

GOVERNMENT CONTRACTS AND PUBLIC LAW

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It is time to reconsider how public law affects government contracting. Concepts of ‘the Crown’ or ‘the prerogative’ do not assist. Instead, the issues are, and must be seen as, issues about structure of government. Federal considerations limit the Commonwealth’s power to contract. The Commonwealth executive has constitutional power to make contracts for administering the departments of state. So, too, do the states. But the structure of the federal and state constitutions may require that the executive not make substantial contracts without legislative authority. In addition, it may be doubted that the legislature may authorise a contract by which the polity, or an organ of government, promises to bind future administrations.

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I INTRODUCTION

How, if at all, do principles of public law affect government contracting by the federal or state governments in Australia? The short answer seems commonly to be assumed to be ‘not much’. If that was ever right, it is time to reconsider. It is time to ask at least three more particular and basic questions. What boundaries are there to the *kinds* of contract (or contractual promise) which Australian governments can make? What *processes* must Australian governments follow when making a contract? Which *organs* of Australian governments must be engaged to make contracts that are binding?

It is time to reconsider how principles of public law affect government contracting not only because governments are making larger and more complicated contracts but also because the contracts that are made may have national and international consequences. Large resource and infrastructure developments provide obvious examples of circumstances in which the contracts that developers make with government may be very important domestically. Inevitably, the larger the contract and the more complicated its terms, the more likely it is that the contract will provoke legal and political controversy. And, if the developer is not an Australian entity, free trade agreements and other international arrangements will often give the contract an important international dimension.

The time is right to undertake these inquiries because, as the practices of executive governments have changed over recent years, the courts have been grappling more closely with the nature and extent of executive power. Some of the issues have now been resolved by the High Court’s decisions in *Pape v Federal Commissioner of Taxation*,¹ *Williams v Commonwealth* (‘*Williams [No 1]*’)² and *Williams v Commonwealth [No 2]* (‘*Williams [No 2]*’).³ But not all issues have been resolved. And the Commonwealth and state governments continue to rely on executive power to make promises on behalf of the polity which go beyond ‘the rights and obligations of government.’⁴ The promises that are made are intended to be given legal force and effect and, in some

¹ (2009) 238 CLR 1.

² (2012) 248 CLR 156.

³ (2014) 252 CLR 416.

⁴ *South Australia v Commonwealth* (1962) 108 CLR 130, 140 (Dixon CJ).

cases, to have consequences for the rights and duties of others (both in Australia and elsewhere).

As will later be explained, the answers that are given to questions about types of contract or promise and governmental processes and powers depend upon, and are to be derived from, Australian constitutional instruments and principles. And, although it is beyond the scope of this article, it will be instructive to observe recent developments in other legal systems which, like Australia, are exploring the limits of executive power and, in particular, dealing with governments making larger and more complicated contracts.⁵

It is useful to begin by saying something about the kinds of contracts that Australian governments make.

II GOVERNMENT CONTRACTS

Australian governments make many contracts which take many forms. Apart from employment and quasi-employment⁶ contracts, governments make:

- procurement contracts for the acquisition of goods or services or for the provision of works;
- contracts with private entities for the provision of services to the public generally or some section of the public; and
- contracts with private entities for the construction — and in some case operation — of capital assets for the use of which the relevant private entity may receive public moneys or may charge users.

Procurement contracts take many forms and deal with many different kinds of goods, services and work. They range from the simple contract to buy pencils for the public service to engaging a private firm to provide security at military bases. In the United Kingdom, defence contracting extends to the contract which Serco has for the operation and maintenance of the UK

⁵ See, eg, the decision of the Supreme Court of Israel in *Movement for Quality Government v Prime Minister (Israel)* [2016] HCJ 4374/15, in which the Court held that a government promise made in connection with a large natural gas development project was invalid. The government had promised not to change taxation, export or antitrust laws affecting the natural gas market during the next 10 years; to oppose any private Bill proposing a change; and to undo any change that was effected. See also 'Movement for Quality Government v Prime Minister', *Versa: Opinions of the Supreme Court of Israel* (Web Page, 27 March 2016) <<http://versa.cardozo.yu.edu/opinions/movement-quality-government-v-prime-minister>>, archived at <<https://perma.cc/XNK2-HQCR>>.

⁶ 'Quasi-employment' is an inaccurate expression intended to capture arrangements that govern the holders of statutory or constitutional offices.

Ballistic Missile Early Warning System. There, an aspect of the defence of the realm is let out to contract. And in Australia, the federal government made a contract with a private security firm (initially without legislative authority) apparently authorising and requiring that firm to detain persons on Nauru who had sought to enter Australia by sea without a valid visa.⁷ Whether that contract is properly described as a 'procurement' contract may invite an unproductive definitional debate that is better left aside.

There may be no bright line between contracts that can be called 'procurement' contracts and those that are better seen as public-private arrangements. 'Procurement' presupposes that government retains a part in providing goods or services to the public; in recent years, however, the trend has been for governments to step aside from the provision of many services they once provided. But again, it is as well not to be diverted by definitional debates about what is, or is not, a procurement contract.

Private entities now provide many services that were once provided by government (or government-owned enterprises) to the public generally or some section of the public. The steps taken by governments during the 1980s and 1990s, first to corporatise and then to privatise what had previously been government monopolies in the provision of utilities like water, electricity and gas, are well known. And private entities now provide many other services to the public or sections of the public which once were provided by government or government-owned enterprises.

Public-private arrangements have seen prisons built and operated by private firms;⁸ courts sitting in a courthouse built and operated by a private firm on terms that the government pay a fee for each day a court room is used;⁹ and toll roads operated by private ventures, payment of tolls being enforced by the state through the statutory mechanisms prescribed for the collection of fines and penalties.¹⁰

Not only do governments make many different kinds of contract, governments sometimes use contracts to advance social or economic policies. In the late 1970s, the Labour government in Britain pursued an anti-inflation policy. An undertaking to comply with that policy was a prerequisite for the award of almost all government contracts and the contracts contained a term requiring

⁷ *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42.

⁸ See, eg, *Corrections Act 1986* (Vic) pt 2A div 1.

⁹ See, eg, 'Victorian County Court Project', *Victoria State Government: Treasury and Finance* (Web Page) <www.dtf.vic.gov.au/Infrastructure-Delivery/Public-private-partnerships/Projects/Victorian-County-Court-Project>, archived at <<https://perma.cc/8CVF-BH6N>>.

¹⁰ See, eg, *Melbourne City Link Act 1995* (Vic) pt 4 div 2.

compliance with the policy.¹¹ One author has rightly described this as government using its economic strength to promote its policy ‘in a style, and with results, which for a long time we have assumed must be the hallmark of Parliamentary legislation: that is to say, officially promulgated rules backed by effective general compulsion.’¹²

Unsurprisingly, governments wish to contract on the best terms that can be obtained. Private counterparties who can obtain a preferred position in some relevant market may pay a considerable premium for that preference. Hence, government contracts providing the counterparty with preference, in return for what may be assumed to be a price larger than that party was otherwise prepared to pay, are now not uncommon. A notable example of that kind is found in the arrangements for the leasing of the Port of Melbourne, dealt with by the *Delivering Victorian Infrastructure (Port of Melbourne Lease Transaction) Act 2016* (Vic). The lessee of the Port of Melbourne obtains protection from competition on terms that provide for payment to the private party if there is even *an announcement* by the State of the *proposed* development of international container facilities at a port in Victoria other than the Port of Melbourne.¹³

A government’s concern to obtain the greatest return possible from its dealings with private parties is further illustrated by the contracts lying behind the litigation between two gaming ventures and the State of Victoria, considered by the High Court in *Tabcorp Holdings Ltd v Victoria*¹⁴ and *Victoria v Tatts Group Ltd*.¹⁵ Government permitted only two participants (one private and one public) in part of the gambling market. When the public enterprise (the TAB) was privatised (as Tabcorp) by issuing shares to the public, Tabcorp agreed that the whole of the proceeds of the share issue would be paid to government as the price for the entity’s licence to operate in the relevant market. In order to maximise the price investors would pay for the shares (thus increasing the return to government), Tabcorp and the State agreed that the State would make a payment equal to the value of the licence to Tabcorp at the end of the licence. This being so, the amount Tabcorp paid for its licence did not have to be amortised over its term and the shares issued

¹¹ Terrence Daintith, ‘Regulation by Contract: The New Prerogative’ (1979) 32 *Current Legal Problems* 41, 41.

¹² *Ibid* 41–2.

¹³ *Delivering Victorian Infrastructure (Port of Melbourne Lease Transaction) Act 2016* (Vic) s 61(1)(b)(iii).

¹⁴ (2016) 328 ALR 375.

¹⁵ (2016) 328 ALR 564.

to the public commanded a higher price than would otherwise have been the case. After the privatisation of Tabcorp was complete, government made a further agreement with the other entity operating in the market (Tatts) obliging that entity to pay annual licence fees fixed at a level having a discounted value substantially equivalent to the amount paid to government as the proceeds of the float of Tabcorp. In this way, government secured a payment from Tatts that was fixed at a level reflecting its preferred and protected position as one of a duopoly.

Consideration of the questions posed at the outset must therefore proceed against the background of governments making many different kinds of contract, for many different reasons.

III ASSUMPTIONS ABOUT GOVERNMENT CONTRACTING

The central question posed at the outset was: how, if at all, do principles of public law affect government contracting by the federal or state governments in Australia? Why would that question be answered: 'not much'? It could be answered in that way if it were to be assumed that contracts made by government are 'private' arrangements amenable only to private law remedies. But, if that was ever right, it is an assumption which must be challenged as governments make longer and more elaborate contracts containing terms which are unlike any which private parties can or do agree.

The view that a contract made by government is regulated only by the law of contract may stem from the related notions that it is 'the Crown' that makes the contract and that 'the Crown' has the same capacity as a natural person to make a contract. But it is important to recognise how distracting those ideas are.

That it is 'the Crown' that makes a government contract finds expression in various ways. It is common to find written contracts made between a named Minister 'for and on behalf of the Crown in right of' a state. Proceedings to enforce contracts made by state governments are regulated by 'Crown Proceedings' or 'Crown Suits' legislation.¹⁶

So, to take the clearest legislative statement of the place of 'the Crown' in contracting, the *Crown Proceedings Act 1958* (Vic) regulates 'Civil Proceedings by and against the Crown' and provides that '*the Crown shall be liable in respect of any contract made on its behalf in the same manner as a subject is*

¹⁶ See *Crown Proceedings Act 1988* (NSW); *Crown Proceedings Act 1980* (Qld); *Crown Proceedings Act 1992* (SA); *Crown Proceedings Act 1993* (Tas); *Crown Proceedings Act 1958* (Vic); *Crown Suits Act 1947* (WA).

liable in respect of his contracts.¹⁷ That is, the statutory assumption of the Victorian *Crown Proceedings Act* (like other states' Crown Suits Acts) is that it is 'the Crown' which makes a contract on behalf of government.

By contrast, the *Judiciary Act 1903* (Cth) does not speak of proceedings against 'the Crown', providing, instead, that '[a] person making a claim *against the Commonwealth*, whether in contract or in tort, may in respect of the claim bring a suit *against the Commonwealth*' in one of a number of identified courts.¹⁸

Legal writing in England often speaks of 'the Crown' having an inherent power to enter contracts that is the same as a natural person has to make contracts.¹⁹ And sometimes these statements are expressed in terms of Crown prerogative. But there can be no unthinking translation of what has been said about government contracting in Britain to Australia. The constitutional settings are too different to permit that. Not only that, fundamental questions about the extent of executive power in the United Kingdom remain unresolved. In *Malone v Metropolitan Police Commissioner*, Sir Robert Megarry V-C began from a premise that the executive could do anything not expressly forbidden (in that case, tap telephones),²⁰ whereas in *R v Somerset County Council; Ex parte Fewings* the rule of law was understood to require

¹⁷ *Crown Proceedings Act 1958* (Vic) s 23(1)(a) (emphasis added).

¹⁸ *Judiciary Act 1903* (Cth) s 56(1) (emphasis added).

¹⁹ See, eg, *Halsbury's Laws of England* (4th ed reissue, 1996) vol 8(2), para 101 n 6. Wade and Forsyth note that 'the Crown as a corporation sole has all the powers of a natural person and may enter into contracts and own and convey land and do all the many other things its subjects may do': Sir William Wade and Christopher Forsyth, *Administrative Law* (Oxford University Press, 11th ed, 2014) 180 (citations omitted).

²⁰ [1979] Ch 344, 357. The view that a Minister can do anything a natural person can do is sometimes described as the 'Ram doctrine'. The history, and relatively recent discrediting, of that view is conveniently traced in Adam Tomkins, 'The Authority of *Entick v Carrington*' in Adam Tomkins and Paul Scott (eds), *Entick v Carrington: 250 Years of the Rule of Law* (Hart Publishing, 2015) 161, 169–72. See also House of Lords Select Committee on the Constitution, *The Pre-Emption of Parliament*, House of Lords Paper No 165, Session 2012–13 (2013) 17 [55]; HM Government (UK), *House of Lords Select Committee on the Constitution Report on the Pre-Emption of Parliament: Government Response* (14 October 2013) [9]–[10].

that the executive point to a source of power,²¹ be it statute, prerogative or common law.²²

Reference to ‘the Crown’ invites personification of the executive government of a polity. Personification of the government generally, or the executive government in particular, as contracting party, is a distraction. Personification masks at least two critical points. First, it masks the fact that, as the *Judiciary Act* indicates, the polity makes and is liable under a contract. And second, it masks the need to consider questions about which arm of the government of the polity may make the contract in question and about what limits there may be to the powers of that arm of government.

As was pointed out in *Sue v Hill*, ‘the Crown’ can be used in different contexts with different meanings.²³ It is important, therefore, to identify carefully what is meant when we speak of a contract being made by or on behalf of the Crown (or the Crown in right of a particular polity). In the United Kingdom, ‘the Crown’ may be used to refer to the body politic.²⁴ But in Australia, the federal *Constitution* (and the several constitutions of the states) do not use the expression in that way. Instead, the preamble to the *Commonwealth of Australia Constitution Act* speaks of the people of the colonies having ‘agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the *Constitution* hereby established.’²⁵ And, by s 61 of the *Constitution*, it is the executive power of the *Commonwealth* that ‘is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative’, not the executive power or prerogatives of the Crown that are vested in either the executive government of the Commonwealth or the Governor-General.

The entity called into being by the *Constitution* as a body politic is ‘the Commonwealth’, not ‘the Crown’ or ‘the Crown in right of the Commonwealth’. And the states which are the integers of the federation are likewise separate bodies politic. So much is recognised by the *Constitution’s* provi-

²¹ [1995] 1 All ER 513, 524 (Laws J). See also *R v Secretary of State for the Home Department; Ex parte Northumbria Police Authority* [1989] 1 QB 26; *R v Secretary of State for Health; Ex parte C* [2000] 1 FLR 627, 632–3; *R (Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681, 1695–6 [46]–[47]; *R (Shrewsbury and Atcham Borough Council) v Secretary of State for Communities and Local Government* [2008] 3 All ER 548, 562–3 [47]; *R (New London College) v Secretary of State for the Home Department* [2013] 1 WLR 2358, 2371–2 [28].

²² This tripartite classification may be compared with that in *Davis v Commonwealth* (1988) 166 CLR 79, 108 (Brennan J). Cf *Plaintiff M68* (n 7) 96–7 [130]–[132] (Gageler J).

²³ (1999) 199 CLR 462, 497–503 [83]–[94] (Gleeson CJ, Gummow and Hayne JJ).

²⁴ *Ibid* 498 [84].

²⁵ *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, Preamble.

sions²⁶ for ‘a practical system of law where [the] Commonwealth can sue a State, a State can sue [the] Commonwealth, and a State can sue a State.’²⁷

Like ‘the Crown’, ‘prerogative’ can be used in different senses.²⁸ It may refer to those powers or capacities that are peculiar to ‘the Crown’ or the sovereign.²⁹ It is sometimes used as a general description of the powers and capacities of the Crown. In the United Kingdom the prerogative was recently described by the majority of the Supreme Court as encompassing ‘the residue of powers which remain vested in the Crown’ and as powers ‘exercisable by ministers, provided that the exercise is consistent with Parliamentary legislation.’³⁰ That description offers no criterion readily applied in Australia for deciding what does or does not form a part of the prerogative. The appeal to history leaves unasked and unanswered the question which, in the Australian context, is critical. What effect did the adoption of the federal *Constitution* have on whatever may have been, at federation, the residue of prerogative powers of the Crown in right of the United Kingdom?

Neither ‘the Crown’ nor ‘the prerogative’ is a useful concept when considering government contracting in Australia because the questions that must be answered require examination of the distribution of powers between the arms of government established under a written constitution. Not only is neither concept usefully employed, each is apt to mislead through its implicit appeal to ideas developed in the radically different constitutional setting of the United Kingdom. Those ideas will mislead because, in Australia, unlike in the United Kingdom, there will always be questions about the distribution of powers between ‘independent governments existing in the one area and exercising powers in different fields of action carefully defined by law’,³¹ and about the federal *Constitution*’s ‘distribution of the functions of government amongst separate bodies ... by requiring a distinction to be maintained between powers described as legislative, executive and judicial.’³²

²⁶ *Constitution* ss 75(iii)–(iv).

²⁷ *Minister for Works (WA) v Gulson* (1944) 69 CLR 338, 350–1 (Latham CJ).

²⁸ See HV Evatt, *The Royal Prerogative* (Law Book, 1987) 29–31.

²⁹ *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 424 (Brennan CJ), 438 (Dawson, Toohey and Gaudron JJ), 454 (McHugh J); *Williams [No 1]* (n 2) 252–3 [200]–[203] (Hayne J).

³⁰ *R (Miller) v Secretary of State for Exiting the European Union* [2017] 2 WLR 583, 633 [47].

³¹ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 267–8 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) (‘*Boilermakers’ Case*’).

³² *R v Davison* (1954) 90 CLR 353, 381–2 (Kitto J).

Hence, consideration of government contracting in Australia should begin from some accepted principles that do not depend upon notions of the Crown or Crown prerogative.³³

IV SOME ACCEPTED PRINCIPLES

First, each of the Commonwealth and the several states is a polity. Each polity has a written constitution assigning functions and powers between the branches of government. There are, of course, differences between the federal *Constitution* and the several constitutions of the states, not least in respect of the separation of powers, but each constitution assigns powers to the three branches of government: legislative, executive and judicial.

Second, it is well established that public moneys cannot be applied except 'under appropriation made by law'.³⁴ Hence, money which government owes under a contract cannot be paid except out of properly appropriated funds. But it is also now well established that the prior provision of funds by Parliament is not a condition preliminary to the contract being valid.³⁵ *Performance* of a government contract requiring the payment of money requires appropriation of public money; *making* the contract does not require that the appropriation has been made.

Third, *Williams [No 1]* and *Williams [No 2]* (known collectively as the 'School Chaplains Cases') demonstrate that the power of the executive of the Commonwealth to make a contract is limited by federal considerations. In both cases the High Court held that contracts which the federal executive had made to pay for school chaplains were invalid. In the first case, the contracts had no legislative authority and the Commonwealth relied on the executive power; in the second case, there was legislative authority, but the authorising law was held to be invalid in its relevant operation because it was not a law with respect to a head of federal legislative power.

V MORE DIFFICULT ISSUES

These three established principles invite attention to questions and issues where the principles are not yet settled. Neither of the *School Chaplains Cases* decides whether there are some contracts made by government that require

³³ See *Williams [No 1]* (n 2) 254 [205] (Hayne J).

³⁴ *Constitution* s 83.

³⁵ *New South Wales v Bardolph* (1934) 52 CLR 455, 510 (Dixon J).

legislative authority. It remains unclear whether there are limits to the power of the executive government to make contracts without legislative approval and, if there are, what those limits are. It is useful to approach those questions by making three preliminary points.

First, if the executive decides that the polity should acquire goods or services from a private entity rather than from some source within government, the decision will rarely be open to judicial review. There is usually no decision under an enactment that would engage Acts like the *Administrative Decisions (Judicial Review) Act 1977* (Cth). It will rarely be possible to establish a ground for the issue of relief in the nature of certiorari, mandamus or prohibition. The consequence is that a government's decision to 'outsource' the provision of goods or services will ordinarily be a matter for political accountability only.

Second, decisions about who will be the counterparty in a government contract will seldom be open to judicial review. Natural justice need not be, and seldom is, provided to those who would seek to contract with government. Subject to some important but largely unexplored limits,³⁶ government can set its own tender rules. And because government can set its own criteria for determining who is an acceptable counterparty, government can, as already explained, pursue and secure whatever economic or social policy goals it sees fit by requiring those counterparties to abide by those policies.

Third, as has been noted, the executive may make contracts which call for the payment of money even though there is no parliamentary appropriation of funds to meet that payment. But, as has also been explained, public moneys cannot be spent except in accordance with a valid appropriation.

Challenging the sufficiency of an appropriation is far from easy.³⁷ It is for the Parliament to control the expenditure of public moneys. And the difficulty of challenging an appropriation is all the greater when government adopts an 'outcomes-based' method of appropriation coupled with accruals rather than cash accounting. The High Court's decision in *Combet v Commonwealth* explained that appropriation items are now less specific (and less confined) than once was the case.³⁸ The explanation was made by reference to the history of parliamentary practices with respect to appropriation, changes in government accounting practices, and legislative changes made with respect

³⁶ See, eg, *Competition and Consumer Act 2010* (Cth) pt IIIA div 2B.

³⁷ See *Combet v Commonwealth* (2005) 224 CLR 494.

³⁸ *Ibid* 523 [6] (Gleeson CJ), 577 [161] (Gummow, Hayne, Callinan and Heydon JJ).

to ‘the review and audit ... of the receipt of revenue and the expenditure of money on account of the Commonwealth.’³⁹

Two further observations may be made in relation to the propositions that have been stated about governments making a contract. First, in *Acquista Investments Pty Ltd v Urban Renewal Authority*, the Full Court of the Supreme Court of South Australia held, by majority, that a deed made by a statutory authority and the Premier of the State, granting options to purchase certain land, was not to be set aside.⁴⁰ The appellants failed to demonstrate that the deed was made beyond power or without taking account of certain mandatory considerations,⁴¹ or that the decision to make it was *Wednesbury* unreasonable.⁴² An appeal to the High Court of Australia, against the decision of the Full Court of South Australia, was compromised before the appeal was heard. But it is to be noted that one member of the Full Court (DeBelle AJ) concluded that the decision to make the deed was made without taking into account an important relevant factor that had to be considered, and that the decision was *Wednesbury* unreasonable.⁴³ These conclusions proceeded from the premise that the land should have been, but was not, sold by the best available competitive process.

Although the application for judicial review that was made in *Acquista* failed, it may encourage others to pursue that path. But, as the decision demonstrates, an application for judicial review of a government decision to make a contract encounters many difficulties, not least because the decision to make the contract will seldom be made in exercise of any statutory power. It will, therefore, seldom be possible to argue that the relevant decision-maker took irrelevant considerations into account or ignored mandatory relevant considerations. It will seldom be possible to say that the decision to make the contract was *Wednesbury* unreasonable.

Second, the impugned transaction considered in *Acquista* resulted from the increasingly common process described as an ‘unsolicited proposal’ or ‘market-led proposal’ made to government by a private entity. Some states have published guidelines to encourage what one state has called ‘innovative

³⁹ *Constitution* s 97.

⁴⁰ (2015) 123 SASR 147.

⁴¹ *Ibid* 153 [11], 162 [55], 170 [88] (Vanstone and Lovell JJ).

⁴² *Ibid* 153–4 [12]–[14]. See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. Cf *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

⁴³ *Acquista* (n 40) 251 [349].

infrastructure or service delivery solutions.⁴⁴ But at least for the most part the procedures set out in the guidelines are neither subject to nor provided for by legislation and may proceed by direct negotiation with the proponent to the exclusion of actual or potential competitors. But again, because the process is not regulated by statute, decisions made in response to an ‘unsolicited proposal’ seem unlikely to yield readily to challenge by judicial review.

It is next necessary to consider what *kinds* of contract a government can make. More particularly, within and subject to federal limitations of the kind recognised in the *School Chaplains Cases*, can the federal executive make any kind of contract it likes, without legislative authority? That is a question about the ambit of executive power. It is convenient to approach it by first identifying what the executive can do without legislative authority rather than by trying first to mark out what it cannot do.

VI ADMINISTRATION OF THE DEPARTMENTS OF STATE

The better view is that there is constitutional authority for the federal executive to make contracts for the administration of the departments of state and that the federal executive needs no separate legislative authority to do so. That constitutional authority rests in ss 61 and 64 (and perhaps s 70 in its operation with respect to ‘any authority of a Colony’).

The executive power of the Commonwealth ‘extends to the execution and maintenance of this *Constitution*,⁴⁵ and the provisions of the *Constitution* that have been identified give authority to Ministers of State ‘to administer [the] departments of State of the Commonwealth.’⁴⁶ More particularly, it is well arguable that those provisions give Ministers authority to administer the departments of state by, among other things, making contracts for the acquisition of goods and services for the conduct of the affairs of those departments of state. And, on that basis, so long as there is money appropriated for the payment of sums due under those contracts — as there always will

⁴⁴ ‘Unsolicited Proposals’, *New South Wales Government* (Web Page, 30 September 2016) <www.nsw.gov.au/your-government/unsolicited-proposals>, archived at <<https://perma.cc/BS9A-YX57>>. See also New South Wales Government, *Unsolicited Proposals: Guide for Submission and Assessment* (February 2014); Department of Treasury and Finance (Vic), *Market-Led Proposals Interim Guideline* (February 2015); Queensland Government, *Project Assessment Framework: Guidelines for the Assessment of Market-Led Proposals* (July 2015). Cf Department of Lands (WA), *Unsolicited Bids Guideline for the Sale or Lease of State-Owned Land*.

⁴⁵ *Constitution* s 61.

⁴⁶ *Ibid* s 64.

be by appropriations made ‘for the ordinary annual services of the government’⁴⁷ — the myriad contracts which must be made to ensure the orderly administration of the public service can be made and performed without separate legislative authority.

Now, however, the *Public Governance, Performance and Accountability Act 2013* (Cth) should be understood as expressly giving the secretary of a department of state of the Commonwealth power to make contracts, agreements, deeds and understandings ‘relating to the affairs of’ the department.⁴⁸

The state constitutions do not provide the same textual foundations for reaching the like result with respect to the executive governments of the states. But once the conclusion is reached, as it must be, that the constitution of each state provides for a form of representative and responsible government, it would appear inevitable that state Ministers have both the power and the responsibility to administer the relevant departments of state, and for that purpose may make contracts for the provision of goods and services for the conduct of the affairs of those departments.

Many kinds of contract fall within the scope of this authority. A government can buy pencils for the public service. But it may also be that a Minister may commit the Commonwealth to buying defence matériel of at least some kinds and value. It seems probable that the power to administer the departments of state authorises the executive or, more precisely, a Minister to lease buildings in which the public service has its offices. The power permits the executive to carry on the daily administration of the business of government and to make all sorts of contracts for that purpose without special legislative authority.

The power is not unbounded. It is a power to make contracts for the administration of a department of state. And fixing the boundary between what is and what is not for the administration of a department of state may not be easy. Indeed it grows harder as notions about the role of government change. But two points may be made with relative safety.

First, the fact that a contract is made in the name of a Minister responsible for administering a department of state cannot be sufficient to demonstrate that the contract is of the requisite character. So, for example, a contract to sell or lease a state’s electricity grid would probably not be within that power. It may be that large defence procurement projects, requiring large expenditures

⁴⁷ Ibid s 54. See also *Combet* (n 37) 535–7 [44]–[47] (McHugh J), 572–5 [148]–[154] (Gummow, Hayne, Callinan and Heydon JJ). This phrase is also used in the long title of the Commonwealth’s annual Appropriation Act (No 1).

⁴⁸ See ss 11, 12 and 23 together with the definition of ‘arrangement’ in s 8.

over many years, may fall outside the notion of *administering* a department of state. Both the net present value of such obligations and their duration suggest that these are not matters that can lawfully be decided by the Minister of State appointed by the Governor-General under s 64 of the *Constitution* to administer the Commonwealth Department of Defence, let alone a department of defence matériel. And if the procurement decision cannot be made by a Minister, it would follow that the Minister cannot, in exercise of a power conferred by s 64, bind the Commonwealth to performance of the terms of a contract effecting that procurement.

Second, the fact that a Minister or a department of state has responsibility for administering *a contract* cannot be sufficient to demonstrate that the contract is for the administration of *the department of state*. Hence, not every contract made in respect of the many items gathered under the heading of 'Administered Items' in an Appropriation Act can be classed as a contract for the administration of the department of state simply because it is made in connection with a program being administered by a department of state. If administration of a contract *by* a department of state were sufficient to conclude that the contract is *for* the administration of that department, the contracts at issue in the two *School Chaplains Cases* would have been held to be valid.

It is convenient, at this point, to make particular reference to the *Constitution of Queensland 2001* (Qld) ch 3 pt 5. Section 51 provides:

- (1) The Executive Government of the State of Queensland (the State) has all the powers, and the legal capacity, of an individual.
- (2) The State may exercise its powers—
 - (a) inside and outside Queensland; and
 - (b) inside and outside Australia.
- (3) This part does not limit the State's powers.

Example—

This part does not affect any power a Minister has apart from this part to bind the State by contract.

Sections 52–5 deal with the subject of 'commercial activities', an expression defined as including 'commercial activities that are not within the ordinary functions of the State', 'commercial activities of a competitive nature' and

‘activities declared by an Act to be commercial activities.’⁴⁹ Section 53(1) provides that ‘[t]he State may carry out commercial activities’ and sub-s (2) of that section provides that ‘[t]his section is sufficient statutory authority for the State to carry out a commercial activity’. Section 54 permits a Minister to ‘carry out commercial activities for the State’. Section 55 then permits a Minister to ‘delegate a power of the State to an appropriately qualified officer of the State’ and an officer of the State to ‘subdelegate the delegated power to another appropriately qualified officer of the State’. Although s 51(1) may be read as defining the ‘State’ as ‘[t]he Executive Government of the State of Queensland’, s 52 provides that “‘State” includes a public sector unit.”⁵⁰

Taken as a whole, the provisions about ‘commercial activities’ can be seen to proceed from a premise that ‘[t]he Executive Government of the State’, as distinct from those persons who may hold particular offices in the structures of government, is an entity to which powers and capacities can be given. That is, the premise for the way in which the provisions are drafted is that ‘[t]he Executive Government of the State’ is a legal person, presumably a legal person which is separate from the body politic itself. It is ‘[t]he Executive Government of the State’ which may ‘carry out’ commercial activities.

These sections of the *Constitution of Queensland 2001* present many difficult and fundamental questions. Not least among them may be whether the provisions are consistent with the conceptions on which the federal *Constitution* is framed.⁵¹ One of those conceptions is of the states as bodies politic and integers of the federation, not ‘commercial’ or profit-making enterprises.

VII WHEN IS LEGISLATION NECESSARY?

Some contracts negotiated between the executive and a private party provide that the contract will not operate unless legislation is passed ratifying or approving the contract.⁵² Some contracts provide that a Minister will ‘use best endeavours’ to procure passage of legislation giving effect to the terms of the

⁴⁹ *Constitution of Queensland 2001* (Qld) s 52.

⁵⁰ The *Acts Interpretation Act 1954* (Qld) provides that a ‘public sector unit’ is ‘a department or part of a department’ or ‘a public service office or part of a public service office’: at sch 1 (definition of ‘public sector unit’).

⁵¹ See *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82 (Dixon J).

⁵² See, eg, *Pilbara Energy Project Agreement Act 1994* (WA) sch 1 cl 4. Cf *Government Agreements Act 1979* (WA) s 3.

agreement.⁵³ (Whether the contract between the parties remains in force, if the contemplated law is passed, remains unresolved.⁵⁴ There seems much to be said, however, for the view that those aspects of the parties' rights which it was agreed would be the subject of the intended law are, if the law is enacted, regulated by that law and the relevant provisions of the contract are discharged either by performance or by merger in the new statutory rights.)

Leaving aside those cases where the parties to the contract agree that legislation will be passed, when is legislation necessary to make a government contract enforceable? Or, putting the same question another way, if the contract is not a contract for the administration of a department of state, what power does the executive have to make the relevant contract?

As indicated earlier, there are two fundamental reasons to ask what *is* the relevant power, rather than whether there is some relevant *limit* to power.

First, there are the federal considerations explored in the *School Chaplains Cases*. That is, the question of executive power to contract raises questions about the distribution of powers between 'independent governments existing in the one area and exercising powers in different fields of action carefully defined by law'.⁵⁵ But second, and no less importantly, the question of power to contract raises questions about the federal *Constitution's* 'distribution of the functions of government amongst separate bodies ... by requiring a distinction to be maintained between powers described as legislative, executive and judicial'.⁵⁶ And, in the case of the states, despite there being a different separation of powers, it raises exactly the same structural questions.

The two *School Chaplains Cases* turned on the first, or federal, set of issues. The first case held that the contracts in issue in that case were invalid and not supported by the executive power of the Commonwealth. The second case held that the laws relied on to support the agreements in issue in that case were not valid laws of the Commonwealth.

Together, the two *School Chaplains Cases* decided that the federal executive's powers to make a contract are limited by federal considerations. But both cases also rejected a 'natural person' analysis of government contracting.⁵⁷ That is, it is now the received doctrine of the High Court that considera-

⁵³ See, eg, the clauses described in *Port of Portland v Victoria* (2010) 242 CLR 348, 357 [7] and *Tatts* (n 15) 567 [14].

⁵⁴ *Tatts* (n 15) 580–1 [78]–[81].

⁵⁵ *Boilermakers' Case* (n 31) 267–8.

⁵⁶ *Davison* (n 32) 381–2.

⁵⁷ See especially *Williams [No 1]* (n 2) 193 [38] (French CJ), 237–8 [154]–[155] (Gummow and Bell JJ), 253–4 [204] (Hayne J), 352–3 [518]–[524] (Crennan J), 373–4 [595] (Kiefel J).

tion of the executive power of the Commonwealth to contract cannot begin from an assumption that the executive has the capacity of a natural legal person. As explained in *Williams [No 1]*, there are at least two basic difficulties with that assumption.⁵⁸ First, ‘the position [of the executive making a contract requiring expenditure] is not that of a person proposing to expend moneys of his own. It is public moneys that are involved.’⁵⁹ And ‘[t]he law of contract has been fashioned primarily to deal with the interests of private parties, not those of the Executive Government.’⁶⁰ Second, to endow the executive with the capacities of an individual assumes that the executive branch of government has a legal personality distinct from the legislative branch. But the legal personality called into existence by the *Constitution* is the Commonwealth of Australia.⁶¹ The Commonwealth is a body politic; the executive is not.

It remains necessary, however, to focus upon the second set of issues identified above: structural considerations limiting executive power. Those issues were touched on, but not resolved, in *Williams [No 1]*.⁶² And there remains the possibility (some may say near certainty) that Alfred Deakin’s opinion on ‘Channel of Communication with Imperial Government: Position of Consuls: Executive Power of Commonwealth’⁶³ will once again be deployed⁶⁴ in aid of an argument that federal executive power is unbounded by considerations of constitutional structure.⁶⁵ Examination of that argument must always distinguish between what an executive suggests would be a power which it would be convenient for it to have and those powers that are necessary for the performance of the executive’s proper constitutional functions.

⁵⁸ *Ibid* 236–8 [150]–[155] (Gummow and Bell JJ).

⁵⁹ *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424, 461 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ).

⁶⁰ *Williams [No 1]* (n 2) 236 [151] (Gummow and Bell JJ).

⁶¹ *Ibid* 237 [154].

⁶² *Ibid* 218 [89], 237–8 [155].

⁶³ Alfred Deakin, ‘Channel of Communications with Imperial Government: Position of Consuls’ in Patrick Brazil and Bevan Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1: 1901–14* (Australian Government Publishing Service, 1981) 129, 130–1.

⁶⁴ See *Williams [No 2]* (n 3) 466 [71] (French CJ, Kiefel, Bell and Keane JJ). Cf *Plaintiff M68* (n 7) 96 [129] (Gageler J).

⁶⁵ Cf *Miller* (n 30) 662 [160] (Lord Reed JSC), citing William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765–9) bk 1, ch 7 and referring to ‘[t]he value of unanimity, strength and dispatch in the conduct of foreign affairs’ providing ‘compelling practical reasons for recognising [a] prerogative power to manage international relations’.

For present purposes, two often stated propositions may be accepted. First, it may be accepted that s 61 describes rather than defines executive power. Second, it may be accepted that, in Deakin's words, federal executive power 'is administrative, as well as in the strict sense executive; that is to say, it must obviously include the power not only to execute laws, but also to effectively administer the whole Government'.⁶⁶

Nonetheless, consideration of the structure of the government created by the *Constitution* requires the conclusion that, absent express legislative authority, the federal executive does not have power to make 'major' or 'substantial' contracts.⁶⁷

Of course, much turns on what is meant by 'major' or 'substantial' and it will be necessary to explore that aspect of the matter further, but before doing so, it is necessary to justify the assertion that the executive's power to make a contract is limited by structural considerations.

VIII EXECUTIVE AND LEGISLATURE: SEPARATE ORGANS OF GOVERNMENT

The executive and the legislature are separate organs of government connected through the mechanisms of responsible government (such as s 64 of the *Constitution* providing that '[a]fter the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives'). But those connections cannot diminish the force of the observation that, as separate organs of government, neither performs the tasks of the other and neither can speak for the other. The executive cannot bind the Parliament; the Parliament can enact laws which apply to or regulate the executive but it cannot direct what the executive does except by validly made legislation.

The executive cannot impose taxation,⁶⁸ cannot create a new offence,⁶⁹ and cannot dispense with the operation of any law.⁷⁰ Because the executive cannot dispense with the operation of any law, it is beyond power for the executive to contract with a private party that particular laws (commonly revenue laws)

⁶⁶ Deakin (n 63) 131.

⁶⁷ Whether those structural considerations support some wider proposition need not be examined.

⁶⁸ *Commonwealth v The Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 433–4 (Isaacs J), 460 (Starke J).

⁶⁹ *Davis* (n 22) 112 (Brennan J).

⁷⁰ *Port of Portland* (n 53) 359–60 [13].

will in the future be understood as having a particular operation. These limitations on executive power reflect ‘the basal assumption of legislative predominance’ that underpins the constitutional structure.⁷¹ And once both the analogy with the capacities of natural legal persons and the consequent assumption of unbounded executive contractual capacity or power are discarded, it becomes necessary to identify a source for the power that is exercised in any particular case. In undertaking that task, it is necessary to identify and reconcile the separate roles that are assigned to the legislative and executive branches.

The identification and reconciliation of those roles must recognise that the separation of powers effected by the federal *Constitution* ‘was not a product of abstract reasoning alone, and was not based upon precise definitions of the terms employed.’⁷² The power of the executive to make a contract must be determined recognising the legislature’s predominance. The Parliament controls expenditure of public moneys. Money bills (proposed laws appropriating revenue or moneys or imposing taxation) must originate in the lower house of the Parliament and, hence, it is that house that makes and unmakes governments. Cabinet may propose legislation but, as recent political experience shows, it is the Parliament that determines whether it will pass and in what form it will pass.

These basic observations point firmly towards the conclusion that the executive does not have power to make a major or substantial contract without express legislative authority.

IX HIGH COURT AUTHORITY

The High Court has not dealt directly with which government contracts must be authorised by legislation. But it is important to recognise what has been said about the issue in five cases: *Commonwealth v The Colonial Ammunition Co Ltd*,⁷³ *PJ Magennis Pty Ltd v Commonwealth*,⁷⁴ *Australian Woollen Mills*

⁷¹ *Williams [No 1]* (n 2) 232 [136] (Gummow and Bell JJ).

⁷² *Davison* (n 32) 381 (Kitto J). The same point must be made in respect of state constitutions, perhaps with even greater force.

⁷³ (1924) 34 CLR 198.

⁷⁴ (1949) 80 CLR 382.

Pty Ltd v Commonwealth,⁷⁵ *Placer Development Ltd v Commonwealth*⁷⁶ and *Port of Portland Pty Ltd v Victoria*.⁷⁷

A Colonial Ammunition

Colonial Ammunition sued the Commonwealth on a contract said to be contained in an exchange of correspondence between the company and the Secretary of the Department of Defence. The company alleged that it was a term of the agreement that the Commonwealth would take over obligations which it owed to certain members of its staff and that the Commonwealth had breached this term. The plurality (Knox CJ, Gavan Duffy and Starke JJ) disposed of the matter on the construction of the alleged contract.⁷⁸ By contrast, Isaacs and Rich JJ examined whether, by the department's action, 'it was the Commonwealth Government, that is, the Crown, that entered into [the] bargain.'⁷⁹ Having concluded that the promise alleged by the company was not a term of the contract,⁸⁰ Isaacs and Rich JJ went on to consider whether, if the department had agreed to the stipulation, it would be legally enforceable and concluded that it would not have been.⁸¹ Their Honours' reasons examine the effect of certain provisions of both the *Defence Act 1903* (Cth) and certain Appropriation Acts appropriating moneys for payment of sums that were said to be outlaid in performance of the alleged agreement.

Two points of present relevance may be drawn from the reasons of Isaacs and Rich JJ. First, Parliament does not make contracts on behalf of the Commonwealth; that is the executive's task. Second, there are circumstances in which it would be expected that a contract made by the executive may require legislative ratification to be effective.

B PJ Magennis

The central issue in *PJ Magennis* was whether a Commonwealth Act, authorising the making of certain agreements with the State of New South Wales,

⁷⁵ *Australian Woollen Mills* (n 59).

⁷⁶ (1969) 121 CLR 353.

⁷⁷ *Port of Portland* (n 53).

⁷⁸ *Colonial Ammunition* (n 73) 207–8.

⁷⁹ *Ibid* 214.

⁸⁰ *Ibid* 216–17.

⁸¹ *Ibid* 219–25.

effected an acquisition of property not on just terms. What is presently important is how Dixon J characterised the effect of the Act in issue. He described it as removing

possible objections based on such authorities as *Commercial Cable Co v Government of Newfoundland* and [*Colonial Ammunition*]; it puts beyond doubt the authority of the signatory to execute the instrument on behalf of the Commonwealth; and it secures for the executive government Parliamentary approval of the transaction. But it goes no further. It does not otherwise change the legal character of the instrument or of the transaction it embodies.⁸²

That is, Dixon J saw the authorising Act as dealing both with the authority of the particular person executing the instrument and the authority of the executive to make the contract.

C Australian Woollen Mills

The plaintiff company received subsidies from the Commonwealth. The Commonwealth demanded and received repayment of part of what had been paid; the company alleged that too little, rather than too much, had been paid and it claimed to recover both this further amount and the amount it had repaid as money due under a contract. The Court held that there was no contract for the payment of the subsidy.⁸³ But in the course of the reasons, the Court said that

if there was an intention on the part of the Government to assume a legal obligation [to pay the subsidy], *one would certainly have expected statutory authority to be sought* ...⁸⁴

And the Court said that the case was ‘entirely unlike’ *New South Wales v Bardolph*,⁸⁵ which it described as a case ‘in which an officer of the Premier’s

⁸² *PJ Magennis* (n 74) 410 (citations omitted). In *Commercial Cable Co v Newfoundland* [1916] 2 AC 610, the Privy Council held that the Newfoundland Governor-in-Council had no power to make the relevant contract because the letters patent appointing the Governor required the Governor to exercise powers in accordance with laws and ordinances in force from time to time, and a standing order of the House of Assembly of Newfoundland required that contracts of the relevant kind must provide that the contract shall not be binding until approved by resolution of the House.

⁸³ *Australian Woollen Mills* (n 59) 465–6 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ).

⁸⁴ *Ibid* 461 (emphasis added).

⁸⁵ *Bardolph* (n 35).

Department, with the authority of the Premier, signed a contract in the ordinary course of the carrying on of an activity of a more or less commercial character *under governmental control*.⁸⁶

D Placer Development

The dissenting reasons of Windeyer J in *Placer Development* point out that not all promises made by government give rise to obligations enforceable at law.⁸⁷ Some promises, like those considered in *South Australia v Commonwealth*,⁸⁸ give rise to political, not legal, obligations. And for Windeyer J, both parliamentary approval of the agreement and parliamentary appropriation of funds to meet the obligations, coupled with the agreement's 'commercial character and ... language',⁸⁹ would, it seems, be expected if it were to be found that the government had assumed an obligation that was to be enforceable at law.

E Port of Portland

The Port of Portland Authority was a Victorian statutory authority. Under its constituting Act, the State Treasurer had power to direct the Authority to sell its undertaking and assets on terms and conditions specified by the Treasurer. The Treasurer directed the Authority to sell its undertaking and assets by making an identified contract with an identified purchaser. The Treasurer 'for and on behalf of the Crown in right of the State of Victoria' was party to the contract, and moneys to be paid under the contract were to be paid to the State.⁹⁰ The contract provided that, if the purchaser was assessed to land tax at a rate higher than that specified in the contract, the State would refund or allow to the purchaser the difference, and also provided that the State would effect an amendment to the relevant land tax legislation to ensure that tax would be assessed on the relevant land at the rate specified in the contract.

It was submitted that the provisions of the contract constituted an impermissible attempt to dispense with the provisions of statute law. The High Court held that the question of dispensing was not reached.⁹¹ The contract

⁸⁶ *Australian Woollen Mills* (n 59) 455 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ) (emphasis added).

⁸⁷ *Placer Development* (n 76) 367–8.

⁸⁸ *South Australia* (n 4).

⁸⁹ *Placer Development* (n 76) 368.

⁹⁰ *Port of Portland* (n 53) 357 [5].

⁹¹ *Ibid* 361 [18].

was authorised by statute and the contract provided for adjustment of the purchase price according to a formula fixed by the contract.

Two points are of present relevance. First, the Court referred approvingly to what Windeyer J had said in *Placer Development* about statutory backing for contracts made by the executive.⁹²

Second, it is important to recognise that the provision at the heart of the dispute was one which fixed the price for the assets which were being sold. As the Court pointed out, the argument based on 'constitutional principles emphasising the control by the legislature of the executive, particularly in revenue matters, was effectively confessed and avoided' by the arguments rooted in the provisions of the contract.⁹³

F *The Central Question*

What government contracts require legislative authority or approval? It may be that what has been said in the cases points towards a rule that would require legislative authority or approval for any contract *except* a contract made for the administration of a department of state. Certainly a rule expressed in those terms would not be inconsistent with what has been said in the cases. But for the moment it is enough to confine attention to 'major' or 'substantial' contracts.

X 'MAJOR' OR 'SUBSTANTIAL' CONTRACTS

What is a 'major' or 'substantial' contract? First, at the risk of undue repetition, it is a notion that does not include contracts entered for the ordinary administration of the departments of state.

Second, the words 'major' and 'substantial' are intended to convey an essentially qualitative test. This is not to say, however, that quantitative considerations are irrelevant. On the contrary, the larger the sums required to be paid or received under the contract (the 'dollar value' of the contract), the more likely it is that it will be a 'major' or 'substantial' contract. But the central idea sought to be conveyed by the description of a contract as 'major' or 'substantial' is to identify a distinction described, in another context, as being 'whether the commitment involves a routine matter of administration or rather implements or entrenches a policy, program or administrative structure

⁹² *Ibid*, quoting *Placer Development* (n 76) 366 (Windeyer J).

⁹³ *Port of Portland* (n 53) 361 [18].

which is [or, I would add, 'may be'] politically contentious.⁹⁴ Matters which are or may be politically contentious should be resolved directly by the Parliament, not by the executive.

Contracts providing favourable treatment for a counterparty would almost certainly fall within the class of 'major' or 'significant' contracts. A matter of that kind may be politically contentious at the time but, even if it is not, a contract promising favourable treatment for a counterparty seeks to bind future administrations. Hence, promises not to allow a competitor to enter the market to compete with the counterparty, or not to change the regulatory framework, would lie beyond the power of the executive. But so too would promises to use best endeavours to procure such a result. And if there is no power to make the promise to prefer the counterparty, provisions operating on 'breach' of those promises would likewise be beyond power.

Can the legislature authorise the making of such promises? It is useful to approach that question by postulating a law authorising the executive to make a contract promising that it will use best endeavours to procure the enactment of a law providing that the regulatory (or taxation) regime governing the counterparty will not change during the term of the contract.

Let it be assumed that the contract is carried into effect and a law enacted forbidding alteration of the relevant regulatory or revenue regime during the term. The postulated law would not prevent any future Parliament repealing the provision and enacting a law altering the regulatory or taxation regime.⁹⁵ Enactment of a law repealing the provision and enacting a new regulatory or taxation regime could not be intercepted by injunction.⁹⁶ No less importantly, enactment of a law of the kind described would found no action for damages or any other relief. Even if the promise made by contract were regarded as surviving the enactment of the law which the agreement contemplated would be made (which may be doubted) the promise was not one which either the executive or the legislative branch of government had power to make.

What then of the contract that says that, if the law is changed in some relevant respect, the government party will pay a sum of money to the counterparty? Let it be assumed that the law of penalties is not engaged. That is, let it be assumed that the parties have agreed what damages will be paid if government does alter the preferred position of the private counter-

⁹⁴ Department of the Prime Minister and Cabinet (Cth), *Guidance on Caretaker Conventions* (2016) 3 [4.1].

⁹⁵ See, eg, *A-G (NSW) v Trethowan* (1931) 44 CLR 394, 429–30 (Dixon J), *affid* (1932) 47 CLR 97 (PC).

⁹⁶ *Ibid* 430.

party, and that the agreed amount is a reasonable pre-estimate of the loss that will be suffered if, for example, a monopoly is broken or favourable tax treatment abolished. Let it further be assumed that the amounts in issue are not insignificant.

XI CONTRACT AS AN INDIRECT FETTER

The questions which arise can be framed as follows. Can a polity make a contract, in 2016, with a 50-year term, which will impose a large financial consequence on the polity in the year 2040 if government decides to pursue some different policy direction? Does the promise — and the threat of its enforcement — represent an impediment to the exercise of legislative or executive power in 2040? If it does provide an impediment, does that matter?

The answer to these questions must be found in the structure of the *Constitution*. One of the conceptions on which our federal and state constitutions are framed is legislative predominance: the conception that the executive branch is immediately responsible to, and liable to control by, the legislative branch and that the legislative branch is ultimately responsible to the people. This entails that the executive cannot, by its actions, control or restrict the action of the legislature. And if a *law* which says future Parliaments will not, for a time, enact certain kinds of laws does not preclude the enactment of such a law within that time, the executive cannot, *by its action*, seek to prevent such a result directly (by promising that it will not happen) or seek to prevent such a result indirectly (by promising that, if it does happen, the government will be liable for a large sum of money).

If that last proposition is right, it is a proposition about power or capacity to make certain kinds of promise. And if the chain of argument has integrity, it comes from structural considerations of a kind very similar to those considered in *Melbourne Corporation v Commonwealth*.⁹⁷

Importantly, if the chain of argument has integrity, it is a chain of argument that would apply regardless of whether the legislature expressly approved the agreement or sought to give the terms of the agreement the force of law. It would apply equally because, if the executive and the legislature cannot bring about this result by legislation, why would you — how could you — conclude that the executive can bring about that result by contract?

⁹⁷ *Melbourne Corporation* (n 51) 81–2 (Dixon J).

XII CONCLUSION

Because the issues considered in this article invite attention to the very structures of government, they are important. It may be doubted whether any state or federal government would see exploration of the limits of the power of the executive to make contracts with private parties as helpful. Those who make contracts with government may have little practical reason to suggest that they are not enforceable according to their terms. And hovering over all of these issues is the spectre of sovereign risk with all of the consequences for commercial reputation that attend that notion. But one of the chief aims of the public law is that identified by Brennan J in *Attorney-General (NSW) v Quin* as ‘the declaration and enforcing of the law which determines the limits and governs the exercise of [a] repository’s power’.⁹⁸

It is time that we looked more closely at the law which determines the limits and governs the exercise of the powers of the executive to make contracts. This article proposes that the limits are to be found in basic considerations of Australian constitutional structures. But, as other judicial systems grapple with issues about the ambit of executive power and about government contracting, it will be important to consider carefully what can be learned from their experience.

⁹⁸ (1990) 170 CLR 1, 36.