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COMMERCIAL CONTRACT DISPUTES IN A GOVERNMENT CONTEXT

General comments.

Commercial contracting is not always an easy fit with government. The sovereign was always a risky entity to become involved with and initially at least the courts did not entertain actions by private citizens against the sovereign.

In more recent years the tide has turned significantly such that the starting point is that a contract with a government is generally justiciable and enforceable. Indeed at a State level, the *Crown Proceedings Act 1980* s.10[1] expressly recognises that the courts have jurisdiction to hear actions involving the State as if they were between subject and subject. The *Constitution of Queensland 2001* also expressly provides that the State may carry on "commercial activities".

There remain however, some significant exceptions to the general rule that contracts involving the government are enforceable, which I will come to later.

Despite the Crown generally being subject to the law of contract, some different risks and considerations still arise when drafting and administering commercial contracts where the government is a party. To a large extent these risks are inherent from the nature of government itself, and can only be mitigated rather than removed. For example, few corporations change their boards, entire senior management and strategic direction every 3 years, as an Australian government is at risk of doing due to our system of government.
[2]

While counterparties need to bear this political reality in mind, it is equally important for government advisors to not lose sight of the commercial environment and drivers for the

[1] *Crown Proceedings Act 1980* s.10 confirms that Court's power to hear and determine proceedings with the Crown as if it were between subject and subject.

counterparty. A water-tight contract from the government's perspective may not be acceptable to the commercial proponents in the market. If there is no market for the contract, the government will not have the benefit of acquiring the work to be done at a reasonable price, if at all.

As with any contract, it is a matter of the parties achieving an appropriate balancing of the risks, so that each considers that the deal is worth pursuing, the bargain can be struck and the contract honoured.

From the counterparty's perspective the key risk has been labelled "sovereign risk" which encompasses risks such as the following[3]:

- Possible changes of policy or government;
- Legislation overriding or impacting on the return available under and enforceability of the contact;
- Stability of the system of law, economy and government of the country in which the contract is being performed, or of the government counterparty.

From the government's perspective it will be looking to:

- Strike a deal that will give value for taxpayer's money and also be perceived to do so in the public arena;
- Ensure sufficient flexibility in its terms including termination provisions and if necessary, compensation provisions to provide for possible future government changes or policy changes; and
- Ensure that the contract is robust so that the counterparty is bound to perform it, and the State's rights for recovery in the event of default are protected as far as reasonably possible.

Because of the breadth of the topic (my topic as published must take out the longest title award), I intend to firstly give a brief overview / checklist for some of the major risks I have encountered in contracting where the government is a party: - at the stage of drafting, then during the performance and finally at the sticky end – termination or enforcement. I will

[3] This description of this concept is my own. The term "sovereign risk" takes on various meanings depending upon the context. A broad definition given by E Carew in *The Language of Money*, Allen & Unwin 1988 is that refers to "*the extra dimension of risk involved in international, as distinct from domestic, transactions. Sovereign risk is the aspect of the credit proposal which is outside the individual borrower's control… risk additional to the usual commercial risks… It implies the possibility that conditions will develop in a country which inhibit repayment of funds due from that country*."

principally be approaching the topic from the perspective of the Government counterparty (and particularly the State government, with which I am most familiar).

Key risk areas to consider in drafting

The following lists of key risk areas are not conclusive, but could be useful "memory joggers", particularly when time is short and you are gathering your thoughts for that urgent meeting mentioned earlier.

Risk	**Comments**
Parties	Correct descriptions of the legal entities; Establish that the entity contracting has sufficient resources: consider strength of guarantees / indemnities and bank guarantees as means of ensuring financial ability to complete.
Clear description of project and deliverables	There is no substitute for clarity of purpose and scope of the contract and specifying the deliverables clearly.
Staging / acceptance testing per stage	Recommended if possible, and dealt with in the paper by the previous presenter.
Legislative obligations	Ensure government is not committing to compliance with or to review or change legislation where it can't (even if a standard clause, it may need redrafting).
Time of the essence?	Important to specify
Change of control – for benefit of government agency	Particularly where it is a business area, state instrumentality or GOC entering into the contract, it is important to ensure that the sale of the business (or even just a restructure into a different arm of government) does not trigger a right to terminate for the benefit of the counterparty, for change of control.
Change of control for non-government contractor	From a State's perspective the entity that is the holding company of the special purpose vehicle can be a key consideration / risk factor, whether politically or commercially.

Risk	**Comments**
Contract management	Preferable for key contacts / means of resolving issues under the contract are specified, and also as to how those responsible will communicate and how they may change during the term.
Termination – Default	Clarity as to triggers for default; what are the essential terms and conditions (and not every obligation should be specified).
Termination – for convenience right + compensation	Common in government contracts as a means of limiting the quantum that State is liable for should it need to terminate, and also gives some assurance to the commercial contractor that has some recompense in those circumstances. Should not be a "penalty" but a genuine pre-estimate of damages, and may need to escalate depending upon stage of the contract.
Termination – force majeure	The events nominated as force majeure events need to be carefully considered in light of the nature of governments, and need not be limited to war and acts of god. However, the counterparty will also be seeking to cover broad risks in its favour.
Guarantees, indemnities	Always very important and hard fought over. Beyond the scope of this paper.
Insurance	It is common for the State to require that the counterparty include the State as an "insured", even if the policy of the government is to self-insure. Be careful as to the link between indemnities given or received and the scope of insurance.
Confidentiality	Should not preclude the briefing up to Ministers; dealing with central government (e.g. if government party is a GOC). Be careful of separate legal entities within the broad umbrella of the government.
Boilerplate clauses e.g. law of contract; entire contract; means of amendment of the contract	Can be overlooked. Failure to include can result in unexpected expense / uncertainty.

Risk	**Comments**
Exclusion of warranties / prior dealings	Remains important even though the State may still be subject to some implied warranties and guarantees e.g. Australian Consumer Law.
Shareholding ministers approvals	These processes occur outside the terms of the contract, but are additional processes to negotiate, and can delay negotiations / or resolution of disputes and processes under the contract. Sometimes the processes for such approvals are referred to in the contract itself.
GOC / statutory body considerations	The legislation establishing the body corporate needs to be considered in the drafting of the contract. For State Government, the *Government Owned Corporations Act 1993* and the modified application of the Corporations Act may need to be considered.

Key risk areas in performance

Risk	**Comments**
Internal management / contract management	No substitute for good contract management. However, officers need to ensure that they do not inadvertently give assurances / purport to agree with the contractor on issues that are not within the scope of their authority or are not authorised by the contract. Can lead to issues with potential claims of estoppel, variations to the contract. May also enable early intervention or resolution of issues giving rise to a potential dispute.
Confidentiality	Maintenance of this remains important. Ministers may want to release information, but contractual constraints need to be considered.
Briefing up regularly for large or contentious matters	Key to ensuring that communication with senior management, Ministers and their advisers continues

Risk	**Comments**
	through performance, if the contract is large or contentious .
Right to Information processes	Can be a means of obtaining disclosure without the need to pursue the processes required in litigation, and can be a precursor to litigation. Ensure that manage requests appropriately.
Legal professional privilege	Both internal and external lawyers. For example ensure that non lawyer to client documents, do not contain summaries of advices. Clear differentiation of project management and legal advice roles for officers involved.

Key risk areas in terminating or enforcing the contract.

Risk	**Comments**
Express termination provisions, and show cause provisions	Follow the requirements to the letter. Strict compliance is necessary e.g. see recent decision in *Vision Eye Institute Ltd v Kitchen* [2014] QSC 260 which is an example of where the failure to comply strictly with time periods in a notice to remedy and termination procedure provided for in the contract, resulted in the purported termination being ineffective.
Service on correct entity at correct address	Basic but can be easily overlooked or wrongly done.
Securing assets	Consider whether injunctive relief necessary and available
Public comments / political dimension	Contain the comments to just one spokesperson; coordinate with the Minister's office / media liaison officer.
Carefully consider /obtain advice on technical issues of whether or not	For example, necessity to ensure ready and willing to perform if the breach is on the other side. If

Risk	**Comments**
contract in default and by whom;	repudiation involved important to actively decide whether or not to accept the repudiation.
Review terms of any guarantees, security provided, indemnities	Early notification of any third party guarantor / surety may be a contractual requirement.
Confidentiality provisions and legal professional privilege and RTI	With litigation potentially pending maintaining LPP is particularly important. Confidentiality provisions should be reinforced with persons and other entities involved. In the lead up to litigation beware of fishing RTI applications and maintain any LPP and commercial in confidence to the extent possible.
Consider power of the government agency to have contracted – is it valid and enforceable?	Source of constitutional power is important. Commonwealth is more constrained through the Commonwealth constitution and recent decisions of the High Court on its application, than are the States. Local government remains a creature of statute, so its legislative basis needs to be considered. State has broad power to rule for the "peace order and good government of" the State[4], subject to the Commonwealth Constitution.
Consider executive necessity; non-fettering of future legislative action or exercise of a power or discretion granted under legislation; and legislative overriding of part or all of the contract.	Further discussed below.

[4] Constitution Act 1867 s.2

Executive Necessity, non-fettering and legislative overriding

In the time available, I thought it would be most beneficial to focus on a couple of cases relevant to the relatively rarely invoked, but fundamental principles which go to the heart of what makes contracting with government, a somewhat tricky path for both the government and the contractor.

I am indebted to N Seddon, the author of *Government Contracts, Federal, State and Local*[5], for the categorisation of these principles, (which have been described in various terms over time) as follows:

1. *Executive necessity*. This is the classic reason for a government to break a contract and avoid damages i.e. that it is necessary for the government to do so for urgent or substantial policy reasons relating to the "*welfare of the state*"[6]. It was a principle that was invoked in the landmark case of *Amphitrite*, in circumstances of war. However, the principle has more recently been criticised, and some commentators and members of the judiciary have sought to read it down, so as to be available only in extreme cases[7]. Currently the reach of this principle is uncertain.

2. *The primacy of existing legislation*. This principle recognises that the executive of the government cannot validly contract out of an existing statutory obligation or fetter the exercise of discretion granted under an existing law. To the extent that it purports to do so the contract will be wholly or partly unenforceable. There is quite a body of case law under this category which many of you will be familiar with.

3. *The rule against fettering future executive action*. The executive may in some cases be unable to bind itself by contract as to its future freedom to use executive power. Of course, a contract in a sense must always bind the executive as to the use of some of its powers, as otherwise there would be no contract at all. Again it would appear to be a question of nature and extent of the future executive action e.g. it is

[5] 5th ed, The Federation press 2013 at p248-249
[6] Rowlatt J, *Rederiaktiebolaget "Amphitrite" v The King* [1921] 3 KB 500 at 503.
[7] See Davies ACL, *The Public Law of Government Contracts*, Oxford University Press 2008 p 169 at p 180 and 181; Hogg, PW, "*The Doctrine of Executive Necessity in the Law of Contract*", (1970) 44 ALJ 154. ; *Northern Territory v Skywest Pty Ltd* (1987) 48 NTR at 46 per Kearney J.

suggested by Seddon that a contract not to change a fundamental overarching policy such as conservation of forests or waterfront reform would not be binding[8].

4. *The rule against fettering future legislative action*. The executive cannot bind itself by contract to legislate or not legislate in the future. This principle follows from the separation of powers. It was applied in *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54 and confirmed more recently in the *Port of Portland Pty Ltd v Victoria* (2010) 242 CLR 348.

5. *The primacy of parliament*. This principle recognises that the government has power to legislate to specifically override a contract. This concept is fundamental to our system of law, but is also a power by government used sparingly, due to its ramifications in the commercial world. To find that the principle applies, the courts require that the legislative intention to override or take away the contractual rights must be clear on the face of the statute[9].

   One qualification on the principle is where the rights granted under the contract are in the nature of property rights and it is the Commonwealth that is party to the contract. The Commonwealth may be liable to pay just terms for the acquisition under s.51(xxxi) of the Commonwealth Constitution. A similar entitlement however, does not exist at State[10] or local government level, unless there is a specific provision in applicable legislation (e.g. the *Acquisition of Land Act 1967*), granting such an entitlement.

   It is also interesting that in some other jurisdictions such as the United States and Canada, the overriding by legislation still constitutes a breach of contract[11]. However, in Australia, no such principle has yet emerged.

[8] At p 267
[9] *Bromley v Forestry Commission of New South Wales* (2001) 51 NSWLR 378 at390 per Mason P; See also *State of Victoria v Tatts Group Ltd* [2014] VSCA 311
[10] This was confirmed by the High Court in *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399.
[11] Seddon op cit at 261

Recent cases

I have selected two of the more recent cases to illustrate the application of some of these principles. We will then look specifically at the events in Victoria and where they may be heading.

Port of Portland v State of Victoria[12] (Portland)

Many of you may be aware of this case, as it dates from 2010. However, in the area of executive necessity and the principles outlined previously, this case is still fairly recent. It is interesting that in this case the State was successful in the two prior proceedings in the Victorian Supreme Court and Court of Appeal, in maintaining an argument that a provision in an asset sale agreement was an executive act which purported to bind the Parliament, and was therefore beyond power and void. However, ultimately the State was unsuccessful when the matter went to the High Court.

The contract (which included the State as well the port authority vendor and the purchaser) provided for adjustment to the completion amount in the sale contract in the event that certain amendments to the land tax legislation did not become law, and the purchaser was assessed to land tax at a rate higher than would otherwise have been the case. The State was a party to the contract because of a provision in legislation that authorised the Treasurer to direct the port authority to sell its assets on terms and conditions which included the making of adjustments regarding this land tax provision.

The clause in question stated:

> *"(a) The State has agreed with the Purchaser that it will effect an amendment to statutes governing the assessment and imposition of land tax to ensure that the unimproved site value used as the basis for assessment of land tax liability for the Real Property excludes the value of buildings, breakwaters, berths, wharfs, aprons, canals or associated works relating to a port.*
>
> *(b) In the event that, before or after Completion the relevant statutory amendments do not become law and, as a result of that the Purchaser is assessed to land tax on the Real Property at a rate higher than would have been the case if the*

[12] (2010) 242 CLR 348; [2010] HCA 44

> *relevant statutory amendments were law, the State will refund or allow to the Purchaser the difference between the two amounts."*

It was ultimately found by the Court that paragraph (a) was not fulfilled by the later legislative amendments which were passed to the land tax legislation. It was also accepted by the purchaser in the High Court proceedings that the principle stemming from the *Bill of Rights 1688* that the executive of government cannot dispense with statute law[13] applied. The court noted that this limitation upon the executive was incorporated in the constitutions of the State as identified in s.106 of the Commonwealth Constitution. The Court thereby confirmed the currency of this principle. However, ultimately it was not necessary to decide whether clause 11.4(a) did in fact impose an obligation on the executive which was unlawful.

The case in the High Court was really fought on the effect of paragraph (b) of clause 11.4 quoted previously. This meant that the State's argument based upon the principle 4 above, and the wording of paragraph (a) was effectively confessed and avoided by the appellant purchaser[14]. However, the exploration of the concept and review of the law since the *Bill of Rights 1688* in this case remains of interest and has been subsequently referred to by the High Court in the later decision of *Williams v The Commonwealth[15].*

In regard to the argument based on paragraph ((b), as it was found that the amending legislation passed was ineffective to achieve the purpose in paragraph (a), paragraph (b) applied. Paragraph (b) was not found to be void or ineffective due to conflict with any constitutional principle[16].

The Court said:

> *"The payments are 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". [17]*

[13] Expressed in *Portland* at p358 in its original terms in the 1688 Bill of Rights as *"no executive 'dispensation by non abstante of or to any statute or any party thereof shall be allowed but that the same shall be held void and of no effect except a dispensation be allowed' of by statute"*
[14] *Portland* at p 361
[15] [2012] HCA 23 at [135];
[16] *Portland* at p 372.
[17] *Portland* at p 360

There is some speculation by commentators however that without the legislative backing for the promise to pay, this provision may have been construed as an illegal dispensation[18].

State of Victoria v Tatts Group Ltd[19]

This case concerned the duopoly of Tabcorp Holdings Limited and the Tatts Group Limited (Tatts Group). Under an agreement entered into by the State and the Tatts Group in 1995, the State agreed to pay compensation "*for the investment in infrastructure lost*", should the then named, "*Gaming Operator's Licence*" expire "*without a new gaming operator's licence*" having been issued to Tattersalls. There was also a side letter signed by the Treasurer which was annexed to the agreement. The agreement and side letter was in addition to statutory provisions as to compensation being payable in similar circumstances.

In 2008, the Premier announced that the government would move to a new structure for the gambling industry beyond 2012 to remove the scheme for the licensing of gaming machine operators, and replace it with a scheme of "*gaming machine entitlements*" to be issued to venue operators. In 2010, 27,500 of these entitlements were created and allocated to take effect in 2012 immediately after the expiry of the existing gaming machine entitlements. Amendments were also made to the legislative provisions which had provided for compensation to be paid where no new licence was issued on expiry of the existing licence.

The Victorian Court of Appeal dismissed the appeal by the State. The Court found that the statutory amendments were effective to remove the right to compensation under statute, but the Tatts Group was successful in respect of the claim based on the compensation provided for in the contract. The State had sought to argue that the interpretation of the agreement should be that compensation provision was not triggered, since the licences referred to in the agreements no longer existed, and the reference in the agreement to "*a new gaming operator's licence*" should not be taken to include reference to the new licencing regime. On the basis of the interpretation of the agreement and having regard to the context within which it was entered into, the Court found that the compensation provision in the contract did have application.

The case is interesting in a number of respects:

[18] N Seddon, *Government Contracts Federal, State and Local* 5th ed, The Federation Press 2013 at p 271.
[19] [2014] VSCA 311;

Firstly, the Court decided that the amending legislation which introduced the new licensing regime demonstrated "*a legislative determination to eschew any idea of Tatts once having had a right to payment which the change in the regime has now denied it*".[20] The Court also found in the legislation a "*statement of the will of Parliament*"[21] that Tatts was not and never had anything more than a right to payment under the legislation when the gaming licence in the form issued to it was issued to someone else. However, despite this the Court was prepared to give a broad interpretation to the words in the contract to find that the contractual compensation was payable, even though the statutory compensation was not.

Secondly, the court made some fairly blunt remarks regarding the State's treatment of the Tatts Group in passing the legislation and removing the compensation provisions:

> *"The emasculation of the right to compensation which has now been accomplished by the enactment of s.3.4.3 may do little to enhance the State's reputation for reliability and commercial morality in its dealings."*[22]

Thirdly, a side letter signed and attached to the 1995 agreement contained the following statement:

> *"The Government recognises the importance of the gaming industry to the Victorian economy and in recognition of that, it will continue to deal with the Trustees reasonably and in good faith"* (underlining added)

The Court found, that despite an earlier provision in the letter which indicated that the "*statement of principles in this letter does not bind this Government or future Government*", that the letter, and in particular the last paragraph, meant that an express good faith term was included in the contract. The State had admitted an implied term of cooperation. However the Court also found that neither the implied term of cooperation nor the express term of good faith, were effective to impose on the State an obligation to ensure or to attempt to ensure that a particular outcome occurred (e.g. retention of the right of Tatts to the payment of compensation), if that was not the correct construction of the contract. The Court found that the application of these terms was "*confined to the process of government action*"

[20] Tatts Group at p 30
[21] Ibid at p 30
[22] Ibid at p 32

and may have been relevant for example, if there had been a failure by the government to consult[23].

It was also ultimately unnecessary for the Court to consider the State's argument that the good faith term would be void or unenforceable as a fetter upon legislative intention.

Therefore beware of concluding paragraphs in side letters, (or more importantly the scope of your rider as to it not being binding on future governments) and if you want to override a contract, do so in express terms in the legislation!

There is a note in the press from 13 February 2015 that the government is seeking leave to appeal this decision to the High Court, so we may obtain a further clarification of the law in this area from the High Court in due course.

East West Link

As indicated at the outset, I have been following with some interest over the last few months the Victorian East West Link situation and the issues that have arisen. As I have not sourced any of this information from inside sources and do not have a copy of the contract in question my comments are purely based on publicly available information and my speculation. The issues being discussed are still to be resolved, so caution must be exercised in relying on any comments made in regard to this matter.

The contract for the building of the East West Link (a 6.6 km freeway) has apparently had a long period of gestation, and was supported by previous Labor and Liberal governments in Victoria. However, on the eve of the signing of the contracts in 2014, the Labor opposition released a statement that it would not proceed with the contract if elected. However, the then Liberal government still signed the contract. In addition, two months before the election (which was held on 29 November 2014), the former Treasurer Michael O'Brien signed a "secret" side letter reassuring the East West Connect consortium that it would receive its compensation money, whether or not a valid contract existed, should the project not proceed.

The Labor party campaigned throughout the election campaign on the basis that the contract was "*not worth the paper it was written on*" and it would not go ahead with the project once in office. However, it was apparently unaware of the side letter until after it came to office.

[23] Ibid at p82-83

After gaining government, the new Premier, Daniel Andrews has continued to maintain that the East West Link would not proceed. In January, he was reported to have played down any concerns of sovereign risk, saying it was "not an issue"[24].

Premier Andrews also announced that he would make public all documents relating to the East West Link contract. To date he has released all of the tender documents, but attempts in Parliament by the opposition to have the contract tendered in Parliament have failed. No doubt the Premier is wanting to honour confidentiality arrangements while negotiations continue. However, even an advice from the Solicitor General, Allan Myers QC regarding the power of the government to enter into the contract has been released.

The first stage of the project is reported to have required funding of $6.8 billion of which $2 billion was to be contributed by the State of Victoria, $1.5 billion by the Commonwealth and $3.2 billion by a consortium made up of QIC (30%), Lendlease (30%), a UK investor John Laing (30%), and construction specialists Bouygues and Acciona each holding 5%.

Some of the key aspects of this saga are:

- There is criticism of both sides of politics i.e. that the Liberal government shouldn't have proceeded to sign such a substantial and contentious contract when the election was to be held in the next few months; but also that the Labor government had previously supported the project and should honour a commercial commitment made by a previous government.

- The financial commentators are becoming increasingly strident in their criticism of the Victorian government and the implications for the Australian governments generally for world finance, credit ratings and future commercial dealings.

- The compensation has been estimated to be between $300 million and $1.1 billion, depending upon whether the provision in the contract is honoured, or the State merely compensates for what has been spent to date.

- Commentators have also not ruled out the possibility of a legislative override – although this would appear to be a last resort.

[24] The Age, 21/1/15 per Richard Willingham article "*Daniel Andrews won't rule out using parliament to block East West Link compensation*".

- There are at least 3 QC's who have reportedly provided advice on the issue of the validity of the contracts. The Solicitor General, Allan Myers QC reportedly advised that the contracts were valid, despite the litigation by the councils. There is however, other advice reportedly from Ray Finkelstein QC that the contracts may not have been in accordance with the Major Transport Project Facilitation Act and a planning approval may be invalid[25].

The government of Victoria is, as a consequence of the continued uncertainty regarding the project, being besieged on all fronts by:-

- litigation by at least 3 councils not happy with the original proposal of East West Link, and an apparently late decision to acquire land within the Council areas;

- litigation by the consortium, East West Connect, regarding a planning approval that was required in order that the project could proceed;

- the Commonwealth, due to the fact that it had contributed $1.5 billion to the project. It has made statements earlier this year that it still wanted to proceed with part of the project, or will be seeking overall return of $3 billion in roads funding;

- the financial press. Robert Gottliebsen has called for the Commonwealth to honour the compensation arrangements, if the Victorian government does not, in order that the world capital and construction markets should not "blackball" Victoria for future projects. He has also pointed to the danger to Australia's AAA credit rating, if the Victorian Government should fail to honour the compensation required to cover break fees.[26]

- the tunnelling companies: The firm Arnold Dix, a specialist international tunnel construction advisor, has written an open letter to the Premier imploring the Victorian government not to make retrospective legislation to remove or change the State's obligations under the contract. The firm warns

[25] Herald Sun 24/11/14 per James Campbell.
[26] The Australian, 5 March 2015 p 23 "Victoria bound to creditor links".

of an impact on the perception of Australia's sovereign risk and the large direct and indirect costs of such an action[27].

- the auditor-general is also proposing to investigate, once the negotiations regarding the future of the contract conclude.

The merits of whether or not the East West Link is a good project or not for the State of Victoria are not relevant for the purposes of this discussion. However, what is of interest is just how quickly and easily in the space of a few months, a State can bring itself into some disrepute in the handling of a commercial contract. The comments made in the Tatts Group case referred to earlier, appear apposite.

There is also relevance to Queensland due to the fact that QIC is a 30% shareholder in the consortium, and will therefore be involved with any discussions as to compensation, should the contract be terminated.

I would think that the State of Victoria, the consortium and their advisers will all be taking another look at the principles outlined earlier. It would appear unlikely that this could be treated as a classic executive necessity matter, as roads policy is perhaps not so central to the welfare of the State as war, or other such devastating events. Accordingly, much will depend upon the drafting of the contract. The issue may be further clouded by the existence and contents of the side letter (similarly to the complications that arose in the Tatts Group case).

The State may have reason to bargain for a reduction on the contracted compensation on the basis that it has the ultimate power to override the contract by legislation in any event; the short length of time that the contract has been in effect, and the fact that the consortium was aware from the time of signing of the contract, that the government policy on this matter could change within a few months of signing.

On the other hand, as indicated by the decisions in *Portland* and the *Tatts Group* case, the Courts have indicated a willingness to take account of the merits of the matter, and hold the State to bargains struck regarding compensation.

[27] ibid

In any event, I suggest that you may wish to keep abreast of developments in this matter, as further case law may eventuate of relevance to the contentious area of executive necessity and related non-fettering principles.

Conclusion

In these current times, of apparently greater frequency of changes of government, it is timely to review the issues surrounding commercial contracting with the government, and particularly those principles which are key to the allocation of risk between the parties.

This volatility in government and particularly the attitude of government to honouring contracts from previous administrations, can have substantial impacts on the ability of Australian State and Federal Governments to negotiate and finance future large commercial contracts in the future.

Hopefully the East West Link matter will be resolved without the need to resort to interminable litigation (even though that may be in the interests of my colleagues in Victoria). It is also hoped that the overview today may assist you in some small way to better provide for, manage or resolve the risks of commercial contracting in a government context.

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