

THE LAW RELATING TO CONTRACTS WITH GOVERNMENTS AND PUBLIC AUTHORITIES

by

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Introduction

The topic of government contracts is an elusive one, because in most respects government contracts are not a distinct legal type of contract. Certainly the question of validity or enforcement of government contracts, the performance of which might infringe the due exercise of some statutory or other power, is one special feature of government contracts, and it will be dealt with in this article. Again, the question of the capacity to make particular contracts is of especial importance in the case of governments and public authorities, and mention will be made of that question. For the most part, however, the legal considerations are the same as those attaching to any contract. The range of contracts which governments make is obviously a wide one, but the contracts within the range are essentially similar to private contracts.

It is possible, however, to find some special features in government contracting practice, and these have encouraged writers in Australia and elsewhere to treat the topic as deserving special study.² Of course, the degree of difference from private sector contracts varies with the sort of contract being considered.³

Aronson and Whitmore single out as distinguishing features of government contracts —

- the policies sought to be achieved by the contracts;
- the importance from a public interest point of view of the subject matter, and of the need for flexibility and control; and
- the large amounts of public money often involved.⁴

Puri also refers to —

- the public accountability for and public audit of the contracts;
- the existence of numerous terms and conditions (though I don't regard that as a feature peculiar to government contracts);
- the involvement of a body of officials which might not consist of the same individuals all the time; and
- the desire to avoid unwarranted litigation.⁵

I wish to discuss a number of matters that I have encountered in practice as a government lawyer working in New South Wales. I do not know in any detail what particular rules of Queensland law, particularly statutory law, may bear on the matters, so that it is perfectly possible that in this State the same problems do not arise, or have been tackled differently. However, I am not aware of any fundamental differences.

I would like to begin with some authorities on the questions of capacity to contract, and

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² There is at the end of this article a bibliography of some relevant books and articles.

³ Accordingly, government contracts can range between the extremes of (1) routine procurement contracts, characterised by more or less precise specifications and rigid terms, and (2) research and development contracts, with terms far more negotiable because the government would often be unable to specify the work to be done, or even the result to be achieved.

⁴ M. Aronson & H. Whitmore *Public Torts and Contracts Law* Book Sydney 1982 at 177.

⁵ K.K. Puri *Australian Government Contracts* CCH Sydney 1978 at 73.

of the effect of statutory requirements about the manner of making contracts.

I would then like to mention government contracts for the procurement of supplies, general conditions of which form one of the last bastions against the advance of plain English. I will mention, not case law so much (for in recent times there has been little), but the changes that are occurring in government practice in New South Wales, and I think elsewhere in Australia. Those changes are probably coming about as a result of the influence in government of the private sector, but may be helped along by developments in administrative law. I will not include contracts for the construction of public works in this discussion, as they form a highly specialised subject of which I have little experience⁶; and for the same reason I shall steer clear of international contracts.

Then I would like to refer to a field which I shall call "special project development contracts", in which a new crop of litigation, more substantial in terms of the scope of issues and evidence involved than any other litigation of relevance to government contracts, has been growing, at least in New South Wales. I have in mind the sort of case where a government has encouraged a private developer to take a lease of public land for some (perhaps reluctant) instrumentality, in order to construct and operate some form of development, but the project has turned sour, perhaps because of the political pressure or popular resistance to the project.

In contrast with procurement contracts, project development contracts of necessity are not in a common form. In recent claims against the government, there has usually been a dispute as to whether a contract exists at all. The claimant has usually been concerned with establishing alternatively the actual existence of a contract, or rights of the same kind by virtue of equitable estoppel, or rights to compensation for money spent on work that has not resulted in a contract. On some occasions, the claim has involved an assertion that the government bound itself to exercise some statutory discretion favourably to the claimant and the point has been taken by the government that it is not within a government's power to bind itself in that way.

Some of the leading cases on those topics have been (with the exception of the last two) private sector cases, rather than ones involving governments. I have included those cases here, because both sides to a dispute arising from the breakdown of a project need to be thoroughly acquainted with the case law. I will end with a discussion of a case which does involve the Government, and which draws these topics together.

2. Capacity to Contract, and Statutory Restrictions on Contract Making

In New South Wales, at least, the capacity of the Crown itself to contract is a subject of diminishing practical significance, as legislation has authorised the making of contracts of particular kinds by the State, or has clarified the contractual capacity of statutory bodies. There is, however, no legislation dealing with the contractual capacity of the Crown in general.

So far as the capacity of particular statutory bodies to make contracts is concerned, the question is, of course, one of construing the legislation establishing the body, and any other legislation affecting it individually or as a member of a class. The *Interpretation Act 1987* (NSW), Part 8, confers contractual powers on statutory corporations generally, but has to be read subject to the particular provisions of other relevant legislation.⁷ The authority

6. Public works in New South Wales account for vast areas of contracting falling within the administrative law, and various major instrumentalities, which operate autonomously within those areas, and have done so for many years. They have their own legislation, practices and forms.

7. *Interpretation Act 1987* (NSW), s.5.

statutory bodies to raise financial accommodation is dealt with generally in the *Public Authorities (Financial Arrangements) Act 1987* (NSW).

Of course, it will always be necessary also to consider whether there is anything in the legislation establishing the body which indicates the purposes for which it may contract, or sets some limit on a contracting power that it would otherwise enjoy by reason of more general legislation. Not every statutory regulation of the manner of contracting is, however, a constraint on the power to contract, and the question of whether or not it is such a constraint has given rise to litigation, of which I shall mention two recent cases. They deal as well with the question of the effect of statutory requirements as to the making of contracts.

In *Australian Broadcasting Corporation v. Redmore Pty Ltd.*⁸ the A.B.C. itself, in a dispute with its former landlord as to whether the A.B.C. had validly agreed to enter into a new lease, relied on a statutory provision⁹ that "the Corporation shall not, without the approval of the Minister, . . . enter into a contract" involving a certain amount of expenditure. The Minister's approval had not been obtained for the relevant agreement. The landlord had not known of the absence of approval.¹⁰ In the High Court, which by majority¹¹ held against the A.B.C., the only question was one as to the effect of the statutory provision on what was otherwise a binding contract.

In the majority judgment, the question was posed whether the provision was:

"merely directory (to the A.B.C.) in character or whether it operates to confine the actual powers of the A.B.C. or to render illegal or unenforceable any contract of the type to which it refers which is entered into by the A.B.C. otherwise than in accordance with its terms"¹².

The majority considered it to be of the former character. They pointed out that in terms the provision was directory as to the manner of exercise of a power acknowledged to exist. It was not directed to a party dealing with the A.B.C., for whose benefit no procedure existed under the Act to ascertain whether the Minister had or had not approved: it was directed to the A.B.C. alone.

There was no explicit provision as to the effect of non-compliance with the requirement,¹³ so that the question was one as to what might be implied from the provision in its context. In holding that the provision did not imply that non-compliance took such a contract beyond the A.B.C.'s powers, or that any such contract was illegal or unenforceable, the majority relied on various features of the legislation. Its provisions conferring general contractual power, and provisions explicitly limiting that power, were to be found in a separate part of the Act. The provision relied on was in a part, the general topics of which were the provision of funds and governmental supervision of their expenditure. Parallel with the provision was another which prohibited expenditure except in accordance with estimates approved by the Minister, but which could not have been intended to confine the power of the A.B.C., or to invalidate the otherwise lawful expenditure of money by it. Moreover, the conduct of entering into such a contract without the necessary approval was conduct on which the Act imposed certain sanctions.

The minority agreed that non-compliance with the statutory requirement did not affect the A.B.C.'s contractual power to enter into the contract, but considered that the contract

⁸ (1989) 166 CLR 454.

⁹ *Australian Broadcasting Corporation Act 1983* (Cth), s.70(1)(a).

¹⁰ *Supra* n.8 at 456, though see *ibid.* at 461.

¹¹ Mason C.J., Deane and Gaudron JJ.; Brennan and Dawson JJ. dissenting.

¹² *Supra* n.8 at 456-7.

¹³ In contrast, the corresponding provision of earlier legislation had spoken of the A.B.C.'s not being "empowered" to enter into a contract without the requisite approval.

was avoided by the statute, there being, in their opinion, no other effective means of giving effect to the purpose of the provision. That purpose was to protect public funds. It prevailed over the injustice that would befall an innocent party dealing with the A.B.C.:-

“Whether the statute has that operation depends on its purpose. If the purpose of prohibiting entry by a party into contracts of a particular class is the protection of the public interest and if the purpose would be frustrated by giving effect to contracts of that class, the statute sterilises those contracts”.¹⁴

Later, I shall be dealing with the subject of enforcement of contracts that fetter statutory discretions. That subject is concerned, of course, with the enforcement of contracts by the repository of the relevant discretion to exercise it in a particular way. It seems to me, however, that there is a similarity between the end result of the conduct in such a case and the end result of the conduct in a case such as *Australian Broadcasting Corporation v. Redmore Pty Ltd*. The Minister in *Australian Broadcasting Corporation v. Redmore Pty Ltd* was denied the opportunity to exercise the statutory discretion to approve or disapprove of the A.B.C.’s transaction. From the point of view of the public interest involved in the conferral of that discretion, the consequence was much the same as if he had purported to fetter his discretion.

In *Capricornia Electricity Board v. John M. Kelly (Builders) Pty Ltd*¹⁵, a statutory provision¹⁶ required an Electricity Board in Queensland to invite public tenders before entering into contracts for the sale of land, though it could dispense with that procedure if it advertised for registration of interest and then invited tenders from those who registered. The Board invited expressions of interest for the construction of a new office for it in Rockhampton, and then invited tenders from, not all the respondents, but a short list of them, in relation to various alternative schemes. One of the schemes contemplated that the land on which the Board’s existing office was built might be sold to the successful developer, in part payment for construction of a new office building. This scheme appealed to a particular company, which was associated with the defendant company, and which tendered to construct the new office on separate land, on the basis that the site of the existing office would be sold by the Board to the defendant company. The defendant company, however, had not been one of those organisations which had registered their interest.

The Board, believing itself to have complied with the statutory requirements, entered into a contract of sale to the defendant company, and, when things went wrong, sought in these proceedings specific enforcement of that contract. It enjoyed, under other provisions of the Act, general capacity to sell land; but the defendant company raised the defence that the Board had not complied with the statutory requirements for a contract of the relevant kind. The Board had indeed failed to bring itself within the exception to the general rule of seeking public tenders, because its invitation to register interest had not been sufficiently specific, it had not invited tenders from all the organisations which had registered their interest, and it had sold to an organisation that had not registered at all. But did that mean that it was beyond its power to enter into the contract, or that a breach of the provision rendered the contract unenforceable, on the one hand; or, on the other hand, were the relevant provisions merely directory, regulating the manner and form of due exercise of the power to contract, but not mandatory?

Byrne J. of the Queensland Supreme Court took a similar course to that of the majority in *Australian Broadcasting Corporation v. Redmore Pty Ltd*. His Honour began by pointing

14. *Supra* n.8 at 463.

15. (1990) 71 LGRA 256.

16. Of the *Electricity Act 1976* (Qld).

out that the statutory provisions about contracts of this kind contained nothing explicit to render them void if the statutory requirements were not met. That was in contrast with other provisions in the same Act about another class of contract. The question, then, was whether the consequences of non-compliance asserted by the defendant were implied.

His Honour thought that the provisions did not go to capacity, which on the construction of the Act was really a matter dealt with elsewhere in it. On the question whether the contract, though made by the Board in good faith, was nevertheless void for non-compliance, he relied on the contrast to be drawn with other provisions avoiding particular contracts, on the fact that strict compliance would have severe consequences for even the most trivial breach, and on the availability of certain statutory penalties to deal with non-compliance. He concluded that the legislature did not intend that non-compliance with the requirements should avoid a contract entered into by a Board in good faith.¹⁷

I should like to turn briefly to the question of the capacity of the State itself to enter into contracts, in cases where some statutory instrumentality has not been established for the purpose. In this case the difficulty arises because of the indications given long ago by the High Court, particularly in *New South Wales v. Bardolph*¹⁸, that the capacity of the State to enter into contracts without statutory authorisation is limited to contracts made in the ordinary course of administering a recognised part of the government of the State.

Academic writers have criticised that test¹⁹, but the occasion has not yet arisen for the High Court to reconsider it, and it remains a cause of concern on the part of the legal advisers on both sides of negotiations for government contracts. Personally, I think that the test may have more life in it than some writers allow, because of its relation to the legislature's control over expenditure; but perhaps it will be articulated more precisely on some future occasion. In most cases, the test will be regarded as being satisfied anyway, but in some cases the only prudent course may be to get legislative sanction for the contract. On occasions, of course, there exists a wider need for legislation to get rid of some impediment in the way of the proposed transaction, and the authorisation becomes only one of several matters dealt with by the legislature.²⁰

Sometimes a separate question arises as to the authority of an individual (Minister or public servant) to act as agent for the State to bind it to a contract within its capacity.²¹ It is obviously essential for the lawyers on both sides to have regard to any legislative restrictions on the authority of the person in question.²² That contingency aside, one possible measure to put the authorisation of the individual to bind the State beyond doubt is to have the Governor-in-Council grant the authorisation, and record it in a minute of the Executive Council.

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17. The defendant also unsuccessfully relied on a provision in the contract itself, warranting compliance with the legislation, as an essential term. Byrne J. held it not to be such a term.
 18. (1934) 52 CLR 455, the case in which the successor to the Lang Government unsuccessfully contested the validity of a contract made by that Government on the authorisation of the former Premier for the placing of routine government advertisements in a newspaper with Labor affiliations.
 19. See, for example, Aronson & Whitmore *supra* n.4 at 187ff.
 20. Amongst a number of examples in recent times, the case of the Sydney Harbour Tunnel is a conspicuous example of the use of legislation both to make necessary amendments to existing legislation, and to sanction the contract itself.
 21. See *Coogee Esplanade Surf Motel Pty Ltd v. Commonwealth* (1976) 50 ALR 363, concerning the effect of a "letter of intent" on the Commonwealth's part to enter into a lease when funds became available during early in the ensuing financial year, the letter having been issued by the Under-Secretary of the Department, after approval of the proposal by the Minister, to enable the prospective lessor to show it to its creditors. Needham J. considered the Under-Secretary lacked the necessary authority to bind the Commonwealth. In the New South Wales Court of Appeal, the case went off on the footing that it had not been intended in any event that the Commonwealth be immediately bound. See also *Northern Territory v. Skywest Airlines Pty. Ltd.* (1987) 48 NTR 20.
 22. *Attorney-General for Ceylon v. Silva* [1953] AC 461.

For routine contracts, however, that seems quite unnecessary. For instance, there is surely no doubt about the authority of a Department Head (who is charged with the running of the Department as a whole), or the delegate of a Department Head, to enter into contracts for the acquisition of supplies for the Department where it is consistent with legislation about procurement of supplies for them to have that authority. Contracts of this kind are entered into every day by officials possessing delegations from their Department Head, and nobody in my experience raises any question about their authority.²³

In recent times I have seen the question raised as to whether a statutory corporation empowered to make contracts, but also declared to represent the Crown, is a legal person distinct from the Crown itself, so as to make it possible for the corporation to contract with the Crown itself. I do not think there is any doubt but that in most cases they will correctly be regarded as distinct persons, capable of contracting with each other.²⁴ The same goes, of course, for the various governments in Australia. Nobody, so far as I know, has suggested any problem with inter-governmental contracting in Australia.

3. Procurement Contracts

In New South Wales the legal and administrative arrangements for procurement of supplies have been undergoing substantial change. The Government announced in Parliament in March 1990 its response to a report Supply of Goods and Services presented in August 1989 to the Legislative Council by a Standing Committee on State Development. It was announced that the negotiation of tenders should have as its new basis value for money and whole-of-life costing, rather than the lowest price to specification. It was also announced there would be post-tender negotiations with preferred suppliers, and the negotiation of substantial volume discounts on significant purchases and contracts. A code of ethics and a risk management policy would be developed to complement these changes. New administrative arrangements would be made.²⁵

These recent developments in the administrative arrangements in New South Wales for procurement of supplies are being accompanied by a review of the terms that will govern supply, and of relevant legislation. In some specialist areas, such as computer contracts, that is being done in conjunction with the Commonwealth and other States, with a view to achieving standard terms.

Within New South Wales the administration of most procurement is handled by one particular department²⁶, the contracting authority being a State Contracts Control Board. So far as concerns the Public Sector in a narrow sense, procurement is currently governed by one set of rules.²⁷ However, delegations are granted to Departments to procure less expensive supplies.

23. As Aronson and Whitmore note (*supra* n.4 at 203-4), "in practice most contractors do not concern themselves with such difficulties and, having regard to the dearth of case law, it seems that failure to find out about statutory, ministerial or other authority has caused little difficulty in Australia".

24. In *State Rail Authority v. Consumer Claims Tribunal* (1988) 14 NSWLR 473, the Court of Appeal held that the legislation governing the Authority established that it had an independent existence, and that when it entered into contracts (particularly contracts of carriage, which were involved in that case) it did so as principal, and not as agent for the Crown. On the question of statutory emanations of the Crown seeing each other, see *parte Workers' Compensation Board of Queensland* [1983] 1 Qd R 450.

25. New South Wales Hansard, 1 March 1990, No.2, at 494.

26. The Commercial Services Group. Many instrumentalities outside the inner budget group have their own legislative charter to procure supplies and services, so that in those cases the central procurement department is not necessarily involved, though in fact it may be used in order to take advantage of its bargaining power.

27. The *Public Sector Management Act* (NSW) and the *Public Sector Management (Stores and Services Regulations)* 1988. Contracts for the construction on the Government's behalf of public works are not regarded as falling within the concept of procuring services for the Public Service, a distinction which seems commonsensical, yet is hard to pin down.

In common with contractual arrangements of other governments, the contracts customarily include a set of "general conditions of contract", which have long taken a more or less fixed form. I think much of it belongs to the past, and the task now, it seems to me, is to revise the policies and reflect the revision in consistent and readable documentation.

Routine procurement contracts for many classes of goods and services have been criticised as being contracts of adhesion, with stringent provisions in favour of the Government which enable it to decide what quantity of supplies it will order, or indeed to withdraw altogether, and enable it to determine disputes, and to forfeit property or rights of the contractor in the event of default.

These characteristics can be illustrated by some of the provisions of the standard forms. In the one still in use in New South Wales, the State Contracts Control Board may unilaterally decide what, if any, quantity of stores it will order during the period of the contract, and the contractor is obliged to fill any such orders. In the event of any dispute as to stores, quantity, quality, and so on, "or any other matter whatsoever in respect of or connected with the Contract", the matter is to be determined by the Board, whose decision is to be final and binding on the Contractor.²⁸

The General Conditions empower the Board, in various circumstances indicative of financial trouble on the contractor's part, to take the performance of the contract out of the contractor's hands, and get someone else to complete it, at the Contractor's expense²⁹. The Board may in any of those circumstances, "or if the Board is not satisfied with the manner in which orders may have been executed", cancel the contract, whether there are any orders remaining to be executed or not; "and in such case the moneys which have been previously paid to the contractor on account of the orders executed shall be taken by him as full payment for all orders executed under the Contract". On cancellation, "all sums of money that may be due to the Contractor, or unpaid, shall be forfeited, and all sums of money held as security shall also be forfeited and become payable to the Government, and with the money so forfeited and payable . . . shall be considered as ascertained damages for breach of Contract".³⁰

Provisions of these kinds are not, of course, unique to government in New South Wales. Puri, in particular, reveals that they are common to other jurisdictions.³¹

Governments explain the provisions as necessary to enable the government to adapt quickly to rapid changes in technology, or in the government's need for particular products, or to price changes, without wasting public money on the purchase of superfluous or obsolete or over-priced supplies; and they will explain their control over disputes as necessary to prevent specious claims.

How far those are valid policy considerations is a question that will have to be addressed in the review of the standard conditions. I should, however, mention that, as a matter of law, Puri thought conditions of these kinds quite vulnerable to being struck down in the courts as unconscionable,³² if, indeed, some of them might not in any event be struck down on other public policy grounds, such as precluding the jurisdiction of the courts,³³ or imposing penalties.³⁴ He conceded, however, that Australian authority was not helpful to

28. Clause 10.

29. Clause 19.

30. Clause 20(a).

31. Puri *supra* n.5 at chs. 14 and 15.

32. *Ibid.* at ch. 16.

33. *Ibid.* at 164-166.

34. *Ibid.* at 169-170.

him.³⁵ Nor do subsequent developments in Australia in the law by which contractual provisions may be treated as unconscionable and therefore unenforceable help his case.

Procurement contracts are entered into with commercial parties. That fact may not in itself be decisive of whether their provisions will be treated as unenforceable on the ground of unconscionable conduct.³⁶ In the absence of special facts, however, the commercial party, however small its marketing power, does not, in entering into the contract, labour under the kind of special disadvantage which has featured in cases where the courts have treated the enforcement of a contract as unconscionable. In some cases the courts have regarded it as unconscionable for a party in a superior bargaining position consciously, or with awareness of the possibility, to take advantage of some special disadvantage suffered by the other party.³⁷ The types of cases in which the courts have set aside contracts on the ground of unconscionable conduct have been cases of "illness, ignorance, inexperience, impaired faculties, financial need or other circumstances (affecting the other party's) ability to conserve his own interests".³⁸ The mere inequality in bargaining power is not a relevant disadvantage.³⁹ It is hard to see what relevant form of disadvantage there could be, or how the tendering process would either reveal it to the government or incline the government to make use of it. Furthermore, a tenderer will have the opportunity to take independent advice on the proffered contract anyway.

Aronson and Whitmore have pointed out, in connection with government contracts, that the *Contracts Review Act* 1980 (NSW) is binding on the Crown.⁴⁰ However, a corporation may not be granted relief under the Act. Nor may an individual be granted relief in relation to a contract so far as the contract was entered into in the course of or for the purpose of a trade, business or profession carried on, or proposed to be carried on by that individual.⁴¹ It is difficult to see the Act's relevance in practice to contracts with government suppliers.⁴²

35. He mentioned particularly (*ibid* at 210-212) *South Australian Railways Commissioner v. Egan*, (1973) 130 CLR 506, in which the High Court upheld a provision in a railway construction contract with the Commissioner, under which the entitlement of either party to recover money under the contract was dependent on a certificate from the Chief Engineer to the Commissioner; and *Forestry Commission of New South Wales v. Stefanetto* (1976) 133 CLR 507, in which the High Court upheld a road construction contract provision enabling the Commission to take possession of the contractor's on-site plant in the event of default, and use it, free of cost, to complete the job.
36. *Hospital Products Ltd v. United States Surgical Corporation* (1984) 156 CLR 41 esp. per Mason J. at 100.
37. See *Commercial Bank of Australia v. Amadio* (1983) 151 CLR 447 esp. at 467; and see generally J.W. Carter & D.J. Harland *Contract Law in Australia* 2nd ed Butterworths Sydney 1991 at ch. 15.
38. Per Kitto J. in *Blomley v. Ryan* (1956) 99 CLR 362 at 405. See also Fullagar J.'s exemplification of the cases: "poverty or need of any kind, sickness, age, sex, infirmity of mind or body, drunkenness, illiteracy, or lack of education, lack of assistance or explanation where assistance or explanation is necessary": *Ibid.* at 405-6. But note Deane J.'s warning in *Commercial Bank of Australia Ltd v. Amadio*, *supra* n.37 at 474, that "the adverse circumstances which may constitute a special disability for the purposes of the principles relating to relief against unconscionable dealing may take a wide variety of forms and are not susceptible to being comprehensively catalogued"; and note that Mason J., while "disavow(ing) any suggestion that the principle applies whenever there is some difference in bargaining power of the parties", thought it could well be applied in the case of "entry into a standard form of contract dictated by a party whose bargaining power is greatly superior", though only if unconscientious advantage had been taken of the other party's disabling condition or circumstances: *Ibid.* at 462-3.
39. See, for instance, Gibbs C.J. in *Commercial Bank of Australia Ltd v. Amadio*, *supra* n.37 at 459.
40. *Supra* n.4 at 229. There is no equivalent statute in Queensland.
41. *Contracts Review Act* 1980 (NSW) s.6.
42. A court enjoying jurisdiction under that Act may grant relief in respect of a contract or term found to be "unjust", including harsh, oppressive or unconscionable. It may consider "the public interest and . . . all the circumstances of the case" (s.9), including a wide variety of matters specified in s.9(2), such as material inequality in bargaining power, and whether the provisions were the subject of negotiation, or could reasonably practicably have been. Aronson and Whitmore expressed doubt as to whether the Act would in most cases be the source of any relief to a contractor, because there is "an overriding public interest involved in most government contracts". They thought it would be more likely to serve as a deterrent to the government's taking extreme positions in its contracts: *supra* n.4 at 230.

The Ombudsman legislation, however, may be another matter.⁴³ In New South Wales the *Ombudsman Act 1974* empowers the Ombudsman to investigate complaints about, and report on, “conduct” in the sense of any (alleged) action or inaction relating to a matter of administration⁴⁴ of public authorities.⁴⁵ The Ombudsman may condemn conduct as “wrong” which is contrary to law; unreasonable, unjust, oppressive or improperly discriminatory; in accordance with any law or established practice, but the law is, or may be, unreasonable, unjust, oppressive or improperly discriminatory; or otherwise wrong.⁴⁶

There appears to be no reason to think of the conduct of a public authority in —

- the negotiations for, or entry into, contracts, or
- the manner in which it performs, or enforces, or terminates, or breaches a contract,

as excluded from the concept of a “matter of administration”. Dr. Margaret Allars notes⁴⁷ that there is Canadian authority that commercial decisions made by government do not lie outside the scope of what is a “matter of administration”, and that the Commonwealth Ombudsman’s Office has acted on the same basis, investigating such things as complaints by unsuccessful tenderers regarding government decisions to award contracts, and of the costs thrown away in preparing tenders. That appears also to have happened in New South Wales.

Before passing from procurement contracts, I should like to mention the recent decision of the Court of Appeal in England of *Blackpool & Fylde Aero Club Ltd v. Blackpool Borough Council*⁴⁸ in connection with the tendering process. The plaintiff, which had held a concession from the Council, tendered for the grant of a fresh concession, but through the Council’s own fault the tender was treated as having been lodged too late, and the Council awarded the contract to someone else. In the circumstances of the case it was held that the Council had impliedly contracted to consider tenders lodged in time, as the plaintiff’s tender had in fact been.

4. Development Project Contracts

I propose to refer to a number of relatively recent cases, either involving contracts of this type with the government, or (though arising in the private sector) relied on in litigation against governments. I shall begin with the Darling Harbour Casino case in New South Wales, which is of interest, not so much for the legal points decided in the litigation as for the procedures adopted in the negotiating process to treat tenderers on an equal footing. Then I shall refer to some well-known cases on restitution and estoppel, cases which are of great importance to both sides in litigation on these types of government contracts, as well as litigation within the private sector. Finally, I shall deal with the law about fettering statutory discretions, which is, of course, a feature peculiar to government contracts.

Hooker Corporation and Harrahs v. Darling Harbour Authority and State of New South Wales

The ill-fated Darling Harbour casino venture took the form of letting tenders for the construction and operation of the casino, and it is an instructive illustration of the process involved in letting tenders for such a complex development.

The development of part of Darling Harbour as a site for a casino and hotel was let out to tender in 1985-6. The site was to be held on long-term lease from the Darling Harbour

43. See, for the position in England, and generally on the applicability of administrative law, Sue Arrowsmith (University College of Wales), *Government Contracts and Public Law*, Legal Studies, Vol.10 No.3, Dec 90.

44. So defined in s.5.

45. As widely defined in s.5.

46. s.5(2). The section includes other cases of conduct that are treated as “wrong”.

47. M. Allars *Introduction to Australian Administrative Law* Butterworths Sydney 1990 at para. 2.50.

48. [1990] 1 WLR 1195.

Authority. The Government of the day wanted competitive bids from tenderers as to what share of the proceeds of the casino revenues, as well as rent, they would be willing to pay to the Government. At the same time, the Government was very concerned to lay down an extremely strict regime for the operation of the casino, partly through legislation, partly through contract; and, of course, it was concerned as well to ensure buildings and services of high standards.

There was to be a common set of contractual provisions to which the tenderers would promise to bind themselves in the event of their tender being successful. Though the Government set a very tight timetable, the procedure adopted did allow discussion with the various short-listed tenderers of that set of contractual provisions before the Government settled its final form. That was a wise precaution against unworkable provisions. Moreover, it was provided that the Authority and the Government might allow the successful tenderer variations, agreed on within a specified time, to accommodate the particular corporate and financing structure the tenderer wished to employ, though nothing else. To give the Government and Authority time to consider the tenders, each tenderer was obliged to enter into a deed poll holding its offer open for a period (and providing for the manner of its acceptance), and containing promises to the effect just stated, i.e. that on acceptance of the offer the successful tenderer would execute and become bound by a set of contractual documents — we may call them the “operating documents” (the lease, the operating agreement for the casino, and so on) — modified (if at all) by agreement to accommodate the corporate and financial structure proposed by the tenderer.

So much for the process that was envisaged. The Government of the day ultimately refused to proceed with the successful tenderers, that is, to enter into the operating documents itself; and that led to litigation which was ultimately settled, but not before some issues as to the contractual effect of the deed had reached the Court of Appeal. Before Rogers J.⁴⁹ in the Commercial Division the Government and the Authority had successfully argued that the acceptance of the tender had not led to any contractual obligation on their part to proceed to execute the operating documents (the lease, and so on) annexed to the deed poll. The Court of Appeal⁵⁰ overturned that decision⁵¹, for reasons which may be briefly indicated.

There was no express obligation on the Government or Authority’s part to execute the documents annexed to the deed poll on execution of them by the tenderers; but nor did it provide that the requirement on the tenderers to proceed with the development should depend on whether the Government chose to execute the documents. The Court of Appeal held that the surrounding circumstances contemplated such an obligation. In particular, the obligations undertaken by the tenderers in the deed of offer to perform the agreements embodied in the text of the operating documents, and to press on with the work to meet the Government’s timetable, implied that the Government and the Authority should bring those agreements into existence by themselves executing the documents.

*Sabemo v. North Sydney Council*⁵²

Sabemo v. North Sydney Council is a decision of Sheppard J. in the Supreme Court. It has not so far proved necessary, so far as I know, for any court, whether at the trial or appellate level, and whether between private litigants or in a case involving the

49. Various unreported judgments: 7 May 1987, 16 September 1987, 30 October 1987, 4 December 1987.

50. Mahoney, Priestly and Clarke JJ.A., 20 September 1988 (unreported).

51. The High Court refused special leave to appeal against that judgment pending the resolution of the many other issues that remained in dispute, particularly questions of whether the tenderers had performed their bargain, and whether the Government was estopped from denying that they had. The case generally was remitted to the Court of Appeal for determination first of those issues, but was settled.

52. [1977] 2 NSWLR 880.

government, to decide whether or not to approve or follow it.

The Council invited tenders for the development of land zoned for a civic centre under a building lease to be granted by it. The Council and the successful tenderer were to plan the project together, and ultimately agree on a lease. Sabemo successfully tendered, and prepared in detail for the Council and at its request schemes for the civic purposes in contemplation by the Council and certain commercial development. The Minister for Local Government made an interim development order allowing as well for commercial development, on certain conditions, and Sabemo modified its scheme to fit in with them. The modified scheme, however, encountered objections from the authorities responsible for heights of buildings. The Council asked Sabemo to prepare a further scheme which would meet those objections, on the basis that the Council and Sabemo (which had raised its concern about the expenditure already outlaid) would share the additional cost. A modified scheme was prepared, to everyone's satisfaction, and the Council approved a development application for it.

In the meantime the solicitors for each party were discussing documentation of the agreement. Various important issues arose as a result, that were not resolved. While they were still under negotiation, the Council began to change its mind, and ultimately proposed a scheme involving no commercial development, inviting Sabemo to put forward a new proposal. Instead, it sent the Council a bill for the very substantial expenditure it had incurred during the three years that all this had taken, and when it was not paid, sued, not on any contractual basis, but in quasi-contract.

That claim succeeded.⁵³ The central passage in His Honour's reasons was that⁵⁴:-

"where two parties proceed upon the joint assumption that a contract will be entered into between them, and one does work beneficial for the project, and thus in the interests of the two parties, which work he would not be expected, in other circumstances, to do gratuitously, he will be entitled to compensation or restitution. If the other party unilaterally decides to abandon the project, not for any reason associated with bona fide disagreement concerning the terms of the contract to be entered into, but for reasons which, however valid, pertain only to his own position and do not relate at all to that of the other party".

His Honour rejected an argument that there could never be such an entitlement to compensation for work done towards (in preparation for) the formation of a contract. Parties to negotiations for a contract would ordinarily assume the risk that the negotiations might break off, and the money spent by them might be wasted. His Honour distinguished that ordinary situation from the circumstances of the present case, however, where the party for whose benefit (in part) the work had been done had been the party to break the negotiations off, in circumstances where it was more probable than not that a concluded agreement would have been reached in due course.⁵⁵ He also rejected an argument that no claim would lie unless the party sued had obtained a lasting benefit from the work done.⁵⁶

Incidentally, to mention a point of possible relevance to a government case, His Honour

53. Succeeded, that is, in the sense that the Judge found that in principle Sabemo was entitled to compensation. He had not been asked to fix the compensation, which the parties had indicated they wished to settle amongs themselves, if he judged the Council liable. The Judge was able to give only broad indications of the items of expenditure which he thought might be recoverable: see *ibid.* at 903. The compensation was to include the direct cost to Sabemo of preparing various plans and models, and attending various conferences in connection with the planning and design of the project. Some items (for instance, legal costs) were excluded, and some remained indeterminable without a further hearing, which presumably did not eventuate.

54. *Ibid.* at 902.

55. *Ibid.* at 900-1. His Honour also rejected an argument that the work done before the height-of-building problem emerged had been wasted, and should not be compensated for.

56. *Ibid.* at 902.

recognised the risk for Sabemo that a change in Council after a periodic election might bring a changed attitude to the project; but in the circumstances of the case, where the Council had pursued the scheme for more than 3 years, he did not think that justified Sabemo's bearing the risk of the expenditure.⁵⁷

Sheppard J. did not believe that any application of equitable doctrine or principle was involved. For him the relevant law was not that of contract or equity⁵⁸, but a separate category of quasi-contract. He considered that in modern times (so far as concerned recovery of compensation for work done, in the absence of a contract) an obligation might arise, in certain cases, on one party to pay for work done for that party's benefit by another, even though the parties to the transaction, actual or proposed, did not intend, expressly or impliedly, that such an obligation should arise.⁵⁹ I am not aware of any departure from the English authorities on which His Honour relied⁶⁰, but Sheppard J.'s view of their effect remains, as has been mentioned, to be reviewed by an appellate court.⁶¹

*Waltons Stores (Interstate) Ltd v. Maher*⁶²

I mention this very well known decision of the High Court upon promissory estoppel because of the reliance which has been placed on it in suits against the government.

I should briefly remind you of the facts. The case arose in the context of commercial dealings between private parties. Waltons proposed to take a lease of land in a country town from the owners (the Mahers), on the basis that the Mahers, within a strict and urgent timetable, would pull down the existing, quite valuable building on the land, and erect in its place a new store for Waltons' occupation. Just at the stage when negotiations had nearly concluded, Waltons began to have doubts about proceeding, doubts which it did not, however, reveal to the Mahers. Waltons left the Mahers to labour under an impression that an agreement for lease, to be created by exchange of counterparts, had been entered into, or was about to be entered into, by Waltons, just as it had been by the Mahers. The Mahers, to Waltons' knowledge, proceeded with the demolition of part of the building, and

57. *Ibid.* at 901.

58. "Plainly there are cases not founded on contract, nor in tort, nor upon the application of any equitable doctrine or principles, where there may be recovery": *Ibid.* at 897.

59. *Ibid.* at 898. His Honour (see *Ibid.*) based this conclusion on (amongst others) the following English cases involving work done during negotiations for a contract, which he discussed in detail:-

Jennings and Chapman Ltd v. Woodman Matthews & Co [1952] 2 TLR 409, Court of Appeal (intending sublessee held not liable for cost of building alterations made by lessee to accommodate his offices, where the lessee unsuccessfully took the risk of obtaining the lessor's consent to the alterations. As Sheppard J. pointed out (*Sabemo*, *supra* n.52 at 888-9, 898-9), that case could be explained as one of an implied term, but the Court of Appeal approached it as one of assigning the risk appropriately).

Brewer Street Investments Ltd v Barclays Woollen Co Ltd [1954] 1 QB 428, Court of Appeal (prospective lessor entitled to recover cost of building alterations made for company with whom it was negotiating a lease, where negotiations on the lease later broke down on a point on which there had always been a difference. As Sheppard J. pointed out, the prospective lessee had agreed in advance to pay the costs, but the work remained incomplete when the parties failed to reach agreement on the main contract, that for the lease; and, again, the court thought of the problem as one of assigning the risk: *Sabemo*, *supra* n.52 at 891-4, 899).

William Lacey (Hounslow) Ltd v. Davis, Barry J. [1957] 1 WLR 932 (builder entitled to recover cost of estimates relating to reconstruction work done, on terms that the owner should pay, in anticipation of a contract for the reconstruction itself, where the work lay outside the scope of what a tenderer would ordinarily be expected to do at his own cost. Again, as Sheppard J. pointed out, the claim was on an express contract, but the court used language that His Honour regarded as supporting the conclusion he arrived at: *Sabemo*, *supra* n.52 at 894-6, 899-900).

60. See the preceding footnote. There can now be added, in connection with work done by one party at the request of the other during the course of negotiations *British Steel Corporation v. Cleveland Bridge & Engineering Co Ltd* [1984] 1 All ER 504.

61. I gather, from S. Arrowsmith, *Government Procurement and Judicial Review* Carswell Toronto 1988 that there may be Canadian authority on the question: see *ibid.* 55, fn 21, and ch.17, esp. at 320.

62. (1988) 62 ALJR 100 (the references used here are from that report); (1988) 164 CLR 387.

incurred other expense. Waltons eventually decided not to proceed, and the Mahers sued.

It was clear that in point of contract law no agreement for a lease had come into existence, because the parties had always intended that exchange of counterparts would be necessary for the purpose. There was a factual question as to what the Mahers themselves believed had happened. In the courts below, the findings were that the Mahers believed either that contracts had been exchanged, or that, in any case, a binding contract had come into existence. Their counsel, in the High Court, argued for another finding, that they believed that contracts would be exchanged. The distinctions between these possible states of belief were very important for the application to the case of the differing rules of common law and equity on estoppel.

There is a convenient distillation of the main points by Priestly J.A., in delivering the judgment of the New South Wales Court of Appeal in *Silovi Pty Ltd v. Barbaro*⁶³:-

- “(1) Common law and equitable estoppel are separate categories, although they have many ideas in common.
- (2) Common law estoppel operates upon a representation of existing fact, and when certain conditions are fulfilled, establishes a state of affairs by reference to which the legal relation between the parties is to be decided. This estoppel does not itself create a right against the party estopped. The right flows from the court’s decision on the state of affairs established by the estoppel.
- (3) Equitable estoppel operates upon representations or promises as to future conduct, including promises about legal relations. When certain conditions are fulfilled, this kind of estoppel is itself an equity, a source of legal obligation.
- (4) Cases described as estoppel by encouragement, estoppel by acquiescence, proprietary estoppel and promissory estoppel are all species of equitable estoppel.
- (5) For equitable estoppel to operate in circumstances such as those of the present case there must be the creation or encouragement by the defendant in the plaintiff of an assumption that a contract will come into existence or a promise be performed, and reliance on that by the plaintiff, in circumstances where departure from the assumption by the defendant would be unconscionable.
- (6) Equitable estoppel may lead to the plaintiff acquiring an estate or interest in land; that is, in the common metaphor, it may be a sword.
- (7) The remedy granted to satisfy the equity (which is either the estoppel or is created by it) will be what is necessary to prevent detriment resulting from the unconscionable conduct”.

In the High Court in *Waltons Stores v. Maher*, Mason C.J. and Wilson J. (in a joint judgment) and Brennan J. held that there was no foundation for the belief that Waltons had in fact sent a counterpart of the agreement in exchange for the Mahers⁶⁴, or that in some other way a binding contract had come into existence.⁶⁵ Deane J., however, considered that the finding of the courts below that the Mahers believed a binding agreement to have come into existence was amply justified, and should not have been reopened in the High Court.⁶⁶ Gaudron J. was of a similar view, and dealt with the case on the basis that the Mahers believed a contract to have come into existence, by exchange.⁶⁷

53. (1988) 13 NSWLR 466 at 472; Hope and McHugh J.J.A. agreed with Priestly J.A.’s judgment, without giving separate judgments.

54. *Supra* n.62 at 112 per Mason C.J. and Wilson J.; and at 128 per Brennan J..

55. *Ibid.* at 113 per Mason C.J. and Wilson J.; and at 128 per Brennan J..

56. *Ibid.* at 129-133.

57. *Ibid.* at 141-2.

The significance of the majority view against the finding that the Mahers believed a contract to have been exchanged, or otherwise to have come into existence, before they commenced building, was that the Mahers could not rely on common law rules about estoppel, which confined estoppel to representations as to supposedly existing facts. The common law rule was that representations about future conduct should be enforceable only if contractual, that is, if supported by consideration.⁶⁸

On the other hand, the majority⁶⁹ held that Waltons was bound *in equity* to compensate the Mahers for their expenditure on the demolition and building work. It was already established law that, in the case where there was an existing contractual relationship, but one party had promised to the other not to exercise some right under the contract, and the other party relied on that promise and incurred some detriment in doing so, equitable estoppel would prevent the first party from enforcing his contractual right. The Mahers, however, succeeded, in a case where there was no pre-existing contract, to enforce a promise which was in itself non-contractual (a promise to enter into a contract).⁷⁰

The basis of the estoppel was Waltons' conduct in retaining the counterpart executed by the Mahers and sent to Waltons' solicitors by the Mahers "by way of exchange", and in allowing the building work to go on, without disclosing that Waltons had not executed, and had no immediate intention to execute, their counterpart, so as to bring an agreement into existence — all this, in a situation where the completion of the building was urgent.⁷¹

I have tried to gather together what appear to me to be important aspects of the principles stated in the majority judgments about equitable estoppel in relation to the circumstances of cases like this:-

A plaintiff⁷² who has acted to his detriment on the basis of a basic assumption about the parties' legal relationship, an assumption that the other party has been responsible for to the extent that it would be unconscionable conduct for that other party to ignore it, may obtain relief as if that were the parties' legal relationship, though to that extent only. For instance, the party may obtain an order for

68. *Ibid.* at 113 per Mason C.J. and Wilson J.; and at 121 per Brennan J., Mason C.J. and Wilson J. thought it would be unwarranted to draw a distinction for this purpose between representations of fact, and standing by in silence where duty would require the other party's mistaken belief to be corrected. The Court had not been asked to overturn the common law rule. Brennan J., *ibid.* at 121, pointed out that, while it was true that this estoppel in pais was merely a rule of evidence and not a cause of action, the assumed state of affairs might be the existence of a contract giving rise to a cause of action, which could then be pursued by the party in whose favour the estoppel operated.

Deane J., who (adopting as he did the findings of the courts below) regarded the case as one of representation that an agreement had been concluded, considered there was no reason why a plaintiff might not rely on an assumed or represented mistaken state of affairs as the factual foundation of a cause of action arising under ordinary principles of the law: *Ibid.* at 134. His Honour was also emphatically against any distinction being drawn now between law and equity so far as representations of future conduct were concerned: *Ibid.* at 137.

69. Mason C.J., Wilson and Brennan JJ. Deane J. would have been prepared to dismiss the appeal on the same basis, but disposed of it on a different basis. Gaudron J. was inclined the same way, but expressed no concluded view on the equitable estoppel approach.

70. *Supra* n.62 at 114-8 per Mason C.J. and Wilson J.; *ibid.* at 121-2, 122-8, per Brennan J. Deane J. would have been prepared to join in the majority view, had he thought it necessary: *ibid.* at 135ff. Gaudron J. pointed out that an assumption that contracts would be exchanged was an assumption as to future rights, which might provide the basis for the operation of an equitable estoppel; but Her Honour did not find it necessary to decide whether there was a general rule going beyond the cases of proprietary estoppel (an entitlement to a positive right in the person claiming estoppel, with correlative duties on the part of the other party) and promissory estoppel (other party precluded from asserting existing rights): *ibid.* at 141.

71. *Ibid.* at 117 per Mason C.J. and Wilson J.; and at 122 per Brennan J.

72. Meaning, of course, the party seeking the relevant relief.

performance of a promise.⁷³

A failure on the other party's part to fulfil a promise does not of itself amount to unconscionable conduct: the party must have created or encouraged the assumption on the plaintiff's part that a contract will come into existence or a promise will be performed, and must have known (or, perhaps, have reasonably expected) that the plaintiff was relying or would rely on the assumption to his detriment.⁷⁴

Parties who are negotiating a contract, then, may proceed in the expectation that the terms will be agreed and a contract made out but, so long as both parties recognise that either party is at liberty to withdraw from the negotiations at any time before the contract is made, it cannot be unconscionable for one party to do so. It is only if a party induces the other party to believe that he, the former party, is already bound and his freedom to withdraw has gone that it could be unconscionable for him subsequently to assert that he is legally free to withdraw.⁷⁵

Waltons Stores v. Maher has been referred to subsequently in decisions of the High Court.⁷⁶ It has been applied in decisions of the New South Wales Court of Appeal⁷⁷ and other courts.⁷⁸ I should particularly mention the decision of the New South Wales Court of Appeal in *Austotel Pty Ltd v. Franklins Selfserve Pty Ltd*⁷⁹, and the decision of Young J. in *Copers (No. 664) Pty Ltd v. NZI Securities Australia Ltd*.⁸⁰

Austotel v Franklins

In *Austotel v. Franklins* the majority of the Court of Appeal refused to uphold an order, based on estoppel, compelling Austotel, as the owner of a shopping centre site, to grant a

73. *Supra* n.62 at 116 per Mason C.J. and Wilson J.; *ibid.* at 125-6 per Brennan J. Their Honours pointed out there was no logical distinction for this purpose between (in Brennan J's words, *ibid.*) "a change in legal relationships effected by a promise which extinguishes a right and a change in legal relationships effected by a promise which creates one." Indeed, "the point has been made that it would be more logical to say that when the parties have agreed to pursue a course of action, an alteration of the relationship by non-contractual promise will not be countenanced, whereas the creation of a new relationship by a simple promise will be recognised" (*ibid.* at 115 per Mason C. J. and Wilson J. referring to D. Jackson *Estoppel as a Sword* (1965) 81 LQR 223 at 242).
74. *Supra* n. 62 at 117 per Mason C. J. and Wilson J. Brennan J. emphasised the need both for an intention on the part of the promisor and an understanding on the part of the promisee that the promise affect their legal relations, and for knowledge or intention on the part of the promisor that the promisee will act or abstain from acting in reliance on the assumption or expectation: *Ibid.* at 123-5.
75. The words are Brennan J.'s, *ibid.* at 124. His Honour's summary of the circumstances in which there will be equitable estoppel are set out *ibid.* at 127.
76. See e. g. *Trident General Insurance Co Ltd v. McNiece Bros Pty Ltd* (1988) 165 CLR 107; and *Foran v. Wight* (1989) 168 CLR 385.
77. *Silovi Pty Ltd v. Barbaro supra* n. 63; *Austotel v. Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582. The latter case is dealt with in the main text. *Silovi Pty Ltd v. Barbaro*, which has already been cited for Priestly J.A.'s description of the points decided in *Waltons Stores v. Maher*, involved the estoppel of owners of land from denying the effectiveness of a lease and a licence granted by them to owners of an adjoining nursery, who in reliance on the instruments had taken possession of parts of the land and spent substantial amounts on it for extension of their nursery. The ineffectiveness of the instruments, or at any rate the lease, arose because they involved the subdivision of the land in a manner contrary to the *Local Government Act*. The owners wished to sell to a third party, who had made it obvious that he might well eject the plaintiffs. Their failure to reserve the right, in their contract of sale, to withdraw if their supposed lessees failed to establish their entitlement to occupy the land, was held to be unconscionable, giving rise to an equity which could be satisfied by orders, not inconsistent with the *Local Government Act* provisions, compelling the owners to license the use of the land, and confer a profit a prendre, for the contemplated time. The nursery owners' consequent equitable interest prevailed over the later equitable interest of the purchaser from the owners, who was affected by notice.
78. For cases not concerning commercial contracts, see *Verwayen v. The Commonwealth of Australia* (No. 2) [1989] VR 712. Vic Full Court (on appeal to the High Court, (1990) 170 CLR 394); *Collin v. Holden* [1989] VR 510; and *Minister for Immigration and Ethnic Affairs v. Kurtovic* (1990) 21 FCR 193.
79. (1989) 16 NSWLR 582.
80. Unreported judgment dated 29 March 1989.

lease to Franklins on terms as to rent to be settled by the parties or, if they could not agree on them, to be settled by a valuer or (if the parties wished) the court itself. The parties had gone a long way towards agreement on the terms of a lease, but had not settled the rent for a substantial addition to the original area proposed to be let. In the meantime, Franklins had provided important information to the owners to enable them to construct the building suitably, and had incurred substantial expenditure. It was not a case, then, such as *Waltons Stores v. Maher* or *Silovi Pty Ltd v. Barbaro*, of a settled but (otherwise) unenforceable agreement. Priestly JA would have been prepared, all the same, to uphold the order made at first instance, based on a line of cases indicating that in similar cases the courts could devise appropriate relief, with a wide discretion as to what form it should take notwithstanding the absence of agreement by the parties.⁸¹

For Kirby P and Rogers A-J.A. the reason why Franklins should be denied relief was that in its negotiations the company's negotiator had deliberately refrained from raising the topic of the additional rent that might be sought by Austotel for the additional space, in the hope that the topic would never be raised. Franklins, then, could make no assumption in relation to that matter, and was not entitled to believe that a lease would be entered into before the additional rent was agreed. In the view of Rogers A-J.A.⁸²:-

"The deliberate gamble that the plaintiff had embarked on failed and it is not for equity to put the plaintiff into the position it would have been in had it never embarked on its gamble. The magnitude of the risk may not have been manifest but that is not the point. There is, in my view, a fundamental difference between a situation where the parties simply fail to address a question necessary for a complete and concluded agreement and the present, where there is a deliberate and conscious decision to refrain from coming to agreement on the term. It is in this respect that the present case is completely and fundamentally different from all the decisions referred to in the judgment of Priestly J.A. . . . The concept of a court imposing a term which one party has deliberately sought to withhold would constitute a full frontal assault on what is generally required to make an agreement between persons engaged in commerce".

Kirby P. had, in general, no disagreement with Priestly J.A.'s account of the law of estoppel, but, like Rogers A-J.A., thought it inapplicable to the facts. He added this caution⁸³:-

"At least in circumstances such as the present, courts should be careful to conserve relief so that they do not, in commercial matters, substitute lawyerly conscience for the hard-headed decisions of business people . . . If courts do not show caution here they will effectively force on commercial parties terms which the court may think to be reasonable and as ought commonly to govern such a contract but which the parties have themselves held back from concluding . . . The wellsprings of the conduct of commercial people are self-evidently important for the efficient operation of the economy. Their actions typically depend on self-interest and profit making, not conscience or fairness. In particular circumstances protection from

81. See the cases referred to *supra* n.79 at 605-9 of His Honour's judgment. He would have amended Point 5 in his list in *Silovi Pty Ltd v. Barbaro* of the points decided in *Waltons Stores v. Maher* to read (I have underlined the additional words):-

"5. For equitable estoppel to operate there must be the creation or encouragement by the defendant in the plaintiff of an assumption that a contract will come into existence or a promise be performed or an interest granted to the plaintiff by the defendant, and reliance on that by the plaintiff, in circumstances where departure from the assumption by the defendant would be unconscionable": *supra* n.79 at 610.

82. *Ibid.* at 620-1.

83. *Ibid.* at 585.

unconscionable conduct will be entirely appropriate. But courts should, in my view, be wary lest they distort the relationships of substantial, well-advised corporations in commercial transactions by subjecting them to the overly tender consciences of judges. Such consciences, as the cases show, will typically be refined and sharpened by circumstances arising in quite different relationships where it is more apt to talk of conscience and to provide relief against offence to it”.

Both Kirby P⁸⁴ and Rogers A-JA,⁸⁵ however, adverted to the possibility (which could not be determined in the appeal) that Austotel might be liable to Franklins, in an action based on the principles of *Sabemo Pty Ltd v. North Sydney Council*, to restore to Franklins the money it had wasted on preparing plans, on acquiring equipment which could not be relocated, on taking advice, and (possibly) on deciding not to exercise an option it had had on an alternative site. Rogers A-JA spoke of “the somewhat ill-defined distinction between estoppel and restitution”.⁸⁶

*Corpers (No.664) Pty Ltd v. NZI Securities Australia Ltd*⁸⁷

This case illustrates the distinction between common law estoppel based on representation that a state of fact exists, and equitable estoppel based on promise of future conduct. It was a suit for specific performance by the defendant finance company of a supposed contract to lend money to the plaintiff. Letters saying that the loan had been approved were signed by officers who did not have the authority, actual or ostensible, to approve the particular transaction. The plaintiff acted on the faith of the letter to its detriment. It was arguable that the supposed contract would in any event have been void or uncertainly. Young J drew attention to the importance of the distinction in such circumstances:-

“(I)f one finds that there has been a representation that a certain fact exists, one applies common law principles of estoppel and if the case is made out, then the defendant is taken to have actually made the transaction which he is estopped from denying that he has made. Thus, if the transaction is a contract and the defendant is estopped from denying the contract, then the court actually enforces the contract.

On the other hand, if the defendant has not represented that there is in fact a contract, but has represented that the fullness of time will bring about the contract, one does not have a case of common law estoppel, but one has a case of equitable estoppel. In such a case there never has been a contract and the court never enforces the non-contract. What the court does do is to say that the conscience of the defendant is so affected that it must in equity do the same acts as it would have had to do had its representations been correct and that in due course of time a contract had come into existence . . . The vital distinction between the two concepts in the instant case is that if we are here dealing with a common law estoppel, then very real questions arise as to whether even if the estoppel is made out, the parties are in the state of contractual relationships, or if they are, whether the contract is void for uncertainty. If we are dealing with equitable estoppel, none of those problems arise.”

In fact His Honour found that a representation had been made that a contract already existed, and that the assumed contractual relationship was capable of enforcement. To reach that conclusion, His Honour examined questions as to whether the parties had intended not to be bound until a formal instrument was prepared, and whether the terms of

84. *Ibid.* at 587.

85. *Ibid.* at 621.

86. *Ibid.* at 621. He mentioned especially P. Birks *An Introduction to the Law of Restitution* Clarendon Press Oxford 1985 at 291ff: *supra* n.79 at 621-622.

87. *Supra* n.80.

the letter were too uncertain to be capable of contractual effect, finding on both issues for the plaintiff. His Honour would have been prepared, in the alternative, to treat the case as one of equitable estoppel.

The next topic which continues to be raised in suits against the government is that of the validity or enforcement of contracts fettering statutory discretions.

5. Fettering Statutory Discretions

The case in the High Court which is closest to this question in the context of contracts remains, so far as I am aware, *Ansett Transport Industries (Operations) Pty Ltd v. The Commonwealth of Australia & Ors.*⁸⁸ Because of the importance of the matter to the consideration of development project disputes with the government, I think it is worthwhile referring to the treatment of the subject in the judgments, though the case, of course, has been often analysed.⁸⁹

Ansett sought injunctions to restrain the Secretary of the Department of Transport from issuing permits to other defendants⁹⁰ to import aircraft into Australia for interstate operations which *Ansett* claimed would involve infringements by the Commonwealth of the Airlines Agreements sanctioned by statute.⁹¹ The importation of the aircraft into Australia required such a permit, under the *Customs (Prohibited Imports) Regulations* made under the *Customs Act 1901-1973* (Cth), which prohibited the importation of various classes of goods, including aircraft, except in accordance with the regulations. Once the aircraft were imported, they could be used for interstate operations under licences that could only be refused on safety grounds. The Commonwealth Minister had announced in Parliament his approval of the issue of permits, and the Commonwealth was joined as defendant and was sought to be restrained from issuing the permits.

The Commonwealth and the Secretary demurred to the plaintiff's statement of claim on the ground that the matters pleaded did not constitute a breach of the Agreements, and that, even if they did, the issue of import permits was none the less effective in law. The other defendants contended (amongst other arguments which need not be noted here) that the Secretary's discretion was not restricted or qualified by the Agreements.⁹²

By far the most extensive examination of the question of fettering future government action was made in the judgment of Mason J..⁹³ I should like to try to summarise his view on the matter:-

1. There could be no implication (because the parties could not be taken to have intended) that the Commonwealth was obliged not to alter the law if to do so would permit third parties to operate on the routes. That would fetter it from making law required for the public interest and in conformity with the interstate freedom of trade and commerce guaranteed by s.92 of the Commonwealth Constitution⁹⁴

88. (1977) 139 CLR 54. See also *Cudgen Ruttle (No. 2) Pty Ltd v. Chalk* [1975] AC 520.

89. Aronson and Whitmore cover it under the heading *The Principle of Government Effectiveness*, *supra* n.4, and Professor S.D. Hotop has recently covered it, under the title *The Doctrine of Executive Necessity*, in the paper referred to in the bibliography.

90. Who were joined later, and against whom no relief was sought.

91. The agreements set out in the *Schedules to the Airlines Agreements Act 1952-1973* (Cth).

92. *Supra* n.88 at 65 per Mason J..

93. *Ibid.* at 70-8.

94. *Ibid.* at 71. Section 92 entered the picture because the freedom conferred by it (as the section was then interpreted) was inconsistent with the creation by law of a duopoly in interstate airline services. His Honour referred to *William Cory & Son Pty Ltd v. London Corporation* [1951] 2 KB 476 as appearing to suggest that such an (implied) covenant on the Commonwealth's part, not to alter the law, would be invalid as constituting an attempt to fetter the future exercise of a power to make regulations in the public interest; but he expressly refrained from commenting on the decision itself.

2. Nor could there be an implication that the Commonwealth was obliged to act in any particular way under existing law, in this sense, that it could not be implied that it undertook to act in disregard of (for example) airline operations licensing regulations that had to be construed in conformity with s.92 of the Commonwealth Constitution.⁹⁵
3. On the question whether a less stringent obligation on the Commonwealth could be implied, viz, to do all within its power, conformably with law, necessary or convenient to attain the expressed object of the Agreements, there were substantial considerations militating against the implication of such a term.⁹⁶ Those circumstances included the unlikelihood, in the face of the considerations mentioned below, of a government's intending impliedly to bind itself to exercise a statutory discretion in a particular way in future circumstances not foreseeable.⁹⁷ ". . . (I)n the absence of specific words, an undertaking which would affect the exercise of discretionary powers to be exercised for the public good, should not be imputed to the (government)".⁹⁸
4. On the question whether the suggested obligation would amount to an impermissible fetter on the exercise of the discretionary powers given to the Secretary under the Customs (Prohibited Imports) Regulations:-

(a) It is a general principle of law that a public authority cannot preclude itself from exercising important discretionary powers or performing public duties by incompatible contractual or other undertakings⁹⁹; and a somewhat similar principle seems to have been expressed in relation to government contracts in *Rederiaktiebolaget Amphitrite v. The King*.¹⁰⁰

(b) However, the statement by Rowlatt J. in the latter case that:

"it 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"¹⁰¹

is too wide, in its reference to "future executive action". Nevertheless Mason J. considered that:

"the public interest requires *supra* neither the government nor a public authority can by contract disable itself or its officer from performing a statutory duty or from exercising a discretionary power conferred by or under a statute by binding itself or its officer not to perform the duty or to exercise the discretion in a particular way in the future"¹⁰²

95. *Supra* n.88 at 71-2.

96. The object was expressed in a recital, which could be taken as an intended aid to the construction of the substantive provisions, but not itself, in the context of an elaborate agreement, an accidentally omitted substantive provision. The subject of the Commonwealth's use of its regulation-making powers was dealt with in an express provision, viz that it should not use them to discriminate against the plaintiff (a permissible provision), indicating that it was not intended to leave it to implication. The (then) problems of s.92 meant that in any event it would have been risky to make provision to the effect suggested by the plaintiff on the subject.

97. *Supra* n.88 at 78.

98. *Ibid.* at 78, referring to *Commissioners of Crown Lands v. Page* [1960] 2 QB 274 at 287 per Devlin L.J..

99. His Honour cited *Ayr Harbour Trustees v. Oswald* (1883) 8 App. Cas. 623.

100. [1921] 3 KB 500.

101. *Ibid.* at 503.

102. *Supra* n.88 at 74. His Honour exemplified the proposition by reference to the Secretary's powers under the Regulations, which needed to be exercised at all times in accordance with law. If, then, the Secretary, in relation to a particular application, considered that, in conformity with government policy, the public interest called for importation of the aircraft, he would be obliged to grant permission, notwithstanding, say, a government contract not to permit importation for some period. Aronson & Whitmore, *supra* n.4 at 194, refer to a later part of Mason J.'s judgment (*supra* n.88 at 78) for support for the idea that no sharp distinction should be drawn between "prerogative" power and statutory power for the purpose of the rule preserving freedom of the future action of the Executive. At that part of his judgment His Honour cited a passage from *Commissioner of Crown Lands v. Page* [1960] 2 QB 274, in which Devlin L.J. mentioned both powers in the one breath, but it seems that Mason J. *did* distinguish between them.

- (c) Where the party to such a contract is itself the one in which the statutory discretion is reposed, the contract or undertaking that a statutory discretion will be exercised in a particular way will (in the absence of a statute approving it) be *intra* or *ultra vires*. Where, however, the discretion is given to someone else, not a party to the contract, it may be that a breach of the undertaking will be compensated for damages, as long as the contract is one which the government is authorised to make and is not expressly or impliedly prohibited by statute.¹⁰³
- (d) Where there is statutory approval of the making of a particular contract (as in the present case), there is no room for the notion that an undertaking that a statutory discretion will be exercised in a particular way is invalid as a fetter on the exercise of that discretion. The approving statute may, indeed, amend the statutory discretion for the purposes of the contract, so as to convert it into a duty to exercise it in a particular way, in which case the undertaking in the contract may be specifically enforceable; but if not, then the exercise of what remains as a true statutory discretion, contrary to the contract, will be compensated for by damages.
- (e) In the case of the Airlines Agreement legislation, the statutory approval could not be construed as impliedly amending the *Customs Act (Cth)* or the regulations under it. The legislation simply made the agreements contractually binding on the Commonwealth.

Aickin J. was of the view that under the Agreements the Commonwealth was obliged not to do anything which would bring to an end the position that there should be two and no more than two trunk route airline services in Australia, and that the Commonwealth was obliged to do whatever it could do constitutionally to preserve that position. On that argument that such a construction of the Agreements would involve a fetter on executive action, extending to making or not making a regulation, his answer was that the Agreements had been sanctioned by statute, which could, of course, not merely authorise the Executive so to restrict itself, but affect the regulation-making power.¹⁰⁴ His Honour did, however, comment that the distinction that had been drawn in *Rederiaktiebolaget Amphitrite v The King* between "discretionary powers of the Crown to be exercised for the public good" and the exercise by the Crown of its executive power to enter into "commercial contracts", was "not one which leaps to the eye",¹⁰⁵ and added: "If it is intended to be no more than an aid to construction, it would be easier to reconcile with principle".¹⁰⁶ He added: "In the ordinary way one might well hesitate before regarding a contract by the executive government to use, or not to use, a regulation-making power granted by statute as enforceable against the Crown, but no such hesitation would be called for if such a contract were specifically authorised by statute . . ."¹⁰⁷

Murphy J. considered that the Agreements contained no such implied term as alleged. He rejected the argument that the *Customs Act and Regulations* had been impliedly amended by the *Airlines Agreements Acts*.¹⁰⁸ He considered that the obligation that it was alleged that the Commonwealth had undertaken was of an impossible width, and

103. If Mason J. adopted the distinction between the case where the contracting party was the same as the holder of the discretion, and the case where they were different, he seems to have done so only subject to that qualification, i.e. that the contract should be within power and not incompatible with statute, including (without doubt) the statute conferring the discretion. In the *Ansett* case itself, as he went on to observe, no such incompatibility with legislation existed, because the Agreements were approved by statute anyway. It seems to me that some commentators overlook this qualification.

104. *Supra* n.88 at 113.

105. *Ibid.*

106. *Ibid.*

107. *Ibid.* at 114.

108. *Ibid.* at 85.

inconsistent with “fundamental concepts of our framework of government”.¹⁰⁹ He did not mention expressly the existence of the regulation-making power in that regard, but he did reject the idea that the government might be legally bound to a particular policy because of contractual obligation, saying:-

“There is no reason why government policy should not be at variance with contractual obligations. It sometimes is. It would be inconsistent with the separation of powers if the judicial branch of government were to give orders to the executive branch on government policy and on what directions or encouragement the executive branch should give to the members of the public service on matters of government policy”.¹¹⁰

Gibbs J. considered that the Agreements ought not to be construed as making it a breach of the Commonwealth to permit or encourage the importation of the aircraft, though he did not consider that, so construed, they would constitute an invalid fetter on the discretion conferred on the Secretary by the Regulations made under the *Customs Act*, because the Agreements had statutory approval. He considered that the width and lack of precision of the supposed obligation militated against its implication.¹¹¹

Barwick C.J. agreed with the view of Aickin J. that it would be a breach of the Agreements for the Commonwealth not to maintain the two airlines policy.¹¹²

The law on this subject remains to be developed further, but it is obvious that if a project necessitates the favourable exercise of statutory discretions, a developer's position is unlikely to be completely secure unless the Government can be persuaded to introduce legislation to by-pass that hurdle. The obvious trap for both sides is ignorance or disregard of the need for one or more statutory discretions to be exercised favourably to the project, and of the administrative law principle requiring those who are to exercise those discretions to exercise them in good faith for the statutory purpose.

*Attorney-General (NSW) v. Quin*¹¹³

The question of fettering discretions has again been discussed in the High Court in 1990 in the very different context of the non-appointment of a former stipendiary magistrate to be reconstituted (by statute) Local Courts system in New South Wales. In *Quin's* case, the disappointed magistrate asserted that the government was not free to depart from its originally announced policy of appointing all existing magistrates to the new court, as long as misbehaviour had not been established, to a policy of appointing the best from a field of applicants for positions. After holding that the government's changed policy was one that the relevant legislation entitled it to adopt, Mason C.J., rejecting the former magistrate's contention, went on to make these observations¹¹⁴:-

“The Executive cannot by representation or promise disable itself from, or hinder itself in, performing a statutory duty or exercising a statutory discretion to be performed or exercised in the public interest, by binding itself not to perform the duty or exercise the discretion in a particular way in advance of the actual performance of the duty or exercise of the power. . .¹¹⁵ Accordingly, it has been said

9. *Ibid.* at 86.

10. *Ibid.* at 86.

11. *Ibid.* at 62.

12. *Ibid.* at 60-1.

13. (1990) 170 CLR 1; (1990) 64 ALJR 327. The following page references are to the ALJR report.

14. *Ibid.* at 333.

15. His Honour cited a number of authorities, including *Ansett's case supra* n.88, and *Malvaso v. The Queen* (1989) 64 ALJR 44.

that 'a public authority. . . cannot be estopped from doing its public duty'. . .¹¹⁶ Gummow J. observed in *Minister for Immigration v. Kurtovic*¹¹⁷, the principle has been explained on the footing that:

'in a case of discretion, there is a duty under the statute to exercise a free and unhindered discretion and an estoppel cannot be raised (any more than a contract might be relied upon) to prevent or hinder the exercise of the discretion; the point is that the legislature intends the discretion to be exercised on the basis of a proper understanding of what is required by the statute, and that the repository of the discretion is not to be held to a decision which mistakes or forecloses that understanding'. . ."

After indicating that in his view the same principle was as applicable to the unfettered exercise by the Crown of common law powers (such as, presumably, the appointment of judges) when they involved the making of decisions in the public interest, Mason C.J. went on to suggest a qualification that each case might nevertheless depend on a balancing of aspects of the public interest:-

"What I have just said does not deny the availability of estoppel against the Executive, arising from conduct amounting to a representation, when holding the Executive to its representation does not significantly hinder the exercise of the relevant discretion in the public interest. And, as the public interest necessarily comprehends an element of justice to the individual, one cannot exclude the possibility that the courts might in some situations grant relief on the basis of a refusal to hold the Executive to a representation by means of estoppel will occasion greater harm to the public interest by causing grave injustice to the individual who acted on the representation than any detriment to that interest that will arise from holding the Executive to its representation and thus narrowing the exercise of the discretion. . ."¹¹⁸

*Pivot Group Ltd v. State of New South Wales*¹¹⁹

These authorities are drawn together in the most recent of the cases in New South Wales in which a contract dispute with the State has arisen from a development project. The case is, at the time of writing, under appeal to the New South Wales Court of Appeal, and the Office is acting for the State, so I must limit myself to an account of the relevant points in the case. It is noteworthy, however, that Cole J.'s judgment is headed by a quote from Disraeli: "Finality is not the language of politics".¹²⁰

In 1987 a contract was entered into, after public tender and with the (former) Australian Government's blessing, between the Maritime Services Board (the Sydney port authority) and a joint venture headed by Pivot, permitting the latter to demolish a Finger Wharf of some historical importance in Woolloomooloo Bay, Sydney, and to build a marina on the site, which was vested in the Board. A few months later, however, during the last months of that Government, the Heritage Council of NSW placed a permanent conservation order under the Heritage Act (NSW) on the Finger Wharf. The incoming Liberal/National Party coalition government approved a new proposal by Pivot. The proposal was to restore the wharf, but also to construct a hotel on the foreshore of the Bay, bounding public lands. The

116. A quotation from Lord Denning M.R.'s judgment in *Lever Finance v. Westminster London Borough Council* [1971] 1 QB 222 at 230.

117. (1990) 92 ALR 93 at 111.

118. *Supra* n. 113 at 333. His Honour referred to the observations of Lord Denning M.R. in *Laker Airways v. Department of Trade* [1977] QB 643 at 707 and also to the criticism of this approach by Gummow J. in *Kurtovic, supra* n.117 at 121-2.

119. Cole J., Commercial Division, Supreme Court of NSW, 17 July 1990, unreported.

120. Apparently this was said in the House of Commons in 1859, the year of Queensland's separation!

idea was that income from the hotel would enable the costly restoration of the Finger Wharf to be met from private sector funds. A letter of October 1988 was written by the Government to Pivot, advising it that a Cabinet sub-committee had directed that the company might proceed with that development. The old formal agreement was rescinded, with a release of obligations, by a new formal one made in December 1988 between the Board and a Pivot subsidiary, embodying this proposal. Under this Deed the Pivot subsidiary became obliged to apply for all necessary planning approvals, with either party being free to terminate after 12 months if no approvals were obtained.

It was the Pivot subsidiary's responsibility, then, to secure development consent. The City Council, which wanted that part of the Bay free both of the wharf and any hotel, refused planning approval. The Government could have overridden the Council, but instead instituted new negotiations with a view to scaling down the hotel. The Heritage Council could have lifted the conservation order on the wharf, but did not do so at that time, and was itself opposed to an hotel. Agreement could not be reached with the City Council for a scaled-down version of the hotel. The Government pressed the Heritage Council with the Government's view that the original proposal was the best option (no finger wharf, no hotel, just a marina), but that, if the Heritage Council would not lift the conservation order on the Finger Wharf, Pivot should be allowed to proceed with the hotel. The Heritage Council lifted its order. The Government announced in September, 1989, through the Minister for Local Government, that the development would not proceed.

The Deed was formally terminated in October, upon which, under its terms, any further obligation between the parties to perform it ceased, but without prejudice to rights founded on any antecedent breach.

Pivot sued the State, claiming a contract or contracts to have been formed from these dealings between the Government itself and either Pivot or its subsidiary, and to have been repudiated by the Minister's announcement. Pivot sought to rely on the correspondence and the course of dealing between its executives and the State's Ministers as establishing contractual relations between the State and Pivot over and above the formal contractual relations between the Board and Pivot's subsidiary.

Pivot claimed a contract to have arisen out of the letter of October 1988 (wharf plus original version of hotel), under which, in exchange for the company's promise to construct the development, the State would ensure the granting of all necessary planning and other consents, and do nothing to frustrate the project. This agreement was said to have been repudiated when the Government ultimately announced that the hotel development was not to proceed.

Cole J. held that the letter had been intended to have contractual effect so as to bind the Board to enter into the subsequent formal agreements (which it had done). His Honour rejected, however, the argument by Pivot that, on the true construction of the letter, it contained promises by the State, on the one hand, that it would use its overriding powers to ensure development approval, and, on the other hand, that it would refrain from impeding or preventing the development. His Honour pointed out the difficulties in implying terms to that effect:-

"It is not so obvious that it goes without saying that a State giving its approval to proceed with a development upon terms that the other party will obtain necessary development consents from all relevant authorities promises to use its overriding powers to impose those consents if the relevant authorities decline to give consent. Nor, in relation to the negative promise asserted, does it go without saying that the State will not act either as a government or through its instrumentalities, in proper pursuit of its statutory or other obligations where to do so might be to 'hinder or

prevent' the agreed development.¹²¹ Particularly is that so where to refrain from acting may be contrary to the public interest".¹²²

Had he not held that the letter did not constitute a contract with the State, Cole J. would have been prepared to reject the State's argument that the alleged agreement (or any estoppel relied on) involved an impermissible fetter on the discretion of the Minister for Planning whether or not to concur in refusal by the City Council of consent to the development.¹²³ In the first place, the State, not the Minister, would have been the party to the assumed contract, so that the State's being bound would not have fettered the Minister's exercise of his discretion. In any event, there would have been no reason, in a commercial contract such as this, to deny the innocent party a remedy in damages.¹²⁴ The State, his Honour remarked, can always avoid making a contract or representation if it wishes to avoid contractual liability sounding in damages.

There were other claims by Pivot, all of which save one (which resulted in nominal damages only) failed. A claim that an agreement with the State had arisen from the negotiations about a scaled-down version of the hotel, and had been repudiated, failed, on the ground that no contractual relations were intended to arise from the events on which the claim was founded. The parties were only exploring alternatives to the hotel development, after the Council's rejection of it, to see if an economically feasible development acceptable to all the parties, including the Council and the Heritage Council, was possible. If it was, the parties intended to amend the 1988 Deed, but not otherwise.

The Pivot subsidiary claimed breach by the Board of the December 1988 Deed, on the ground that the Minister for Local Government had made his announcement that the development would not be proceeding at a time while there was still one month to go of the time allowed to the Pivot subsidiary to gain the necessary planning approvals, and that the Board should be taken to have been a party to that decision not to proceed. His Honour held that this announcement had been technically an anticipatory breach, and one to which the Board had been a party.

However, it was not a breach for which the Pivot subsidiary could recover any but nominal damages. At the time of the announcement the Council had already rejected the proposal, the subject of the 1988 Deed (which had not been amended to substitute some other proposal). While that rejection was ineffective under the relevant planning laws, until approved by the Minister, the Minister had not exercised his power one way or the other, and was not (and the State was not) under any contractual obligation to do so.

The Minister had decided not to exercise the power if the Heritage Council resolved to recommend the lifting of the permanent conservation order, but that was permissible. A Minister may, his Honour pointed out¹²⁵, give effect to a change in policy even if it be unfair to others.¹²⁶ Absent any valid contractual obligation, he may do so without liability in damages. His Honour queried whether any such contractual obligation would have been valid, citing *Ansett*.

The reality was that at the time of the Minister's statement the Pivot subsidiary had no prospect of obtaining the consent of the Council, on which the Board's obligation to grant a lease was dependent. A loss of a chance, his Honour remarked, may be compensated, but in

121. His Honour referred at that point to the then unreported *Attorney General for New South Wales v. E.A. Quin*, *supra* n.113.

122. At 148-9 of the unreported judgment.

123. At 169-173 of the unreported judgment.

124. His Honour referred to the judgment of Mason J. (as he then was) in *Ansett*, *supra* n.88.

125. At 183 of the unreported judgment.

126. His Honour cited *Quin's case supra* n. 113 at 352 per Dawson J.

this case there was no prospect of success. Only nominal damages of \$1 should be awarded.

There were also a claim based on *Sabemo*.¹²⁷ Pivot accepted that for a reliance interest to arise, there must be expenditure by the claimant in reliance upon a legitimately held expectation of a future contract, that fails to materialise because of unilateral termination by the other party for purposes associated with its own interest.¹²⁸ The future contract relied on here was the 75 year lease to be granted after completion of the construction. In putting the claim on this basis, Pivot attempted to avoid the circumstance that, unlike the situation in *Sabemo*, the parties here had entered into a contract which regulated the rights and responsibilities of the parties in relation to the steps in respect of which the expenses were incurred.

However, the parties had intended all contractual relations to be between the Board and the Pivot subsidiary, so that Pivot itself had no reliance claim. So far as the Pivot subsidiary's claims were concerned, all claims in relation to steps taken under the 1987 Agreement had been discharged by the releases given in December 1988; and any claims for moneys spent after that were extinguished by the provision of the 1988 Deed terminating all claims — unless they were claims based on breach of contract — in the event (which occurred) that the Pivot subsidiary could not obtain the necessary planning approvals for the development.

Finally, it is worth mentioning that there had also been a claim that the State owed a fiduciary duty, arising from the parties' joint objective to bring the development about, and had broken it by not ensuring that the necessary approvals were granted. The claim¹²⁹ was based on a fiduciary relationship that was alleged to have arisen between either or both of Pivot and its subsidiary, on the one hand, and the State or the Board, on the other. The relationship was claimed to flow from a joint venture and commonality of purpose to achieve development at the site for profit to each, evidenced by the parties' collaboration in certain respects during the history of the transaction.

However, Cole J. held that the arrangements did not constitute a joint venture, for there was no joint holding of property nor a joint sharing of any profit in fact or in contemplation, and the parties were not partners, and did not contribute respective assets or skills into a joint endeavour. Each endeavoured to care for and progress its own financial and other interest. There was only a simple contractual relationship, between the Board and the Pivot subsidiary in terms of the Deeds of Agreement.

It could be accepted that precise contractual arrangements are not necessary in order to give rise to a fiduciary relationship¹³⁰, and that the possibility of a relationship's being fiduciary would not be precluded simply because the relationship was not within some established category of fiduciary relationship. The critical requirement is that the fiduciary undertake or agree to act in a representative capacity for another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense.¹³¹

There was nothing, however, to indicate that the State or the Board undertook to act for or on behalf of Pivot or its subsidiary. The parties were jealous of their own interests. The fact that the State, by virtue of its position of dominance, may have been better able to protect its interests, or harm Pivot's or its subsidiary's, did not impose any fiduciary duty on the State or the Board. The mere circumstance of capacity to adversely affect another is not

27. *Supra* n.52.

28. The *Sabemo* claim is discussed by Cole J. at 194 of his unreported judgment.

29. See Cole J.'s unreported judgment at 191ff.

30. His Honour cited *Muschinski v. Dodds* (1985) 160 CLR 583.

31. His Honour cited *Hospital Products v. United States Surgical Corporation* (1985) 156 CLR 41 at 96 per Mason J.

the substance which creates fiduciary relationships. Rather, such relationships are based upon an assumption of a duty arising from contract or circumstances.

BIBLIOGRAPHY

There have been only a couple of Australian books published in anything like recent times dealing with government contracts.

One is K.K. Puri's *Australian Government Contracts*, written in the mid-seventies. Puri concentrated on the arrangements within the Commonwealth Government for contracting, though he made many references as well to practice within the Australian States, the United States, the United Kingdom and India. To the extent to which it deals in detail with legislation and administrative arrangements and practice, it is now substantially out of date. To a large extent, however, it dealt with issues that remain important to this day, in particular the issue of trying to balance the public interest which the government is supposed to protect, and the private interests of persons doing business with it. In its discussion of those interests, Puri's book remains of substantial value, not least because it is partly a work of comparative law.

The other book is Mark Aronson and Harry Whitmore's *Public Torts and Contracts*, written in 1982. The second half of that book, Chapter 5 onwards, deals with government contracting, again with some reference to the situation in other countries. It advances by another 5 years Puri's account of the law .

There are various articles or lectures on government contracting which cover more recent developments, including -

1. S.D. Hotop, *Powers of Instrumentalities*, a lecture delivered in April 1989 in Perth to a seminar "State Instrumentalities and Government Guarantees" organised by the Law Society of Western Australia as part of its Continuing Legal Education Program.¹³² Professor Hotop's lecture is, of course, directed to the position in Western Australia, so that its references to legislation are to legislation of that State; but the wider case law is dealt with.
2. Margaret Allars *Administrative Law, Government Contracts and the Level Playing Field*; K. Lindgren *Estoppel in Contract*, in (1989) 12 UNSWLJ (No. 1).
3. D. Rose, *The Government and Contract* in P.J. Finn (ed.) *Essays on Contract Law* Book Co Sydney 1987.
4. Sue Arrowsmith, *Government Contracts and Public Law*, Legal Studies, Vol.10 No.3, Dec. 1990.

32. The NSW Supreme Court Library holds a copy.

