INFRASTRUCTURE SEMINAR

"THE LEGAL IMPLICATIONS OF DEALING WITH GOVERNMENT AND STATUTORY BODIES"

4/10/90

A. POWER OF GOVERNMENT TO CONTRACT

Identifying the Party

When considering the power of Government to contract, the starting point should always be: with whom are you proposing to contract? Is it:

- the State or Federal Government;
- the Minister or a department of the Executive Government;
- a division of a department of the Executive Government;
- a statutory authority or instrumentality;
- an agent or employee of the crown; or
- a combination of some or all of these bodies.

It is crucial that you continually keep in mind exactly who you are dealing with and exactly which body they represent. The reason is that different legal implications arise when considering the powers and functions of the Executive Government or instrumentalities of the Crown. If you are not sure of the party you are dealing with it is best to have it expressly identified and spelled out in writing at the earliest possible stage.

Identifying the Power or Authority

Statutory Authorities

It is straight forward enough to ascertain the functions powers and duties of statutory authorities. They are found in the legislation that creates the relevant bodies. The general power to enter into contracts is found in

almost all of the enabling legislation of statutory authorities. This does not mean that it is a simple task to ascertain the functions and powers of the authorities. Such provisions of the legislation must be read with the general principles of statutory construction foremost in mind and, as is often specifically prescribed, the provisions must be read together with other provisions in the legislation relating to the objects of the statutory authorities. Other legislation may also affect these functions and powers and it can sometimes be a time consuming task simply to ascertain this basic information about the body you are dealing with.

The next question to be considered when looking at statutory authorities is whether the authority is for all purposes or for a specific purpose an arm or an emanation of the Executive Government, or the Crown.

The Courts have not yet settled on a definitive test for ascertaining the status of a statutory authority as an emanation of the Crown. If the Parliament states, as it often does, that the authority is to be an agent of the Crown, that is the end of the matter. If words such as this do not appear in the legislation, you may need to look at the legislation as a whole to see if it has satisfied what has come to be known as the "control test" as it is applied by the courts. On this test, if the statutory body is subject to an appropriate level of direction or control by the responsible Minister or by the Executive Government generally, the Courts will deem an intention by the Crown that the body is a Crown agent. From time to time, the Courts have applied a "functions test" which takes into account the functions of the statutory body in determining whether it is an agent of the Crown. On this test, a body exercising a commercial or developmental function is less likely to be held to be an agent of the Crown than a body that undertakes something closer to traditional Government activity. What is a governmental or commercial function of government is often difficult to determine.

You should keep in mind, however, that a body may be an agent or an arm of the Crown for some purposes and not for others. This makes a difficult question even more complex to address.

Executive Government

The power of the Government, its department and the respective ministers to enter into contracts is a general power based on common law doctrines. It is arguable that the power is only limited by the constitutional powers of the Government. In 1934 the High Court held [in **New South Wales v Bardolph** 52 CLR 455] that the New South Wales Government had wide powers to enter into contracts without the need for a specific statutory power or a specific appropriation of Government money. Such a contract, the High Court said, shall be binding on the Crown.

Constitutional Limits

It may be that a Government's power to contract is limited to the subject matter over which the Government has power to make legislation. The Federal Government, by way of the Commonwealth Constitution, has specific, enumerated heads of power and is thus clearly limited in what it can do. The State Governments, however, are not so limited. The State Constitution Act provides that the New South Wales Parliament has the power to make laws for the "peace, welfare and good Government" of New South Wales. This is an extremely wide or what we call a plenary power which allows the State Parliament to enact legislation and delegate its functions over a wide range of subject matters and to a large variety of bodies. The legislative power of the State Parliament is limited by the Commonwealth Constitution and the necessity of a connection or a nexus with New South Wales.

Similarly, the powers of the Executive Government in New South Wales to enter into contracts is in my view at least as wide as the Parliament's legislation-making powers.

Fettering of Statutory or Discretionary Powers

One principle not yet finally determined by the Courts in Australia is whether the Government or a statutory authority has the power to commit itself by contract to the future exercise in a particular way of a discretion or a statutory power. The concept is sometimes called the doctrine of "executive necessity" or the principle of Government effectiveness. The principle involves the idea of such contracts or promises being

unenforceable as the public interest requires effective Government and the need to at times override existing rights including those coming from contract. The principle is also based on the presumption that nothing short of legislation should hinder the Executive from adopting a new policy and implementing that new policy in the public interest.

As the Chief Justice of the High Court of Australia, Sir Anthony Mason stated in a case this year [**Attorney-General (NSW) v Quin** (1990) 64 ALJR 327 at 333]:

> "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. ... Accordingly, it has been said that "a public authority ... cannot be estopped from doing its public duty" ... [T]here 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.
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> 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 then any detriment to that interest that will arise from holding the Executive to its representation and thus narrowing the exercise of the discretion."

It is important then to keep these principles in mind if the Government makes certain promises about the future exercise of its statutory powers or general discretions. They must be exercised in accordance with law.

B. POWERS OF GOVERNMENT TO MAKE OTHER ARRANGEMENTS; PUTTING THE DEVELOPER IN THE BEST POSSIBLE POSITION

Apart from the Government's general and specific powers to enter into contract, there are a number of other possible arrangements that we think are worth exploring that would put the private party in the best possible position when undertaking the State's infrastructure projects.

Some of the possibilities I will discuss are:

- delegation of authority;
- delegation of law-making powers;
- endowment of Crown privileges and immunities; and
- provision of indemnities and guarantees.

Delegation of Authority

While authority to construct an infrastructure project could well come solely from the proper execution of Government contracts and the gaining of licences and permissions, the power to actually allow the developer or another party to operate such an infrastructure project once constructed becomes important. Questions of operational powers involves a detailed examination of all of the legislation that could possibly be relevant to the operation and function of the project. This can be quite a task. The private developer's position would be considerably enhanced if a statutory power could be found that would enable the relevant executive officer or the Minister to delegate as broad an authority or power as possible to the developer or an officer of the developer to establish the most efficient and legally sound basis for operating the project.

If a specific delegation of authority or power cannot be achieved then you should examine other possibilities for a power sharing arrangement.

We doubt whether the Executive could delegate power or authority to a private person or body without specific statutory authorisation.

Delegation of Law-making Powers

Following from my discussion of the constitutional limits of law-making powers in New South Wales, it is my view that it is within the State Government's power to delegate law-making powers or functions to a private individual or a private body. This power would include power to draw, promulgate and enforce what lawyers call "delegated legislation" such as by-laws and statutory instruments such as regulations.

While the State Parliament has the power to delegate such a function, it clearly does not have the power to abrogate or abdicate its sovereign legislation-making powers. It must retain the right to repeal or amend the enabling legislation and to withdraw the authority and discretion at any time. It is possible in our view for the State Parliament to give a private body the power to amend legislation itself in certain circumstances. Such a power has been given to the National Companies & Securities Commission (eg s215C of the Companies Code and s58 of the Takeover Code).

If the situation arises whereby the developer must obtain special regulations or the power to make regulations in order to construct or operate a specific project, consideration must be given to the effect of the **Subordinate Legislation Act** 1989 (New South Wales). This Act makes provision for:

(i) establishing new requirements regarding the making of statutory rules including;

(ii) a requirement to comply with statutory guidelines as to the making of such rules;

(iii) a requirement to prepare regulatory impact statements;

(iv) a requirement to consult affected persons;

(v) and a requirement to publish information relating to the proposed statutory rule; and

(vi) repealing (with limited exceptions) statutory rules made before 1 September 1990 in 5 stages, ending on 1 September 1995; and

(vii) providing that any statutory rule made on or after 1 September 1990 is to be automatically repealed 5 years after it is made.

Ideally, a way should be found to avoid or minimise the possible application of this Act to any regulations that affect, or regulation-making power to be given, to the project at issue.

Crown Privileges and Immunities: The Application of Statutes to the Crown

You often hear lawyers and government officials talk about the "privileges and immunities" of the Crown. To give you a list of exactly what these privileges and immunities comprise is a difficult if not impossible task because these are flexible concepts depending on the body you are looking at, the legislative power concerned, and, sometimes, the nature of the activity undertaken or proposed. Probably the most well known privilege and immunity of the Crown is, generally speaking, that the Crown is not liable to pay rates and taxes. Other privileges and immunities of the Crown stem from an ancient common law presumption of Crown immunity from its own legislation.

Prior to 20 June 1990 there was a well-developed and entrenched presumption of Crown immunity from its own legislation in Australia. The rule is a common law principle of construction of statutes.

The old rule was that the Crown is not bound by a statute or a provision in a statute unless an intention that the Crown be bound appears:

1. Either expressly in the statute, or;

2. By necessary implication from the words of the statute.

The test of necessary implication was not easily satisfied. It must have been:

1. Manifest,

2. From the very terms of the statute,

3. That it was the intention of the legislature that the Crown should be bound.

The test in determining whether the test of "manifest from the very terms of the statute" is satisfied, was that it must have been possible to affirm that:

1. At the time when the statute was passed and received the Royal sanction,

2. It was apparent from its terms that,

3. Its beneficent purpose must be wholly frustrated unless the Crown were bound.

On 20 June 1990 the High Court handed down its decision in **Bropho v Western Australia** [(1990) 64 ALJR 374]. The decision has profound implications relating to the application of statute law to the Crown, State or Federal, in Australia and its instrumentalities, agents and employees. In what can only be described as "judicial legislation" the Court threw away the existing inflexible rule and replaced it with a new flexible rule.

The Court drew a "clear and fixed" distinction between functions of the Crown that were "governmental" and those that were not. The Court stated:

> "[T]he historical considerations which gave rise to a presumption that the legislature would not have intended that a statute bind the Crown are largely inapplicable to conditions in this country where the activities of the executive government reach into almost all aspects of commercial, industrial and developmental endeavour and where it is a commonplace for governmental commercial, industrial and developmental instrumentalities and their servants and agents, which are covered by the shield of the Crown either by reason of their character as such or by reason of a specific statutory provisions to that effect, to compete and have commercial dealings on the same basis as private enterprise. It is in that contemporary context that the question must be asked whether it is possible to justify the preservation in our law of an inflexible rule ..." (at page 379).

The court did not specifically identify the terms of its new rule. The new rule appears to be able to be described as follows:

1. there is a presumption that the general words of a statute do not bind the Crown or its instrumentalities or agents, or stated another way, there is a prima facie immunity of the Crown from legislation not expressed to be binding on it;

2. the rule of construction is flexible;

3. the legislative intent must remain paramount;

4. the strength of the presumption of Crown immunity will depend upon circumstances, including;

   (a) content and purpose of the particular provision, and,

   (b) the identity of the entity in respect of which the question of the applicability of the provision arises, that is, whether we are dealing with the Sovereign herself, the executive government, a statutory corporation, or agents or employees of these Crown entities.

5. the presumption is extraordinarily strong when considering whether the Sovereign herself or himself is personally bound by the general words of a criminal law statute;

6. the presumption is little more than a starting point if the question involves (as was the position in **Bropho's Case**) whether the employees of a government corporation engaged in commercial and developmental activities are bound by general provisions of legislation designed to safeguard places or objects whose preservation is of vital significance to a particular section of the community (at pages 380-381).

Justice Brennan stated the new rule in the following terms:

> "... the presumption cannot be put any higher than this: that the Crown is not bound by statute unless a contrary intention can be discerned from all the relevant circumstances. ... Those circumstances include the terms of the statute, its subject matter,

> the nature of the mischief to be redressed, the general purpose and effect of the statute, and the nature of the activities of the Executive Government which would be affected if the Crown is bound." *(at page 383)*

The new rule has the potential to expose many Crown activities conducted through employing instrumentalities or agents to legislation that earlier may have been thought to be inapplicable.

Crown Privileges & Immunities: Does the Shield of the Crown extend to Contracting Parties?

The High Court held in Bropho's case that the shield of the Crown in the circumstances of that case did not extend to the servants employees and agents of the Crown. We should explore possibilities of whether the Crown can "endow" its own privileges and immunities on a private developer for the purposes of a specific project. It is technically incorrect to speak of an endowment in the way I have just mentioned. It is correct to say that a private developer may "come within" the shield of the Crown by way of its contractual connection with the Crown.

Generally speaking, a private party contracting with the Crown does not assume or is not endowed with any of the Crown's privileges and immunities, *in the sense of that private party* **taking over** *the powers* and functions of the Crown, unless there has been a specific and proper delegation of authority from the Crown or a specific statutory provision has achieved this. The best that a private contractor of the Crown could hope for is to come within the shield of the Crown and take the benefit of the presumption of the Crown's immunity from its own legislation. To be able to take the benefit of these privileges and immunities you should ensure that you are contracting with a body that is **itself** an agent or an instrumentality of the Crown. This can be very difficult to determine as, you will recall, a body may be an agent or an arm of the Crown for some purposes and not for other purposes.

In one recent case, the Full Court of the Federal Court decided that a particular statutory crown trust was not to be considered as "the Crown" when it provided a commercial service, such as the selling of products and the leasing of an entertainment centre. [**The Paul Dainty Corporation Pty Limited v The National Tennis Centre Trust** (1990) ATPR 41-029 at 51,463]

The test for deciding whether the shield of the Crown extends to private contracting parties can be put in these terms: is the privilege or immunity being claimed by the private party for the benefit of the private party or *the benefit of the Crown itself? Another way of putting the question is:* would the Crown be prejudiced in any way by the private party not coming within the shield of the Crown? If the benefit is solely for the private party, and the Crown's interests are not prejudiced in any way, the immunity does not extend to the private party.

In 1955, Justice Kito of the High Court stated [in **Wynyard Investments Pty Limited v Commissioner for Railways (NSW)** (1955) 93 CLR 376 at 393-395]:

> "Ordinarily ... to hold that a given statutory provision binds the Crown is to hold that it operates to destroy or curtail or impair some interest or purpose of the Sovereign as so considered. Where the immunity is claimed by a subject of the Crown, whether an individual or a corporation, the question to be decided, whatever may be the language in which for convenience it may be expressed, cannot really be whether the subject is within a class of departments, organisations and persons generically (and loosely) described as the Crown. It must always be whether the operation of the provision upon the subject would mean some impairment of the existing legal situation of this Sovereign. ... [I]n order that a case *should be held to fall within [this class] it must be found that the* application of the relevant provision to the subject who invoked the Crown's immunity would be, in legal effect, an application of it to the Crown. But here again care is needed least convenient shorthand expressions prove misleading. The question in such a case is not fully stated by asking, as is often asked, does the particular subject "represent" the Crown. The question is not really one of attributing to the subject the status of a representative of the Crown; for, even where "representative" is an apt word to use, representation of the Crown generally is not what such a contention must be understood as necessarily asserting. The question concerns only the relationship to the Crown in which the individual stands in respect of the particular matter in which the impact of the relevant provisions is incurred. Whatever the features of a case are relied

> upon as bearing upon the claim to the benefit of the Crown's immunity, they must always be looked at ... with due regard to the nature of the immunity or privilege of the Crown which is claimed, so that attention may be directed to what is relevant to the particular enquiry which is being made. ... But the immunity of the Crown can never inure for the benefit of a subject. Whoever asserts it must assert it on behalf of and for the benefit of the Crown."

This concept of prejudice to the Crown has been applied in later cases so that a body contracting with the Crown may take the benefit of Crown immunity whenever the interest of the Crown may be prejudiced.

Immunities and Guarantees

Putting the developer in the best possible position also involves exploring the possibilities of obtaining a government guarantee and an indemnity in respect of loss or costs.

A specific statutory power may be found in the enabling legislation of the Crown body or agent you are proposing to contract with. If there is no specific statutory provision in that legislation you may wish to either rely on the general principles of contracting with the Crown, or ask whether you can come within the operation of the **Public Authorities (Financial Arrangement) Act 1987.**

To come within the provisions of this Act, the authority or body you are dealing with must be specifically named as an "authority" for the purposes of the Act. The Act is designed to facilitate the borrowing or issuing of funds by public authorities in New South Wales. The scheduled authorities are given powers to obtain, with written approval from the state Treasurer, what is termed "financial accommodation" for the purpose of exercising its functions. A financial accommodation under the Act means the borrowing or raising of money by the authority by means of the issue of specified securities, and, the participation by the authority in any "other arrangement or transaction" which is approved by the Treasurer.

Section 15 of the Act provides for a statutory guarantee of the repayment of the securities issued by a scheduled statutory authority. Section 16

enables the government at its discretion to guarantee the performance by an authority of any obligation incurred by the authority as a result of the authority's entering into or participating in any arrangement or transaction authorised by the Act.

Under Section 18 of the Act the government can agree to indemnify or guarantee in circumstances where the statutory authority itself does not have the power to make these commitments. The Treasurer may act on behalf of the government for the purposes of giving a guarantee under Section 16 or Section 18 and he may execute any of the relevant documents relating to the guarantee or indemnity.

Ordinarily, money cannot be paid out by the government unless it is pursuant to an appropriation under an act of state parliament. The requirement of a specific appropriation comes from Division 4 of the **Public Finance and Audit Act 1983** and Section 45 of the Constitution Act 1902. However, specific appropriation is allowed for in Section 22 of the **Public Authorities (Financial Arrangements) Act 1987** for the government to make good its guarantee or indemnity.

If the government body you are dealing with is not specifically named as an authority by the Act you may consider the possibility of obtaining a guarantee from the government. An executive guarantee could be provided by the government if there were no statutory provisions regulating the proposed transaction.

Executive guarantees can be given by a government without the need for express statutory authority or without any prior appropriation of funds. You must deal with an appropriate servant or agent of the government who is acting within the clear scope of his or its authority. Subject to what I have said earlier about the Crown's capacity to enter into contracts I will discuss the enforcement of such a guarantee in the absence of a specific appropriation by Parliament in a moment.

C. ENFORCEMENT

Enforcement against the Crown

When things go wrong, you may need to very quickly re-assess your remedies and rights against the Crown in order to enforce the agreement and secure all of the other arrangements that have been set in motion.

Procedural statutes have been enacted in New South Wales and the Commonwealth to enable proceedings to be commenced against the Crown. The **Judiciary Act** 1903 (Commonwealth) provides for contract and tort actions against the Federal or State government to be commenced and the State **Crown Proceedings Act** 1988 (NSW) provides for a simple mechanism for the commencement of proceedings in New South Wales.

The **Crown Proceedings Act** provides that the New South Wales government or its instrumentalities may be sued. Once a judgment is obtained, section 7 of the Act provides that the Treasurer shall pay out of any money legally available all of the money payable by the Crown under any judgment including any interest. The section could be regarded as a standing appropriation of funds for payment of judgment debts.

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It is not, however, an appropriation of funds. It is simply a direction to the Treasurer to pay a judgment debt out of funds "legally available". Funds are not "legally available" unless there has been a lawful appropriation. The Treasurer therefore, in my view, may legally refuse to pay a judgment debt against the Crown until specific funds have been appropriated.

Should the money not be available out of the relevant Crown fund, subsection 2 of section 7 of the Act provides that execution attachment or similar process shall not be issued out of any court against the Crown or any property of the Crown. In his second reading speech to the legislative assembly, the Attorney General stated:

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> "In practical terms the excluding of execution will make no difference as at no time has a party ever been required to resort to execution to recover a judgment against the Crown and it will not happen under this government." (Hansard 18 October 1988 page 2418)

An interjector, Mr Whelan, said:

> "I shall make sure that is recorded by Hansard." (Ibid)

Executive Guarantees

As for the Executive guarantees and immunities I was discussing earlier, once a judgment is obtained against the relevant minister or Crown, you

will be faced with the question of appropriation and whether the money will in fact be paid. You would be best advised to ensure prior to the execution by the Crown of the guarantee that specific appropriation has been properly arranged.

Enforcement of Crown Contracts

In most respects, the Crown abides by its duties under contract just the same as any ordinary contracting party. In litigation, the **Judiciary Act** and the **Crown Proceedings Act** provide that in any proceedings the rights of the parties shall be as nearly as possible the same as in an ordinary case between private litigants.

The main advantages of being the Crown in attempting to avoid a contract or a contractual obligation is the Crown's ability to argue:

1. that the future exercise of a statutory discretion was fettered or that Executive policy has changed in the public interest;

2. that the making of the contract was not authorised by legislation or proper authority of the Crown;

3. that the Crown retains the right to modify or extinguish its contractual obligations by legislation at any time with certain limitations;

4. the New South Wales Crown is not legally obliged to pay a judgment debt in the absence of a specific appropriation;

5. that execution does not lie against the New South Wales Crown.

Subject to these possibilities, the law on contracting with the government may well be regarded as a level playing field.

Administrative Law

At the same time as examining your remedies in contract or, possibly, breach of statutory duty, you should also consider the possible administrative law remedies or actions available to you.

Freedom of Information

Under the new **Freedom of Information Act** 1989 which became operational in New South Wales on 1 July 1989, you have a legal right to obtain access to certain policy and guidelines documents of the government and its agencies as well as access to documents relating to your personal affairs. As to whether a company is capable of having personal affairs within the meaning of the Act is a question that has not yet been decided in New South Wales but we believe it is at least arguable that a company has "personal affairs" and therefore access to its own document or documents relating to or affecting it.

Ombudsman

If you feel you have a legitimate complaint in relation to the improper or unlawful exercise of the Crown's discretion or its conduct generally, you may wish to apply to the State or Federal Ombudsman asking him to investigate the matter. The best you can hope for with this action is that the Ombudsman commences an investigation into the matter and you obtain a statement of reasons or an explanation from the government body or official concerned.

Judicial Review: Natural Justice

Probably the most important administrative law remedy is your access to the State or Federal courts for a review of a decision made against you by a public body or official that should not have been made because you were denied procedural fairness or, as it is called, natural justice, or the tribunal or body deciding against you was biased, in the legal sense of the word.

If you are commencing proceedings under the **Administrative Decisions (Judicial Review) Act** 1977 (Commonwealth), or under the general common law principles of judicial review of administrative action, you may be successful in having the decision made against you set aside by the court as being void.

The general grounds for having a decision reviewed by the courts are:

1. that a breach of the rules of natural justice occurred;

2. that procedures that were required by law to be observed were not observed;

3. that the person who purported to make the decision did not have jurisdiction;

4. that the decision was not authorised by the relevant statute;

5. that making the decision was an improper exercise of the decision-maker's power;

6. that the decision involved an error of law;

7. that the decision was induced or affected by fraud;

8. where there is nothing to justify the making of the decision;

9. that the decision-maker took into account irrelevant considerations or failed to take into account relevant considerations;

10. that the relevant power was exercised for the wrong purpose;

11. that the decision was made in bad faith; or

12. the decision was made contrary to law.

The grounds I have just listed are a mix of the statutory and common law criteria for a judicial review of administrative decisions. These are not the only hurdles you will encounter. You must first convince the relevant court that you have legal "standing" to make your application. You must convince the court that you are "a person aggrieved" by the administrative decision. This can sometimes be a difficult task when the decision does not directly affect you.

When you seek judicial review of an administrative decision, you will not get a decision of the court in substitution of the decision made against you. The court will generally declare the decision made against you to be void and of no legal effect or the court may make other orders. A complete

review of your case on the merits of your case cannot be achieved on the existing state of law in New South Wales. We have no body similar to the Commonwealth Administrative Appeals Tribunal (the "AAT") established *under the* **Administrative Appeals Tribunal Act 1975** (Cth). That Act relates generally to Commonwealth bodies.

Enforcement Against Third Parties: the Developer as a Private Body

While I am on the subject of enforcement, the developer may find itself in a position of having to defend its agreement or arrangement with the Crown from attacks by third parties such as disappointed private sector tenderers that may feel aggrieved at any of the stages of the process of assessment of infrastructure projects as detailed in the government guidelines. Admittedly it is difficult for the developer to protect itself against claims it has no control over at the initial stage, however, once proceedings have been commenced against the Crown by the third party, urgent consideration should be given to attempting to join the litigation as an interested party and making appropriate submissions with a view to expediting the proceedings and removing the potential threat to the development or project.

Enforcement Against Third Parties: the Developer as an Emanation of the Crown

The other aspect of enforcement I wish to discuss today is enforcement by the developer against third parties once the developer has been endowed with statutory or regulation-making powers. Can the developer be given power to impose rates, charges, levies as well as the power to actually enforce the imposition of these charges by way of a penalty or fine on the public?

In my view the power of the developer to enforce these charges as penalties depends upon:

1. the identity of the occupier of the property the subject of the venture;

2. the type of arrangement the developer has with the Crown, that is, whether the developer could impose the charge or levy and, whether the Crown could enforce it separately; and

3. the type of regulations applicable or regulation-making power granted to the developer. It is possible that the developer could be given the power to apply to the Local Court or another court to have the levies or charges recovered as a statutory penalty together with court costs, and for execution or warrants of apprehension to be issued should these penalties not be paid.

You should also keep in mind the possibility of a constitutional challenge by third parties or members of the public to the validity of the regulations or statute empowering the construction or operation of the project you are engaged in. Advice as to validity of any existing or proposed statutes or regulations should be obtained at the earliest possible stages of your venture to minimise the risk of any such challenge.