BANKING IMPLICATIONS OF CONTRACTING WITH GOVERNMENT

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The focus of this paper is the rules applicable to contracting with government. Given that bankers can have an interest in government contracts both through providing financial services and accommodation to government and through financing third parties who are dealing with government almost all aspects of contracting with government may have implications for banking.

During the last 30 years there have been significant statutory changes and changes in judicial interpretation which have had the effect that, by and large, parties dealing with government can treat the government as they would an ordinary citizen. Some differences remain and I intend to deal with some of them.

In Australian constitutional law, each of the States and the Commonwealth are emanations of a single and indivisible Australian Crown. However, the Australian Constitution has the effect that the governments of each of the States and the Commonwealth are, to a great extent, legally independent of each other.[1] For practical purposes they can be treated as distinct and separate legal entities and that is how I will treat them in this paper.

Governments are large organisations composed of a variety of structures and legal regimes. Any discussion of contracting with government must attempt some sort of categorisation and deal with the various issues in that context. In the hope that it is useful I will deal with the issues by discussing, first contracting with "central" government (State and Federal), then I will deal with contracting with statutory authorities including local government and finally I will discuss government owned companies. In respect of both central government and statutory authorities I will deal both with the power to contract and with liability.

POWER OF CENTRAL GOVERNMENT TO CONTRACT

There are two possible sources of power for central government to enter into a contract: the prerogative or statute.

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1 *Engineer's Case* (1920) 28 CLR 129, 152; *Cth v NSW* (1923) 32 CLR 200, 211; *Bradken Consolidated v BHP* (1979) 145 CLR 107, 135; *Polyukhovich v Cth* (1991) 172 CLR 501, 638.

In respect of the **prerogative** the Crown has the same power as an ordinary individual to enter into contracts,[2] a power which I call the "personal prerogative". The personal prerogative is subject to some limitations:

1. The prerogative power can only be exercised "in the **ordinary course of administering** a recognised part of the Government of the State".[3] Given the breadth of activities of modern governments this limitation is likely to arise only in a constitutional context eg if a State attempted to enter into a contract for the provision of military hardware for the purpose of establishing its own defence force. The State has no power to enter into such a contract, as it is exclusively within the power of the Commonwealth Government[4] so the prerogative power would not be available to support the contract.

2. The usual rule for prerogative powers is that where **legislation touches the same subject matter as the prerogative**, the legislation will exclude the prerogative.[5] Because of the suspicion with which the courts have viewed prerogative powers, the rule is broadly applied. It is not a test of parliamentary intention or of inconsistency; if the statute touches the same subject matter the prerogative is usually excluded. The High Court has applied this principle to the personal prerogative. In *Brown v West*[6] the issue concerned the power of the Commonwealth to make payments to Members of Parliament for postal allowances. There was a statutory power in the Remuneration Tribunal to determine such allowances. On the assumption that, absent the statutory power, the Commonwealth Government could make such payments under the personal prerogative, the court held that the specific statutory power of the Remuneration Tribunal to determine such payments necessarily excluded the prerogative and the payments were unlawful.

   The effect of this can be far reaching. For example, in most jurisdictions there are statutes conferring rights on various government officers or bodies to grant guarantees[7] or to enter into loan contracts.[8] On the face of it the conferral of these express statutory powers has the effect that the Crown cannot enter into these types of contracts in reliance on the personal prerogative. This means that if the Treasurer is given a statutory power to enter into loan contracts a subsequent loan contract made by the Premier will be invalid. Again this proposition must be qualified, to the extent that, if the specific statutory provision can be construed as facultative only, this will not be taken to have excluded the prerogative.[9] In South Australia, for example, we have taken the view that the specific power given to the Treasurer under section 16 of the *Public Finance and Audit Act* to grant indemnities in certain circumstances, is facultative only and that indemnities can still be granted in other circumstances pursuant to the prerogative.

3. In addition to the broader formulation of the rule, there are cases where the power to contract is **specifically or necessarily restricted by statute**. For example, the Crown cannot contract

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2 See Harris "The third source of authority for Government action" (1992) 108 LQR 626, 635-636; *The Banker's Case* (1700) 90 ER 270; *Queensland Trustees Ltd v Fowles* (1910) 12 CLR 111, 118-119, 122-123.

3 *New South Wales v Bardolph* (1934) 52 CLR 455, 474, 496, 508; the limitation is doubted by some commentators: see Aronson & Whitmore "Public Torts and Contracts" (1982, LBC) p 197.

4 *Joseph v Colonial Treasurer of New South Wales* (1918) 25 CLR 32, 45-47.

5 *AG v De Keyser's Royal Hotel* [1920] AC 508; *Barton v Cth* (1974) 131 CLR 477, 484, 501.

6 (1990) 169 CLR 195; see also *New South Wales v Bardolph* (1934) 52 CLR 455, 496

7 See eg the *Industries Development Act*, 1941 (SA).

8 See eg *Public Finance and Audit Act*, 1987 (SA) sections 16 and 17.

9 See *Skywest Airlines v NT* (1987) 45 NTR 29, 41-44; (an appeal) 48 NTR 20, 41.

so as to restrict a statutory discretion.[10] In South Australia contracts for the purchase of goods can only be made by the State Supply Board or its delegate[11] and in Tasmania contracts for the construction of public works above designated amounts can only commence after they have been the subject of review by the Public Works Committee.[12] However, in most jurisdictions the procedures for entering into contracts are specified in the Audit Regulations or their equivalents[13] which usually impose obligations relating to tendering and so forth. It is generally thought that these requirements have no effect upon the validity of the contract if they are not complied with,[14] although breach of them can result in disciplinary action against the officers involved.

A significant limitation upon the contracting powers of Australian governments was the effect of the **Financial Agreement**. The 1927 Financial Agreement governed the borrowing powers of the Australian governments.[15] In particular, neither the States nor the Commonwealth could undertake any borrowing, other then for certain limited purposes, except in accordance with a decision of the Loan Council.[16] Since at least 1990, the effect of these limitations has been largely ameliorated in practice. Instead of adopting specific borrowing limits, the Loan Council adopted "global limits" for each State which included the borrowings by statutory authorities and by local government. There was uncertainty as to how these "global limits" applied within the context of the Financial Agreement and to avoid that uncertainty, the States and the Commonwealth have agreed on a new Financial Agreement.[17] The new Agreement will come into force when ratified by the relevant parliaments. Under the new Agreement, most of the restrictions on borrowing powers have been removed and Loan Council recommendations are no longer binding.[18] Although decisions about the extent of public borrowings within the Federation will remain a significant matter between the Commonwealth and the States, it is no longer a matter that need concern those that enter into loan contracts with Australian governments.

4. The personal prerogative is also subject to some limitations arising from the **nature of the Crown** and its powers. For example, at common law the Crown has priority over all estates of like degree which has the practical effect that the Crown cannot hold land jointly with another except pursuant to statute.[19] The personal prerogative cannot be used to enter into an contract

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10 *Birkdale District Supply Co v Southport Corporation* (1926) AC 355; *Ansett Transport Industries v Cth* (1977) 139 CLR 54; *Compass Building Society v Cevara Fifty Seven P/L* (1992) 1 VR 48.

11 *State Supply Act*, 1985.

12 *Public Works Committee Act*, 1914 section 16. In other jurisdictions the relevant committee has investigatory powers, but it would be unlikely that the government would proceed with a construction contract before referring the matter to the committee: see, for example, Part IVA of the *Parliamentary Committees Act*, 1991 (SA). It should also be noted that some jurisdictions have limitations upon who can enter into contracts for public works eg in Victoria the Minister of Public Works decides on the acceptance of all tenders (*Public Lands and Works Act*, 1964, section 8) and in Tasmania only the Minister for Lands and Works can enter into contracts for the purchase of land for construction of public works (*Public Works Construction Act*, 1880).

13 As to these see Puri *Australian Government Contracts* (1978, CCH) pp 56-57; Aronson & Whitmore *Public Torts and Contracts* (1982, LBC) pp 212-215.

14 *Crothall Hospital Services (Aust) P/L v Cth* (1980) 32 ACTR 3.

15 As to the binding effect of the Financial Agreement pursuant to section 105A of the Commonwealth Constitution, see Saunders "Government Borrowing in Australia" (1989) 17 *MULR* 187, 210-212.

16 Financial Agreement, 1927 (as amended) clause 3(15).

17 See, for example, the *Financial Agreement Act*, 1994 (SA).

18 Financial Agreement, 1994 clause 4(9).

19 *Willion v Berkley* (1561) 1 Plowd 223 (75 ER 339); *Re Mazurin* (1990) 97 ALR 391, 396; *FCT v The Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278, 301.

involving the joint ownership of land. Similarly, at common law the Crown is immune from execution[20] and mandatory injunction.[21] As will be discussed in due course these restrictions remain in some jurisdictions. This has the practical effect that, at common law, the Crown can not pledge or mortgage its property, because there is no procedure by which the equitable interests may be enforced.[22] Unless there is an applicable statute which provides an appropriate procedure for the enforcement of rights, the personal prerogative cannot be used to enter into a contract having the effect of a mortgage or pledge.

5. The person entering the contract as **agent** for the Crown must have authority to do so. In principle such authority is derived from the Governor as the Queen's representative or (perhaps) from Cabinet.[23] Although actual authority will be readily inferred,[24] almost invariably there is no actual authority from the Governor[25] and often not from Cabinet, and the person entering into the contract relies upon the ostensible authority of the agent.[26] Some care must be taken with this. In the New Zealand case of *Meates v AG*[27] it was held that the New Zealand Prime Minister did not have ostensible authority to bind the New Zealand Government. Nevertheless, for practical purposes it can be assumed that Ministers and their executive officers have authority to enter into contracts within the purposes of their portfolio, and that the Chief Minister may enter into any contract for the ordinary purposes of government. In this regard it should be noted that Ministers and Crown employees are not liable for breach of warranty of authority.[28] It should also be noted that ostensible authority cannot be relied upon if the contract would be in breach of a statutory scheme or prohibition and that no estoppel will operate against the government in these circumstances.[29]

It is unnecessary to say very much about **statutory powers** to enter into contracts. The issues are broadly the same as those in respect of the statutory powers of statutory authorities to enter into contracts, which I will come to shortly. However, I should comment that some of the restrictions upon the personal prerogative to enter into contracts will also impliedly apply to statutory powers, unless impliedly or expressly excluded. For example, it is likely that the restrictions upon mortgaging or pledging the property of the Crown would still apply unless the power was such that there was a clear implication that the Crown could mortgage its property.

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20 *Cth v Anderson* (1960) 105 CLR 303, 312, 318-321.

21 *Factortame Ltd v Secretary of State for Transport* [1990] 2 AC 85, 143.

22 Where land is under the relevant *Real Property Act*, the procedures under that Act are probably available. For example, the mortgagee's power of sale under section 133 of the *Real Property Act*, 1886 (SA) would appear to be available. A purchaser pursuant to such a sale would not be seeking to execute against the property of the Crown; the relevant action would be an action in trespass.

23 *R v Davenport* (1877) 3 App Cas 115; *Meates v AG* (1979) 1 NZLR 415, 462.

24 *Cth v Crothall Hospital Services* (1981) 54 FLR 439, 452.

25 This is not the case in South Australia where actual authority has been given by the Governor: see South Australian Government Gazette: 24 February, 1994 at page 525.

26 *Robertson v Minister of Pensions* (1949) 1 KB 227. It should be noted that "usual authority" may not be sufficient: compare *Chitty on Contracts (General Principles)* (25th Ed; Sweet & Maxwell) para 695; Arrowsmith *Civil Liability and Public Authorities* (1992, Earlsgate) p 69; and Hogg *Liability of the Crown* (1989; Law Book) p 168.

27 (1979) 1 NZLR 415.

28 *Dunn v McDonald* (1897) 1 QB 555.

29 *AG Ceylon v Silva* [1953] AC 461; *Western Fish Products v Penwith District Council* (1981) 1 All ER 204; *Minister of Immigration v Kurtovic* (1990) 92 ALR 93; Pagone, "Estoppel in Public Law: Theory, Fact and Fiction" (1984) 7 *UNSWLJ* 267.

Before leaving the issue of the power to enter into contracts it might be useful to say something about the control by Parliament of **appropriation** of money for the purposes of government. There is a distinct difference within the public sector between the authority to enter into a contract and the power to pay any sums due pursuant to the contract. The Executive has the power to enter into contracts on the bases already discussed. Before it can make any payments under the contract it is necessary that it have a parliamentary authority for the relevant payment. That authority does not need to exist for the validity of the contract,[30] although there may be internal political and disciplinary consequences for the officers concerned in entering into a contract without appropriation authority. It does need to exist before any payment is made under the contract. If not, then any payment can be recovered if it can be traced,[31] unless there has been value given for the payment.[32] Although no estoppel can operate against the Crown in respect of the recovery of a payment made without appropriation, it may be that the principles of restitution will apply if the payment is based upon mistake. Those principles are discussed further below. In some jurisdictions the effect of the rules respecting payments made without appropriation authority have been largely ameliorated by the provisions of the *Crown Proceedings Acts*. We now come to a consideration of those statutes.

LIABILITY OF CENTRAL GOVERNMENT

At **common law** the Crown was not liable in tort, but it has always been liable in contract and in quasi contract. At common law an action was taken by petition of right.[33] The Crown enjoyed some procedural immunities which could have significant effects upon any legal proceeding. These included that time did not run against the Crown,[34] no execution or distress could be made against the property of the Crown,[35] the Crown was not liable to injunctive relief or to specific performance[36] and the Crown was not subject to pretrial discovery.[37] In addition the Crown was not subject to a number of statutes which may have had an effect upon the proceedings.

The effect of these various immunities has been largely ameliorated, or at least clarified, by legislation in each jurisdiction.

For example, **section 64 of the *Judiciary Act*** provides:

> "In any suit to which the Commonwealth or a State is a party, the rights of the parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject".

The High Court has now held that section 64 is an ambulatory provision, and that it not only has the effect that the States and the Commonwealth are subject to the same procedures as other parties, but that, "as nearly as possible" the same laws are "picked up" and applied. Once proceedings are

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30 *NSW v Bardolph* (1934) 52 CLR 455, 471, 474, 498, 501-502, 509, 523.

31 *Auckland Harbour Board v The King* [1924] AC 318, 326; *Woolwich Equitable Building Society v IRC* [1993] 1 AC 70, 176-177; *Cth v Hamilton* (1992) 2 Qd R 257, 262-264, 272.

32 *Re KL Tractors Ltd (in Liq)* (1961) 106 CLR 318, 338.

33 *Thomas v R* (1874) LR 10 QB 31; *Windsor & Annapolis Railway Co v R* (1886) 11 App Cas 607, 613-614; *Feather v R* (1866) 122 ER 1191, 1204-1205; Hogg "Victoria's Crown Proceedings Act" 7 *MULR* 342.

34 *Chief Secretary v Oliver Food Products* (1959) 60 SR (NSW) 435, 444.

35 *Cth v Anderson* (1960) 105 CLR 303, 312, 318-321.

36 *Blyth District Hospital v SA Health Commission* (1988) 49 SASR 501, 503-506; *Factortame Ltd v Secretary of State for Transport* [1990] 2 AC 85, 143.

37 *Cth v Northern Land Council* (1991) 30 FCR 1, 22.

issued, the Crown will be treated in the proceedings as if bound by statutes which would otherwise not bind the Crown[38] and as not enjoying any prerogative immunities which would otherwise entitle the Crown to special treatment.[39] So, for example, once proceedings are issued, the Crown will be treated as if the common law of executive necessity, by which the Crown could break its contracts in times of emergency, did not apply.[40] Of course, the effect of section 64 can be avoided by other Commonwealth legislation which makes specific provision for the Crown,[41] but not by State legislation.[42] The rights against the Crown created by section 64 only apply as "nearly as possible". This may preserve those particular immunities and powers that have some constitutional significance, including the right of recovery for payments made without appropriation.[43]

Section 64 of the *Judiciary Act* applies within federal jurisdiction. Federal jurisdiction includes "matters"[44] in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth,[45] is a party; matters between a State and a resident[46] of another State,[47] and matters arising under any laws made by the Commonwealth Parliament.[48]

The full effect of section 64 of the *Judiciary Act* has yet to be worked through by the courts. It is not clear whether it is valid in its application to proceedings brought by the States, or where it would have a substantive effect upon a State.[49] In view of this uncertainty is may be sensible to institute any action against a State either in the courts of that State or in the federal registry situated in that State.

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38 *Cth v Evans Deakin Industries Ltd* (1986) 161 CLR 254; *Maguire v Simpson* (1977) 139 CLR 362.

39 *Re Mazuran* (1990) 97 ALR 391, 397.

40 *Manock v IMVS* (1979) 83 LSJS 64; Agars, "Administrative Law, Government Contracts and the Level Playing Field" (1989) 12 *UNSWLJ* 114.

41 *DCT v Moorebank Pty Ltd* (1988) 165 CLR 55; *Trade Practices Commission v Manfal Pty Ltd* (1990) 27 FCR 22.

42 For example, in *Cth v Evans Deakin* (1986) 161 CLR 254 the relevant State statute specifically provided that it did not bind the Crown in any of its capacities. This was not effective to prevent the Commonwealth from being bound by the relevant statute.

43 Aronson & Whitmore *Public Torts and Contracts* (1982, LBC) pp 9-12. The issue was discussed in *Crothall Hospital Services (Aust) Pty Ltd v Cth* (1980) 32 ACTR 3, 10-11 where it was commented that the Crown's rights of recovery no longer applied. On appeal the Full Court dealt with the issue on the basis that the common law right of recovery was still applicable: (1981) 54 FLR 439, 453.

44 As to the meaning of "matters" see *Phillip Morris Inc v Adam p Brown Male Fashions* (1981) 148 CLR 457; *Stack v Coast Securities* (1983) 154 CLR 261.

45 *Commonwealth Constitution*, section 75(iii).

46 A corporation is not a resident of a State: *Crouch v Cmmr Rlwys* (1985) 159 CLR 22; this has the practical effect that proceedings between a bank and a State and not based upon a Federal statute are unlikely to be within federal jurisdiction.

47 Ibid, section 75(iv).

48 Ibid section 76(ii) and *Judiciary Act*, 1903, section 39(2).

49 The most obvious power to enact section 64 in its application to the States is section 78 of the *Commonwealth Constitution*. That section is restricted to proceedings against the States, and is restricted to "rights to proceed": *Maguire v Simpson* (1977) 139 CLR 362, 401, 405; *China Ocean Shipping v South Australia* (1979) 145 CLR 172, 203, 205; *Commonwealth v Evans Deakin* (1986) 161 CLR 254, 263. But compare *Cmmr Rlwys v Peters* (1991) 24 NSWLR 407, 434-435, 443-444; Aitken "State Liability under the Constitution after Peters" (1992) 3 PLR 221. It is also possible to argue that the power to enact section 64 in respect of the States relies upon section 75 of the Constitution and section 51(39). There is some authority for this approach: see eg *Mutual Pools & Staff Pty Ltd v Cth* (1994) 68 ALJR 216, 245-246, but other cases are to the contrary: *Hooper v Hooper* (1955) 91 CLR 529, 535. The concern of the States is that if the substantive effects of section 64 can validly apply to the States, then the Commonwealth would have the legislative power to create causes of action specifically in respect of the States if within federal jurisdiction.

This should ensure that the relevant State's *Crown Proceedings Act* is "picked up" by virtue of section 79 of the *Judiciary Act*.[50] It would seem to be clear that section 64 only applies to "proceedings". It does not change the actual liability of the Crown. If proceedings are not instituted then section 64 does not apply. For example, it may be that the law to be applied in an arbitration would not include section 64.

The *Judiciary Act* does not deal with execution. I doubt that section 64 could have the effect of making the property of the Crown liable to execution or distress. On the other hand, I am not aware of any case where an Australian Crown has not met its judgment debts.

Except for Western Australia, all of the **States have statutory provisions** which are similar to section 64 of the *Judiciary Act*.[51] It is believed that they have similar effects ie. that they are ambulatory and that they have substantive effect. Only South Australia and Tasmania make provision for the liability of other State's Crowns. If, for example, the South Australian Crown was sued in a New South Wales court and it was not in federal jurisdiction then the South Australian Crown would enjoy all its immunities, including an immunity from suit. Again I make the point that proceedings against a State Crown should be instituted in the courts of that State.

Some of the States make specific provision for various aspects of liability. For example, most preclude execution against Crown property.[52] In some jurisdictions there is specific provision for standing appropriation to meet judgments debts. In some jurisdictions, mandatory injunctions are precluded. There are also specific provisions in some jurisdictions about whether a statute binds the Crown and these provisions would apply notwithstanding the terms of the State's *Crown Proceedings Act*.[53]

The situation in **Western Australia** is somewhat different. Section 5(1) of the *Crown Suits Act* provides that the Crown "may sue and be sued in any court or otherwise competent jurisdiction in the same manner as a subject". It may be that that provision is procedural only, and that it does not have the effect of applying the same substantive rules on the Crown.[54]

POWER OF STATUTORY AUTHORITIES TO CONTRACT

Statutory authorities are bodies corporate[55] established by statute usually for carrying out a governmental purpose. They include the major utilities, local government bodies and so forth. A

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50 See Cook, "Section 79 of the Judiciary Act, 1903 - How widely does it travel?" (1987) 17 *FL Rev* 199.

51 *Crown Proceedings Act*, 1988 (NSW), section 5(2); *Crown Proceedings Act*, 1980 (Qld), section 9(2); *Crown Proceedings Act*, 1992 (SA), section 5; *Crown Proceedings Act*, 1993 (Tas), section 5; *Crown Proceedings Act* (Vic), section 25.

52 *AG v Wentworth* (1991) 24 NSWLR 347, 350; *De Bruyn v South Australia* (1990) 54 SASR 231.

53 See eg *Acts Interpretation Act*, 1954 (Qld), section 13; *Acts Interpretation Act*, 1931 (Tas), section 6(6); *Acts Interpretation Act*, 1915 (SA), section 20.

54 Compare *Blyth Hospital v South Australia* (1988) 49 SASR 501, 503-506 which held that section 5 of the *Crown Proceedings Act*, 1972 (SA) [which was in similar terms to section 5 of the WA Act] was procedural only. In Aronson & Whitmore *Public Torts and Contracts* (1982, LBC) p 4 it is suggested that the WA Act does have substantive effects, but in *NT v Mengel* (decision of the High Court delivered 19 April, 1995 as yet unreported) at n 82 of the majority judgment there is specific reference to the fact that the Western Australian provision is dissimilar to that in all other Australian jurisdictions.

55 The principles discussed in respect of statutory authorities also apply to bodies that have the powers of a corporation (ie powers to hold property and to sue etc), but which are not incorporated. An example of such a body was the Chaff and Hay Acquisition Committee which was discussed in *Chaff and Hay Acquisition Committee v Hempill & Sons Pty Ltd* (1947) 74 CLR 375. As the Commonwealth Parliament does not have power to legislate in respect of incorporation (*NSW v Cth* (1990) 169 CLR 482) and as it has shown an increasing willingness to use the corporations power to legislate in respect of State statutory authorities (eg in the areas of competition policy and industrial policy) it may be that the States will make increased use of such unincorporated structures in the future.

statutory authority is, by definition, a body whose powers are defined by statute. In considering those powers it needs to be remembered that the establishment of a statutory authority involves a significant loss of power and control by both the Parliament and the Executive. As statutory authorities invariably have the power to maintain their own accounts Parliament loses the power to control the expenditure of the authority. As the authority invariably has some degree of independent action, the Executive loses its power of "hands on" control. The extent of that loss of power depends upon the particular statutory regime. By reason of this loss of power courts read and **interpret the powers of a statutory authority narrowly**, unlike in relation to other corporations.[56] So, for example, although a power to contract or purchase personal property would authorise the authority to enter into borrowing or lending contracts for the purpose of the authority,[57] it would not normally include a power to hold or purchase shares because of the capacity that might give to expand the functions of the statutory authority.[58] On the other hand, if there were power to carry out joint projects[59] or to make investments, then this might authorise the purchase of shares.

The most notorious case in recent times dealing with the power of statutory authorities is *Hazell v Hammersmith & Fulham London Borough Council.*[60] This case concerned the powers of English local government authorities to enter into interest rate swap transactions. Initially the Council entered into swap transactions for the sole purpose of speculative profit. After initial concerns about this practice, later swap transactions were designed to hedge potential liabilities on the initial swap contracts. Although the relevant powers of the authority are not detailed in the judgment, a consideration of the *Local Government Act*, 1972 (UK) highlights just how limited those powers were. Revenues might be raised by rates or by limited asset sales. Receipts were required to be paid into specific accounts[61] which were subject to detailed audit. Powers to borrow or lend were strictly limited both as to amount and as to purpose.[62] There was no general investment power.[63] The House of Lords held that the swap transactions are speculative, even when they consist of replacement or reprofiling of existing swap transactions; that the powers of local government do not include speculative trading activities and that the entering into of swap transactions was ultra vires.

In my view the decision of the House of Lords was plainly right, although the reasoning may be questioned. The powers of Councils were so limited that it may be doubted that they had the power to enter into swap transactions at all and certainly did not have power to do so for speculative purposes. As even the later transactions were for the purposes of hedging liabilities arising under the speculative trading, they remained ultra vires. Although the decision seems to me to be right, I think that the House of Lords expressed itself too broadly in saying that swap transactions are necessarily speculative. I would not expect an Australian court to take this view. I would expect that an Australian court would take the view that a body with power to borrow could enter into swap transactions for the purpose of hedging liabilities under a borrowing contract.[64]

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56 *Earl of Shrewsbury v North Staffordshire Rlwy Co* (1865) 35 LJ Ch 156, 172; *Kathleen Investments (Aust) Pty Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117, 130; *Hazell v Hammersmith & Fulham LBC* [1992] 2 AC 1; *McCarthy & Stone Developments Ltd v Richmond on Thames LBC* [1992] 2 AC 48, 68-70.

57 *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672.

58 *Re Lands Allotment* (1894) 1 Ch 616.

59 *Kathleen Investments (Aust) Pty Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117.

60 [1992] 2 AC 1.

61 See eg section 147 of the Act.

62 See Schedule 13 of the Act.

63 Although a limited power might be inferred from the power to maintain accounts.

64 In this regard it is to be noted that the English courts have taken an extremely narrow view of the powers of local government authorities: see for example *Prescott v Birmingham Corporation* (1954) 3 All ER 689; *Bromley LBC v*

For some reason I am still unable to understand, this decision seems to have caused considerable concern in banking circles about the capacity of any statutory authority to enter into any financial transaction. Concerns were even raised about the powers of the States' central borrowing authorities to enter into financial transactions. These bodies are established as central borrowing and investment authorities, with broad, indeed almost unparalleled, powers to enter into financial transactions.[65] Obviously *Hazell's* case has nothing whatever to do with the powers of these authorities. In my view there is little doubt that at least the South Australian Government Finance Authority could enter into swap transactions for speculative purposes, if they were silly enough to do so. Interestingly, the concerns that were expressed in Australia about the powers of statutory authorities to enter into these transactions, were not raised so far as I am aware, in the international markets.

What this serves to highlight is that, in each instance it is necessary to have regard to the actual statutory powers in order to ascertain the power of the relevant authority to enter into the particular contract.

Where the purported contract is ultra vires, there were concerns about the position of the other party to the transaction.[66] Estoppel was often not available to protect the other party because an estoppel cannot operate to avoid a statutory limitation.[67] However, the courts have recently applied the new developments in the law of **restitution** with the apparent effect of filling the gap. Where money is paid pursuant to an ultra vires contract occasioned by a mutual mistake of law, the money is repayable with compound interest and without any set off.[68] The defence of change of position cannot be relied upon if the change of position is based upon the assumed validity of the ultra vires transaction.[69] Although restitution will always be based upon its own particular facts, the consequence and effect of these decisions, particularly in so far as they limit any set off, is that it is the statutory authorities that are most at risk if the contracts are ultra vires.

LIABILITY OF STATUTORY AUTHORITIES

Invariably statutory authorities have power to "sue and be sued". It has always seemed to me that one of the reasons for the initial creation of statutory authorities in the late 18th century was to create bodies which did not enjoy the immunities of the Crown and which could trade in the same way as a private sector company.[70]

This is not the way it has turned out. Where the statutory authority can be considered as a servant or agent of the Crown then **it is treated as the Crown**, and the provisions respecting Crown liability will apply.[71] The tests for whether the statutory authority can be considered a servant or agent of the

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GLC (1982) 1 All ER 129; *Westminster GC v GLC* (1986) 2 All ER 278; *R v Somerset CC ex p Fewings* (noted at (1995) *Pub L* 27).

65 See for example, sections 5(2), and 11 of the *Government Financing Authority Act*, 1982 (SA).

66 See, for example, Loughlin "The Limits of Legal Instrumentalism" (1991) *Pub L* 569, 575.

67 McDonald "Contradictory Government Action: Estoppel of Statutory Authorities" (1979) 17 *Osgoode Hall LJ* 160; *Gardner v Dairy Industry Authority* (1977) 1 NSWLR 505, 520-521.

68 *Kleinwort Benson Ltd v South Tyneside Metro BC* (1994) 4 All ER 972; *Westdeutsche Landesbank Girozentrale v Islington LBC* (1994) 4 All ER 890.

69 *South Tyneside BC v Svenska International* (1995) 1 All ER 545.

70 See, for example, the comment of Glynn in the Melbourne Constitutional Convention Debates, 1 March, 1898 (Official Record at p 1655) that the Commissioner of Railways could be sued pursuant to the Railways Acts "because the Crown has, to some extent, given up its prerogative" (see also Downer at 1663); see also *International Railway Co v Niagara Parks Commission* (1941) AC 328.

71 *Breavington v Godleman* (1988) 169 CLR 41, 170; Harrison Moore, "Liability for Acts of Public Servants" (1907) 89 *LQR* 12; Friedman, "Legal Status of Incorporated Public Authorities" (1948) 22 *ALJ* 7; Evatt *The Royal Prerogative*

Crown are the same as for the question whether the authority is entitled to the shield of the Crown. Various indicia are considered in determining whether a body is a servant or agent of the Crown, including the extent of Ministerial control, the extent to which it holds its property for the Crown, the nature of its powers and so on.[72]

On the other hand, where the authority is not a servant or agent of the Crown, usually because it is not subject to direction or control, then the rules as to liability of central government have no application. The authority can be treated as if it were a private sector body. Local Government authorities fall within this class.

GOVERNMENT OWNED COMPANIES

The process of corporatisation has resulted in an increasing amount of government activity being carried on through companies. For legal purposes a government owned company can be treated as a private company; it does not enjoy any of the special powers or immunities of the Crown.[73] The rights and entitlements of the Crown as shareholder are defined by the *Corporations Law*.[74]

Government ownership may have a practical effect which will afford some comfort to those contracting with government owned companies. This effect is commonly called the **implied guarantee**. It was recently described by the Audit Commission established by the South Australian Government as follows:

> "... if the Government retains any significant interest in a government business ... the government ceases to have full control. Yet the Government is likely to be considered by the markets, the general body of shareholders and the community as implicitly guaranteeing all the now private company's obligations and financial performance."[75]

There have been a number of recent examples of the operation of the implied guarantee. The support by their respective governments of TriContinental[76] and Beneficial Finance are good examples. There have also been more contentious examples such as the eventual support of DFC New Zealand Ltd, apparently as a result of the pressure of the financial markets and notwithstanding the statements of the New Zealand Government that it would not support privatised or corporatised entities. The extent and nature of the implied guarantee will depend upon political and economic factors. I doubt that it is capable of precise legal definition. Its uncertainty means that the government probably does not realise the full potential benefit of the guarantee because, for example, rating agencies do not take it into account.

(1987; Law Book) pp 239-245. Within federal jurisdiction, the test may be whether the relevant body is "the State" or "the Commonwealth". This is a wider test then whether the body is a servant or agent of the relevant Crown: see *Inglis v Cth Trading Bank* (1969) 119 CLR 334, 336, 343; *Maguire v Simpson* (1977) 139 CLR 362, 375, 390, 397, 405; *Crouch v Commr Rlwys* (1985) 159 CLR 22, 32, 38-42; *SBNSW v Cth Savings Bank* (1984) 154 CLR 579, 584; (1986) 161 CLR 639, 648, 652. Even if the relevant *Crown Proceedings Act* does not specifically apply to statutory authorities, it is "picked up" by the principle that statutory authorities cannot enjoy any greater immunities than does the Crown itself: *Skinner v Cmmr Rlwys* (1937) 37 SR (NSW) 261.

72 *Superannuation Fund Investment Trust v Cmmr Stamps* (1979) 145 CLR 330, 340-348.

73 *Cth v Bogle* (1953) 89 CLR 229.

74 *Sparling v Quebec* (1988) 89 NR 120 (SCC).

75 South Australian Commission of Audit, "Charting the Way Forward" (1994; SAGP); see also "Statutory Authorities and Government Business Enterprises: A Policy Discussion Paper" (1986; AGPS) para 2.61; Senate Standing Committee on Finance and Public Administration "Government Companies and Their Reporting Requirements" (1989; AGPS) para 5.2.3; Queensland Government White Paper "Corporatisation in Queensland" (1992; QGP) para 6.8.

76 See "First Report of the Royal Commission into the TriContinental Group of Companies" (1991, VGP) p 468.

SUMMARY

Contracting with government does present some special difficulties. Care needs to be taken to ensure that any statutory limitations upon power are considered, and the nature of the Crown means that some sorts of security, such as mortgages and pledges are not available. Once a contract has been entered into, care needs to be taken to ensure that any legal proceedings upon that contract are instituted in the appropriate jurisdiction.

There are other issues which time does not permit me to mention. These include problems with confidentiality given the constitutional responsibilities of the government to answer questions in Parliament and the possible impact of *Freedom of Information Acts* in those jurisdictions that have them. They also include the potential application of judicial review to government contracts.[77]

Even taking account of these factors, it is still true that Australian governments are most desirable parties with which to contract.

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77 Taggart "The Impact of Corporatisation and Privatisation on Administrative Law" (1992) *AJPA* 368; Arrowsmith "Judicial Review and the Contractual Powers of Public Authorities" (1992) 106 *LQR* 277; Arrowsmith *Civil Liability and Public Authorities* (1992; Earlsgate) pp 85-92; Harris "The Third Source of Authority for Government Action" (1992) 109 *LQR* 626, 643; Freedland "Government by Contract and Public Law" (1994) *Pub L* 86; Taggart "Corporatisation, Contracting and the Courts" (1994) *Pub L* 351.