BANKING IMPLICATIONS OF CONTRACTING WITH GOVERNMENT

Commentary

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In this commentary on the main paper, I will address from a New Zealand perspective the following issues:

(1) Liability of central government;

(2) Government owned companies; and

(3) General legal framework in which central government has carried out asset sales and its implications for bankers.

LIABILITY OF CENTRAL GOVERNMENT

In New Zealand, the issue of Crown liability both in respect of contract and tort is dealt with in the *Crown Proceedings Act* 1950. This Act[1] provides that any person may enforce as of right by civil proceedings taken against the Crown for that purpose in accordance with the provisions of the Act any claim or demand against the Crown in respect of any of the following causes of action:

(a) breach of contract or trust;

(b) tort; and

(c) equitable relief.

The Act provides that some relief such as injunctions on specific performance cannot be granted against the Crown, however the Court may grant orders declaratory of the rights of the parties. In practice, the Crown has accepted such declarations as if they were orders so that the difference is not substantive.

The last issue is that of execution against the Crown. The Act provides that no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing satisfaction by the Crown except as provided in the Act.[2]

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1 Section 3(2), *Crown Proceedings Act* 1950.

2 Section 24, *Crown Proceedings Act* 1950.

In substance, there is a process whereby a certificate from the court can be obtained by a party who has obtained judgment against the Crown. On receipt of such certificate, the Governor-General without further appropriation may cause the amount to be paid. While the provision is not mandatory, I am not aware of any instance where payment has not been made.

GOVERNMENT OWNED COMPANIES

In New Zealand, while government owned companies are incorporated and governed by the *Companies Act* 1955 or 1993, there are specific additional statutory provisions relating to these companies.[3]

There are many reasons why the policy has been to go beyond the general companies legislation but one of the major reasons has been the wish to have more specific accountability provisions between the Crown as shareholder and the directors. One of the methods used to achieve this is the requirement for statements of corporate intent to be negotiated between shareholders and directors and made public. A risk of such a process is that of raising the spectre of ultra vires. That problem is dealt with by section 21 of the *State-Owned Enterprises Act* 1986 which provides that:

> "A failure by a State Enterprise to comply with any provision contained in Part I of this Act (principles) or any statement of corporate intent shall not affect the validity or enforceability of any deed, agreement, right or obligation entered into, obtained, or incurred by a State Enterprise or any subsidiary of a State Enterprise."

I note the issue of the implicit guarantee and to the extent that bankers might take comfort, from the Crown side there is a corresponding concern. A major plank of the policy of corporatisation was to increase external monitoring by lenders. To the extent that monitoring is weakened by the implicit guarantee, one of the objectives of corporatisation is not being achieved.

GENERAL LEGAL FRAMEWORK IN WHICH CENTRAL GOVERNMENT HAS CARRIED OUT ASSET SALES AND ITS IMPLICATIONS FOR BANKERS

From a legal perspective, the framework in which the New Zealand Government has carried out asset sales is simple. The process is generally:

(a) the issue of an information flyer to a wide audience of potential purchasers;

(b) the issue of an information memorandum to potential purchasers subject to confidentiality agreements;

(c) potential purchasers provide non binding indicative bids;

(d) potential purchasers short listed on the basis of non binding indicative bids and invited to do due diligence;

(e) draft agreement for sale and purchase provided to short listed parties;

(f) after completion of due diligence, negotiation with all parties of an agreement for sale and purchase on which basis the purchasers will bid;

(g) final bids provided; and

(h) acceptance of one bid.

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3 *State-Owned Enterprises Act* 1986, *Crown Research Institutes Act* 1992, *Housing Restructuring Act* 1992, *Health and Disabilities Services Act* 1993.

Throughout the process, the focus is on providing information so that purchasers can make their own assessment of the asset and thus limiting the warranties and indemnities which the Crown will provide. That position reflects a conscious policy to limit or eliminate residual risk for the Crown. Accordingly, the standard warranties the Crown provides is that the Crown owns the asset, it is empowered to sell and the asset is unencumbered. The Crown could gold plate the asset and might obtain value for gold plating as a party that has "deep pockets" but this runs counter to the Crown's wish to reduce risk.

The implications for bankers who are funding the purchasers is that they will not be able to rely on the purchaser obtaining wide warranties and indemnities from the Crown and thus will need to take their own view of asset value and may need to conduct their own extensive due diligence.