Submission
No 68

INQUIRY INTO CROSS CITY TUNNEL

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Theme:

Summary

Tabled by
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PARLIAMENT OF NSW

Inquiry into the Cross City Tunnel

Submission of Professor Tony Blackshield

1. My concern is with the constitutional principles affecting the entry by State government agencies into public-private partnership agreements, and particularly with the possible effect of those principles on the agreements establishing the Cross City Tunnel project. Among those agreements I shall refer in particular to the agreement of 18 December 2002 ("the Project Deed") entered into by the Roads and Traffic Authority with CrossCity Motorway Pty Ltd ("the Company") and CrossCity Motorway Nominees No 2 Pty Ltd ("the Trustee"), and to the amended agreement made by the same parties on 23 December 2004 ("the First Amendment Deed").

2. In my view the effect of the constitutional principles – and indeed of the agreements themselves, as I would construe them – is that the agreements impose no legally binding constraint on the New South Wales government or on the Roads and Traffic Authority in determining how best to deal with the management of the tunnel and of the various traffic problems associated therewith. Further, I submit that, on the basis of a proper understanding of the constitutional principles, there is a need for a comprehensive review of all similar contracts entered into by the State of New South Wales and its agencies, and for the formulation of principles and procedures to govern any similar arrangements in the future.

3. The basic principle to be borne in mind is that governments and government agencies must at all times remain free to exercise their powers in whatever way the public interest may at any time require. Accordingly, any contractual arrangement which purports to limit that continuing freedom is legally ineffectual, regardless of the particular level of government that may be involved.

4. The principles in question are subject to exceptions and qualifications, the extent of which is often obscure. In particular, it is often said that the principles have no application to "ordinary commercial contracts" (for example, a simple contract for the purchase of office supplies for a government department). However, what constitutes an "ordinary commercial contract" may often be open to debate; and even an "ordinary commercial contract" may contain particular clauses purporting to limit the future exercise of government powers. In such a case those clauses will be unenforceable even though the rest of the contract is binding in the usual way. As Callaway JA put it in the Victorian case of *L'Huillier v Victoria* [1996) 2VR 465 (at page 479), what is decisive is not "the character of the contract but the character of the discretion". Other possible qualifications arise mainly from the interpretation of particular contracts or particular relevant statutes; for present purposes it is sufficient to state the principles at their broadest level.

5. At that level, the fundamental principle was spelled out in 1921 in the English case of *Rederiaktiebolaget Amphitrite v The King* [1921] 3 KB 500, where it was held that a Swedish ship (the *Amphitrite*), entering British waters during World War I, had lawfully been detained by the British government despite a written undertaking that she would be allowed free passage. In that case Rowlatt J said (at page 503):

> No doubt the Government can bind itself through its officers by a commercial contract, and if it does so it must perform it like anybody else ... But this was not a commercial contract; it was an arrangement whereby the Government purported to give an assurance as to what its executive action would be in the future in relation to a particular ship in the event of her coming to this country with a particular kind of cargo. And that is, to my mind, not a contract for the breach of which damages can be sued for in a Court of law. It was merely an expression of intention to act in a particular way in a certain event. My main reason for so thinking is 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.

Similarly, in the South Australian case of *West Lakes Ltd v South Australia* (1980) 25 SASR 389 (at pages 390-391), King CJ explained:

> Ministers of State cannot ... , by means of contractual obligations entered into on behalf of the State fetter their own freedom, or the freedom of their successors or the freedom of other members of parliament, to propose, consider and, if they think fit, vote for laws, even laws which are inconsistent with the contractual obligations. To enter into a contract containing a provision purporting to fetter members of parliament in their deliberations and to attempt to enforce any such contractual provision would, in my opinion, be the clearest breach of the privileges of the parliament and of the members thereof. The Ministers of State are members of parliament. As such they are free to propose, to consider, to discuss and to vote for any bill unconstrained by any contract entered into on behalf of the State.

6. This latter passage makes it clear that the principle operates even at the highest level. The freedom to act as the public interest may require at any given time must remain unimpaired even at the highest level of ministerial and cabinet government, and even (or perhaps especially) at the level of Parliament itself. Thus, even when a contract is entered into at the highest executive level, the executive government must remain free to repudiate the contract. Similarly, even when the terms of a contract are approved by (or incorporated in) legislation, Parliament must remain free to repeal the legislation, or simply to legislate inconsistently with it (in which case the new legislation will operate as an implied repeal).

7. At lower governmental levels, where the contract is entered into by a subordinate government agency – such as the Roads and Traffic Authority – the principle is usually stated by saying that no such agency can "fetter its discretion". That statement is often explained by saying that the decision-making powers of such agencies have been conferred by statute, to be exercised from time to time as the public interest requires; so that any contractual obligation which purports to limit the agency's continuing future discretion is simply not authorised by the statute. As Callaway JA put it in *L'Huillier v Victoria* (at page 479):

> No doubt the principle gains some of its force from the circumstance that the discretion has a legislative foundation and it is not readily to be supposed that the legislature intended that a proper exercise of the discretion in the public interest was to be frustrated, hindered or circumvented by executive action.

He added, however, that "there is no reason why the same principle should not apply to common law powers and functions of the Crown or the Executive when they involve the making of decisions in the public interest".

8. An example involving a statutory power is *Watson's Bay and South Shore Ferry Co Ltd v Whitfield* (1919) 27 CLR 268, where the plaintiff company had a claim to compensation arising from the resumption in 1912 of land at Nielsen Park which it had been about to purchase. In 1916 the Minister of Lands proposed to revoke the dedication of the land, to offer it for sale by public auction, and to pay the proceeds to the plaintiff company in full satisfaction of its claim to compensation. The Minister entered into a contract with the company by which he undertook to proceed in the manner proposed, and the company agreed to accept the proceeds of the auction in full satisfaction of its claim. (It appears to have been envisaged that the plaintiff company would itself be the highest bidder, so that effectively it would regain possession of the land, and the price paid by it at auction would be a mere book-keeping entry, to be returned to the company in satisfaction of its compensation claim.) When the company sued to enforce the contract, the Supreme Court of New South Wales held that the contract was unenforceable, and on appeal the High Court of Australia affirmed that decision in a judgment delivered by Isaacs J. The element of sham in the proposed auction arrangements was treated as a second, subsidiary reason why the contract was unenforceable. The principal reason was that the contract was "an attempt to fetter in advance the discretion and the public duty of the Minister of Lands for the time being", since the "very ground" of the company's claim was its contention "that the Minister was bound by the contract to exercise his statutory power, not as the expediency of doing so presented itself to him at the moment of exercise, but as predetermined by the contract" (page 277).

9. One exception sometimes proposed to the rule against "fetters on discretion" is that the very act of the government agency in entering into the contract may itself constitute an *exercise* of the relevant discretion, so that subsequent governmental conduct pursuant to the contract should be seen as merely the legitimate implementation of a discretionary decision that has already been validly made. In the *Watson's Bay Case*, however, an argument of that kind was rejected. The High Court's judgment explained that the Minister of Lands was not free to exercise his discretion in that way: the contract was not "a completed exercise of discretion", but "an anticipatory fetter on the future exercise of discretion" – since, if the discretion had not been fettered, the Minister might have decided not to auction the land at all. The crucial notion here is that of an *anticipatory* fetter – that is, an undertaking about how a power *will* be exercised *at some future time* cannot be characterised as a present exercise of power in a way that takes immediate effect. The relevance of this analysis is unambiguously clear when the undertaking is conditional: that is, an undertaking about the action to be taken *if* certain specified conditions arise.

10. The distinction between a contract the formation of which constitutes a valid *exercise* of a governmental discretion at the time when it is made, and a contract which invalidly purports to fetter a *future* exercise of discretion, was further explained by Callaway JA in *L'Huillier v Victoria*. He pointed out (at page 479) that what is decisive is "the time-frame": that is, it is necessary to consider the point of time at which the relevant power is properly to

be exercised. In the English case involving the Swedish ship *Amphitrite*, for example, the power was one "that could be exercised only when the time arrived for the release of the ship" (page 480).

11. Thus far I have stated the relevant principles very broadly. In a more elaborate analysis Nicholas Seddon, in his book *Government Contracts* (Federation Press, 2nd edition 1999) has suggested (at pages 167-168) that no fewer than five distinct principles are involved:

1. **Executive necessity** – the government may be able to break an otherwise perfectly valid and enforceable contract because it is necessary to do so for acceptable governmental reasons (such as a change of policy). In such a case the government breaks the contract without paying damages.
2. **The primacy of legislation** – the government cannot contract out of an *existing* statutory obligation or fetter its future exercise of a statutory power or discretion conferred by *existing* legislation. In such a case the contract is either wholly or partly ineffective.
3. **The rule against fettering future executive action** – the government cannot by contract bind its *future* freedom to govern through the use of the executive power. In such a case the contract may be ineffective if at some future date action is taken which cuts across the obligations found in the contract.
4. **The rule against fettering future legislative action** – the government cannot bind itself by contract not to legislate in the *future* in a manner which may thwart the contract. In such a case the contract is either wholly or partly ineffective to the extent that the legislation, once passed, is inconsistent with it ...
5. **The primacy of parliament** – the government may simply legislate to override an existing contract if the obligations in the contract are proving to be burdensome or unacceptable to the government.

12. The immediate issues arising from the contract for the Cross City Tunnel are governed by Seddon's second and third principles – understood, as they must be, as extending to contractual undertakings entered into not merely by government at the highest executive level, but by any subordinate government agency. The second principle is the relevant one if attention is focused on the fact that the powers and discretions vested in the Roads and Traffic Authority are conferred by legislation, including the *Transport Administration Act* 1988 and the *Roads Act* 1993. The point then is that, by purporting to exclude a continuing discretion given to it by the legislation, the Authority is acting contrary to the legislation. The third principle, that in any event no government agency can by contract fetter its future freedom of action, is the more general one.

13. However, all of Seddon's principles are worth bearing in mind, as indicating that a government which chooses not to be bound by a contract has many options available to it, including the ultimate power of overriding the disputed contract by legislation.

14. In *Ansett Transport Industries (operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, Mason J suggested a different analysis. In that case Ansett complained that the grant of permits to rival companies, effectively enabling them to compete with Ansett in interstate air freight services, was in breach of an implied term in its agreements with the Commonwealth implementing the "two airlines" policy. The action failed because, in a court of five judges, a majority of three (Gibbs, Mason and Murphy JJ, with Barwick CJ and Aickin J dissenting) held that the agreements did not in fact imply any such term. As to what the position would have been if such an undertaking *had* been implied, there was a different division of opinion: Gibbs J joined the Chief Justice and Aickin J in thinking that in the circumstances such an undertaking would have been enforceable. It would not have amounted to an impermissible

fetter on discretion since the agreements had statutory approval: their reasoning was that the agreements as approved by statute were a clear expression of government policy, and that government officers (in that case in the Customs Department) were entitled to be guided by government policy when deciding how to exercise their powers. In that sense the government's policy, as embodied in the approved agreements, was a *legitimate* fetter on discretion. By contrast, Mason and Murphy JJ thought that any undertaking of the kind suggested would have been an impermissible fetter on discretion, and would therefore have been wholly unenforceable.

15. The fullest analysis was offered by Mason J. He acknowledged the underlying tension that troubles any discussion in this difficult area: that is, the tension between the basic constitutional principles of the Westminster system of government, and the practical and commercial imperatives that lead governments into reliance on different forms of "public-private partnerships". As Mason J put it (at pages 74-75):

> Public confidence in government dealings and contracts would be greatly disturbed if all contracts which affect public welfare or fetter future executive action were held not to be binding on the government or on public authorities. And it would be detrimental to the public interest to deny to the government or a public authority power to enter a valid contract merely because the contract affects the public welfare. Yet on the other hand the public interest requires that neither the government nor a public authority can by a 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 ... To hold otherwise would enable the executive by contract in an anticipatory way to restrict and stultify the ambit of a statutory discretion which is to be exercised at some time in the future in the public interest or for the public good.

16. Accordingly, he attempted to restate the governing principles in a way that would achieve an acceptable compromise among the competing considerations involved. Essentially he distinguished among three classes of case. The most typical of these, and the one most directly relevant to the Cross City Tunnel debate, is the first (at page 76): where a public authority itself enters into a contract or undertaking which purports to restrict or predetermine its own future exercise of a power conferred upon it by statute, the contract or undertaking will be invalid as "an anticipatory fetter by that person on his future exercise of the statutory power or discretion". His Honour noted that in all the decided cases of this kind (including the *Watson's Bay Case* referred to above) it was possible to conclude that the contract or undertaking "was not one authorized by the relevant legislation, or was incompatible with it", so that on that basis also the undertaking was "invalid or ultra vires".

17. Mason J went on to contrast this type of case with two others. In his second category, where the contract is made at a higher level of government, and the agency whose powers are affected is not a party to the contract, he again thought that the terms of the contract could not affect the continuing discretion of the agency as to how its powers might be affected; but he thought that in such a case the contract *might* be enforceable, in the sense that a departure from its undertakings might give rise to an action for damages. In this respect his Honour's suggestion has been widely criticised, chiefly on the ground that a public servant's awareness of a possible exposure to damages might effectively fetter his discretion just as much as a

fully enforceable contract could do. In the third category, where the contract has specifically been approved by statute, and specifically provides that a statutory power will be exercised in a particular way, his Honour thought that the contract might be fully enforceable, provided that its operation could be construed as putting an end to any continuing discretion in the decision-maker. This might be because the statute could be analysed as impliedly amending the earlier statute by which the discretion was conferred; or because it could be analysed as imposing on the decision-maker a statutory duty to exercise the power in a particular way.

18. These are not necessarily the only ways in which the specific approval or adoption of a contract by legislation may overcome the general rule against fetters on discretion. For example, there is the suggestion made by other judges in the *Ansett* case, particularly by Aickin J, that the statute might give expression to a government policy by which the subordinate decision-maker might legitimately be guided, even in the exercise of what was analysed as a continuing discretion. On the other hand, a court may be reluctant to interpret a statutory provision in such a way as effectively to fetter a discretion if that intention is not clearly expressed.

19. I said in paragraph 16 above that, among the three kinds of situation identified by Mason J in the *Ansett* case, the one most directly relevant for present purposes is the first, where a public authority itself enters into a contract which may appear to restrict its own future exercise of its statutory powers. I say this because the Cross City Tunnel agreement is *not* one that was initially entered into at a higher executive level or specifically approved by statute. The contract was entered into by the Roads and Traffic Authority itself, and its only immediate statutory basis is the general power of the Authority to "make and enter into contracts or arrangements for the carrying out of works or the performance of services or the supply of goods or materials" under s 53(1)(b) of the *Transport Administration Act* 1988 (NSW). It is simply not conceivable that a general clause of this kind, which is clearly directed at least in part to "ordinary commercial contracts", could be construed as effecting or authorising any departure from the normal rule against fettering of discretion.

20. It has been suggested that this conclusion may be affected by the provisions of the *Public Authorities (Financial Arrangements) Act* 1987 (NSW). Pursuant to s 20(1) of that Act the Treasurer gave his approval to the financial arrangements envisaged by the Project Deed in December 2002, and gave similar approval to the first Amendment Deed in December 2004. Consequently upon the Treasurer's approval of the Project Deed, the Minister of Lands executed a Deed of Guarantee under s 22B of the Act. The Treasurer's approval under s 20(1) of the Act is said to have a variety of legal consequences which the Act spells out, notably including the following:

(a) By s 2C(1), the Act overrides any *earlier* "Act or statutory rule", while by s 2C(2) it prevails over any *later* "Act or statutory rule" unless the later Act expressly provides to the contrary. (Whether this latter provision is legally effective may be open to doubt.)

(b) By s 8A, the essential provisions of an approved financial arrangement shall have effect "despite any Act or rule to the contrary".

(c) By s 11(2), a public authority which participates in an approved financial arrangement shall have power (a) to "enter into any contract, agreement or other transaction"; (b) to "incur any obligations under a contract, agreement or other transaction"; and (d) to "make any covenants or promises, including those which are absolute and unconditional". There are similar provisions in s 17(2) and s 20(2). It is arguable that these provisions supply an additional source of power for the entry by the Roads and Traffic Authority into the Cross City Tunnel agreements.

(d) By s 13 (see also s 21(1)), the Treasurer's approval "is conclusive evidence that anything done by the authority in accordance with the approval is authorised by this Act".

(e) By s 22AA the Treasurer's approval has the effect that "the performance of all or any specified obligations incurred by an authority" is guaranteed by the government; and by s 22B the government "may guarantee the due performance by an authority of any obligations incurred by it" as a result of an arrangement or transaction "authorised by this Act".

21. However, my own opinion is that these and other provisions of the *Public Authorities (Financial Arrangements) Act* are of no particular relevance. Assuming that the Cross City Tunnel agreements are valid and effective, their validity and effectiveness are sufficiently supported by the Roads and Traffic Authority's general powers under s 53(1) of the *Transport Administration Act*; there is no need to invoke the additional support of the *Public Authorities (Financial Arrangements) Act*. Assuming that, by reason of the constitutional principles to which I have referred, the agreements are *not* invalid or effective, I do not consider that any of the above provisions would avail to cure the problem. In particular, it should be noted that the override provisions in ss 2C and 8A refer only to an "Act or statutory rule", not to a general constitutional principle or rule of common law; and that references to "obligations incurred by an authority" extend only to obligations which have legally enforceable effect.

22. It follows that if the agreements purported to impose an anticipatory fetter on the future exercise by the Roads and Traffic Authority of its statutory powers, any such fetter would be of no legal effect.

23. However, in spite of possible first impressions, my opinion is that the relevant agreements do *not* have the effect of fettering any of the Authority's powers in an impermissible way. The Project Deed envisages an elaborate plan of traffic control which, if taken at face value, would effectively constrain for over thirty years the decisions which should be taken by the Roads and Traffic Authority in the exercise of its statutory functions. For example, clause 18.2 of the Deed envisages detailed restrictions or closures of specified traffic lanes, while clause 18.3 assumes the continued opening of other specified traffic lanes.

If these and similar provisions had the effect which they appear to have at face value, they would impermissibly fetter the Authority's discretionary powers, and would therefore be invalid and unenforceable by reason of the constitutional principles to which I have referred. As I understand the agreement, however, all such provisions must be read in the light of clause 2.3(a), by which the consortium parties "acknowledge and agree" that –

> (i) nothing in this Deed or in any of the Project Documents will in any way unlawfully restrict or otherwise unlawfully affect the unfettered discretion of RTA to exercise any of its functions and powers pursuant to any legislation; and
> (ii) without limiting clause 2.3(a)(i), anything which RTA does, fails to do or purports to do pursuant to its functions and powers under any legislation will be deemed not to be an act or omission by RTA under this Deed and will not entitle the Trustee or the Company to make any Claim against RTA arising out of the subject matter of this Deed and the other RTA Project Documents.

The qualification added by clause 2.3(b) will be considered below.

24. In my opinion the above clause necessarily requires that any provision which might otherwise have been read as a fetter on the Authority's discretion (and would therefore have been rendered unenforceable by constitutional principle) is not to be read in that way. Rather, the assumptions and expectations which the Project Deed records (as to traffic flow, management of lanes and the like) must be read as imposing no restriction at all upon the continuing liberty of the Roads and Traffic Authority to vary those arrangements from time to time as the public interest requires. On one reading, the agreement would be ineffectual to fetter the Authority's discretion because it could not constitutionally be permitted to do so. On the alternative reading which seems to me to be required by clause 2.3(a), it is ineffectual to fetter the Authority's discretion because it does not even purport to do so.

25. This conclusion is reinforced by clause 18.1 of the Project Deed, which provides:

> Nothing in this Deed will in any way limit or restrict the ability or power of RTA or the Government, directly or through any Authority to:
> (a) develop, construct, operate and/or maintain directly, by sub-contractors or otherwise, other tollways, tunnels, freeways and other roads in New South Wales.
> (b) maintain, manage, change or extend the Sydney road and transport network or any traffic or transport system;
> (c) extend, alter, close or upgrade existing tollways, freeways and other roads;
> (d) extend, alter or upgrade existing public transport routes or services;
> (e) construct new public transport routes or establish new transport services;
> (f) develop the transport network generally;
> (g) implement Government policies; or
> (h) otherwise do anything which, subject to this Deed, they are empowered to do by Law.

In this context it may be worth noting that – by contrast with the reference in the *Public Authorities (Financial Arrangements) Act* to any "Act or statutory rule" (see paragraph 21 above) – the word "law" in this lastmentioned provision is defined to include "those principles of law established by decisions of courts".

26. For these reasons, the agreements do nothing to impair the continuing freedom of the Roads and Traffic Authority to make whatever decisions relating to management of traffic and related matters that a proper exercise of its powers in the public interest may from time to time require. And, of course, by virtue of the wider constitutional principles to which I have referred, the government remains at liberty at any time – preferably by legislation, but

perhaps even by executive action – to repudiate the entire arrangement, or simply to adopt an alternative regime for the management of the tunnel inconsistent with the existing arrangement.

27. Turning now to the question of compensation, I shall first assume that the existing agreements remain in force; that consistently with those agreements the Roads and Traffic Authority is at liberty to make changes to traffic arrangements; and that in fact the Authority does so to the perceived disadvantage of the consortium partners. In that situation, would the consortium partners be entitled to compensation?

28. I noted earlier that clause 2.3(a) is subject to a qualification; but in my view this can be put to one side. The qualification is added by clause 2.3(b), which provides:

> RTA, the Trustee and the Company agree that clause 2.3(a) is taken not to limit any liability which RTA would have had to the Trustee or the Company under this Deed or any other RTA project document as a result of a breach by RTA of a term of this Deed or any other RTA Project Document but for clause 2.3(a) of this Deed.

Whatever the precise effect of this provision, it does not appear to be relevant to the situation I have envisaged, since its operation is confined to liabilities arising "as a result of a breach by RTA" of a contractual term. On the reading which I have adopted, new traffic arrangements adopted by the Roads and Traffic Authority would *not* involve such a breach, since the contract does not purport to exclude them. On the alternative reading that the contract does attempt to exclude such arrangements, it fails to impose any enforceable contractual term to that effect – so that, on that interpretation also, no question of breach arises.

29. The same can be said of any question of liability to damages for breach of contract under the general law. Traffic variations of the kind here envisaged are either not excluded by the contract at all, or any provision that might be interpreted as excluding them would be unenforceable. In either case such variations would involve no breach of contract, and therefore would not give rise to any liability to damages for breach.

30. The Project Deed does, however, appear to contemplate its own compensation regime which might extend to variations of the kind envisaged – at least if they were sufficiently extensive to have what is described as a "material adverse effect" upon the ability of the Trustee and the Company to implement the tunnel project; upon their ability to repay financial borrowings; or upon their anticipated "equity return". The Deed contemplates a variety of circumstances which may give rise to a "material adverse effect"; they include decisions by the Roads and Traffic Authority which involve reductions in traffic lanes, removal of traffic restrictions, new roads, new tolls and changed speed limits (see particularly clauses 18.4 and 18.5). When any of these decisions or any of the other specified events has occurred, in a way that "has had or has started to have" a "material adverse effect", the consortium parties are required to give notice under clause 19.1, and the parties are then required to "negotiate in good faith" with a view to a solution under clause 19.2.

31. Different aspects of this mechanism appear to have different degrees of onerousness. On the one hand, the basic obligation is only "to negotiate in good faith" (clause 19.2(a)); the consortium parties "must use all reasonable endeavours" to "mitigate the adverse consequences of the event or circumstance" (clause 19.1(g)); and the negotiating parties must take "a flexible approach", including consideration of amendment to the project documents, variations to the contemplated thirty-year term, varying the parties' financial commitments, adjusting tolls, and "taking such other action as may be appropriate" (clause 19.2(b)). On the other hand, the object of the negotiations is to restore the ability of the consortium parties to repay their financial borrowings and to maintain their anticipated "equity return" – subject only to the qualification that, if the repayment capacity or the "equity return" were already diminished, the object is to restore them only to that diminished level (clause 19.2(a)).

32. The most troubling aspect of these objectives is the maintenance of the anticipated "equity return". According to the definitions in clause 1.1 of the Project Deed, this anticipated return is to be calculated, where possible, by reference to "historical performance ... taking into account economic cycles and the growth cycle of the business"; and presumably this basis for determining a realistic rate of return would become more relevant as the thirty-year period contemplated by the agreements goes on. In the absence of such objective data, however, the anticipated rate of return is to be calculated by reference to the "Base Case Financial Model" described in Exhibit D to the Project Deed. My understanding is that this "base case" involves calculations based on an estimate of 90,000 cars a day using the tunnel; though some reports have referred to an estimate of 93,000, 95,000 or even 100,000 cars a day. At all events, it appears that the actual number of cars so far using the tunnel falls vastly short of the estimate relied on in the "Base Case Financial Model", and that any realistic projection of future use would also fall well short of that figure. Thus, what the mechanism in clause 19.2 appears to envisage is that any variations in the traffic arrangements contemplated by the agreements would trigger a requirement to maintain the profits made by the consortium partners at unrealistically inflated levels.

33. The question that immediately arises is whether this mechanism itself constitutes a "fetter on discretion" of the kind that the constitutional principles forbid. The suggestion by Mason J in the *Ansett* case that in certain cases a government departure from contractual undertakings might give rise to an action for damages (paragraph 17 above) is not directly relevant here; but the criticisms directed at that suggestion may be directly relevant. The essential point, as I noted earlier, is that a public servant's awareness of a possible exposure to damages might effectively fetter his discretion just as much as an enforceable contract could do. As Enid Campbell puts it ("Agreements about the Exercise of Statutory Powers" (1971) 45 *Australian Law Journal* 338, at page 340), *any* acknowledgment of a possible liability for damages in *any* situation involving a government contract might mean that

> future decisions about how the statutory powers should be exercised could well be inhibited. Even if action in breach of the contract were legally effective, the statutory body would always have to weigh very heavily the price it would have to pay for its breach of contract.

Dennis Rose ("The Government and Contract", in PD Finn (ed), *Essays on Contract* (law Book Co, 1987) 233, at page 242) sees this as part of a deeper problem:

> It would be inconsistent with the legislation conferring the discretion to allow a government to burden itself with the prospect of paying damages if that discretion is exercised in a particular way. Indeed, there is a strong case for saying that even a ... statutory official who is completely independent of the government should not be put in the position of knowing that a particular exercise or non-exercise of a discretion would result in the [government] being liable for damages. That would be a real deterrent to the exercise of the discretion in the public interest as required by the legislation.

Rose notes a suggestion by Professor Campbell that developers might be sufficiently protected if, rather than making a contractual promise that a statutory power will only be exercised in a particular way, a government party might agree that, if the power is exercised in some other way, the developer will be compensated for any resulting losses. That, of course, is essentially the solution adopted by the Cross City Tunnel agreements. However, Rose argues (at page 243) that it is subject to the same objections as liability for damages:

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

34. Similarly, Nicholas Seddon in his book *Government Contracts* (*op.cit.* at pages 185-86) has argued that damages should not be regarded as an appropriate remedy in any situation involving contracts to which governments or their agencies are parties. He points out that if damages *are* available, then the whole distinction between government contracts and private contracts would essentially disappear, since in any contract the parties have the choice of either complying with the contract or paying damages. He adds:

> [A]nother problem with the suggestion of Mason J is that, although the relevant officer is not bound by the contract, he or she may in practice be effectively bound by it because there will be a strong inhibition against putting the government into a position where it will have to pay damages.

35. Clearly, these arguments against the availability of damages apply equally to the compensation mechanism in clause 19.2 of the Project Deed. Accordingly, there is a persuasive argument that the mechanism established by clause 19.2 is a "fetter on discretion", just as much as a clause directly purporting to foreclose the possibility of future variations in traffic management – since it might conceivably inhibit the willingness of the Roads and Traffic Authority (and, indeed, of the executive at higher levels) to contemplate the possibility of such variations even when the public interest requires them. Indeed, there is evidence that the clause has already had this inhibiting effect. The argument that the clause is a "fetter on discretion" is therefore worth considering, in two distinct contexts.

36. First, it must be considered whether the reasoning in paragraphs 23 and 24 above is applicable to clause 19.2, as well as to the various clauses which might otherwise have appeared to operate directly as "fetters on discretion". That argument, it will be recalled, was that the apparent "fetters" were reduced to mere statements of assumption or expectation, having no binding force, by virtue of the recital in clause 2.3(a) that nothing in the agreements "will in any way unlawfully restrict or otherwise unlawfully affect the unfettered discretion of RTA to exercise any of its functions and powers". Clearly, once clause 19.2 is

seen to operate as a fetter on discretion, these words if read literally would apply to it just as much as to any more direct "fetter"; and the qualification in clause 2.3(b) (see paragraph 28 above) would not avail to save the operation of clause 19.2, either – again for the reason that clause 2.3(b) relates only to liabilities arising "as a result of a breach by RTA" of its contractual undertakings, and the present discussion is limited to the effects of changes in traffic management that would not involve any breach. However, despite this possibility of a literal application, I do not believe that clause 2.3(a) can fairly be read in that way. The overall intention of clause 2.3 read with clause 19.2 – and particularly of clause 18.1 when read with clause 19.2 – is that the assumptions and expectations set out in the project documents are not to restrict the freedom of the roads and Traffic Authority to introduce other future arrangements, but that any "material adverse effect" resulting from such future arrangements will give rise to a need to negotiate under clause 19.2. Accordingly, despite the wording of clause 2.3, clause 19.2 should be read as intended to impose a binding obligation.

37. The question that then becomes relevant is whether clause 19.2, as thus understood, can be seen as a "fetter on discretion" for purposes of the constitutional principle that prohibits such fetters. Here the arguments outlined above appear to me much stronger, particularly if the provisions relating to "equity return" are understood as having the exorbitant effect referred to in paragraph 32 above. That is, the more onerous the expectations of compensation to the consortium partners arising from clause 19.2 are perceived to be, the more likely it is that the entire clause will be rendered invalid and unenforceable as an impermissible fetter on discretion.

38. In paragraph 31 above I have noted the ambivalent character of the obligation to negotiate in clause 19.2. It may be possible, by emphasis on its softening or mollifying characteristics – the obligation "to negotiate in good faith" and to take "a flexible approach" – to read down the stated objectives of the negotiations as targets merely to be worked towards, and in particular to see the apparent requirement of maintenance of estimated profits derived from the "Base Case Financial Model" as no more than an ambit claim. To the extent that any such modification might make the operation of the clause appear to be more appropriately tailored to reasonable compensation, the argument for treating it as a "fetter on discretion" might well become correspondingly weaker. That is, by modifying the apparent rigour of clause 19.2, it may be possible to save its validity.

39. In any such "reading down" of clause 19.2, it would be necessary to emphasise the constraints that might, in any event, be implied in the requirements of "good faith" and flexibility: first, that any compensation arrived at must be fair and reasonable, and second, that the assessment of what is "fair and reasonable" must include attention to what is "fair and reasonable" from the viewpoint of the government and its taxpayers. In the different context of the compensation payable by the Commonwealth government for acquisitions of property under s 51(xxxi) of the Constitution, these latter requirements were emphasised by the High Court in the well-known case of *Grace Bros Pty Ltd v Commonwealth* (1946) 72

CLR 269. For example, Dixon J said in that case (at 290) that the inquiry "must be whether the law amounts to a true attempt to provide fair and just standards of compensating or rehabilitating the individual considered as an owner of property, *fair and just as between him and the government of the country* [emphasis added]"; and (at 291) that justice to the claimant does not "demand a disregard of the interests of the public or of the [government]". Similarly, Latham CJ said (at 280) that "[j]justice involves consideration of the interests of the community as well as of the person whose property is acquired", and that what must be sought is "a reasonable basis for adjusting the interests of the individual and of the community". Although these observations were made in a particular constitutional context, they appear to be relevant in any case where a government is required to compensate private interests out of public funds.

40. The point of the preceding paragraph is that, if clause 19.2 were "read down" in the light of the moderating principles referred to, it might be more possible to rebut the argument that the clause is wholly invalid as a "fetter on discretion". Alternatively, if the latter argument were rejected without resort to such "reading down", so that clause 19.2 was seen as remaining in force as fully valid and binding, then conceivably it might still be possible to modify the effect of the clause by invoking similar arguments. However, in that situation I doubt that such arguments would carry much weight.

41. By contrast, if clause 19.2 were rejected as imposing a "fetter on discretion", that would not necessarily mean that the government was freed of *any* obligation to compensate the consortium parties for "material adverse effects" arising from traffic changes. It would mean, however, that any such compensation would fall to be assessed on general principles, freed from the more rigorous requirements of clause 19.2. In any such assessment, the principles referred to in paragraph 39 above would carry full weight.

42. In paragraphs 27 to 40 above, I have considered the issue of compensation on the limited basis that the whole of the existing contractual framework for the Cross City Tunnel arrangements is assumed to remain in force, so that any question of compensation arises only because, within that framework, the Roads and Traffic Authority might make traffic arrangements perceived to have a "material adverse effect" on the interests of the consortium partners. However, the wider constitutional principles referred to earlier in this submission make it clear that the government is also at liberty to repudiate the whole of the existing contractual framework, and in particular to introduce (preferably by legislation) a new regime for the management of the Cross City Tunnel inconsistent with the existing arrangements, and overriding them as later in time. What compensation, if any, might be payable to the consortium partners in the event of such a more radical change?

43. One possible answer is that *no* compensation would be payable because the effect of the constitutional principles is that any contract purporting to limit the freedom of any government to make such changes is simply rendered void. There are therefore no contractual obligations in force, and nothing to compensate for.

44. Another possible answer is that no compensation would be payable because, in such an eventuality, the common law rules relating to frustration of contracts would come into play: that is, as Lord Reid put it in *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 (at page 723), the result is the complete "termination of the contract by operation of law", because of "the emergence of a fundamentally different situation". The effect of the frustration doctrine is that (subject to an important qualification to be considered below) upon the contract being brought to an end the loss lies where it falls: that is, each party must simply bear the loss of whatever resources it has invested in the contract up to that point. That the frustration doctrine may apply in principle to government contracts in Australia was made clear in the case of *Brisbane City Council v Group Projects Pty Ltd* (1979) 145 CLR 143, particularly in the judgment of Stephen J at pages 156-163. (Indeed, Stephen J appeared to suggest that the doctrine might apply more readily to government contracts than to ordinary commercial contracts, since what a government party has at stake is an interest not merely in financial gain, but in some perceived public benefit.) That was a case where a contract for infrastructure development in a suburban subdivision had been entered into between the city council and a private developer, but the contract was brought to an end when the land was resumed by the Queensland State government. In other words, this was a case where a contract entered into by *one* government agency was frustrated by the action of a *different* government agency. However, given the underlying postulate of continuing governmental freedom of action, there appears to be no reason why the very same government agency which has entered into a contract might not itself make a later decision which results in the contract being frustrated, and certainly no reason why a contract entered into at one level of government should not be frustrated by decisions made at a higher level of government.

45. The qualification foreshadowed above is that, where the frustration of a contract is induced by the action *of one of the parties to the contract*, that party is not entitled to rely on the general principle that the loss lies where it falls, but may still be liable to compensate the other party for loss. On the face of it, this would seem to mean that even if the Cross City Tunnel contracts were brought to an end because the doctrine of frustration was triggered by the introduction of a new regime by the New South Wales government, yet because it was the government's own action that had brought about the frustration, the consortium partners would still be entitled to compensation. However, Seddon (*op.cit.* at 183-84) has argued persuasively that this does *not* follow:

> But the underlying principle in self-induced frustration cases is that a party to a contract should not be allowed to benefit from his or her own *wrongdoing* and should therefore be precluded from pleading frustration when the alleged frustrating event was caused by that person's fault. This principle should not operate in relation to government action where there is no element of fault or wrongdoing. The frustrating event is one brought about for the public good ... [I]n such cases ... the doctrine of frustration should operate to relieve both parties of further performance from the time when the government exercises its prerogative [in a way] which is incompatible with the obligations under the contract.

46. Three points should be added. First, this reasoning would have even more force where the new regime introduced by the government was not simply the result of a change of mind, but a response to an identifiable change of external circumstances. Second, it may be important to bear in mind that (as noted in paragraph 19 above) the main contracts for the Cross City Tunnel were entered into simply by the Roads and Traffic Authority itself, and that what is here contemplated is frustration arising from a policy decision made at a different and higher level of government. Thirdly (and incidentally), it may be worth noting that what is described in the agreements as an "uninsurable event", instead of having the consequences ascribed to it by the Project Deed, might rather result in the termination of the entire contractual framework through the operation of the frustration doctrine.

47. In short, one possible answer is that no compensation might be payable because the contract is void (paragraph 43 above); and another possible answer is that no compensation might be payable because the contract has been frustrated (paragraphs 44-46 above). However, there are other possible answers. One, of course, is that damages for breach of contract would be payable according to the ordinary principles of general contract law. We have seen, however, that in the *Ansett* case Mason J was inclined to confine this possibility to one limited class of case, and that even that limited suggestion has attracted sustained academic criticism, for reasons that are equally applicable to *any* liability to damages being imposed on a government party at all (see paragraphs 33-34 above). Thus, if anything, the trend of opinion is *away from* the possibility of liability to damages.

48. An alternative suggestion sometimes considered is that, without any entitlement to damages (and in particular, without any suggestion that the damages might include a punitive element for a perceived breach of contract), the disappointed party might be entitled to reasonable compensation for actual losses through an application of the principles of "restitution" or "unjust enrichment". In any possible assessment on this basis, the principles referred to in paragraph 39 above would presumably be given full play.

49. In concluding this part of my submission, I should emphasise two points. The first is that much of what I have written is speculative and inconclusive; in particular, in discussing possible liabilities to compensation (from paragraph 27 on), I have reviewed a range of possible answers without finding any answer conclusive. In relation to any variations in traffic arrangements that might be made by the Roads and Traffic Authority, I have noted a persuasive argument that the mechanism provided by clause 19.2 of the Project Deed is invalid as a "fetter on discretion"; in relation to any wider departure from the existing regime that might be made at a higher level of government, I have noted a persuasive argument that the entire existing arrangement might thereupon be terminated by the doctrine of frustration, and that the losses would then simply lie where they fall. But neither of these conclusions can be asserted with any certainty. This lack of clarity is not surprising. The state of the decided cases is that, while the constitutional principles I have referred to are clear, their consequences are not; and in any event those consequences must ultimately depend on the

precise circumstances of any individual case. Moreover, the very uncertainty of the possible consequences leads, in the case of the Cross City Tunnel, to two important conclusions. One is that it is certainly *not* the case that the government is irrevocably committed to a Hobson's choice between either adhering completely to the existing arrangements, or facing the possibility of compensation according to the full rigours of the level suggested by the "Base Case Financial Model". The other is that, in any negotiations with the consortium partners, the very uncertainty of the situation would strengthen the government's hand. The consortium partners might well be prepared to accept a more reasonable level of compensation, rather than face the possibility of no compensation at all.

50. A further qualification is that I have not in fact explored all the possible outcomes that might result from the principles to which I have referred. In Seddon's book on *Government Contracts* (*op.cit.* at 186) he summarises the possible outcomes as follows. In any particular case the constitutional principles may possibly –

1. render the whole contract void;
2. render a particular term void in which case it may then be possible to sever that term [leaving the rest of the contract in force];
3. result in the contract being frustrated;
4. render the contract unenforceable to the extent necessary to allow for the government's needs;
5. result in the contract, or a particular term, being construed (read down) so as not to impinge on the government's needs;
6. have no effect on the validity of the contract in executive necessity cases, at least to the extent that it can support an action for damages;
7. generate a possible right to restitution;
8. preclude the implication of a term;
9. result in a term being implied to the effect that the government may have to abandon the contract for policy reasons.

51. In any event, my main concern is not with the Cross City Tunnel itself. It is rather (first) that all existing contracts embodying versions of the "public private partnership" model need to be reviewed in the light of the constitutional principles I have referred to; and (second) that any future contracts of this nature should be subject to a regime in which the effect of those principles is fully understood and considered.

52. In particular, I submit that in future any contracts of this nature should be approved by, and preferably incorporated in, parliamentary legislation – as was the case, for example, with the *Sydney Harbour Tunnel (Private Joint Venture) Act* 1987 (NSW).

53. It is necessary to bear in mind that even this does not guarantee complete security to private developers who choose to participate in such arrangements, since even after a statute of this kind has been enacted, the Parliament must always remain at liberty to repeal the statute (or simply to effect an *implied* repeal by enacting new and inconsistent legislation). The *only* limitation on this continuing power of Australian State parliaments is the possibility of entrenching a statute by a "manner and form" requirement arising nowadays from s 6 of the *Australia Act* 1986 (Cth); and attempts to entrench such legislation by providing that an agreement shall not be varied without the developer's consent have been held to be ineffective, since such a requirement of corporate consent is not a "manner and form"

requirement: see the South Australian *West Lakes* case, referred to in paragraph 5 above, and the Queensland case of *Commonwealth Aluminium Corporation Ltd v Attorney-General* [1976] Qd R 231.

54. Nevertheless, the incorporation of an agreement in statute gives developers the highest level of security that the constitutional principles allow. More importantly, such a procedure should ensure that, before the statute is enacted, the legal effect of the agreement is thoroughly scrutinised by the Crown Solicitor's office and parliamentary counsel. The apparent absence of any such scrutiny in the case of the Cross City Tunnel has been one of its more disturbing features.

55. It is perhaps necessary to acknowledge finally that the options preserved to governments by the constitutional principles referred to above are not likely to be frequently exercised. Nor is it desirable that they should be. As Seddon puts it (*op.cit.* page 169):

> [I]t should not be too readily inferred that government contracts are not worth the paper they are written on because the circumstances in which the doctrine is invoked are very rare. In the vast majority of ordinary government contracts, the doctrine is simply irrelevant. Apart from the legal conundrums that the doctrine poses, a government which too readily resorted to this doctrine would be well advised to think again because of the very important practical matter of its reputation in the market place. International rating agencies would no doubt take into account the government's record of breaking contracts.

At the same time, it should also not be inferred that in practice a government can *never* depart from a contract once entered into, since to do so would irrevocably injure its reputation for commercial reliability, and the willingness of future developers to enter into such contracts. No doubt a pattern of *repeated* departure from contracts solemnly entered into would soon come to have that effect. But such a departure in an isolated case, by a government with a generally good reputation for reliability, is unlikely to do so. For instance, the South Australian and Queensland cases referred to in paragraph 53 above do not appear to have damaged the commercial reputation or contractual capacity of the governments of those two States. In particular, a departure in an isolated case might more readily be understood if explained by the oppressive or unconscionable features of the particular contract in question – as might well be convincingly done in the case of the Cross City Tunnel arrangements.

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Tabled by Prof. Blackshield
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Australian Constitutional Law and Theory

Commentary and Materials

Fourth Edition

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> clearly the intention of such parliaments may be expressed in an enactment, that intention shall not be given effect to unless it contains the magic formula. I think that the command in sec 6 was quite ineffective and inoperative.

Despite the confusion as to which Act was to be appraised to determine whether it touches "the Constitution, Powers, and Procedures of such Legislature", it is arguable that the *South-Eastern Drainage Case* makes a significant point. What most concerned Latham CJ was his apprehension that s 6 of the *Real Property Act* had purported "**[618]** to prescribe the contents" of future legislation. It is this that, consistently with the doctrine of parliamentary sovereignty, no Act of Parliament can be permitted to do. The effect of the *Colonial Laws Validity Act* in permitting "manner and form" requirements is thus acceptable only if, as to the desirable *content* of legislation, each new Parliament has a continuing freedom to judge what is desirable in response to the policy exigencies of its own time.

The assumption that the legislature cannot fetter its future freedom of action may extend in some contexts to the executive government as well. It is clear that when the Crown or one of its agencies enters into an ordinary commercial contract it is bound in the ordinary commercial way. However, attempts have been made to distinguish such commercial arrangements from those of a governmental character. In cases of the latter kind, it has been said that the Crown cannot bind itself, since to do so might fetter future policy judgments in a changed political context. Thus, in *Rederiaktiebolaget Amphitrite v The King* [1921] 3 KB 500 it was held that a Swedish ship entering British waters during World War I was lawfully detained by the British government despite a written undertaking that she would be allowed free passage.

Rederiaktiebolaget Amphitrite v The King (The Amphitrite)
[1921] 3 KB 500

> **Rowlatt J: [503]** No doubt the Government can bind itself through its officers by a commercial contract, and if it does so it must perform it like anybody else ... But this was not a commercial contract; it was an arrangement whereby the Government purported to give an assurance as to what its executive action would be in the future in relation to a particular ship in the event of her coming to this country with a particular kind of cargo. And that is, to my mind, not a contract for the breach of which damages can be sued for in a Court of law. It was merely an expression of intention to act in a particular way in a certain event. My main reason for so thinking is 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.

The Supreme Court of South Australia arrived at a broadly similar view in *West Lakes Ltd v South Australia* (1980) 25 SASR 389. The plaintiff company entered into an agreement with the South Australian government for the planning and development of a residential suburb called West Lakes. The agreement followed earlier arrangements between the government and Development Finance Corporation Ltd. At each stage, these arrangements were embodied in "Indentures" which were ratified and given the force of law by State legislation.

The first three lines of Clause 1 of the Fourth Schedule to the 1969 Indenture, as ratified by the *West Lakes Development Act 1969* (SA), appeared to allow for the possibility that the regulations set out in the Fifth Schedule might be revoked or varied so long as this was done "explicitly", although the last four lines stipulated that this could not happen "without the prior written consent of the Corporation". Section 15(1) of the Act provided that the provisions of the Fourth Schedule "shall apply and have effect ... as if ... expressly enacted in this Act", while s 16(4) provided: "No regulation adding to, varying or revoking the regulations contained in the Fifth Schedule to the Indenture shall be published in the *Gazette* by the Minister or have effect before the final completion of the major works or before the Indenture ceases to have effect (whichever first occurs) except with the consent in writing of the Corporation".

In 1979, complaints by West Lakes residents about the floodlighting of a football oval in the area were referred to a Royal Commissioner, who recommended that the area should be floodlit. He further recommended that, for the purpose of making regulations to implement his recommendations, it should not be necessary to obtain the consent of West Lakes Ltd. Accordingly, the South Australian government prepared draft legislation to amend the *West Lakes Development Act* to provide that the consent of the company would not be required for any regulation giving effect to a recommendation of the Royal Commission. The company sought an injunction to prevent that Bill from being introduced into Parliament.

The action failed on two grounds. First, the Court held that a contractual obligation entered into by the executive government could not inhibit the power of Parliament to enact legislation or the right of Ministers of the Crown to propose such legislation.

West Lakes Ltd v South Australia
(1980) 25 SASR 389

King CJ: **[390]** Ministers of State cannot ... , by means of contractual obligations entered into on behalf of the State fetter their own freedom, or the freedom of their successors or the freedom of other members of parliament, to propose, consider and, if they think fit, vote for laws, even laws which are inconsistent with the contractual obligations. To enter into a contract containing a provision purporting to fetter members of parliament in their deliberations and to attempt to enforce any such contractual provision would, in my opinion, be the clearest breach of the privileges of the parliament and of the members thereof. The Ministers of State are members of parliament. As such they are free to propose, to consider, to discuss and to vote for any bill un-**[391]**-constrained by any contract entered into on behalf of the State. Indeed, I can find no indication in the indenture that it purports to fetter that freedom.

Secondly, it was held that in any event a requirement of written consent by a company was not a "manner and form" requirement within the meaning of s 5 of the *Colonial Laws Validity Act*.

King CJ: **[396]** I think, however, that it is quite clear that the bill under consideration is not a proposed law respecting any of the topics enumerated in s 5 of the *Colonial Laws Validity Act*. The question of whether the parliament can only exercise its powers to make laws respecting topics other than those enumerated in s 5 of the *Colonial Laws Validity Act* in the manner and form (if any) required by its own legislation or whether it may ignore any such requirement, is one of great constitutional importance. In view of the conclusions which I reached as to the other issues in the case, it is unnecessary for me to decide that question, and I think that it is undesirable therefore that I should express any view upon it. When it falls for decision, the question will involve a consideration of the way in which the constitutional principles discussed above are to be applied to a legislature which derives its authority from constitutional sources of the kind which are the foundation of the authority of the South Australian parliament. It will, moreover, involve a consideration of the true effect of the decision of the High Court in *South-Eastern Drainage Board (South Australia) v Savings Bank of South Australia* [(1939) 62 CLR 603].

A question might arise as to whether a particular statutory provision is truly a manner and form provision, which must be observed (at least as to legislation which falls within s 5 of the *Colonial Laws Validity Act*) as a condition of the validity of the Act, or whether it is a limitation or restraint of substance, which would not invalidate legislation inconsistent with the limitation or restraint. A requirement for a special majority in the parliament, such as the provision in the Ceylon constitution considered **[397]** in *Ranasinghe's* case [[1965] AC 172], might present special difficulty. The question whether the special majority provision related to manner and form did not arise in *Ranasinghe's* case. The *Colonial Laws Validity Act* did not apply and the case turned upon the provision being one of "the conditions of lawmaking that are imposed by the instrument which itself regulates the power to make law" [[1965] AC 172 at 197]. There must be a point at which a special majority provision would appear as an attempt to deprive the parliament of powers rather than as a measure to prescribe the manner or form of their exercise. This point might be reached more quickly where the legislative topic which is the subject of the requirement is not a fundamental

constitutional provision. When one looks at extra-parliamentary requirements, the difficulty of treating them as relating to manner and form becomes greater. It is true that Dixon J in *Trethowan's* case [(1931) 44 CLR 394] gave "manner and form" a very wide meaning ... *Trethowan's* case, however, concerned a requirement that an important constitutional alteration be approved by the electors at a referendum. Such a requirement, although extra-parliamentary in character, is easily seen to be a manner and form provision because it is confined to obtaining the direct approval of the people whom the "representative legislature" represents. If, however, parliament purports to make the validity of legislation on a particular topic conditional upon the concurrence of an extra-parliamentary individual, group of individuals, organisation or corporation, a serious question must arise as to whether the provision is truly a law prescribing the manner or form of legislation, or whether it is not rather a law as to substance, being a renunciation of the power to legislate on that topic unless the condition exists ...

The Court was asked to construe the *West Lakes Development Act*, 1969, as meaning that the parliament may not legislate inconsistently with the provisions of the indenture without the consent of the plaintiff company. It was argued that the statute, so construed, prescribes a manner and form to be observed in legislation of that kind. Even if I could construe the statute according to the plaintiff's argument, I could not regard the pro-**[398]**-vision as prescribing the manner or form of future legislation. A provision requiring the consent to legislation of a certain kind, of an entity not forming part of the legislative structure (including in that structure the people whom the members of the legislature represent), does not, to my mind, prescribe a manner or form of lawmaking, but rather amounts to a renunciation *pro tanto* of the lawmaking power. Such a provision relates to the substance of the lawmaking power, not to the manner or form of its exercise. The point becomes clearer if one considers hypothetical (albeit extreme) examples such as provisions that legislation of a certain character might not be enacted without the consent of the governing body of a political party, or of an organization of employers or employees, or of an officer of the armed forces, or of any other individual, office holder, or body which does not form part of the representative legislative structure. It follows, in my view, that even if the statute bears the meaning attributed to it, it does not prescribe a manner or form of legislation and Parliament may legislate inconsistently with it. Parliament may therefore validly enact the bill which is under attack.

The principle stated by Rowlatt J in *The Amphitrite*, and by King CJ in *West Lakes*, is expressed as applying at the highest levels of legislative and executive power; but for individual Ministers, and for government officers and instrumentalities operating at subordinate levels, it is mirrored in the doctrine that they cannot "fetter their discretion" by binding themselves contractually to exercise their powers in a particular way (see, for example, *Watson's Bay and South Shore Ferry Co Ltd v Whitfield* (1919) 27 CLR 268). At all levels, the precise extent of the principle is open to debate. It is sometimes said that the contracts which can validly be made are those that affect "operational" matters as distinct from "policy" matters, or a government's "proprietary" interests as distinct from its "governmental" interests. There may also be overlap with the different principle that agreements with obvious implications for matters of government policy may sometimes be construed as not intended to create legal relations at all (see, for example, *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424).

In *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, Ansett complained that the grant of permits to rival companies, effectively enabling them to compete with Ansett in interstate air freight services, was in breach of an implied term in its agreements with the Commonwealth implementing the "two airlines" policy. The action failed because the High Court held by a 3:2 majority that no such term was implied. Barwick CJ and Aickin J dissented, and Gibbs J, though otherwise in the majority, agreed with them that such a term would not impermissibly have fettered discretion since the agreements "**[62]** have statutory approval". Murphy J disagreed. Mason J, who considered the point most fully, agreed that the *Amphitrite* principle was "**[74]** expressed too generally", but attempted to reconcile the need for "[p]ublic confidence in government dealings and contracts" with acknowledgment that "the public interest requires that neither the government nor a public authority can by a 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 **[75]** way in the future".

In effect Mason J distinguished three types of case. First, where a public authority itself enters into a contract imposing "**[76]** an anticipatory fetter ... on [its] future exercise of [a] statutory power or discretion", the contract will simply be "invalid or ultra vires" because it is "incompatible" with the statute conferring the power.

Secondly, where the contract is made at a higher level of government, and the agency whose powers are affected is not itself a party to the contract, "it has been suggested" that although "the free and unfettered exercise of the discretion" must remain unimpaired, the contract will be enforceable in the limited sense that a breach of it will give rise to an action for damages, though not in the sense that it is amenable to injunction or specific performance. (This idea has been criticised on the ground that a public servant's awareness of a possible exposure to damages might effectively fetter his discretion just as much as a fully enforceable contract: see Dennis Rose, "The Government and Contract", in Paul Finn (ed), *Essays on Contract* (Law Book Co, 1987), 233.)

Finally, Mason J suggested that, when a contract of this latter kind is specifically approved by or enshrined in statute, the effect of the statute may sometimes be to "**[77]** impose on the repository of the discretion a duty to exercise it in conformity with [the contract]", so that in effect the discretion is "relevantly converted into a duty". In that event, he considered that the contract would be fully enforceable.

However, since this analysis depends on the operation of statute, even a statute of the kind suggested could presumably be repealed or amended. Accordingly, developers have frequently sought to ensure not only that their government contracts are incorporated into a statute, but that the statute is then "entrenched" by a "manner and form" provision (see KD MacDonald, "The Negotiation and Enforcement of Agreements with State Governments Relating to the Development of Mineral Ventures" (1977) 1 *Australian Mining and Petroleum Law Journal* 29, and comment thereon by Enid Campbell at 53-8). Yet *West Lakes* suggests that such attempted "entrenchment" is unlikely to be successful.

Nor is this an isolated case. In an earlier but similar case in Queensland, the Commonwealth Aluminium Corporation Pty Ltd ("Comalco") entered into an agreement with the State of Queensland in 1957 to enable it to undertake bauxite mining at Aurukun. The agreement was authorised by the *Commonwealth Aluminium Corporation Pty Ltd Agreement Act 1957* (Qld), which declared that the provisions of the agreement "shall have the force of law as though the Agreement were an enactment of this Act". The Act further provided (in s 4) that the agreement could be varied by agreement between the company and the responsible Minister, but that "no provision of the Agreement shall be varied nor the powers and rights of the company under the Agreement be derogated from except in such manner" and, further, that "[a]ny purported alteration of the Agreement not made and approved in such manner shall be void and of no legal effect whatsoever".

Under the *Mining Royalties Act 1974* (Qld), regulations were made which had the effect of increasing the royalties payable by the company under the agreement. The company protested that the 1957 Act had given the agreement the force of a "law"; that s 4 had prescribed a "manner and form" by which alone that "law" could be amended; and that the *Mining Royalties Act* was invalid because it purported to amend that "law" without satisfying the "manner and form" requirement. However, in *Commonwealth Aluminium Corporation Ltd v Attorney-General* [1976] Qd R 231, the Supreme Court of Queensland rejected these arguments by a 2:1 majority, holding that s 4 of the 1957 Act was *not* a "manner and form" provision, and accordingly that the Act might impliedly be repealed or amended by the normal operation of later legislation inconsistent with its provisions.

The broader political considerations that led King CJ to take a restrictive approach to the concept of "manner and form" in the *West Lakes* case may also affect other interpretive questions arising from the application of "manner and form" provisions. In *Attorney-General (WA) v*