imposed on SOCOG, the City of Sydney (or the Council of the City) and the Australian Olympic Committee under those contracts.[55]

The Endorsement Contract and the Host City Contract were treated at that time as private, confidential documents. They were not laid before Parliament or made available to the public, although they were used to define the scope of the powers and obligations of a statutory corporation. This secrecy coupled with the manner of drafting of the *SOCOG Act* offends the principle that the law should be public and capable of being known by citizens. If the contracts were really too commercially sensitive for public eyes, other objective words should have been found by which to define the powers and duties of SOGOC.

The Endorsement Contract is defined in the *SOCOG Act* as the contract between the State, the City and the AOC dated 1 May 1991, "and as in force from time to time afterwards".[56] The Host City Contract is defined as the contract between the IOC, the City and the AOC dated 23 September 1993, "and as in force from time to time afterwards".[57] This form of drafting is unfortunate and unnecessary; it has the effect that SOCOG's statutory powers and duties can be altered without the agreement, veto or knowledge of Parliament.

Other functions of SOCOG specified in the Act include organising accommodation and transport for competitors, team officials and personnel, and media personnel, organising the sports program for the Games, preparing and operating all venues and facilities for the Games, organising a cultural program, establishing a marketing program and arranging and making available

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51 *SOCOG Act*, s 4.
52 *Ibid*, s 9(1).
53 AOC, "Notice of Intervention from SOCOG to the IOC, AOC and the City", note 4 *supra*.
54 "Functions" include powers and duties: *SOCOG Act*, s 3.
55 *Ibid*, s 10(1).
56 *Ibid*, s 3.
57 *Ibid*.

broadcasting facilities[58] - all matters covered by the Host City Contract. There is provision for SOCOG to be given other specific functions by the Governor on the recommendation of the Minister responsible for the Olympic Games, if the latter is satisfied that the function is connected with the primary objective of SOCOG and if the President of the AOC consents in writing,[59] but the functions of SOCOG are not to be exercised except for the purpose of its stated primary objective except as specifically authorised by or under the *SOCOG Act*.[60] These provisions give ample scope and flexibility for SOCOG to carry out its role without the effective, and secretive, delegation of legislative power to persons outside Parliament.

The Act says that SOCOG:

> is not and does not represent the State except by express agreement with the Minister; and cannot render the state liable for any debts, liabilities or obligations or SOCOG...unless otherwise expressly provided by this or any other Act or law or by the Host City Contract, the Endorsement Contract or the Bid Books.[61]

It was not possible when the Act was passed to assess the extent to which SOCOG represented or could bind the Crown in right of New South Wales; but we now know from the terms of those contracts that SOCOG was and is the agent of the City, the AOC and the State[62] and that the State (with the City) has contracted with the AOC fully to accept liability for and to underwrite SOCOG.

B. Structure of SOCOG

SOCOG as constituted has no share structure or members. It is not capable of being put into receivership or any other form of management for the benefit of its creditors,[63] but it is to be wound up within 18 months after the conclusion of the Games[64] in accordance with Chapter 5 of the *Corporations Law*, the provisions of which are to apply with such adaptations as may be necessary or prescribed.[65]

In its original form the *SOCOG Act* provided that any surplus funds on winding up of SOCOG were to be distributed 10 per cent to the IOC, 10 per cent to the AOC in its own right, and 80 per cent to the AOC:

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58 *Ibid*, s 10(2).

59 *Ibid*, s 10(3).

60 *Ibid*, s 8(2).

61 *Ibid*, s 5(1). The Bid Books are "the candidature files containing the details of Sydney's bid for the Olympic Games in the year 2000 and submitted to the International Olympic Committee on 1 February 1993"; s 3(1).

62 See note 1 *supra*, cl 11.1: "In the event that the candidature is successful, then the AOC will appoint the Company as the organising committee of the Games as the agent of the State, the City and the AOC in accordance with the Olympic Charter".

63 *SOCOG Act*, s 55.

64 *Ibid*, s 52.

65 *Ibid*, s 53.

> to be held in trust to pay the income to the national federations for sports on the Olympic Program for the cost of international competition of their athletes and officials who are likely to be selected in future Olympic teams in accordance with such guidelines as may be determined by the Australian Olympic Committee from time to time.[66]

This provision differed in its administration from the corresponding provision in the Host City Contract, but evidently had the approval of the parties to that contract.

C. Control of SOCOG

Power to manage and control the affairs of SOCOG was vested in its Board of Directors. The *SOCOG Act* originally provided for the Directors to be the President of SOCOG (a nominee of the Premier), two IOC representatives, the President and Secretary General of the AOC, the Lord Mayor of Sydney, the CEO of SOCOG (a Board appointment subject to the Premier's consent), and eight other nominees of the Premier or the State (two of whom were to have been nominated by the Prime Minister to the Premier).[67] This gave effective control over the majority composition of the Board to the State Government, which was also empowered to terminate the President and the appointed Directors without cause.[68] State appointments and dismissals were only to be made after consultation between the Premier and the AOC President, but the AOC was given no right to constrain the exercise of either power.[69]

The agreement of 18 October 1993 purported to qualify the statutory power of the State to hire and fire Directors by making the exercise of the power "subject to" terms giving the AOC President a right "to object" to appointments and constraining the basis on which a Director might be dismissed without AOC consent.

The right to object to an appointment would arise:

> if the President of the AOC shows [the agreement does not say to whom or to whose satisfaction] that the person to be appointed has demonstrated, by his words or actions:
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> (a) disrespect for some or all of the Fundamental Principles, Rules and By-laws adopted by the IOC in the Olympic Charter, being disrespect which is not consequential or accidental; or

66 *Ibid*, s 54. Subsection (3) provides that "the amount of surplus funds is not to be less than the amount calculated in accordance with the Host City Contract". Since it is impossible to legislate for the commercial success of an undertaking, presumably that contract contains some default or deeming provision, such as a provision requiring the State of New South Wales or some other person to provide funds for application by way of surplus. The contract, as noted above, is not available for inspection, and one can only speculate what its terms may provide.

67 *Ibid* s 14; *cf* ss 13, 15 and 17.

68 *Ibid*, s 20; *cf* the definition of "appointed director" in s 3(1).

69 *Ibid*, subsection 21(1).

(b) (in the case of a person to be appointed as the President or Chief Executive Officer of the SOCOG) an attitude towards the AOC or the President or Secretary-General of the AOC which would make it unlikely that he or she and the President or Secretary-General of the AOC could work together co-operatively.[70]

The agreement did not specify the legal effect of an objection.

The State's right to dismiss was only to be exercised if:

(i) the Premier is of the opinion that the performance of other conduct of the director has damaged or is likely to damage the good standing, reputation or interests of the AOC, the State, the City, the SOCOG or the Olympic Movement (as defined in the Olympic Charter) or that his or her performance or conduct has been unsatisfactory for a significant period; or

(ii) the President of the AOC otherwise consents.[71]

When it released the 18 October 1993 agreement in January 1999, the AOC was at pains to justify its insistence on these terms and their secrecy:

> Because the AOC had given up its total control of the OCOG, balancing provisions were included in the agreement to ensure that the AOC could trust and work with the Board. The State did not want these provisions included in the *SOCOG Act*, preferring that these and the State's other obligations to the AOC under the Endorsement Contract remain confidential. The AOC agreed to this on the express basis that the contractual requirements would continue to be of full force and effect.[72]

It is doubtful that these contractual restrictions were legally binding. As a matter of constitutional and administrative law, the Executive government could decide on a policy for the exercise of its statutory discretion, but it could not by contract bind itself or its successors.[73] But that is not the only point.

What is disturbing about the restrictions won by the AOC is not their content; it is their secrecy. If there was to be a binding obligation in relation to the exercise of statutory power, it should have been published to the Parliament when they were asked to vote on the SOCOG Bill, and to the public when they were asked to accept the Act as an accurate statement of public law governing the constitution of SOCOG and the relative power of the State and the AOC to influence its makeup. And if the AOC account is correct, it is doubly disturbing that the then State Premier, Mr Fahey, and his Government saw nothing wrong in such secrecy, but insisted on it.

D. Public Sector Controls on SOCOG

The Act imposes significant financial and other public sector controls on SOCOG reflecting its purpose and public funding.

As originally constituted, SOCOG was not permitted to incur expenditure in excess of the Games budgets prepared for and summarised in the Bid Books

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70 Note 50 *supra*, cl 3.3.

71 *Ibid*, cl 3.4.

72 AOC, "Summary of the Creation and Structure of SOCOG", in note 4 *supra*.

73 *R v Dominion of Canada Postage Stamp Company* [1930] SCR 500; *William Cory & Son v London Corporation* [1951] 2KB 476 (CA); *Watson's Bay & South Shore Ferry Co v Whitfield* (1919) 27 CLR 268.

without the approval of the responsible Minister and the President of the AOC[74] and the Board of SOCOG could not approve a budget which departs from the Games Budgets without similar approval.[75] Until such consent was given, no proposed budget or budget amendment could "be published or made available to the public".[76]

The ability of SOCOG to obtain financial accommodation, to enter into derivatives contracts[77] and to enter joint financing arrangements are subject to controls imposed by the *Public Authorities (Financial Arrangements) Act* 1987.[78] SOCOG requires ministerial approval for its borrowings, but approval must be given up to the levels budgeted in the Bid Books.[79] The power of SOCOG to invest money is also governed by the *Public Authorities (Financial Arrangements) Act* 1987,[80] and a requirement for ministerial approval.[81]

SOCOG is also:

- An "authority" to which Part 2C of the *Public Authorities (Financial Arrangements) Act* 1987 applies.[82] There is a statutory guarantee by the State for the due repayment of financial accommodation obtained by SOCOG by the issue of debentures, bonds, inscribed or registered stock, discounted securities or promissory notes or in consideration of a guarantee or from the Treasury Corporation,[83] and the Government has a discretion to guarantee the performance by SOCOG of other obligations.[84]
- A "statutory authority" for the purposes of the *Public Finance and Audit Act* 1983.[85] It is subject to obligations relating to the keeping of accounts and submission of annual financial statements, and it is subject to audit by the Auditor-General. It is exempted from liability to declare a dividend in favour of the State[86] but it is liable to pay the costs of any audit under the Act.[87]

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74 *SOCOG Act*, s 47(2); *cf* the definition of "Games budgets" in s 3(1).
75 *Ibid*, s 47(3) and (4), but see (5). These provisions were amended in 1996; see below.
76 *Ibid*, s 47(6).
77 See the definition of "financial adjustment" in the *Public Authorities (Financial Arrangements) Act* 1987, s 5.
78 *SOCOG Act*, s 67; *Public Authorities (Financial Arrangements) Act* 1987, Pts 2, 2A and 2B respectively.
79 *Ibid*, s 48.
80 SOCOG is governed by Pt 3 of the *Public Authorities (Financial Arrangements) Act* 1987 by virtue of being a "corporation constituted by or under an Act" referred to in s 23 of that Act.
81 *SOCOG Act*, s 49.
82 *Ibid*, s 67; *cf Public Authorities (Financial Arrangements) Act* 1987, ss 22 and 6.
83 *Public Authorities (Financial Arrangements) Act* 1987, s 22A; *Public Authorities (Financial Arrangements) Regulation* 1995, cl 57.
84 *Ibid*, s 22B.
85 See the definition of that expression in s 4 of that Act, also s 39 and Sch 2, as amended by s 66 of the *SOCOG Act*.
86 *SOCOG Act*, s 50; *cf* s 59B.
87 *Ibid*, s 51.

- A "declared authority" for some purposes of the *Public Sector Management Act* 1988.[88] It is subject to the authority of the Public Employment Industrial Relations Authority[89] and provisions[90] relating to administration and management of the public sector.
- A "public authority" for the purposes of the *Ombudsman Act* 1974.[91]
- A "public authority" for the purposes of the *Independent Commission Against Corruption Act* 1988.[92]

The Premier's second reading speech introducing the SOCOG Bill claimed that SOCOG was explicitly made subject to the *Freedom of Information Act* 1989 (*FOI Act*). That was not correct and the Act makes no such provision, but SOCOG is, as the Premier and Parliament presumably intended, subject to the ordinary terms of the *FOI Act* as a "public authority", being "a body (whether incorporated or unincorporated) established for a public purpose by or under the provisions of a legislative instrument".[93] Establishment for a public purpose can be a surprisingly elusive concept,[94] but it seems to be satisfied in the case of

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88 *Ibid*, s 53. Pt 2 of the *Public Sector Management Act* 1988 (which relates to the Public Service) does not apply to the appointment of Directors, the Chief Executive Officer or other staff of SOCOG, and the office of Chief Executive Officer is not a "chief executive position" or a "senior executive position" for the purposes of that Act.

89 *Public Sector Management Act* 1988, s 88.

90 *Ibid*, Pt 3.

91 *SOCOG Act*, s 52.

92 *Ibid*, s 64.

93 *FOI Act*, s 7; *cf* s 16 and the definition of "agency" in s 6.

94 Several lines of authority deal in different contexts with concepts of 'public purpose'. In English cases dealing with the application of Crown immunity from rating Acts and the Poor Laws to land held by bodies other than the Crown itself, the concept of 'public purpose' was introduced by the courts as a secondary concept in the process of defining the scope of 'the Crown' and the shield of the Crown: *Mersey Docks & Harbour Board v Cameron* (1865) 11 HLCas 443, 505; *Bank voor Handel en Scheepvaart NV v Slatford* [1953] 1QB 248, 298. In diverse statutory contexts the question from time to time arises whether a body falls within the 'shield of the Crown' for a particular purpose, or whether a statute which does not bind the Crown applies to a particular statutory entity. 'Public purpose' is one element in the inquiry, others being the extent of control which the Crown exercises over the body in question and the purpose and intent of the statute. In 'shield of the Crown' cases it has repeatedly been recognized that, in order to fall within that concept or to represent the Crown, a body must exercise functions which are either part of the inalienable functions of government, or have been made functions of government. It is not enough for a body owned by the Crown or created by Parliament as a matter of convenience to carry out functions which are not in themselves intended to be functions of government: see *Grain Elevators Board v Dunmunkle Corporation* (1946) 73 CLR 70, 75. The characterization of a body's functions as inalienably governmental will usually lead without more to its characterization as falling within the shield of the Crown, but such a characterization does not flow automatically if the function is one which the government has taken on as a non-exclusive government function: *Townsville Hospitals Board v Townsville City Council* (1982) 149 CLR 282, 288-9; but that fact does not diminish the public character of such a function. An example of a function taken over almost exclusively by governments in Australia is the operation of the railways: *Wynyard Investments Pty Limited v Commissioner for Railways* (1955) 93 CLR 376, 390; *Bradken Consolidated v BHP* (1979) 145 CLR 107; *Crouch v Commissioner for Railways (Q)* (1985) 159 CLR 22, 28, 38. Cases dealing with acquisition of land by the Commonwealth for a public purpose are governed by a statutory definition of that expression as being any purpose for which Parliament may make laws: *Lands Acquisition Act* 1906, s 5(1). In the context of rating exemptions in Australia 'public purpose', 'public reserve', 'public recreation' and other concepts containing the word 'public' have been employed by statute, and the

SOCOG. Despite substantial non-governmental involvement and the non-governmental nature of the Olympic movement, SOCOG was established to organise a great event which the Government has clearly judged to be one of public importance, is publicly funded, and is otherwise accountable in the manner of a governmental organisation. This indicates a judgment by Parliament that the organisation of the Olympic Games is a public purpose. The fact that SOCOG may not represent the Crown generally is not determinative,[95] particularly in light of the agency provided for by the Endorsement Contract and promulgated in SOCOG's statutory duty to carry out the functions given to it by the Endorsement Contract.

The provision which the *SOCOG Act* does make concerning the *FOI Act* is an express exemption from production under that Act of any document prepared or received by SOCOG which "contains matter that is confidential to" the IOC or the AOC.[96] It was seemingly under this rubric that FOI requests by the Sydney Morning Herald for access to the Host City Contract, the Endorsement Contract and many other details and documents concerning the Games were refused.[97] That refusal seems difficult to justify under the terms of the *FOI Act*, with or without the special exemption, but the Herald did not pursue the point by seeking review of the decisions refusing access.

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meanings given to those concepts have been affected by the precise words of the statutes in question, legal and legislative history, and the purpose of the inquiry: See for example, *Randwick MC v Rutledge* (1959) 102 CLR 54, cases cited in and cases following that decision. In Australian taxing statutes the concept of public charitable or educational purpose has been used in various permutations to create tax concessions, and in each such case the terms and purpose of the relevant statute govern the meaning given to the 'public' element: for example the *Income Tax Assessment Act* 1936, s 23(d), (e) and (j); and old estate duty cases such as *Chesterman v FCT* (1923) 32 CLR 362. In the context of trust law a public trust is defined as such by reference to the nature of its objects and the absence of private beneficiaries, but in the context of the common law criminal offence of breach of public trust it connotes a position of trust under, and a duty owed to, the Crown. It is dangerous to apply any one line of authorities to a new context uncritically.

95 The structure of SOCOG is similar in many respects to that of the Grain Elevators Board (Victoria), considered by the High Court in *Grain Elevators Board (Victoria) v Dunmunkle Corporation* (1946) 73 CLR 70. The Board was established to provide a grain storage facility at a fee to the public, and had power to buy grain and sell surplus grain. The Board was subject to Government audit and financial controls. The Government controlled appointments to the Board, but the Board had considerable autonomy. The Court held that the Corporation's land was not exempt from rates as "land the property of His Majesty which is...used for public purposes" because the Corporation was in effect too independent to be an agent or emanation of the Crown, or to hold its land on trust for the Crown. It was not necessary for the majority to decide whether the land was used for public purposes, but Latham CJ (at 77) expressly recognized "the public nature of the functions of the Board" and (at 75) that "the fact that an authority discharges public functions and makes no private profit is not sufficient to identify it with the Crown". The fact that a body does not represent the Crown does not mean that its purposes are not public purposes in the relevant sense.

96 *SOCOG Act*, s 68; *FOI Act* 1989, Sch 1, cl 22.

97 See M Moore, "The Secret Games", *Sydney Morning Herald*, 21 November 1998. The documents requested are summarised in note 137 *infra*.

V. 1995: THE OCA

In 1995, the newly elected State Labor Government decided to reorganise the legal structures by which the State would carry out its Olympic obligations. It decided to appoint a Minister for the Olympics to take over Ministerial functions that had previously been exercised by the Premier. The change of Ministerial responsibility required amendments to the *SOCOG Act*, for which the State sought and obtained the AOC's prior approval.[98] The Government also decided to centralise control of State functions affecting the Olympics in a statutory authority under the Minister's control. This was done by the creation of the Olympic Co-ordination Authority (OCA), by the *Olympic Co-ordination Authority Act* 1995 (*OCA Act*), which was also empowered to carry out directly or indirectly and to co-ordinate functions for which the State was responsible.

A. The *OCA Act*

The OCA is constituted as a body corporate[99] representing the Crown for all statutory purposes[100] and subject in the exercise of all its functions to the control of the Minister.[101] It took over from the former Olympic Co-Ordination Agency, a Public Service department, and the Homebush Bay Development Corporation.[102] It is therefore more obviously governmental and regulatory in character than SOCOG, although some of its functions are the subject of its own regulation.

The OCA was given a non-exclusive obligation to plan for and 'provide' Olympic venues and facilities including sporting venues, media centres and communications facilities and residential facilities, and to assist the State Government in various matters of an administrative nature in relation to the Games.[103] In so doing, the OCA has specific obligations of:

(a) satisfying the requirements of SOCOG for organising and staging the Olympic Games under the Sydney Organising Committee for the Olympic Games Act 1993 and the Host City Contract referred to in that Act,

(b) ensuring that Olympic venues and facilities are provided within agreed timeframes and budget allocations,

(c) ensuring that Olympic venues and facilities (other than temporary venues or facilities) are suitable for use after the Olympic Games and meet the long term requirements of Sydney and ensuring, in particular, the orderly and economic development of the Homebush Bay area.[104]

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98 Consent was obtained before enactment of the amendments: see "Further Agreement to Amend Endorsement Contract" dated 24 October 1995 in AOC note 4 *supra*.

99 *OCA Act*, s 4.

100 *Ibid*, s 5.

101 *Ibid*, s 7.

102 See the transitional provisions in Sch 2 to the *OCA Act*.

103 *OCA Act*, ss 10 and 11. It has similar functions in relation to the Paralympic Games: s 12.

104 Subsection 10(2).

The first of the principal functions of the OCA is to plan for and provide Olympic venues and facilities. The primary objective of SOCOG under the *SOCOG Act* is to organise and stage the Olympic Games.[105] There is obvious potential for overlapping between the functions of the two bodies, which reflects the fact that the State's obligations stand behind and in some respects exceed those of SOCOG (such as the construction or upgrading of venues, the Olympic village, media centres, and so on),[106] and a great deal is necessarily left to administrative discretion in the distribution of tasks between them and other public and private entities, but the exercise of that discretion is located in the OCA under the direction of the Minister.

The OCA was also given the function of "promoting, co-ordinating and managing the orderly and economic development of the Homebush Bay area, including the provision and management of buildings and of transport and other infrastructure to service that area" as successor in title and function to the Homebush Bay Development Corporation.[107]

The OCA received special powers[108] relating to land. These include a power of compulsory acquisition[109] and power to act in relation to land in the same way as a private individual[110] by carrying out building or other development work on land which it owns or with the consent of the owner. In effect, the OCA is permitted to behave like a private developer in order to carry out its statutory functions.

The OCA is empowered to delegate any of its powers, authorities, duties or other functions to a private corporation in which it has a controlling interest, referred to in the Act as a "subsidiary corporation",[111] or to another authorised person.[112] The OCA may, for example, carry out development by means of a joint venture with private capital, provided that it has a controlling interest in the joint venture vehicle. Unlike the OCA however, a subsidiary corporation, whether wholly or partly owned, does not represent the Crown[113] and is not necessarily subject to the same administrative law controls and remedies such as those provided by the *FOI Act*.[114]

The OCA is more obviously governmental in character than SOCOG. Its amenability to the provisions of the *FOI Act*, the *Ombudsman Act* 1974 (*NSW*) and the *Independent Commission Against Corruption Act* 1988 (*NSW*) is sufficiently obvious not to need specific legislative provision. It is subject to public sector controls in that it is an "authority" under the *Public Authorities*

105 *SOCOG Act*, s 9(1).
106 See note 1 *supra*, cl 10.4.
107 *OCA Act*, s 13 and Sch 2.
108 *Ibid*, Pt 4, Division 2.
109 *Ibid*, s 14.
110 *Ibid*, s 16.
111 *Ibid*, s 20.
112 *Ibid*, s 19.
113 *Ibid*, s 20(5).
114 See *FOI Act*, s 7, in which any "incorporated company or association" is exempted from the definition of "public authority".

(Financial Arrangements) Act 1987[115] and a "statutory body" under the *Public Finance and Audit Act* 1983.[116]

The confidentiality exemption in the *FOI Act* is however extended to apply to the OCA in the same way as it applies to SOCOG.[117]

B. Planning Legislation and the OCA

If the OCA exercises its statutory powers by conducting or sponsoring development which requires consent under environmental planning legislation, it attracts the operation of a special legislative regime which transfers some of the decision making functions that would otherwise belong to the consent authority to the OCA itself.

The OCA is also given power to exempt some development projects described as temporary (though potentially extensive and of significant value) or minor from having to obtain development consent.

These provisions are considered below under "Part X Environmental Planning Law".

VI. 1996: THE AOC BUYOUT AND OTHER CHANGES

The *SOCOG Act* enhanced the influence of the State over the running of the Games at the expense of the influence of the AOC. That balance of influence was partly reversed by some of the events which occurred in 1996.

On 5 June 1996 the Board of SOCOG exercised its statutory power[118] to create a Sports Commission and to delegate to that Commission a significant portion of its core functions. The functions delegated (on the recommendation of the Presidents of SOCOG and of the AOC) included budgetary responsibility (within allocations approved by the Board) for Sport Operations and Competition, Games Scheduling and other sport-specific programs, and responsibility to ensure that the requirements of sport in relation to marketing, facilities, facilities operations, transport, villages, accommodation and other sport-related programs "are delivered according to the commitments of SOCOG to the IOC". The members of the Sports Commission were to be the President and Secretary General of the AOC, the two IOC member representatives in Australia, the CEO and two other Board Members of SOCOG.[119]

The Board resolution went further. It provided that the Commission would be:

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115 Sch 1, cl 1.4.

116 Sch 1, cl 1.6.

117 *OCA Act*, Sch 1, cl 1.2; *FOI Act*, Sch 1, cl 22.

118 *SOCOG Act*, ss 36 and 37.

119 A copy of the Board resolution is annexed to the Variation Deed dated 11 December 1996, publicly released by SOCOG with the Host City Contract in January 1999.

> a permanent Commission whose functions may not be altered and which may not be abolished by the Board unless the decision to do so is supported by both the President of SOCOG and the President of the AOC and which shall be contractually entrenched through amendments to the Host City Contract.

This contradicted the *SOCOG Act*, which provided that "the Board may abolish a Commission...at any time"[120] without allowing for any such right of veto.

Several other changes concerning SOCOG were being negotiated about this time.

The State wanted to buy out the interest of the AOC in any surplus that may result from the celebration of the Games. The deal that was done involved payments exceeding $6.6 million to the AOC and $92 million to the trustee of the Australian Olympic Foundation, to be made after the closing ceremony and the amendment of the *SOCOG Act*, to divert the 90 per cent surplus entitlement previously destined for the AOC into consolidated revenue "to help defray the cost of building facilities for the long term benefit of sport in Australia", and to delete qualified veto rights which the Act had originally given the AOC President over SOCOG's budget.[121]

The price of the buyout cannot be justified by reference to the expected surplus of SOCOG, which was budgeted in 1993 at $21 million[122] and in 1994 at $26 million.[123] The payout for AOC's 90 per cent is approximately four times the 1994 estimate of SOCOG's entire surplus.

Other amendments were made to the *SOCOG Act* at the same time, including the enactment of exemptions under s 51 of the *Trade Practices Act* 1974 and the *Competition Code of New South Wales* for sponsorship contracts of SOCOG. The amendments did not include entrenchment of the Sports Commission, which was evidently intended to be left as a secret contractual arrangement.

While these negotiations were still proceeding, the Government enacted further legislation appointing the Minister for the Olympics *ex officio* President of SOCOG (said by the AOC to have been suggested by the Presidents of the AOC and of the IOC) and appointing the Shadow Minister for the Olympics an *ex officio* Director in lieu of one of the State appointees.[124] The former amendment enhanced while the latter diminished the influence of the governing party, but the latter also insured the stability of SOCOG against a change of government and gave the opposition a stake in SOCOG's success.

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120 *SOCOG Act*, subsection 36(4).

121 Variation Deed dated 11 December, 1996, between the City, AOC, SOCOG, Michael Knight representing the State and Australian Olympic Foundation Ltd: *Sydney Organising Committee for the Olympic Games Amendment Act* 1996. The amounts payable under the Variation Deed were expressed in 1992 dollars ($5 million and $70 million) to be adjusted in accordance with increases in the CPI by a factor not less than 1.3272.

122 Agreement to Amend Endorsement Contract, 23 December 1993 between the AOC, the City and John Fahey for the State.

123 SOCOG General Organisation Plan, submitted to the IOC, December 1994. The budgeted surplus of SOCOG is expressed as US$15 million in 1992 equivalent terms; US$20 million or AUD$26 million nominal based on timing and escalation rate assumptions.

124 *Sydney Organising Committee for the Olympic Games Further Amendment Act* 1996.

The amending Acts were approved by the IOC and the AOC.[125] Commencement of most of their substantive provisions was delayed until a Variation Deed had been finalised with the AOC,[126] consistently with an undertaking given by the Minister, Michael Knight, in correspondence with the AOC and the IOC that the relevant amendments would not commence until the Sports Commission had been established and changes to the Host City Contract approved by all parties.[127]

VII. 1997: THE IOC BUYOUT

In 1997 the State bought out the IOC's 10 per cent interest in any SOCOG surplus for a sum exceeding $11 million payable after the closing ceremony, and consented to amendment of the *SOCOG Act* redirecting that interest to consolidated revenue.[128] This was even more generous than the buyout of the AOC.

VIII. 1998: ORTA

To complete the legislative picture, a third Olympic statutory body, the Olympic Roads and Transport Authority (ORTA) was established by the *Olympic Roads and Transport Authority Act* 1998. Like the OCA, it is a statutory body representing the Crown for the purposes of any statute.[129]

ORTA's principal function is to plan, co-ordinate and provide road and transport services for the Olympic Games and other "special events"[130] and has power to direct any "government agency" (excluding SOCOG and the Police Service) in the exercise of any function relating to the provision of transport, regulation or movement of traffic, parking or any function that might impact on any such functions of a government agency,[131] any law to the contrary (such as an express or implied prohibition on acting under dictation, or arguably even a requirement to have regard to policy or discretionary considerations that do not bind ORTA) notwithstanding.[132] ORTA is subject to the control and direction of

125 AOC, "Summary of the Creation and Structure of SOCOG" in note 4 *supra*.

126 Variation Deed dated 11 December 1996, between the City, AOC, SOCOG, Michael Knight representing the State and Australian Olympic Foundation Ltd. The major provisions of the *Sydney Organising Committee for the Olympic Games Amendment Act* 1996 and the *Sydney Organising Committee for the Olympic Games Further Amendment Act* 1996 commenced 20 December 1996, and 1 January 1997 respectively.

127 Letters dated 5 June 1996, quoted in AOC, "Summary of the Creation and Structure of SOCOG" in note 4 *supra*.

128 Deed dated 11 December 1997, between the IOC, City, AOC and SOCOG: *Sydney Organising Committee for the Olympic Games Amendment Act* 1997. The buyout price was $8.33 million 1992 dollars plus CPI adjustment by a factor not less than 1.3272.

129 *ORTA Act*, ss 6 and 7.

130 *Ibid*, s 8.

131 *Ibid*, s 24.

132 *Ibid*, ss 26 and 33.

the Minister[133] but its CEO is advised by a Board drawn from the OCA, SOCOG, the Department of Transport, the Roads and Transport Authority and the Police Service.[134]

The government agencies most obviously affected by the co-ordinating and directive role of ORTA are the transport authorities - the Roads and Transport Authority, State Transit Authority, State Rail Authority, Freight Rail Corporation and Rail Access Corporation, with whom ORTA is also empowered to contract.[135] ORTA, its contracts and contractors enjoy authorization and immunity under anti-trust provisions of the *Trade Practices Act* 1974 and the *Competition Code of New South Wales*.[136]

The FOI exemption originally created for documents created or received by SOCOG which are confidential to the IOC or AOC extends on the same terms to ORTA.

IX. 1999: PUBLIC RELEASE OF CONTRACTS

The secrecy attached to the organisation and running of the Sydney Olympics attracted criticism. It was adversely compared with the level of information available to the public about the 1996 Atlanta Games, which had been privately run. Freedom of Information requests by the press were refused. The Auditor-General expressed his concern about some aspects of non-disclosure.[137] This came at a time when the IOC was under pressure itself over allegations of bribery and corruption against an embarrassingly large number of its members.

In January 1999, the AOC and SOCOG publicly released, almost simultaneously, the Endorsement Contract and the Host City Contract and the

133 *Ibid*, s 12.

134 *Ibid*, s 16.

135 *Ibid*, s 27.

136 *Ibid*, s 45.

137 See the account given by M Moore, note 97 *supra*. Moore records that FOI requests were refused for: the Host City Contract; Unsuccessful tenders for Olympic venues including village, stadium and indoor arena; Criteria used to pick the winning tenders; Minutes of SOCOG board or committee meetings; Minutes of meetings of OCA or its sub committees; Agendas for any SOCOG or OCA meeting; SOCOG's budget by program, for example spending on arts festivals; SOCOG's quarterly unaudited accounts; SOCOG statements of receipts and disbursements; SOCOG merchandising figures; SOCOG reports to the IOC; Unsuccessful designs for Olympic torch; Unsuccessful designs for public art; Public opinion surveys on: * What people think of SOCOG, * SOCOG sponsor satisfaction study, * Ticket prices, * Gambling proposals, * Proposed brick program, * Green and gold sock day; Report on results of SOCOG staff survey; Documents detailing all revenue from sale of TV rights; Documents detailing expenditure of $172 million to broadcast Games; Minutes of meetings of SOCOG Sports Commission - whilst the following were made public at Atlanta: Host city contracts; Unsuccessful tenders for all venues; Criteria used to select winning tenders; All contracts over $US250 000; Access to board meetings of organising committees; Agendas for meetings; Detailed program budgets; Quarterly unaudited financial accounts; Annual receipts and disbursements; Key business terms of TV contracts; Quarterly merchandising sales figures; Contracts with public entities including inter-governmental agreements and venue contracts; ACOG's formal official report to the IOC; List of volunteers; List of executives loaned to ACOG for one year or more and their companies; List of all employees; Policies on hiring, travel and entertainment, purchasing, expense control; press policy and volunteer services policy.

other agreements varying them. Without access to those documents our knowledge of the legal structure of the Sydney Olympics would be considerably less, as would our knowledge of the nature and extent of the obligations undertaken by SOCOG and the OCA at public expense and at the direction of the State.

There is no obvious basis for secrecy of the Endorsement Contract and the Host City Contract and their respective variations, unless it be a sense of political embarrassment at the extent to which the Olympic movement has successfully insisted on controlling the Games, their cost, and revenue - but where the Games are publicly funded, that is not a legitimate ground for secrecy, nor is it a genuinely commercial one. The disclosure of these documents underscores the absence of apparent justification for secrecy.

Release of the contracts did not end public concern about levels of disclosure and accountability. The special FOI exemption is still in place. In May 1999, the Auditor-General warned that he would not approve SOCOG's accounts unless its Sports Commission complied with public sector accounting practices.[138] Given the role of the Sports Commission, this is a significant issue of accountability. And in recent days a public furore has erupted concerning premium priced tickets quietly withheld from the general public by SOCOG, presumably with the consent of the IOC.[139]

The whole saga illustrates the need for principles of general legal application, constitutional principles, with a small 'c', to be developed to ensure that public access to information is not denied on grounds of commercial confidence in the absence of genuine commercial sensitivity, and to ensure financial accountability (through the Auditor-General or public access to documents, depending on their genuine level of sensitivity) where public funds are committed.

X. ENVIRONMENTAL PLANNING LAW

The primary code of environmental planning in New South Wales is the *Environmental Planning and Assessment Act* 1979 (*EPA Act*), which provides for the making of environmental planning instruments and permits development only in accordance with those instruments. An environmental planning instrument may be a Local Environmental Plan (LEP), a Regional Environmental Plan (REP), or a State Environmental Planning Policy (SEPP). Apart from those developments which are permitted as of right or prohibited altogether, land may only be developed or used[140] for a particular purpose with development consent from the relevant consent authority,[141] which is usually the local Council.[142]

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138 M Evans, "SOCOG accused of misleading audit", *Sydney Morning Herald*, 21 May 1999.

139 See note 32 *supra*.

140 "Development" is defined to include the use of land: *EPA Act*, s 4(1).

141 *Ibid*, ss 76, 76A and 76B.

The most intense Games-related development is occurring within the areas covered by Sydney REP 24 Homebush Bay Area and Sydney REP 26 City West. The consent authority for most of REP 24 is the Minister for Urban Affairs and Planning, who generally requires the concurrence of the OCA in granting development consent.[143]

Part 5 of the *OCA Act*[144] applies to any development sponsored by the OCA in the sense that it is carried out by, for or on behalf of the OCA, or that the OCA is the applicant for development consent although the development may be carried out by and for another person. Such development is defined in SEPP 38 Olympic Games and Related Projects as an "OCA project".[145]

SEPP 38 applies to all proposed development within the Sydney Region for the purpose of an "OCA project" or an "Olympic Games project".[146] The effect of other environmental planning instruments, such as REP 24, REP 26 and SEPP 10 Retention of Low Cost Rental Accomodation, is expressly preserved, at least in the case of consent developments,[147] but the provisions of SEPP 38 are expressed to prevail over other planning instruments to the extent of any inconsistency.[148]

The governing law relating to development consent is therefore:

(a) in the case of development sponsored by the OCA - the *EPA Act* as modified by Part 5 of the *OCA Act*, SEPP 38 and REP 24 or 26 and/or any other applicable planning instrument as modified by SEPP 38;

(b) in the case of development for an "Olympic Games project"[149] in the Sydney Region other than an OCA project - the *EPA Act*, SEPP 38 and REP 24 or 26 and/or any other applicable planning instrument as modified by SEPP 38;

(c) in the case of development which may be related to the Olympic Games but which is not for an "Olympic Games project" in the Sydney Region and is not an "OCA project" - the *EPA Act* and REP 24 or 26 and/or any other applicable planning instrument.

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142 The *EPA Act*, s 4 defines "consent authority" as "the council having the function to determine the application" or the Minister or other public authority having that function under a provision of the Act, the regulations or an environmental planning instrument. LEPs usually provide that the local council has that function. The Minister also has power to override the normal planning process and take over the role of consent authority under s 88A.

143 REP 24, cl 10. There are also small areas where local councils are consent authorities. Water based development requires the consent of the Maritime Services Board.

144 Sections 22-26.

145 See SEPP 38, cll 3 "OCA project", 4 and 5.

146 SEPP 38, cll 3, 4 and 5.

147 *Ibid*, cl 8.

148 *Ibid*, cl 14.

149 See SEPP 38, cl 3.

A. Olympic Games Projects and OCA projects

An explicit objective of SEPP 38 is to facilitate development for Olympic Games projects and OCA projects.[150]

The sole consent authority for Olympic Games projects and OCA projects is the Minister for Urban Affairs and Planning.[151] Regardless what any other planning instrument may say, every Olympic Games project and every OCA project in the Sydney Region is a consent use[152] except specified temporary or minor developments which may be carried out without development consent if the OCA approves.[153]

The Minister cannot grant development consent for an Olympic Games project without the endorsement of SOCOG that the development is required for the Games.[154] Consultation is also required between the OCA or the Minister (for OCA projects or other Olympic Games projects respectively) and other government bodies.[155] Any requirement for advertising or consent of other authorities is suspended, but the Director of Planning is required publicly to exhibit some major development applications.[156]

The criteria that would otherwise apply for deciding development applications are modified in that SEPP 38 prevails over inconsistent provisions of other planning instruments[157] and permits departure from development standards that may otherwise have applied.[158] Consent criteria are supplemented by requiring the Minister to consider public submissions on an exhibited application and consistency with ecologically sustainable development. For a private Olympic Games project, the Minister is to consider further matters including consistency with the Environmental Guidelines developed as part of Sydney's bid for the Games, the arrangements made for disabled people and long term issues such as use of facilities after the Games, but for an OCA project the same matters are to be considered by the OCA.[159]

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150 SEPP 38, cl 2.

151 SEPP 38, cll 6 and 8.

152 SEPP 38, cll 7 and 14.

153 SEPP 38, cl 11A and Sch 1. Although cll 1-4 of Sch 1 specify that the development be of "minor environmental impact", the subject matter covered is not insignificant, including roadworks, landscaping, telecommunications facilities and infrastructure works, lighting, public entertainments, catering facilities and Olympic sponsor advertising. Olympic Home Host accommodation may be provided without OCA approval: cl 11B.

154 SEPP 38, cl 7.

155 *OCA Act*, s 24; SEPP 38, cll 10(1) and 11. The bodies to be consulted include the relevant local council.

156 SEPP 38, cll 10(3) and 9. The applications to be exhibited relate to provision of residential accommodation for competitors, officials or media, venues for over 5000 people, and other development which the Director thinks is likely to have a "significant impact".

157 SEPP 38, cl 14; *cf EPA Act*, s 74.

158 SEPP cl 10(4). Contrast SEPP 1 cl 6, which requires written application on grounds that the application of the standard would be unreasonable or unnecessary in the circumstances; a dispensation also requires the consent of the Director of Planning under cl 7.

159 SEPP cll 10 and 11; *OCA Act* subsection 24(3). Consideration of subsection 24(3) matters by the OCA in relation to OCA projects is anterior to the development application process; the Minister's only role is to ensure that the OCA has consulted and considered as required by that section.

The *OCA Act* modifies the application of the *EPA Act* by providing that OCA sponsored development is not "designated development".[160] Development that is "designated development" under the EPA regulations or under an environmental planning instrument attracts special advertising and notification requirements and entitles objectors to appeal to the Land and Environment Court on the merits of the consent application[161] which are excluded in the case of OCA projects.

The OCA is also its own consent authority for the purposes of obtaining building approval[162] and subdivision approval where that function would otherwise be exercised by a local council.[163]

Under normal circumstances the *EPA Act* provides rights of merit appeal to disappointed developers and in the case of designated development to objectors. It also allows judicial review for error of law without the applicant for review having to show any particular interest or legal standing.[164] In the case of OCA projects objector rights of merits appeal and the specific statutory right of judicial review[165] are negated, although a person with sufficient interest to satisfy common law rules of legal standing could still challenge a decision for error of law relying on common law rights.

XI. SOME CONCLUSIONS

The legal structure of the Sydney Games is an impressive achievement, but it is not flawless. Its flaws relate mainly to excessive secretiveness and a not-unrelated neglect of legal principle.

A. Ownership of the Games

The Endorsement Contract says that the IOC owns the games. That of course is an over-simplification. What the IOC 'owns' is the right to lend its name and the considerable resources of its international organisation to a sporting event. Those rights give the IOC considerable power in bargaining with political and sporting leaders who want to host an Olympic Games. The IOC makes sure in establishing the contractual structure comprised in an Endorsement Contract that each successive games is well-lawyered; that it appropriates to itself the legal and practical lessons learned in past Games; and that it deploys them to retain the maximum quality control over each new Games and to achieve maximum direct control in matters of closest concern to the IOC itself.

But for all its power, the IOC does not have the resources, financial or legal, to run an Olympics Games by itself. The staging of the event requires enormous capital infrastructure development located in and around the Host City. It is therefore to be expected that funding for the Games will be sought principally in

160 *OCA Act*, s 23.
161 See *EPA Act*, ss 77, 79 and 98.
162 And other approvals under Pt 1 of Ch 7 of the *Local Government Act* 1993: *OCA Act*, s 25.
163 Section 26.
164 *EPA Act*, s 123.
165 *Ibid*, subsection 123(4).

the state or country where the Host City is located (not neglecting the considerable potential for revenue from international broadcasting media). Funding can be public or private or both, but the scope of the event is such that the state must be involved to some extent in the running and/or regulation of the Games with their associated infrastructure and other development. That fact gives the local political authorities and financial backers considerable bargaining power.

One could say that the control of the running of Sydney's games rests with SOCOG, subject to the considerable veto and intervention rights of the IOC, but who controls SOCOG? The structure and obligations of SOCOG are such that it has no single point of control. Instead, there is a balance of influence between the various stakeholders who have representation on the SOCOG Board.

At the risk of oversimplification, the balance of influence over the running of the core functions of the Games tends to favour the IOC and the AOC through their relative domination of the Sports Commission; and given the nature of the event, that is probably no bad thing.

The balance of influence over the other affairs of SOCOG, and general control over the capital works, services, infrastructure and facilities to be provided for the Games tends to favour the State Government through its strong representation on the SOCOG Board and its control of the OCA and ORTA and their respective statutory powers, subject to the significant vetoes and controls of the IOC under the Host City Contract.

Responsibility for the financial cost of staging the Games rests with the State and the City under the terms of the Endorsement Contract and the Host City Contract; and so does the ultimate commercial risk of the Games as an entire enterprise. The IOC carries an indirect commercial risk, in that the value of its endorsement of future Olympic Games would be diminished by an adverse outcome in Sydney.

The direct financial benefit of the Games will be shared between the IOC which is entitled to royalties and any other profits it can make from its own activities and the residual intellectual property and other rights secured to it under the Host City Contract and the State which is entitled to any surplus on the winding up of SOCOG (having bought out at great expense the interests of the IOC and AOC).

The Games will also create considerable economic opportunities and activity which are expected to enhance the local economy.

B. Governmental Decision Making

In some respects the legal structure which has been established for the Games is a model of efficiency. Most relevant decision making is centralised and integrated under SOCOG, the OCA and the Minister for the Olympics. A strong streak of single-mindedness is evident in the powers of the OCA and ORTA to override private and institutional interests which could otherwise impede the successful staging of the Olympic Games.

Environmental planning controls are retained but significantly modified. Decision making in that field also is centralised under the Minister for Urban

Affairs and Planning and integrated with significant roles for the OCA and SOCOG. They also have potential roles as participants in development, and their positions in the planning process and the curtailment of normal community rights of appeal and judicial review can only be explained as reflecting a legislative judgment that the successful staging of the Olympic Games is an exceptional and overriding public desideratum.

One of the much vaunted elements of Sydney's bid for the 2000 Olympics was the promise of a 'Green Games'. The environmental standards promised in the bidding process are given legal force by two routes: first, by the statutory recognition of the Endorsement Contract which in turn gives force to the bid documents; and secondly, through the planning criteria in SEPP 38 and Pt 5 of the *OCA Act*.

C. Constitutional Issues

Although there is much to commend in the legal structure that the State has created for the Games, there are also a number of points at which important constitutional principles have been overlooked.

(i) Secrecy of Legislation

First, legislation should be public and publicly accessible; it should not define statutory powers, rights or obligations by reference to a document that it not before the Parliament or assessable to the public. The powers and obligations of SOCOG were defined by reference to the Endorsement Contract and the Host City Contract at a time when they had not been made available. That remained the case when satisfaction of SOCOG's obligations was included in the statutory objects and powers of the OCA and ORTA. This is not to criticize the contracts as such, but only their inappropriate secrecy.

(ii) Delegation of Legislative Power outside Parliamentary Control

Secondly, statutory powers rights and obligations should not be capable of amendment except by Parliament or by a process that includes or provides for Parliamentary scrutiny and control. The statutory definition of the Endorsement Contract and Host City Contract so as to include any subsequent amendments coupled with their nomination as the source of statutory powers and duties had the effect of sidestepping Parliamentary control over legislative amendment. There was nothing to ensure that any amendments of those contracts would even be notified to Parliament.

(iii) Fettering Statutory Powers

Statutory powers may not be fettered by contract.[166] The secret side-agreement made in October 1993 purporting to constrain the Premier's exercise

166 *R v Dominion of Canada Postage Stamp Company* [1930] SCR 500; *William Cory & Son v London Corporation* [1951] 2KB 476 (CA); *Watson's Bay & South Shore Ferry Co v Whitfield* (1919) 27 CLR 268.

of power in relation to hiring and firing of SOCOG directors and the Variation Deed of 11 December 1996 purporting to prevent the SOCOG Board from abolishing the Sports Commission without consent of the Presidents of SOCOG and the AOC infringe that rule. It does not matter that the substance of both agreements may have been unobjectionable; the problem is that they were done secretly and by contract instead of publicly and by Parliament.

D. Unnecessary Secrecy

Unnecessary secrecy seems to have been endemic to the Sydney Olympic Games. Apart from objections to secrecy of legislation and secret agreements concerning the exercise of statutory discretions, one may question the appropriateness of specific FOI exemption for documents received or created by the OCA, SOCOG or ORTA containing material which is "confidential to" the IOC or the AOC. The FOI Act already contains substantial exemptions in relation to confidential information. It is difficult to see why these were not sufficient to protect the legitimate interests of the Olympic movement.

A restrictive policy also appears to have been taken in dealing with FOI requests. Complete refusal of access to the Host City Contract and its variations prior to their release in January 1999 seems unjustifiable; and one may wonder whether the other classes of documents to which access was refused genuinely fall within the scope of FOI exemptions. The Endorsement Contract contained a confidentiality clause against the disclosure of that Contract "or any financial or other confidential information obtained" as a result of the candidature or the staging of the Games.[167] There was no equivalent prohibition in the Host City Contract.

What finally brought the Contracts and much else to light however was the operation of the democratic process, assisted in part by the timing of unrelated revelations concerning corrupt conduct of some IOC members and the resulting scandal which threatened the Olympic movement worldwide, by the press and to a lesser extent, perhaps, by the fact that SOCOG and the OCA were subject to the *Public Finance and Audit Act* 1983 and the attention of the New South Wales Auditor-General.

SOCOG, the State government and the IOC have insisted, presumably for purposes of commercial and political protection, on a level of secrecy which has contributed to public cynicism and in turn to a marked cooling of interest on the part of potential Olympic sponsors. With no eye for irony, they are the authors of their own harm.

It is to be hoped that our lawmakers and future Olympic lawmakers will not only benefit from the considerable legal strengths of the Sydney Olympics but also learn from its mistakes.

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167 Note 1 *supra*, cl 18.1.

E. Last Words

Will the Games be a case of Gold to Australia?

And will the authors of the laws of the Games win Gold? Should they? Have they sufficiently prepared themselves mentally and physically for the final effort not just of two short weeks in September, but of the 'long term requirements of Sydney'?[168] Have they paid enough attention to all the requirements of their demanding sport?

They do not all share the same goals. Some will do better than others. Some will certainly walk away with gold (in one sense or another) but hopefully that is not all there is to the Games.

168 *OCA Act*, subsection 10(2).

TABLE 1

1 Jan 1991	Endorsement Contract *State/City/AOC*
23 Sep 1993	Host City Contract *City/AOC/IOC*
18 Oct 1993	Agreement to Amend Endorsement Contract *State/City/AOC*
9 Nov 1993	SOCOG Act: assent
12 Nov 1993	SOCOG Act: commencement
23 Dec 1993	Agreement to Amend Endorsement Contract (as 11 Sep 1998)
4 Feb 1994	Notice of intervention of SOCOG to IOC, AOC and City
9 Jun 1995	OCA Act: assent
30 Jun 1995	OCA Act: commencement
24 Oct 1995	Further Agreement to Amend Endorsement Contract *State/City/AOC*
21 Dec 1995	General organisation plan SOCOG to IOC
5 Jun 1996	SOCOG Board resolution creating Sports' Commission; assurance by Minister Knight to IOC and AOC
21 Jun 1996	SOCOG Amendment Act 1996: assent and partial commencement
19 Sep 1996	SOCOG Further Amendment Act 1996: assent and partial commencement
11 Dec 1996	Variation Deed (of Host City Contract) *State/City/SOCOG/AOC*
20 Dec 1996	SOCOG Amendment Act 1996: commencement of most provisions
1 Jan 1997	SOCOG Further Amendment Act 1996: commencement of most provisions
25 Nov 1997	SOCOG Amendment Act 1997: assent
1 Dec 1997	SOCOG Amendment Act 1997: commencement
11 Dec 1997	Deed (amending Endorsement Contract) *IOC/City/OAC/SOCOG*
9 Nov 1998	ORTA Act: assent
31 Dec 1998	ORTA Act: commencement
22 Jan 1999	Release of contractual and related documents by AOC and SOCOG
15 Sep 2000	Opening ceremony of Games
1 Oct 2000	Closing ceremony of Games