GOVERNMENT LIABILITY 1996

EXECUTIVE NECESSITY: UPHOLDING CONTRACTS OF A PREVIOUS GOVERNMENT

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In this session I will consider the doctrine of executive necessity

The Doctrine

The issue of whether a government or a statutory authority has the power to commit itself by contract or otherwise to the future exercise in a particular manner of a statutory discretion or statutory duty has not yet finally determined by the Australian courts. The concept is straight forward enough. It is sometimes called the doctrine of executive necessity or the principal of government effectiveness. The doctrine involves the idea that contracts or other agreements and promises are unenforceable in the public interest if they fetter or purport to fetter statutory executive discretions and powers. The rationale is that in the public interest, government is required to act at times to override existing private and/or legal rights including those rights emanating from contract.

The doctrine is often talked about at the same time as the related concept of estoppel against the Crown is discussed. The issue there being, whether the executive can be estopped from making decisions or acting in a particular manner because of earlier representations or actions.

One of the most recent statements on these issues is by former Chief Justice Mason in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1. The headnote accurately records that in 1982 New South Wales Courts of Petty Sessions, which were constituted by stipendiary magistrates, were abolished by statute and replaced by Local Courts constituted by magistrates appointed by the Governor. All but five of the one hundred former stipendiary magistrates who applied were appointed to the new courts in accordance with a policy under which they would be appointed unless they were considered unfit for judicial office. One who was not appointed obtained from the Supreme Court of New South Wales a declaration that the Attorney-General's decision not to recommend his appointment was void on the ground that he had not been afforded an opportunity to respond to certain allegations about his suitability. The Attorney-General then indicated that he would treat an application by the former stipendiary magistrate in the same way as those of any other applicants, namely on merit, save that the allegations the subject of the earlier case would not be taken into account unless he was given an opportunity to meet them. The former stipendiary magistrate commenced another action in which he contended that he was entitled to have his application reconsidered by the Attorney-General without reference to other applications made in the meantime.

It was held by majority (of Mason CJ, Brennan and Dawson JJ) that the Attorney-General was not obliged to treat the plaintiff's application in the manner contended and in accordance with the policy pertaining at the time of the appointments of former stipendiary magistrates;

- by Mason CJ on the ground that to do so would require the court to compel the Attorney-General to depart from a method of appointing judicial officers which conformed to the relevant statute, was within the discretionary power of the Executive, and was calculated to advance the administration of justice;

- by Brennan J on the ground that to do so would impermissibly intrude into the merits of the advice to be tendered to the Governor; and

- by Dawson J on the ground that to do so would exceed the bounds of procedural fairness and intrude upon the policy which was otherwise left entirely to those entrusted with the responsibility of determining who was to be appointed a magistrate.

Mason CJ said, at 170 CLR 177-18

> "Once this is accepted, I am unable to perceive how a representation made or an impression created by the Executive can preclude the Crown or the Executive from adopting a new policy, or acting in accordance with such a policy, in relation to the appointment of magistrates, so long as the new policy is one that falls within the ambit of the relevant duty or discretion, as in this case the new policy unquestionably does. **The Executive cannot by representation or promise disable itself from, or hinder itself in, performing a statutory duty or exercising a statutory discretion to be performed or exercised in the public interest, by binding itself not to perform the duty or exercise the discretion in a particular way in advance of the actual performance of the duty or exercise of the power**: see *Watson's Bay and South Shore Ferry Co Ltd v Whitfeld* (1919) 27 CLR 268, at p 277; *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54, at pp 74-76; *Malvaso v The Queen* (1989) 168 CLR 227, at pp 232-234; *Birkdale District Electric Supply Co v Southport Corporation* [1926] AC 355, at p 364; *Cudgen Rutile (No 2) Ltd v Chalk* [1975] AC 520, at pp 533-534; *Southend-on-Sea Corporation v Hodgson (Wickford) Ltd* [1962] 1 QB 416, at pp 423-425; *Western Fish Products Ltd v Penwith District Council* [1981] 2 All ER 204. **Accordingly, it has been said that "a public authority ... cannot be estopped from doing its public duty"**, to use the words of Lord Denning MR in *Lever Finance v Westminster London Borough Council* [1971] 1 QB 222, at p 230.. See also *Rootkin v Kent County Council* [1981] 1 WLR 1186; [1981] 2 All ER 227. As Gummow J observed in *Minister for Immigration v Kurtovic* (1990) 92 ALR 93, at p 111, the principle has been explained on the footing that:
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> "*in a case of a discretion, there is a duty under the statute to exercise a free and unhindered discretion and an estoppel cannot be raised (any more than a contract might be relied upon) to prevent or hinder the exercise of the discretion; the point is that the legislature intends the discretion to be exercised on the basis of a proper understanding of what is required by the*

statute, and that the repository of the discretion is not to be held to a decision which mistakes or forecloses that understanding."

cf *Attorney-General (Hong Kong) v Ng Yuen Shiu* [1983] 2 AC 629, at p 638.

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. Nonetheless 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.

What I have just said does not deny the **availability of estoppel** against the Executive, arising from conduct amounting to a representation, when holding the Executive to its representation **does not significantly hinder the exercise of the relevant discretion in the public interest**. And, as the public interest necessarily comprehends an element of justice to the individual, one cannot exclude the possibility that the courts might in some situations grant relief on the basis that a refusal to hold the Executive to a representation by means of estoppel will occasion greater harm to the public interest by causing grave injustice to the individual who acted on the representation than any detriment to that interest that will arise from holding the Executive to its representation and thus narrowing the exercise of the discretion: see the observations of Lord Denning MR in *Laker Airways v Department of Trade* [1977] QB 643, at p 707; but see also the criticism of this approach by Gummow J in *Kurtovic* (1990) 92 ALR, at pp 121-122.

However, in the present case there is no justification for granting relief in a form which would compel the Executive to adhere to an approach to judicial appointment which it has discarded in favour of a different approach which, in the opinion of the Executive, is better calculated to serve the administration of justice and make it more effective."

The Origins of the Doctrine

The origin of the doctrine of executive necessity is generally attributed to the decision of Rowlatt J in *Rederiaktiebolaget Amphitrite v The King* [1921] 3 KB 500 [[1921] All ER Rep 542]. In that case, during a time of war, a neutral shipowner, a Swedish steamship company, obtained from the British government an undertaking that their ship would not be detained in a British port if it made its way to Britain with a particular stated cargo. After the ship arrived, the government withdrew the undertaking and the port facilities. The ship, the *Amphitrite*, was detained by the British contractee and the Swedish company to avoid further loss, sold the ship. They sued in the High Court, seeking a petition of right for damages. It was held that the government's contract was not enforceable in a court as it was not within the competence of the Crown to make a contract which would have the effect of limiting its power of executive action in the future. Rowlatt J at (1921) 3 KB 500, at p 503

acknowledged that the government can bind itself through its officers by commercial contract but went on to say:

> "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"

In *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54 [52 ALJR 254, 17 ALR 513], Mason J (as he was then) at 74 said this statement was too wide and was rightly been criticised. Notwithstanding the criticism, the doctrine ought be accepted by Australian courts. Mason J stated the policy considerations in the following terms (at 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."

Mason J set out a number of cases where the principle was applied to trustees, and in town planning cases (at p 75) and other general executive decision making cases (at 76). The cases surveyed there related to contracts which were invalid because the future government decision maker was a party to the contracts and the contracts were, in any event, invalid.

However, different considerations applied in cases where the future government decision maker is not a party to the contract. There, Mason J said (at 76):

> "In these cases at least it has been suggested that the free and unfettered exercise of the discretion is sufficiently preserved if the validity of the contract is upheld, provided that it is enforceable only by way of action for damages and not by order or injunction. Such an outcome, it is said, would work a reasonable compromise between the desirability of recognizing the binding nature of contracts and the need to preserve the free and unfettered exercise of the discretion. The assumption which underlies this approach is that the contract is one which the government is authorized to make, that it is not expressly or impliedly prohibited by statute or, if you like, incompatible with the statute. The contract might, like the agreements in this case, be made with express statutory approval. In this event an undertaking that the discretion will be exercised in a particular way and a potential liability for damages for its breach, though they may or will cause the repository of the discretion to exercise it in the particular way promised, have statutory

> backing with the consequence that the contract stands on a more secure footing."

As to the important group of cases where there is some express statutory approval for the contract, Mason J considered that a failure to comply with it's side of the bargain might well sound in damages. He said (at 77):

> "Where statutory approval for the making of the contract exists and the contract contains an undertaking that the statutory power will be exercised in a particular way, there is no room for the notion that the undertaking is invalid on the ground that it is an anticipatory fetter on the exercise of a statutory discretion. The contract, assuming it to be within constitutional power, is valid and the undertaking is free from attack. There is in such a case the initial question: Does the statute which approves the making of the contract expressly or impliedly amend, for the purposes of the contract, the pre-existing law providing for the exercise of the discretion? The statute may impose on the repository of the discretion a duty to exercise it in conformity with the undertaking or it may leave him with a discretion to arrive at some other result. If it be the former, then the contracting party may be able to compel the government and the person in whom the discretion is vested, though it has been relevantly converted into a duty, to comply with the undertaking. If it be the latter, then the undertaking if it is enforceable will be enforceable by an action for damages only.
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> It will be perceived from what I have written that in my opinion the doctrine that an agreement of the kind in question may constitute an anticipatory fetter on the exercise of a statutory discretion is closely connected with the question whether the agreement is authorized by statute, or is prohibited by, or incompatible with it. If the agreement is authorized, then it is valid, and any breach of the undertaking it contains will be enforceable by damages but only when the effect of statutory approval is to convert the discretion into a duty will it be enforceable specifically."

Mason J's comments are generally regarded as a correct statement of the present doctrine. [See generally: - Aronson & Dyer, *Judicial Review of Administrative Action*, (1996, LBC Sydney) pp 162 et seq, 195, 311, 466-450; Hogg, *Liability of the Crown*, 2nd ed, 1989, LBC at 169-172; LBC *The Laws of Australia*, loosleaf, "Government" paragraphs 8.8.54 et seq]

The comments have been considered in a number of cases, including: *Commonwealth v Hooper* (1992) Aust Contract Reports 90-010 (where a first right of refusal option in respect of the sale by the Commonwealth of gas pipe lines was held not to constitute a fetter in fact); and, *Camberwell City Council v Camberwell Shopping Centre Pty Ltd* (1992) 76 LGRA 26; [1994] 1 VR 163, (where a local council which had, after a new council was elected which changed its mind, reneged on a joint venture agreement with a developer was held liable to pay damages and the contract was valid but not enforceable by specific performance); and *Pivot Group Ltd v State of New South Wales* (unreported, 17 July 1990, SCNSW, Cole J at pp 169 to 173) (rejecting the State's arguments that Mason J's comments in *Ansett* about damages should apply).

Estoppel

As to the law on estoppel, as it exists outside private civil law, the leading cases are: *Waverley Transit Pty Ltd v Metropolitan Transit Authority* [1991] 1 VR 181 (Victorian Supreme Court, Appeal Division, Murphy, Marks and Gobbo JJ) (which held estoppel was available in judicial review); *Kurtovic v Minister for Immigration* (1990) 21 FCR 194 (which held that estoppel did not apply in that case); and *Attorney- General (NSW) v Quin* (1990) 170 CLR 1 at 17-18 in which Mason CJ stated the general principle quited eartlier in this paper. [See also; Douglas & Jones, *Administrative Law: Commentary and Materials,* (1996), pp 569-587; Allars, *Introduction to Australian Administrative Law*, (1990), pp 208-211; LBC *The Laws of Australia*, loosleaf, "Administrative Law" paragraphs 2.4.173 to 2.4.190.]

Renegotiate or Legislate?

The government can always seek to override a contract or representation by legislation. Parliament can always effectively override contracts as long as the legislation is constitutionally valid. For the States, there is generally no problem with general plenary constitutional power and no requirement to provide "just terms" by way of compensation for property or vested rights taken away by statute - see, *Kable v DPP (NSW)*, unreported, 12 September 1996, High Court of Australia. The Commonwealth's legislative power, however, is limited by section 51(xxxi) which provides that any "acquisition of property" must be on "just terms".

As to whether a mere destruction of rights by legislation as opposed to the "acquisition" of those rights on, say, unjust terms, is sufficient, see: *Georgiadis v Australian & Overseas Telecommunications Corp* (1994) 179 CLR 297 and *Commonwealth v Mewett* (1995) 59 FCR 391 (the appeal from which will be argued in the HC in February 1997. The Commonwealth seeks to re-argue *Georgiadis*.)

Thank You