

# Watch out for fetters and dispensations in public sector contracts

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To ensure contractual terms have their intended effect, practitioners need to be aware of special rules applying to contracts entered into with government or its agencies.

A SIGNIFICANT LIMITATION IN government contracting is that the executive arm of government cannot contract out of a statutory obligation or fetter the government's future exercise of a statutory power or discretion conferred by legislation. Neither a Minister nor the executive can bind the legislature to any course of action.

In the case of *Port of Portland Pty Ltd v State of Victoria*,<sup>1</sup> the High Court considered the constitutional principles that the executive not fetter the future exercise of legislative power or dispense with statute law.

The case concerned an appeal brought by Port of Portland Pty Limited (Portland) against the state of Victoria (the state) seeking to overturn the decisions of the two lower courts which held that certain contractual provisions in its agreement with the state were unenforceable for being beyond the state's power and void.

Portland entered into an agreement in February 1996 to purchase the assets and business of the Port of Portland Authority as part of the privatisation of the Victorian commercial port known as the Port of Portland. The Victorian Treasurer entered into the agreement for and on behalf of the Crown in right of the state of Victoria.

The catalyst for the dispute was the land tax liability of Portland.<sup>2</sup> Clause 11.4 of the agreement dealt with land tax and provided that:

(a) the state would amend legislation governing the assessment and imposition of land tax to exclude from payment the value of various improvements made to the Port of Portland.

(b) to the extent that the leg-



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islative amendments in paragraph (a) were not made prior to the assessment and imposition of land tax, the state would refund or allow to Portland the difference between the two

**"The High Court found that the state was in breach of its obligation to refund or allow to Portland the relevant amount of tax."**

bases of calculation.

Portland brought proceedings against the state in the Supreme Court of Victoria and argued that the land tax assessed between 1997 and 2001 was calculated on the basis of the site value which included various port improvements, and that this constituted a breach of cl.11.4.

The Supreme Court of Victoria<sup>3</sup> and then the Court of Appeal (by majority)<sup>4</sup> held that clause 11.4 was void or beyond the power of the state by reason of being a Ministerial or executive act that purported to bind the Parliament.

Portland appealed to the High Court.

### Contract v constitutional power

The interaction between contract and constitutional power was the determining factor in the lower courts. The two constitutional issues that

arose were:

- whether cl.11.4(a) constituted an impermissible fetter on the future exercise of legislative power by the State; and
- whether cl.11.4(b) was an impermissible attempt by the executive to dispense with statute law.

### Was cl.11.4(a) an impermissible fetter?

Maxwell P and Buchanan JA in the Court of Appeal regarded cl.11.4(a) as a promise to amend land tax legislation and that was something which lay within the exclusive legislative arm of the State. They regarded the promise as "simply unenforceable".<sup>5</sup>

In contrast, Nettle JA (in the minority) acknowledged that the state cannot tie the hands of a future Parliament but con-

sidered that cl.11.4(a) could be read down as an obligation on the state to do no more than it could lawfully and effectively do to procure an amendment to the legislation.<sup>6</sup>

Applying that limitation, Nettle JA held that if procuring amendments to the legislation became against the State's interest, it could defend a claim seeking to enforce the obligation to enact the amendments. The basis of that defence would be that clause 11.4(a) contained an implied reservation that the executive had a right not to perform the covenant if the executive assessed performance of the covenant to be inconsistent with the proper exercise of its discretion.<sup>7</sup>

In the High Court, it was not necessary for a determination to be made on the validity or enforceability of cl.11.4(a). Portland sought to argue its case solely as a failure by the State to comply with cl.11.4(b).

It submitted that the only relevance of the failure to meet the obligation in cl.11.4(a) was to define the circumstances which would enliven cl.11.4(b). The High Court agreed with this characterisation.<sup>8</sup>

It therefore became necessary for the High Court to consider whether the consequences, set out in cl.11.4(b), were themselves permissible or whether they operated impermissibly as a dispensation from statute law.

### Was clause 11.4(b) an impermissible dispensation?

In the Court of Appeal, cl.11.4(b) was unanimously held to be void. Although the provision was expressed as imposing an obligation on the State to refund land tax in the event that certain legislative amendments were not made, it was found to operate as an impermissible dispensation from the obligation to pay land tax.<sup>9</sup>

On appeal, the High Court traced the principles of executive dispensation to the time of King James II over 300 years ago. The High Court referred to the prohibition in the Bill of Rights 1688 (1 Will & Mar Sess 2 c 2) that the executive does not have the power to dispense with statute law, and found that this applies in Victoria as a result of the *Imperial Acts Application Act 1980* (Vic) by way of reinforcement of "a general constitutional principle".<sup>10</sup>

According to the High Court, the effect of cl.11.4(b) was to assess Portland at a higher rate of land tax and for the state to bear the difference between that rate and what would have been the case had legislation been enacted under cl.11.4(a). Any refund or allowance made to Portland under cl.11.4(b) was therefore "made by way of adjustment in the price for sale of public assets and do not have the character of a dispensation from the operation of the land tax legislation".<sup>11</sup> It was therefore not a dispensation from the operation of statute law.

This is very different to the characterisation of cl.11.4(b) in the Court of Appeal. According to Buchanan JA, drawing a distinction between unlawfully exempting a person from an

obligation to pay tax on the one hand and validly promising to repay to a taxpayer the amount paid in tax on the other hand elevated form over substance.<sup>12</sup>

Another factor which swayed the High Court was that the *Port of Portland Authority Act 1958* (Vic) supplied legislative support for the entry into and performance of the obligation in cl.11.4(b). In the language of Windeyer J in *Placer Development Ltd v Commonwealth*,<sup>13</sup> the arrangements in the agreement were given "statutory backing" and this sufficiently supported the obligation of the state under cl. 11.4(b).<sup>14</sup>

In the *Placer Development* case, Windeyer J expressed grave doubt in relation to the constitutionality of a reimbursement of tax but for the legislation referred to in that case, and stated: "I do not think that the Government could, without statutory authority, validly promise a person that he would be released from any taxes or duties levied by Parliament. Whether the dispensation was to be by not collecting

the tax or by returning to the taxpayer the amount collected the promise would, I think, be equally improper in a constitutional sense."<sup>15</sup>

Clause 11.4(b) was therefore not void or ineffective for conflict with any constitutional principle and the appeal was allowed. The High Court found that the state was in breach of its obligation to refund or allow to Portland the relevant amount of tax and the matter was remitted to the Supreme Court of Victoria for determination of the amount to be refunded.<sup>16</sup>

#### Lessons for government contracts

Portland paid \$30 million for the assets and business of the Authority. It would have been of serious concern to the company to be placed in a position, years after completion, where it might not receive an entitlement which it originally took into account in determining whether, and for what price, to proceed with the purchase.

The decision provides an insight into the potential risks

and issues which should be considered when entering into a contract with a government agency. Lessons which can be drawn include:

- Parties should consider whether their proposed contractual arrangements can be implemented by one or both parties without more. This applies to dealings between private parties as much as it does to dealings with government.
- When entering into a contract with a government agency, a party should carefully consider the terms of the contract in the context of any applicable legislative framework.

□ There are various rules which apply to government contracts which must be considered. In addition to the prohibition on the executive fettering the powers of the legislature, a range of other limitations applies, including the doctrine of executive necessity and other rules against fettering which restrict the terms a government agency can agree to.

□ Representatives on both sides of contracts between private parties and government should also consider whether statutory approval must be obtained before entering into an agreement. □

#### ENDNOTES

1. [2010] HCA 44.
2. *Ibid* at [3].
3. *Port of Portland Pty Ltd v State of Victoria* [2007] VSC 488.
4. *Port of Portland Pty Ltd v State of Victoria* [2009] VSCA 282.
5. *Ibid* at [3], [58] and [59].
6. *Ibid* at [5] and [86].
7. *Ibid* at [88] and [91]–[93].
8. *Supra* n.1 at [14].
9. *Supra* n.4 at [3], [12], [45] and [89].
10. *Supra* n.1 at [13]. See also the authorities collected in the foot-

- note 16 of the judgment. In NSW, similarly, the Bills of Rights 1688 continues to have force and effect by operation of s.6 and Schedule 2 to the *Imperial Acts Application Act 1969* (NSW).
11. *Ibid* at [15].
12. *Supra* n.4 at [43].
13. *Placer Development Ltd v Commonwealth* [1969] HCA 29.
14. *Supra* n.1 at [15] and [18].
15. [1969] HCA 29 per Windeyer J at [2].
16. *Supra* n.1 at [19] and [64]. □



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