THE ENFORCEABILITY OF MINERAL DEVELOPMENT AGREEMENTS TO WHICH THE CROWN IN THE RIGHT OF A STATE IS A PARTY

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In this article Mr McNamara examines the various benefits that accrue to developers from concluding franchise agreements with relevant governments, as opposed to those accruing under regular statutory mining leases. He also discusses the various restrictions, constitutional and political, that affect the ability of such agreements to bind executive action. The article focuses primarily on the problems faced by the private contracting party in securing the observance by the government of the rights and obligations created by such agreements. Developers often seek to obtain legislative ratification of such agreements and Mr McNamara suggests some possible forms that such ratifications should take if the agreement is to be made unalterable without the consent of the private party and which is not contrary to public policy. It is clear that this objective is difficult to realise. The article concludes with some advice to developers regarding the sorts of considerations it is relevant and wise to bear in mind when negotiating mineral development agreements.

In the mining and petroleum production industries, it has become quite common for producers to enter into franchise agreements, to which State governments are parties, under which particular resource development projects are to be authorised and facilitated. These agreements seek to deal in a comprehensive way with all the conditions imposed by law on the implementation of the project concerned. Their function is to put the developer into a privileged position and to clear the path in the way of a project so that it may all the sooner enter the production phase. They authorise the circumvention of ordinary development procedures which may be cumbersome and time-consuming. For this reason, agreements of this kind are often referred to as "fast track" agreements. Entry into such an agreement is a very attractive alternative to the development of a project pursuant to an orthodox mining or petroleum production tenement, such as a licence or lease coupled with a

miscellaneous purposes licence or a retention lease. The advantages of a fast track agreement will be referred to shortly. Agreements of this nature (which, so far in Australia, have almost exclusively authorised on-shore mineral or petroleum production ventures — two exceptions are the North West Gas Development (Woodside) Agreement of 1979 and the Petroleum (Barracouta & Marlin Fields) Agreement of 1967) are almost invariably sanctioned by a special Act of Parliament and are sometimes given the force of law. For that reason, a layman might suppose that they are inherently "more binding" on the State than an ordinary contract would be. One of the purposes of this article is to show that this supposition is fallacious.

1. Advantages of a Franchise Agreement

When a large scale project is about to be implemented, the producer faces a number of factual and legal hurdles.[1] If the project is to be undertaken in a remote area, a physical infrastructure must be created: facilities for power generation and supply, water reticulation and transportation must be installed; a town may need to be constructed; public roads and airfields may need to be opened. Private land may need to be acquired. It may be necessary for the State government to exercise special powers, such as powers of resumption or compulsory acquisition or its powers over Crown land. Mining titles must be obtained. If the anticipated life of the project warrants it, special tenements capable of enduring beyond the lifetime of an orthodox mining tenement may be needed. The co-operation of local and state government agencies will be essential. Special rights to water, which is indispensable to mining, may be required. Particular environmental protection standards and procedures may be desirable. A developer will not wish to commit itself, legally or financially, to a project until most of these matters have been made the subject of a binding agreement with the State. In addition, special royalty and taxation measures may be called for. In extraordinary cases or in jurisdictions where trespass to private land is not a criminal offence peculiar laws as to the physical security of mining sites may be required. Native rights over land, or minerals, and sacred sites must be dealt with. The most efficient mode of dealing with these matters and of obtaining all consents required by law in a fell swoop is by way of a franchise agreement.

Agreements of this kind have advantages over a regular statutory mining tenement, such as a lease. The title of a statutory leaseholder is not indefeasible. Except in Victoria, the title even of a registered leaseholder is not secure in the same way as the title of a registered proprietor of land held under the Real Property legislation.[2] Indeed, in some ways, a mining lease, even after registration, is a less satisfactory security from the point of view of a lender than are other kinds of Crown leases, such as perpetual leases, granted under the Crown lands legislation. In addition, a statutory mining lease is subject to cancellation and forfeiture; restrictions are imposed by law on dealings in such leases and in shares in the capital of lessee corporations. The maximum authorised term of a statutory mining lease may be insufficient to allow the thorough working of a mine or well. Admittedly, in some jurisdictions, registered leaseholders have an express statutory right of renewal, subject to due compliance with the covenants in the lease.[3] However, the ordinary principles of landlord and tenant, including the rules relating to waiver and

estoppel, are probably not applicable to this right of renewal; certainly, where the lessor is the Crown or a Crown agent, the right of renewal cannot be enforced by an order of specific performance except as authorised by statute.[4] For these reasons, the right of renewal might not avail the lessee. The general mining legislation of most States, despite recent renovation, still bears the stamp of laws devised 120 years ago and is in many ways inappropriate to large scale developments, especially those proceeding on borrowed funds. Certainly, a franchise agreement offers scope for special arrangements to secure the interests of lenders.

For these and other reasons, franchise agreements commend themselves to developers of major projects in remote areas. One of the earliest such agreements entered into in Australia is the indenture ratified by The Broken Hill Proprietary Company's Indenture Act 1937-1940 (S.A.). Since then, several dozen indentures have been entered into and authorised by law. Most of these relate to developments in Western Australia. Only in New South Wales do these agreements fail to find favour.

2. Legislative Sanction of the Agreement

A developer entering into an indenture or franchise agreement with a State or with one of its instrumentalities which imposes mutual obligations enforceable over a long period would be well-advised to insist that the franchise agreement contain provisions which oblige the Crown to seek legislative sanction of the indenture and which, in addition, suspend the developer's undertakings pending proclamation of a ratifying Act, for it is almost certain that the Crown in the right of the States has no power, without general or specific legislative authority, to enter into onerous contracts of the order of common form franchise agreements. It is often said that the Crown has no inherent power to enter into onerous contracts, be they contracts of procurement or of disposition, unless the contract relates to the private estate of the sovereign or is entered into in the ordinary and necessary course of government administration.[5] This supposed rule of contractual incompetence is supported by a number of older authorities[6] but has been trenchantly criticised by writers.[7]

The rule of incompetence is probably not applicable at all to the Crown in the right of the Commonwealth. Section 61 of the Constitution, which vests the executive power of the Commonwealth in the Queen, has been interpreted to authorise the Crown in the right of the Commonwealth to enter into contracts without further general or specific legislative sanction, at least where the contract is one which the Commonwealth Parliament could, by a valid law, authorise.[8] Nor is it applicable to the Crown in the right of the States of South Australia or Victoria,[9] or to agreements entered into in Western Australia since 1979 to which the Government Agreements Act is applicable. Certainly, the rule has been rarely invoked by the Crown. There is so much uncertainty as to its scope and application that grave doubts must be raised as to its very existence.[10] However, as the risk of invalidity of a Crown agreement not authorised by statute is borne by the private contracting party, the developer and its financiers would be prudent to require legislative authorisation of the agreement, as a condition of the developer's own obligations.

3. Agreements as to the Exercise of Statutory Discretionary Powers

Whether or not there exists a general rule disabling the Crown in the right of a State from entering into onerous contracts without parliamentary authority, there are a number of other principles of law peculiar to Crown agreements which, because of the obligations normally undertaken by the Crown in a common form franchise agreement, must be kept in view when an indenture is being negotiated. First, there is said to be a rule that the State cannot, when acting through the Crown or one of its ministers or other agents, enter into a contract with a subject which purports to control in advance the future exercise of a statutory discretion which exists for the benefit of the general public. The rule has been expressed thus by the Privy Council in relation to the Mining Acts 1898 (Qld):

> ...the freedom of the Minister or officer of the Crown responsible for implementing the statute to make his decisions, or use his discretions, cannot validly be fettered by anticipatory action: and if the Minister or other officer purports to do this, by contractually fettering himself in advance, his action in doing so exceeds his statutory powers...This rule is particularly applicable as regards the grant of mining leases, as to which Ministers are given wide powers coupled with discretions to be exercised in the public interest.[11]

The practical effect of the rule is that a Minister or Director of Mines having a statutory discretion whether to grant or withhold a mining lease or other production tenement cannot, without further statutory authority, enter a binding agreement for the grant of a statutory tenement. In other words, the rule, as articulated, is one which prevents the formation of a valid contract. In all Australian jurisdictions, such a discretion is conferred by the mining Acts (in relation to exploration licences and mining leases) and by the petroleum legislation (in relation to exploration titles).[12] This principle, which has been accepted by the High Court[13] and by a number of other appellate courts,[14] has been held to apply both to a delegated statutory power to make laws[15] and to a statutory decision-making power.[16]

The nature and origin of this disabling principle are obscure[17] and it may not survive in its presently expressed form, given recent changes in judicial attitudes to government contracts. Dr J. D. B. Mitchell regards this principle as an instance of a fundamental rule that no contract will be enforced where, as a result of its enforcement, some essential government activity would thereby be seriously impeded or rendered impossible,[18] that is, as an instance of the doctrine of freedom of executive action. This doctrine is, on the view of Dr Mitchell, the product of a recognition by the courts that the general duty and power of the State to act effectively in the public interest must at times override the sanctity of contracts.

There are a number of ways in which this disabling principle can be rationalised within general legal rules. On one view, the principle can be characterised as an aid to the construction of agreements, with the result that where it is attempted to make a contract in anticipation of the exercise of a statutory discretion, the contract is subject to an implied term that it may be varied or revoked by the repository of the discretion. This view smacks of artificiality and is difficult to reconcile with the rules as to implication of contractual terms.[19] Moreover, it is incompatible with the conventional mode of expression of the disabling principle which is that contracts made in breach of it are void from the outset and not merely voidable or unilaterally

variable or revocable.[20] It is quite clear from the authorities that the repository of the discretion can avoid the attempted contract arbitrarily or unexaminably, without the necessity to show a public interest which requires the termination of the contract. To some extent, this tells against Dr Mitchell's rationalisation of the principle.

On another view, the disabling rule is merely a principle which guides the courts in the exercise of their discretion whether to grant a remedy in the event of breach by a public authority of an admittedly valid contract. Where the grant of a remedy, be it an award of substantial damages or a coercive order, would be contrary to the public interest, then the court may, on this view of the rule, withhold the remedy in deference to the responsibilities of the executive branch of government. This view has never been articulated by the courts, although there is oblique authority for it as far as concerns coercive equitable remedies.[21]

The better view is that the supposed disabling rule is not a rule of law at all but merely a practical consequence of the true interpretation of the content of a particular statutory power. On this view statutory powers can, for present purposes, be divided into two categories. On the one hand, there are powers exercisable for the benefit of individuals. Some such powers are exercisable gratuitously (for example, the power of a Minister to grant a social security allowance or the power of a mining registrar to grant relief from the strict operation of a regulation[22]); others are exercisable in the performance of contracts of sale, of procurement, and of services (for example, the power of the Director of Australia Post to carry mail for reward and the power of the Director of Telecom to install and maintain telephone services). It is clear that the exercise of a power of this kind is not revocable without contractual or statutory authority or, in other words, that the supposed disabling principle under discussion is not applicable to statutory powers of this nature, because the donor of the power (that is, the Parliament) has authorised its exercise once only. Such powers are discharged by their exercise and may, according to their nature, be discharged by a contract.[23] Generally, law making powers could not fall into this category.

On the other hand, there exists powers (whether of law-making or of decision-making) exercisable for the public benefit. Laws creating powers of this kind should, in order to give full effect to Parliament's intentions and in order to enable the executive to act freely in the public interest, be interpreted so that any effective exercise of the power will *by virtue of the statute* be revocable or variable or exercisable anew by the repository of the power.[24] In other words, it is the statute conferring power which impliedly authorises its arbitrary review and exercise anew by the repository or indeed an arbitrary or unexaminable refusal to exercise it as promised; it is not the case that the contract is vitiated by an *a priori* rule of law. The cases on the principle under discussion which decide that such powers cannot be fettered by contract are consistent with this view except that, on the view now being advanced, contracts made in relation to discretions are valid albeit unilaterally revocable and variable whereas, on the orthodox view, they are beyond power and therefore void.

Whatever view is taken of this principle, it is clear that revocations or variations of the mode of exercise of a statutory discretion or refusals to exercise it as agreed, are not actionable, if the discretion is exercisable for the public benefit and not for

the benefit of an individual or class of individuals. On the orthodox view, this is because there is no valid contract governing the exercise of the discretion. On the view advanced above, the lack of actionability follows from the rule that conduct authorised (expressly or implied) by a statute is not actionable.[25] The critical question in each case will be, is the statutory power one which will be exhausted by its exercise, or is it one which the donor of the power intended the donee to avail itself of or reconsider whenever the donee perceives that to be in the public interest. Only a course of decisions will enable lawyers to distinguish between discretionary powers exercisable for the public benefit and those powers exercisable for the benefit of an individual. Clearly, however, the statutory power to grant mining and petroleum production tenements is in the "public benefit" category.

Except perhaps in South Australia and Victoria, and in Western Australia (in the case of agreements covered by the Government Agreements Act 1979 (W.A.)), the end result in fact of the various formulations of this disabling principle is the same, namely, that a contract by which a repository of a statutory discretion in the public benefit category undertakes to exercise that discretion in a particular fashion is unenforceable by action unless the undertaking is authorised by statute.

In South Australia and Victoria, the Crown Proceedings Legislation[26] declares that the Crown shall be liable in respect of any contract made on its behalf in the same manner as to the same extent as a private person of full age and capacity is liable. If the orthodox view of the principle now being discussed is accepted, as it was by the Privy Council, then these provisions do not change the position of the Crown, for there is no "contract" on which the provisions of the Crown Proceedings Act can operate.

On the other hand, if the alternative view contended for is correct, then arguably the Crown Proceedings legislation in these two jurisdictions has subjected the Crown in the right of those two States to an actionable liability where a Crown contract relating to a discretion is repudiated. The effect of the Government Agreements Act 1979 (W.A.) is to require the agreements to which it applies to be given effect according to their terms. Accordingly, the Act contains a blanket authority enabling the Crown to fetter its future discretions in a way which will create an actionable liability.

At all events, the private party to an agreement which fetters any statutory discretion vested in the State should insist that the Act ratifying the agreement authorise and require the donee of the power to exercise it in the fashion stipulated for in the agreement.

A second principle which those acting for a developer must bear in mind is the rule that when a statute regulating the creation or disposal of statutory interests prescribes a mode of exercise of a statutory power that mode must be followed and observed and, if the statute contemplates the making of decisions, or the use of discretions at particular stages of the statutory process, those decisions must be made, and discretions used, at the stages laid down.[27] Clearly, this principle (which does incapacitate the Crown, contractually) applies to the mining and petroleum Acts in force in all jurisdictions in Australia which are intended to be an exclusive code for the creation, by the State, of mining and petroleum production tenements.

Generally, some of the obligations of the Crown under a common form mining franchise agreement will be inconsistent with one of the limbs of this principle and for that further reason, the Crown's contractual obligations should be expressly authorised by the ratifying statute.

It is quite common for indenture agreements either to require the State to perform acts which are not authorised by the general law or to permit the developer to take steps prohibited by general law. For example, planning and development legislation, water legislation and taxation measures are frequently overridden by indentures. In these aspects also, the franchise agreement must, in order to be enforceable by the developer, be ratified by Parliament.

4. Remedies Against the Crown

At common law, the Crown in the right of the State could not be sued in the ordinary courts in the event that it breached a contractual obligation.[28] This immunity has been abrogated by statute in all States of Australia.[29] In addition, it was once supposed that, at common law, the Crown could not without specific or general parliamentary authority, enter a contract which required the payment of public funds.[30] This view is no longer accepted[31] and in any event would apply to a mining franchise agreement only where the State undertook to contribute to the cost of creation of an infrastructure, or to pay a bounty or other subsidy. The true rule is that contracts to which the Crown is a party could not, at common law, be enforced by execution of an order for damages except out of funds provided by the Parliament; in other words, the rule is one affecting the enforcement of judgments, not the validity of contracts. Even in its application to the enforcement of judgments against the Crown, the rule no longer has any substantial operation in South Australia, Victoria and Western Australia, where the Crown suits legislation contains standing appropriations in satisfaction of judgment debts.[32] In the other States, apart from Tasmania, execution against public property of the Crown is authorised, subject to exceptions.[33] Accordingly, no special provision in indentures or ratifying legislation is necessary to meet these common law rules as to awards of damages.

Injunctive relief against the Crown is available only to the extent authorised by statute. The Crown Proceedings legislation in all jurisdictions in Australia, except Tasmania, authorises both the grant of an injunction and decrees of specific performance against the Crown.[34] In addition, the Judiciary Act[35] authorises the High Court to issue injunctions against defendant States.

5. The Form of Parliamentary Sanction

Should legislative ratification of an indenture be necessary or desirable, the question arises by what form of statutory words should parliamentary approval be signified? In this context, State practice varies. In Western Australia large numbers of indentures have simply been "authorised" or "sanctioned", before or after execution.[36] In some States, the ratifying Act commonly provides that the indenture "shall have the force of law" or "shall take effect as if enacted in this Act".[37] Probably all that is necessary is a provision in the ratifying Act declaring that the Crown is bound by the indenture and by the ratifying Act, that the Crown or the

responsible Minister is, by force of the Act, authorised, empowered and required to carry the indenture into effect and that the indenture is ratified and approved.[38] The effects of these various formulae have been analysed by Professor Campbell.[39]

The advantage to the developer of insisting that the ratifying Act "require" the Crown to perform the indenture is that the Court may accept that the Crown's obligations are elevated, from the status of contractual duties, to the status of statutory duties and, that being the case, a coercive remedy may be available against the Crown, contrary to common law principles.[40]

6. Legislative Variation of Contracts

On entering into a valid contract, the Crown becomes subject to the ordinary rules of contract. It is a fundamental rule of contract law that a contractual term cannot be varied except by the mutual consent of the parties. Any purported unilateral variation of a contractual term would, according to the circumstances, be non-performance, repudiation or breach. Thus, when the Crown becomes a party to a contract, the Crown has no right unilaterally to alter the contract, in the absence of statutory authority or an express contractual stipulation to that effect.[41] However, when a Crown contract is sanctioned by statute, or given statutory force, a principle of consitutional law comes into play, namely, that the parliament (as the legislative branch of the State) reserves the power to vary its own legislation, by ordinary subsequent enactment.[42] Put another way, an Act of Parliament is alterable by an ordinary Act of Parliament unless the earlier Act is somehow entrenched, that is, unless the earlier Act itself or another statute either stipulates some exclusive and binding "manner and form" in which repealing or amending legislation must be enacted or imposes a binding and exclusive condition on the Parliament's power to make laws.

There is no doubt that this principle of constitutional law is, from the point of view of the developer, the main defect in indentures ratified by statute. Such indentures become alterable at the will of the Crown while the executive commands a majority in the Parliament. No alteration by Act of State Parliament of the obligations created by the agreement would be actionable.[43] Compensation would not necessarily be due in the event of alteration of a contract by a later law. The Parliament could even enact a law locking a developer into an agreement, as modified; that is, Parliament could override any express contractual right on the part of the developer to terminate the agreement in the event of modification of its terms by Act of Parliament, such as clause 2(4) of the Cooper Basin Indenture.[44]

It is here, of course, that constitutional theory and political reality part company. Save in the most unusual circumstances, no government bound by an indenture given statutory force would seek unilaterally to vary the indenture so as to deprive the producer of vested rights, without compensation, or so as to impose significantly greater obligations on the developer, except insofar as concerns taxation or royalty rates. But the artificial inventiveness of lawyers knows no bounds, and it is intriguing to speculate on the question how can an agreement (particularly a politically contentious one), to which the Crown in the right of the State is a party and which has been given force and effect by statute, be made unalterable without the consent of the private contracting party in a manner not contrary to public policy?

7. Express Entrenchment of Indentures

First, it may be convenient to examine two Australian cases dealing with unsuccessful attempts to entrench development agreements. The earlier of these is *Commonwealth Aluminium Corporation Ltd* v. *A.G. (Qld)*.[45] This is the only Australian decision dealing with an attempt to entrench a mineral project authorisation agreement. In 1957, the plaintiff (Comalco) had entered into an agreement with the Premier of Queensland, on behalf of the State, which was intended to facilitate the exploitation by Comalco of a bauxite deposit in Northern Queensland. The State's participation in the agreement was authorised by an Agreement Act, enacted in 1957. That Act contained the following sections:

s.3 Upon the making of the Agreement the provisions thereof shall have the force of law as though the Agreement were an enactment of this Act.
The Governor in Council shall by Proclamation notify the date of the making of the Agreement.

s.4 The agreement may be varied pursuant to agreement between the Minister for the time being administering this Act and the Company with the approval of the Governor in Council by Order in Council and no provision of the Agreement shall be varied nor the powers and rights of the company under the Agreement be derogated from except in such manner.
Any purported alteration of the Agreement not made and approved in such manner shall be void and of no legal effect whatsoever.
Unless and until the Legislative Assembly, pursuant to subsection four of section five of this Act, disallows by resolution an Order in Council approving a variation of the Agreement made in such manner, the provisions of the Agreement making such variation shall have the force of law as though such lastmentioned Agreement were an enactment of this Act.

The Agreement itself contained clauses prohibiting its variation without the plaintiff's consent. In addition, it fixed a royalty rate payable on bauxite won by the plaintiff. In 1974, the Queensland parliament enacted the Mining Royalties Act. Pursuant to a regulation-making power conferred by that Act, the Governor proclaimed regulations which, if valid, would have had the effect of increasing royalties payable by the plaintiff, whether the plaintiff consented or not.

The plaintiff claimed a declaration that the Mining Royalties Act and the Regulations thereunder were invalid either absolutely or insofar as they purported to apply to the deposits covered by the Agreement, and consequential injunction relief. The defendant demurred and the matter came before the Full Court which, by a majority, upheld the State's demurrer. The assenting justices gave somewhat different reasons, which must be read in the light of the plaintiff's submissions. The plaintiff accepted that, because the Constitution Act of Queensland was not itself (for the most part) an entrenched or unalterable law, the Parliament could alter it simply by enacting inconsistent legislation; however, the plaintiff argued that, in enacting section 4 of the Agreement Act, the Parliament had passed a law respecting the Constitution, powers and procedure of the Parliament which required amending legislation to be passed in a certain manner or form, namely, with the consent of Comalco and not otherwise. In this regard, the plaintiff relied on the Colonial Laws Validity Act (1865) (Imp.),[46] section 5, which, in its relevant respect, provided as follows:

5. Every representative legislature shall...have...full power to make laws respecting the Constitution, powers and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament...or Colonial law for the time being in force in the said colony.

On the plaintiff's submission, both the Agreement Act and the Mining Royalties Act 1974 (Qld) were laws respecting the Constitution, powers and procedure of the legislature. Accordingly, the plaintiff claimed that the Mining Royalties Act 1974 (Qld) and regulations were, in their purported operation on the Agreement Act, repugnant in effect to the Colonial Laws Validity Act (1865) (Imp.) and for that reason void.

Wanstall S.P.J. held that, to the extent that section 4 of the Agreement Act 1974 (Qld) sought to restrain Parliament from enacting inconsistent legislation, it was invalid unless it could be interpreted as a manner and form provision.[47] To accept that interpretation, one would have to accept that, in enacting section 4, Parliament had set up a new organ (namely Comalco, the Minister and the Governor in Council) having exclusive legislative power over the Agreement. His Honour was of the view that any law having this effect would be invalid, presumably because such a law would deprive the Parliament of "full power to make laws" and would therefore fall foul of the section 5 of the Colonial Laws Validity Act (1865) (Imp.), in its positive function. Further, His Honour held that section 4 of the Agreement Act did not purport to prescribe a manner and form in which amending legislation could be passed; rather "its only purpose and intention qua the legislature is to prohibit future *legislation* on that subject *in any manner or form*".[48] On His Honour's view, no law which deprived a Parliament of legislative power over a specific subject matter could be characterised as a manner and form provision.[49] However, the prohibition in the Agreement Act was, on His Honour's interpretation, addressed not to the legislature at all, but to the Executive. His Honour did go on to state that, on the assumption that the Agreement Act did amount to a prescription addressed to and binding on the legislature, depriving it of power over a subject matter, then the Mining Royalties Act 1974 (Qld) would nevertheless be valid because it would qualify as an exercise of the positive power conferred by section 5 of the Imperial Act.[50] On the view of Wanstall S.P.J., a law which prohibited the Parliament from exercising its powers over a certain subject matter, by vesting power over that subject matter in another organ, could never be categorised as a manner and form provision, because it could not be regarded as imposing a condition on the exercise of Parliament's powers.[51]

The other assenting justice, Dunn J., agreed with Wanstall S.P.J. that section 4 of the Agreement Act was intended to operate as a fetter on executive power rather than on legislative power and that neither the authorisation Act nor the 1974 Mining Royalties Act was a law with respect to the Constitution, powers and procedure of the Parliament within the meaning of the Colonial Laws Validity Act (1865) (Imp.).[52] In addition, His Honour ventured the opinion that any damage sustained by the plaintiff in consequence of the enactment of the 1974 Act might not be cognisable by the Courts because promises contained in the agreement on the part of the Crown were essentially political in nature.[53]

Hoare J. dissented vigorously. His Honour was of the opinion that the 1957 Act had conferred on the Agreement the status of an Act of Parliament and was a law of the kind referred to in section 5 of the Colonial Laws Validity Act (1865) (Imp.); that it created a special and exclusive manner or form in which amending legislation should be passed; and, that manner and form not having been complied with, the 1974 Act could not validly vary the Agreement Act.[54] In His Honour's view, because the 1974 Act conflicted with the Agreement Act, it was necessarily a law respecting the Constitution, powers and procedure of the Parliament. Hoare J. was the only justice to accept that the Agreement Act contained prohibitions addressed to the Parliament. It is noteworthy that His Honour stated that while he was prepared to uphold this particular Agreement Act, he would not necessarily uphold every provision requiring the consent of a private person to legislation varying an agreement.[55]

The second case in which litigation turned on an indenture that was sought to be made unalterable without the consent of the private contracting party was *West Lakes Ltd* v. *South Australia*.[56] There, in essence, the plaintiff had entered into three successive indentures with the then Premier of the State and the Minister of Marine (in his capacity as a Crown corporation sole) relating to the development of the West Lakes area of metropolitan Adelaide as a residential area. The first indenture had been rescinded by consent and only the second and third were the subject of the litigation: in fact, the third indenture operated merely to vary the second, so reference will hereafter be made to a single indenture, namely the second as varied by the third. The indenture was sanctioned by the West Lakes Development Act 1965-1970 (S.A.), which provided in section 3(1) that the indenture should have effect as if the provisions were expressly enacted in the Act. The Act and the indenture together contained three clauses by which it was sought to prevent unilateral variation by the State of the plaintiff's obligations. First, clause 13 of the indenture provided in positive terms for the amendment of the indenture by the mutual consent of the Premier and the developer:

> 13. The Premier and the Corporation may from time to time and at any time, whether before or after the passing of the Special Act, by agreement in writing amend, and if after the passing of the Special Act then in accordance with the provisions of the Special Act and any amendment of the Special Act and the general law of South Australia, this Indenture by such additions and variations and in any manner whatsoever as may be necessary or desirable to facilitate the carrying out of the scheme or any of the provisions of the terms of this Indenture or both and all parties hereto shall thereupon be bound by all such additions and variations.

Then appeared a prohibition, addressed to the Executive; paragraph 1 of the Fourth Schedule to the Indenture provided that:

> 1. Unless and until Planning Regulations made under the provisions of the Planning Act shall explicitly and not by implication or by general rule of law revoke or vary the Regulations contained in the Fifth Schedule to the Indenture such last mentioned Regulations shall be deemed, notwithstanding the provisions of the Planning Act, to be Regulations made under the provisions of Section 36 and 79 thereof (as well as Regulations made under the Special Act) and to the extent that there shall be any inconsistency

between the Regulations set forth in the said Fifth Schedule and any such Planning Regulations or other Regulations made under the Planning Act the Regulations set forth in the said Fifth Schedule shall prevail and shall not until the final completion of the major works or the Indenture shall cease to have effect, whichever shall first happen, be revoked or varied without prior written consent of the Corporation, nor shall, without like consent, any Planning Regulations or any other regulations made under the provisions of the Planning Act revoke or vary, explicitly or by implication or by general rule of law, the Regulations contained in the said Fifth Schedule.

The regulations contained in the Fifth Schedule constituted a planning code for the area under development, different from the general planning regulations in force in the State.

Thirdly, there appeared section 16 of the Act, which provided, in part:

(1) Subject to this section and to paragraph 1 of the Fourth Schedule to the Indenture the Minister may, by regulation published in the Gazette, from time to time, add to, vary or revoke the regulations and the schedules thereto which together are entitled "WEST LAKES REGULATIONS" contained in the Fifth Schedule to the Indenture, or any of them.

(2) The regulations entitled "WEST LAKES REGULATIONS" contained in the Fifth Schedule to the Indenture shall (together with the Schedules thereto), for all purposes, be, and be deemed to be, regulations made under this Act and each such regulation and schedule shall, upon the commencement of this Act, have force and effect unless and until it is expressly, and not by implication or by general rule, revoked or varied as provided in this Act...

(4) No regulation adding to, varying or revoking the regulations contained in the Fifth Schedule to the Indenture shall be published in the Gazette by the Minister or have effect before the final completion of the major works or before the Indenture ceases to have effect (whichever first occurs) except with the consent in writing of the Corporation: but if the Corporation, in the opinion of the Minister, unreasonably withholds its consent to any regulation adding to, varying or revoking the regulations contained in the Fifth Schedule to the Indenture, the Minister may refer the matter to arbitration under the arbitration clause as if the matter were one which he may refer to arbitration under the Indenture.

Following the entry into force of the ratifying Act, development under the indenture proceeded. Part of the land subject to the indenture (known as Football Park) was leased by the plaintiff to a football league. In 1979, the Park was the subject of a Royal Commission which made recommendations inconsistent with the tenor of the indenture. Subsequently, a Bill was prepared to amend the ratifying Act. Clause 4 of the Bill provided that the consent of the plaintiff was not required for the making, variation or revocation of any regulation for the purposes of giving effect to a recommendation of the Royal Commission. Before the Bill was presented to the Parliament, the plaintiff, which opposed the Bill, instituted proceedings by which it claimed: (i) a declaration that the covenants in the indenture bound the defendant at law; (ii) a declaration that neither the defendant nor any Minister of the Crown was at liberty to be privy to the implementation of the Bill; and (iii) an injunction to restrain the defendant (by Ministers of State or otherwise) from taking any step or being party to any step to further the Bill.

By consent, a special case was stated for the consideration of the Full Court. The case asked six questions, all of which were answered unfavourably to the plaintiff, by the whole Court. In answer to the stated questions, the Full Court held in substance that:

(1) The second declaration and the injunction sought by the plaintiff would, if made, be in breach of the privileges of Parliament, to the extent that they restrained a Minister, as a member of the Parliament, from considering and voting upon the Bill.[57] (In addition, as Zelling J. observed[58] the juristic entity the State of South Australia (created only to facilitate service of proceedings) was not engaged in the furtherance of the Bill, nor were the Ministers of the Crown servants or agents of the State, and the relief prayed for against the defendant in the statement of claim was therefore based on a misconception).

(2) The court had no jurisdiction to issue the second declaration and the injunction sought by the plaintiff. First, there was (for reasons outlined below) no basis in law for the proposed relief. Secondly, the relief sought would again have breached a parliamentary privilege.[59]

(3) Neither the Act nor the indenture did, as a matter of interpretation, forbid the defendant or Ministers of the Crown from being privy to a variation by Act of Parliament of the indenture or of the ratifying Act. In any event, the Parliament had not deprived itself of power to amend the ratifying Act and the indenture.[60]

(4) There was no constitutional impediment to the enactment of the Bill by the Parliament, even without the consent of the plaintiff.[61]

(5) There was no constitutional or other impediment to any member of the Parliament, including Ministers, deliberating on or voting in favour of the amending Bill.[62] (This question was not in fact related to any relief sought by the statement of claim and its answer flowed from the answer to the first and second questions.)

(6) There was no constitutional impediment to any Minister of the Crown being a party either to the passage of the Bill or to advice to the Governor to assent to the Bill.[63] (This question presupposed that a Minister might properly oblige himself by contract to advise the Governor to refuse assent to a Bill passed by both Houses of Parliament. Such a supposition is contrary to constitutional convention.)

The second and fourth answers given by the Court are of general importance to persons who have entered, or who propose to enter, into an indenture or agreement with the Crown. The *West Lakes* case shows that it is virtually impossible to prevent (by means of curial relief) the amendment of a ratified indenture by later Act of Parliament. Once a valid amending law is assented to and proclaimed, the indenture is amended and no coercive relief is obtainable. Effective relief is available, if at all, only before the amending law comes into effect. A private contracting party wishing to prevent legislative modification of an indenture or of the ratifying Act by judicial proceedings must surmount two barriers: he must show first, that he has standing to seek judicial relief against the amending Bill in a court competent to interfere in the legislative process and, secondly, that there is a ground of relief. This second condition requires that the initial ratifying Act be entrenched so that it cannot validly be repealed or amended without the consent of the plaintiff.

As far as concerns the first condition, there is nothing at all in the *West Lakes* case which gives any encouragement to private contracting parties. No member of the

Court was prepared to hold that the Court should, at the instance of the plaintiff, interfere in the Parliamentary law making process. This was not because of the manner in which the indenture or the ratifying Act had been drawn, but because the grant by the Court of the relief sought in this case against the Ministers of the Crown would, on the view of King C.J.[64] and Zelling J.,[65] have been a breach of parliamentary privilege, and because, on the view of Matheson J., the plaintiff had no right to restrain the ordinary procedures of Parliament.[66] This condition, that of standing, will be further alluded to below.

Equally, as far as concerns the second matter, the judgments are quite unhelpful to project developers who seek to prevent alteration by the Government of a franchise agreement. The plaintiff had submitted that sections 3 and 16 of the ratifying Act amounted to the prescription of a "manner and form" in which amending legislation must be enacted in order to be valid; on the submission of the plaintiff, sections 3 and 16 of the ratifying Act were "laws respecting the Constitution, powers and procedure" of the Parliament within the meaning of section 5 of the Colonial Laws Validity Act (1865) (Imp.) and, in the alternative, that the ratifying Act provided for a manner and form apart from that Imperial Act. The short answer to the former submission was that section 5 of the Imperial Act is inapplicable unless the amending bill, not the ratifying Act, is a "law respecting the Constitution powers and procedure" of the Parliament. Clearly, the amending Bill before the Court in the *West Lakes* case was not such a law: it was an ordinary Bill with respect to an earlier Act of Parliament or, as Matheson J. categorised it,[67] a law with respect to the regulation-making powers of the Minister. King C.J. characterised the ratifying Act as a law with respect to the substance of a power, rather than a law prescribing a manner and form, and agreed that the amending Bill was not a law respecting the Constitution, powers and procedure of the Parliament.[68] Zelling J. also held that the ratifying Act did not contain a manner and form provision.[69] All the judgments ranged at length over the earlier decisions on section 5 of the Colonial Laws Validity Act (1865) (Imp.). The Court's views on section 5 are strictly unnecessary to its decision because the Court was unanimous in deciding that, as a matter of interpretation, the restraints contained in the indenture and in the ratifying Act were not applicable at all to the Parliament. Despite some difference in approach, it is clear that none of the members of the Court would regard a provision in an Act requiring the consent of a private contracting party to the amendment of that Act as a law prescribing a manner and form of law-making; in the view of the Court, such a provision is radically different in character from a provision forbidding the presentation of a Bill for Royal assent except after a special parliamentary majority had been obtained or except after a referendum. A provision of the former kind in the ratifying Act would have been viewed by the Court as a restraint or limitation on the power of the Parliament to legislate at all on certain topics; as such, it could be amended or repealed by legislation passed in the ordinary way which simply ignored or set aside the restraint or limitation.[70]

The alternative submission of the plaintiff in the *West Lakes* case as to manner and form was based on the decision of the Privy Council in *The Bribery Commission* v. *Ranasinghe*[71] in which the Judicial Committee had held that "a legislature has no power to ignore the conditions of law-making that are imposed by the instrument

which itself regulates its power to make laws".[72] The answer made to this submission by the Court was that the ratifying Act was not an instrument regulating the power of the Parliament to make laws, and for that reason the Bill could ignore or overcome proscriptions in the ratifying Act.[73]

The gist of the decision in the *West Lakes* case may be stated in two sentences. First, while the indenture bound both the plaintiff and the other parties to it, as a contract, the Parliament was not thereby prevented from amending the indenture, whether it was given statutory force or not. Secondly, before any clause in the ratifying Act could be effective to restrain the modification of that Act by the Parliament, it would have to be doubly entrenched, that is, any clause entrenching the agreement would itself have to be entrenched.

None of the judgments in the *West Lakes* case analyses the reasons for decision in the *Comalco* case. The essential distinctions between the *Comalco* case and the *West Lakes* case are these: first, in the *West Lakes* case, the amending Bill dealt specifically with, and indeed partially repealed, the prohibition against unilateral amendment contained in the ratifying Act and the indenture, while in the *Comalco* case the "amending Act" was explicitly concerned only to regulate the rate of royalty payable by mining operators generally throughout the State and there was no express reference in that Act to the earlier Act or to its prohibition against unilateral amendment. Secondly, in the *West Lakes* case, the relevant prohibition in the ratifying Act was addressed to the executive, whereas in the *Comalco* case the prohibition in the ratifying Act may reasonably have been interpreted to apply to the legislature. Thirdly, in the *West Lakes* case, proceedings were instituted before the amending Bill was enacted, whereas in the *Comalco* case, proceedings were instituted after the amending law was enacted and regulations proclaimed under it. It was this last distinction that gave rise to the plaintiff's main difficulty in the *West Lakes* case, that of showing an interest sufficient to justify the Court's intervention.

8. Standing to Restrain the Enactment of a Law

It was stated above that where a private party to an indenture which has been ratified by Act of Parliament seeks, by curial proceedings, to protect himself from a law which, on its proclamation, would vary the indenture in a manner inconsistent either with the indenture or with the ratifying Act, the party may need to seek relief operative before the law comes into force for, upon the law coming into effect, the indenture may effectively be amended: the unilateral amendment of it by statute would not be actionable in damages.[74] Relief in advance of enactment will be needed unless the amending law, (a) exceeds a limitation imposed by or in virtue of Imperial legislation, on the substantive powers of the Parliament or, (b) is enacted in a manner or form which does not comply with an effective procedural limitation on the legislature's powers: in either of those events, the law will be void and the court may declare it so on the application of any interested person, after the Bill has been assented to.

Where, on the other hand, the plaintiff seeks to restrain the enactment of a law whose passage could be inconsistent with a self-imposed limitation on Parliament's power which (either because it relates to the *substance* of a power rather than prescribing a valid manner and form or because it ineffectively prescribes a non-

entrenched manner and form of law-making) can be ignored or set aside by the parliament by an ordinary law passed in the usual manner (so that, on enactment of the amending law, the plaintiff's rights will be changed) it is imperative that the plaintiff act before the amending law is proclaimed. Yet, as the *West Lakes* case shows, a plaintiff who is a private party to an indenture will not necessarily be regarded as having standing to restrain the legislative processes of Parliament or, indeed, as having standing to seek even declaratory relief, merely because, if the law objected to is enacted, his rights will be changed or extinguished.

A bill to amend a ratifying Act would rarely fall within the former class but the principles as to standing applicable to it are dealt with for the sake of completeness. In the former situation (that is, where a bill would, on enactment, violate a limitation imposed by superior legislation or where a Bill is not passed in accordance with binding procedural directions,) there was until recently no basis for asserting that courts in Australia would interfere with the legislative processes of Parliament. Just as Courts in the United Kingdom have traditionally refrained from interfering in the law-making activities of Parliament,[75] so until *Cormack* v. *Cope*[76] there was a settled practice pursuant to which courts in Australia refused to entertain applications to enjoin the legislative process. However, in *Cormack* v. *Cope*, at least two justices of the High Court decided that the High Court could, prior to presentation of a Bill for the Royal assent, intervene to declare void a Bill passed at an invalid joint sitting of the Federal Parliament purporting to have been convened under section 57 of the Constitution and, presumably, to restrain its presentation to the Governor General, although the Court then decided unanimously not to intervene before the joint sitting had been held. The whole Court held that the Court either would not or could not interfere by means of injunctive relief with the deliberative activities within the Parliamentary chambers (and on this point, the case was followed in *West Lakes*) but Barwick C.J. and Gibbs J. held that the Court could legitimately interfere with those deliberative activities if a constitutional mandate pertinent to the enactment of legislation were not adhered to.[77] A distinction was drawn by Barwick C.J. between, on the one hand, the conduct of the Governor General in convening a joint sitting (which His Honour characterised as an act of the Crown pursuant to statute and which therefore might be restrained) and on the other hand the acceptance of a Bill for assent, which should not be restrained by the Court because it was part and parcel of the parliamentary process of law-making.[78]

These statements of opinion on the parts of Sir Garfield Barwick and Gibbs J. in *Cormack* v. *Cope* have disturbed what has been accepted in Australia since 1911 as at least a settled practice if not a rule of law depriving courts of jurisdiction, and Their Honours' reasoning may ultimately be confined to the context of section 57 of the Constitution. Prior to *Cormack* v. *Cope*, the leading Australian authority on this question had been *Hughes & Vale Pty Ltd* v. *Gair*[79] in which Sir Owen Dixon, with whom the other members of the High Court agreed, said: "An application for an injunction restraining the presentation of a Bill for the Royal Assent is, I will say, not unprecedented but it is at least very exceptional. We do not think it should be granted on this occasion or later in any case". In that case, the plaintiff was a private interstate carrier which sought an injunction to restrain presentation of a Bill

which, it was said, would violate section 92 of the Constitution. Later, in *Clayton* v. *Heffron*[80] the plaintiffs, most of whom were members of the New South Wales Parliament, sought an injunction in the Supreme Court of New South Wales against the presentation to the Governor of a Bill for a referendum to amend the State's Constitution Act. The Supreme Court refused to grant the injunction and a majority of the High Court declined to grant special leave to appeal from the order of the Supreme Court. In *Clayton* v. *Heffron*, the *locus standi* of the plaintiffs was conceded by the defendants; it is clear that a majority of the High Court would, if this point had not been conceded, have decided that the Court should not intervene to restrain presentation of the Bill to the Governor at the instance of the plaintiffs.

One decision of a State Supreme Court which preceded *Hughes & Vale Pty Ltd* v. *Gair* and is difficult to reconcile with it is *McDonald* v. *Cain*.[81] There, the plaintiffs were members of the Legislative Assembly of Victoria and electors of districts which, if the Bill impugned in the suit was assented to, would have been merged with other electorates. The plaintiffs' complaint was that the Bill had not been assented to by an absolute majority of the members of the Legislative Council and the plaintiffs sought declarations that the Bill could not lawfully be presented to the Governor for royal assent. The Full Court of the Supreme Court of Victoria decided both that the plaintiffs had a sufficient interest to seek the declarations referred to and that the Court had jurisdiction to issue those declarations. In the event, however, the Court decided that the ground on which the actions were brought was not tenable and the actions were dismissed, although interim injunctions were issued. In deciding that the Court had jurisdiction, the Full Court followed the decision of the Supreme Court of New South Wales in *Trethowan* v. *Peden*.[82] And in resolving the issue of standing in favour of the plaintiffs, the Full Court decided that the fact that each of the plaintiffs was on the electoral roll for districts which, if the Bill became law, would be abolished, was sufficient to give them an interest.[83] Both *McDonald* v. *Cain* and *Trethowan* v. *Peden*, insofar as they decided that the Supreme Court could restrain presentation of a Bill to the Governor, may be taken to have been disapproved by the High Court in *Hughes & Vale Pty Ltd* v. *Gair*. In all three cases, if the impugned law was vitiated at all, it would have been no more valid after assent than before royal assent.

Be that as it may, *McDonald* v. *Cain* was followed by the Full Court of the Supreme Court of Western Australia in *Tonkin* v. *Brand*.[84] In that case, the plaintiffs were members and electors of the Legislative Assembly and they sought a declaration that, in the circumstances pleaded, the defendants (members of the State Executive Council) were under a mandatory duty to advise the Governor to issue a proclamation pursuant to which an electoral redistribution should take place. The duty alleged was said to derive from a provision of the Electoral Districts Act 1947-1955 (W.A.). The Full Court issued the declarations sought. The case is altogether different from *McDonald* v. *Cain* and *Trethowan* v. *Peden*, because the Court was not interfering in any way with the legislative process. Insofar as it decided that the Court can restrain the Executive Council from doing an illegal act or compel it to do a legal act the decision was endorsed *sub silentio* by the Privy Council in *Teh Cheng Poh* v. *Public Prosecutor (Malaysia)*.[85] The Full Court decided that the plaintiffs' enrolment as electors was sufficient to give them an

interest to litigate the question before the Court.[86]

The dictum of the High Court in *Hughes & Vale Pty Ltd* v. *Gair* and the decision of the Supreme Court in *Trethowan's* case can be reconciled if one takes the view that the Court may intervene at the Bill stage if the manner and form requirement with which the impugned Bill allegedly fails to comply relates to some extra-parliamentary step, for example a referendum.[87] The reasoning in *McDonald* v. *Cain* and in *Tonkin* v. *Brand*, however, is not capable of being reconciled with the dictum in *Hughes & Vale Pty Ltd* v. *Gair*. In *Cormack* v. *Cope*, of course, several members of the High Court were not prepared to give full effect to that dictum. There as has already been indicated, the High Court divided on the question whether the Court had jurisdiction to interfere to prevent the furtherance of a step in the legislative process. Barwick C.J.[88] and Gibbs J.[89] (and on reading, Mason J.[90]) were of the view that the Court might have granted an interlocutory injunction to restrain a joint sitting on the application of members of the Senate, but decided against doing so on the ground that, were the proposed joint sitting to be void, any laws passed at it could be declared void by the court on the application of any proper plaintiff. In the course of his reasons, Barwick C.J. said:

> Ordinarily, the Court's interference to ensure a due observance of the Constitution in connection with the making of laws is effected by declaring void what purports to be an Act of Parliament, after it has been passed by the Parliament and received the Royal Assent. In general, this is a sufficient means of ensuring that the processes of law-making which the Constitution requires are properly followed and in practice so far the Court has confined itself to dealing with laws which have resulted from the parliamentary process. But nothing in that process has its precise analogy of or to that prescribed by s.57. In my opinion, the Court in point of jurisdiction is not limited to that method of ensuring the observance of the constitutional processes of law-making. It seems to me that in an appropriate, though no doubt unusual, case when moved by parties who have an interest in the regularity of the steps of the law-making process at the time intervention is sought, the Court is able, and indeed in a proper case bound, to interfere.[91]

Gibbs J., while agreeing with Sir Garfield Barwick on the issue of principle, decided that the settled practice of the High Court should be followed in this case.[92] McTiernan J. held that the issues arising out of section 57 were not justiciable.[93] Menzies and Stephen J.J. decided that the Court had no jurisdiction to intervene to prevent Parliament from enacting unconstitutional laws,[94] save in the most exceptional circumstances. Of course, that qualification is of great importance.

Only Barwick C.J. decided that the plaintiffs, members of the Senate, had standing to bring the suit. It is difficult to see how any plaintiff could ever have standing to restrain the passage of a Bill, because a Bill does not affect rights.[95] Only a statute, properly enacted, assented to and proclaimed, can affect rights.

In related proceedings[96] the High Court unanimously decided that Queensland did not have a sufficient interest to apply to the Court for orders restraining the joint sitting. Subsequently, in *Victoria* v. *Commonwealth*,[97] the court declared invalid one of the laws passed at the joint sitting, on the ground that the conditions precedent to the operation of section 57 had not as a matter of fact arisen. The majority in that case either assumed or decided that the State had a proper interest in

the matter.[98] At that stage, the law had received the Royal Assent. As previously stated, it is quite clear that, once an Act has been assented to, it can be declared void by the court on the application of any interested person, if the law is beyond power or if it was passed otherwise than in accordance with mandatory procedural requirements. The area in which, because of *Cormack* v. *Cope*, there remains doubt as to what constitutes a sufficient interest to sue is where the applicant seeks declaratory or injunctive relief against a proposed law. *Cormack* v. *Cope* has unsettled the law in this area for Australia, because of the refusal on the part of Barwick C.J., Gibbs and Mason J.J. to give full effect to the dictum in *Hughes & Vale Pty Ltd* v. *Gair*.

In *Rediffusion (Hong Kong) Ltd* v. *A.G. (Hong Kong)*[100] the Privy Council added to this doubt by making pronouncements which are quite contradictory to the statement of the High Court in *Hughes & Vale Pty Ltd* v. *Gair*. In the *Rediffusion* case, the plaintiff (who enjoyed a monopoly in providing cable television services in the Colony) sought to prevent the Legislative Council of Hong Kong from passing a bill which would have amended the Colony's copyright law; to that end, the plaintiff sought appropriate declarations and, in addition, injunctions to restrain the members of the Council from passing an Ordinance and from presenting it to the Governor for assent. The basis of the application was that the Council had no power to enact the bill because it would be repugnant to an Imperial Act, the Copyright Act. The Council was not a representative legislature and therefore section 5 of the Colonial Laws Validity Act (1865) (Imp.) did not apply to it, although section 2 did. The Privy Council held that, as the legislature was not fully sovereign, the practice of the Courts of England against interfering in parliamentary processes was inapplicable.[101] After referring, without comment, to *Trethowan* v. *Peden* and *McDonald* v. *Cain*, and after rationalising the pronouncements of the High Court in *Hughes & Vale Pty Ltd* v. *Gair* and *Clayton* v. *Heffron* as being no more than indications of a settled practice which Australian Courts might observe in deciding whether to grant discretionary relief, the Privy Council said:

> The immunity from control by the courts, which is enjoyed by members of a legislative assembly while exercising their deliberative functions is founded on necessity. The question of the extent of the immunity which is necessary raises a conflict of public policy between the desirability of freedom of deliberation in the legislature and the observance by its members of the rule of law of which the courts are the guardians. If there will be no remedy when the legislative process is complete and the unlawful conduct in the course of the legislative process will by then have achieved its object, the argument founded on necessity in their Lordships' view leads to the conclusion that there must be a remedy available in a court of justice before the result has been achieved which was intended to be prevented by the law from which a legislature which is not fully sovereign derives its powers.
>
> In their Lordships' view the Full Court of Hong Kong were right in holding that they had jurisdiction to enter upon the inquiry whether or not it would be unlawful for the Legislative Council of Hong Kong to pass the proposed bill and if they found that it would be unlawful, to decide in their discretion whether or not to grant the relief by way of declaration and injunction claimed.[102]

However, their Lordships (Lord Morris dissenting) went on to decide that the plaintiff had no standing to bring the action:

> It can truly be said about the conduct of the Legislative Council in passing a Bill which, if enacted by the Governor's assent, would be repugnant to an Act of Parliament, that such conduct cannot affect the legal rights of anyone. If the Governor does not assent, the Bill will never become a law at all; if he does, the Ordinance will be void and inoperative...[103]

The passage first quoted from their Lordships' advice is very favourable to private citizens in the situation of a franchised mining operator who seek to restrain the passage of or assent to a Bill tabled in breach of a clause in an Act ratifying an indenture. Their Lordships' pronouncements were accepted by Barwick C.J. and Gibbs J. in *Cormack* v. *Cope* yet expressly rejected by Menzies and Stephen J.J.

In the *West Lakes* case, this first pronouncement in *Rediffusion* was confined to cases where, as a matter of fact, the plaintiff would lose his rights and his remedy if the Bill became law, that is, to cases where the Bill is presented otherwise than in breach of a substantive or procedural limitation which the Parliament has no power to remove.[104] On the face of things, this condition would be satisfied in the case of a Bill to amend, for example, a clause similar to clause 2(4) of the Cooper Basin Indenture. That being so, the Court would, on the view of the Privy Council, have power to intervene in the legislative process, but *not* at the suit of the private party, whose rights are said to be not affected by a Bill. Furthermore, in that class of case, if the approach taken in *West Lakes* is adopted, the private party would also fail for want of a ground of relief. Thus, whatever the nature of the limitation which Parliament was ignoring, the court would, in its discretion, refuse to intervene in the parliamentary process but would hold either that the developer had no standing (because proposed legislation cannot affect rights) or that the Court should follow the "settled practice" of Australian courts and intervene only after enactment, if there was a ground of relief.

A doubly-entrenched (that is, self-imposed) limitation on Parliament's powers might, therefore, be effective; but such a limitation can be availed of by a private developer only after enactment of a law in breach of the limitation and then only if (a) the later law were to be characterised as a law with respect to the Constitution, powers or procedure of the Parliament or, (b) the earlier law imposed conditions on Parliament's law-making powers which had not been set aside. It follows, therefore that an attempt to entrench a franchise agreement ratification Act could be undone (given the refusal of the Courts to restrain the legislative process):

(a) Where the Colonial Laws Validity Act (1865) (Imp.) is relied upon as the mode of entrenchment, by an amending law drafted so as not to warrant the description "a law with respect to the Constitution, powers and procedure of the Parliament" — the Mining Royalties Act 1974 (Qld) is a good example of this; or

(b) Where the dictum in *Ranasinghe* is relied on by the developer as the mode of entrenchment, by a law setting aside the conditions previously imposed upon the Parliament.

The ease with which limb (a) can be satisfied by a State law (given the enormous range of matters dealt with in debentures), so as to materially affect the rights, obligations and privileges of a developer under an indenture, makes it commercially unrealistic to seek outright entrenchment of a ratifying Act. Limb (b) can be satisfied by a law passed in accordance with the State's Constitution Act because, by

virtue of the positive aspect of section 5 of the Colonial Laws Validity Act (1865) (Imp.), the State Parliament has power to set aside all self-imposed limitations on its powers not entrenched in accordance with the proviso to section 5.

In short then, the authorities appear to warrant the following propositions in relation to the jurisdiction of the Courts with respect to Bills and with respect to standing to sue in relation to Bills:

(1) The courts have jurisdiction to issue declarations and injunctions in relation to all steps within the law-making process, except injunctions against the Crown insofar as the Crown is participating in the legislative process.

(2) Generally, where an applicant seeks a declaration that a proposed law will be invalid if enacted, the court will, in its discretion, decline jurisdiction until the proposed law has completed the parliamentary process.

(3) The Court may, in its discretion, issue a declaration of invalidity of a proposed law at the suit of an interested person, before the law has passed through the Parliament, if the law is proposed to be enacted in breach of a mandatory provision binding the legislature and if the law is such that either, (a) it will destroy the applicant's rights and interest on enactment, or (b) there will be no person with an interest to apply to the Court for a declaration of invalidity of the law, once enacted.

(4) The Court cannot, at the suit of any person, restrain the enactment of a Bill which, when it has completed the legislative process, will be valid.

9. Summary

The conclusions reached so far may be summarised as follows:

1. To the extent that an indenture or franchise agreement purports, (i) to oblige a Minister or other governmental authority to exercise a statutory discretionary power conferred for the public benefit in a particular way, or (ii) to require the Crown to alienate public property in a manner not authorised by law, or (iii) to create an interest or grant a licence otherwise than in accordance with statutory procedures, the indenture would be ineffective in whole or in part unless sanctioned and ratified by Act of Parliament.
2. The mutual obligations in an indenture to which the Crown in the right of a State is a party can normally be varied or rescinded by subsequent legislation, expressly or impliedly, whether the agreement is part of an enactment or not. Statutory modification of the terms of a contract gives the aggrieved party no action in damages or claim for compensation against the Crown in the right of the State. It may be otherwise where the Commonwealth is a party to the indenture.
3. In general, an Act authorising an indenture agreement may be varied or repealed, expressly or impliedly, by a subsequent Act of Parliament. Such a subsequent law would be valid unless the authorising Act and the relevant clauses in the indenture were entrenched, so as to attract either section 5 of the Colonial Laws Validity Act (1865) (Imp.), or the principle in *Ranasinghe's* case. To attract the former, there are three conditions: (a) the earlier authorising law must prescribe and entrench an exclusive "manner or form" of law-making in which amending legislation is required to be enacted; (b) that prescription itself must be incapable of lawful variation by the Parliament except by a law passed in the prescribed "manner or form"; and (c) the amending or repealing law must be characterised

as a law with respect to "the Constitution, powers and procedure of the Parliament", that is to say, in order to take advantage of the negative or restrictive function of section 5, a prohibition, in an Act of Parliament, against its modification or repeal by an ordinary later law must be drawn so that it is a law *with respect to the process of law-making*, for example, a restriction on the right of a person to present a Bill for Royal Assent or a requirement of a special majority. As far as concerns the principle laid down in *Ranasinghe's* case, it is not yet clear whether it applies to all laws, or whether it merely applies to laws affecting the constitution of the relevant legislature.[105]

4. While it is far from clear what kind of laws will be characterised in laying down a "manner and form", where the doubly entrenched "manner or form" requirement stipulates for the consent of a private citizen, such as a developer, the Courts would probably regard the requirement as ineffective either because inconsistent with the positive grant of power contained in section 5 of the Colonial Laws Validity Act (1865) (Imp.), or because the Act "entrenching" the requirement was truly a law with respect to the *substance* of power rather than *manner and form*. This problem of characterisation affects attempts to entrench based both on the Imperial Act and on *Ranasinghe's* case. Such a requirement might also fail because of inconsistency with the State's Constitution Act or because repugnant to public policy. Governments would in any event be loathe to accept such a clause.[106] Provisions in an Act ratifying an indenture would probably be treated differently by the courts than would provisions in a law creating rights, for example, a law creating a charter of freedoms or a law seeking to entrench certain electoral standards.
5. Given the reluctance of the courts to entertain proceedings in relation to merely proposed legislation, the only effective mode of entrenchment of rights is one which will result in a void Act, that is, one which the Court will declare to be a nullity at the conclusion of the legislative process.

What provision then, can a developer usefully seek in an attempt at express entrenchment when negotiating an indenture? The developer might request that the authorising Act contain an entrenched section by which it was sought to make the developer's rights unalterable except with his consent; for example, the ratifying Act might contain a provision prohibiting the presentation to the Governor, for Royal Assent, of a bill to vary the Act, except with the consent of the developer or except in accordance with the award of an arbitrator or special tribunal. In addition, such a provision might also seek to entrench a clause giving the developer the right to terminate the indenture should his obligations be made more onerous, or a clause requiring the submission of disputes to arbitration and, if appropriate, a clause conferring rights to compensation. Such a clause must be wide enough to prevent alteration of rights circuitously, as happened in the *Comalco* case. This last requirement is the most difficult part of the exercise. The draftsman must be familiar with the Constitution Act of the State with which he is negotiating, in order that he be aware of any special provisions enabling entrenchment or, in the alternative, of provisions thwarting certain attempts to entrench: compare Constitution Act 1934-1976 (S.A.) sections 8, 10a(7), 88, with Constitution Act Amendment Act 1934 (Qld) section 3.

In the face of the inevitable refusal by the Government to sponsor an entrenched ratifying Bill, or on deciding that entrenchment provisions could not be vindicated in subsequent litigation, the developer could abandon the hope of an absolutely binding indenture and simply rely on the good faith of the government. Such a course commended itself to Alcoa, in preparing the Portland Aluminium Smelter Indenture: Clause 9 of that agreement provides that "...the State will use its best endeavours to ensure that the rights of the Company under this Agreement are protected for the duration of the agreement". This is the more politically realistic course. The task of the developer and its legal advisers is to seek means short of outright legislative entrenchment by which the Government of the day (rather than the Parliament) will be induced not to vary the indenture in ways not acceptable to the developer.

10. Protection of Rights by Circuitous Means

Techniques (short of express entrenchment) by which indentures can be protected against unacceptable alteration by the Parliament or against repudiation by the Government of the day will depend on the features of each particular development and will require a great deal more imagination than techniques of express entrenchment. As a preliminary precaution, the ratifying Act ought to be so drawn that it can be amended, if at all, only by clear and express words. The insertion of a canon of construction in a statute or, in other words, a rebuttable presumption against implied repeal or amendment, will mean that the Parliament or the Executive must decide whether to amend an Indenture Act and cannot leave to the courts what may be an unsavoury and haphazard task of interpretation. This option avoids the labyrinthine rules about entrenchment, but has admitted shortcomings.[107]

If possible, the indenture and the ratifying Act should impose obligations on a Crown corporation, such as the Minister of Mines or Director of Mines of South Australia. This measure may indirectly assist enforceability, at least where the Statute requires the Crown corporation to observe the agreement, although it must be borne in mind that the casting of obligations on a Crown corporation sole did not assist the plaintiff in the *West Lakes* case because of the nature of the orders there sought. Again, the developer may seek an Act creating a special statutory duty such as is found in section 6(3) of the Roxby Downs (Indenture Ratification) Act.[108]

As a minimum precaution against unilateral amendment by the State the development should require that the ratifying Act provide that *agreed* amendments to the indenture be ineffective unless and until ratified by an Act of Parliament or, in the alternative, that agreed amendments may be disallowed on the resolution of either House. Such a provision in the ratifying Act would be of assistance to a developer who reluctantly agrees to a particular amendment to the indenture; the requirement for Parliamentary approval will delay the implementation of the amendment; in addition, it not infrequently happens in bicameral State legislatures that the Government of the day does not control the upper Chamber; that Chamber may remain faithful to the original indenture and refuse to ratify the amending legislation or, as the case may be, disallow the amendment to the indenture.

Another means by which an indenture can be protected will arise if the developer has entered into a contract for the sale of the product of the mine, at the date of

making the indenture, which contract of sale requires the interstate delivery of goods: such a contract will be an element of interstate trade and commerce. If the contract is approved by and integrated into the indenture, the developer may be able to invoke section 92 of the Constitution in the protection of the agreed indenture.[109]

Lastly, the developer may prefer an agreement which, having dealt with extraordinary matters, leaves the developer with an orthodox tenement held subject to the ordinary law (preferably, over a fee simple estate vested in the producer), so that the developer's rights cannot be radically affected except by a law which affects all mining operators or mine owners in the State or which is explicitly discriminatory and therefore less acceptable politically.[110] The less "irregular" the rights conferred on the developer by the agreement, the less likely is it that the agreement will attract attention from the political opposition. And, this being one area in which the pertinent legal principles are likely to be more unfavourable to the developer than will be the vicissitudes of politics, a developer may deem it prudent to submit a draft indenture to the political opposition for the time being, in order to obtain passage of the ratifying Act by consensus. Such a course, coupled with the oppositions's undertaking not to seek amendment to the law in later years, may be worth more than an array of legal artifice.

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FOOTNOTES

1 These hurdles, and other matters to be taken into account in the negotiation and drafting of a franchise agreement, are referred to more fully in K. D. MacDonald, "The Negotiation and Enforcement of Agreements with State Governments Relating to the Development of Mineral Ventures" (1977) 1 *A.M.P.L.J.* 29, 29-37.

2 Under the mining legislation in most jurisdictions in Australia, the scheme of registration of tenements is a scheme of registration of a title previously acquired and currently held, not a scheme of title by registration: *Kenda* v. *Andrea* (1966) 115 C.L.R. 519 (dealing with Mining Act 1930 (S.A.)); *Maragos* v. *Irwin* (unreported, W.Ct. S.A. 231/77 in relation to the Mining Act 1971 (S.A.)); *Hazlett and Soklich* v. *Rasmussen, May & Piper* [1973] W.A.R. 141, 145; and *Allied Minerals N.L.* v. *Adamson, Hodge, Western Titanium Ltd, Day and Boys* [1974] W.A.R. 21, 27 (both cases concerned the Mining Act 1904 (W.A.), since repealed).

3 See *e.g.*, Mining Act 1971 (S.A.) s.38(2); Mines Act 1958 (Vic) s.45(1); Mining Act (Qld) s.26(2); Mining Act 1929 (Tas) s.51(1).

4 *Halsbury's Laws of England* (4th ed. 1976) Vol. XI, para. 1401. C. Turpin *Government Contracts* (1972) 24; and see P. W. Hogg, "The Doctrine of Executive Necessity in the Law of Contract" (1970) 44 *A.L.J.* 154, 155. The following Acts authorise decrees of specific performance against the Crown: Judiciary Act 1903-1979 (Cth) s.64; Claims Against the Government and Crown Suits Act 1912-1972 (N.S.W.) ss. 4, 9; Crown Proceedings Act 1980 (Qld) ss. 9, 10; Supreme Court Civil Procedure Act 1932 (Tas) s.66 (but note s.69); Crown Proceedings Act 1958 (Vic) s.25; Crown Suits Act 1947-1954 (W.A.) s.9; Crown Proceedings Act 1972-1980 (S.A.) s.5.

5 *N.S.W.* v. *Bardolph* (1934) 52 C.L.R. 455 as to which see M. P. Crisp "Contracts of the Executive Government" (1952) 26 *A.L.J.* 129.

6 *Australian Alliance Assurance Co. Ltd* v. *John Goodwyn, The Insurance Commissioner* [1916] St.R.Qd. 225, 257-258, 272-273; *Attorney-General* v. *Parmeter, In Re Portsmouth Harbour* (1811) 10 Price 378, 401; 147 E.R. 345, 352; *Rederiak Tiebolaget Amphitrite* v. *The King (The Amphitrite* [1921] 3 K.B. 500, 503.

7 See *e.g.*, E. Campbell, "Commonwealth Contracts" (1970) 44 *A.L.J.* 14; P.W. Hogg, *The Liability of the Crown* (1971) 129-140; C. Turpin, note 4 *supra*, chapter one; J. D. B. Mitchell, *The Contracts of Public Authorities* (1954) 28-29, 55; E. Campbell, "Agreements About the Exercise of Statutory Powers" (1971) 45 *A.L.J.* 338; C. Harlow, "'Public' and 'Private' Law: Definition Without Distinction" (1980) 43 *Mod. L. Rev.* 241, 248-249; J. R. Peden, "The Application of Legislation to the Commercial Dealings of the Crown" (1977) 51 *A.L.J.* 756.

8 *Victoria* v. *Commonwealth* (1975) 7 A.L.R. 277, 327; K. K. Puri, *Australian Government Contracts* (1978) 44-47; J. E. Richardson, "The Executive Power of the Commonwealth" in L. Zines (ed.), *Commentaries on the Australian Constitution* (1977) 50, 58. A more restrictive view of s.61, adopted in *Commonwealth* v. *The Colonial Combing, Spinning and Weaving Company, Limited* (1922) 31 C.L.R. 421 and *Commonwealth* v. *The Australian Commonwealth Shipping Board* (1926) 39 C.L.R.1, is no longer tenable. See also *Ansett Transport Industries (Operations) Pty Ltd* v. *Commonwealth* (1977) 139 C.L.R. 54, 61, 62, 74, 77, 113; *Barton* v. *Commonwealth* (1974) 48 A.L.J.R. 161, 169; F. Gurry, "The Implementation of Policy Through Executive Action" (1977) 11 *M.U.L.R.* 189, 195-207.

9 Crown Proceedings Act 1972-1980 (S.A.) s.10(1)(a); Crown Proceedings Act 1958 (Vic) s.23(1)(a).

10 See generally *The Steaua Romana; The Oltenia* [1944] P. 43, 50; *Robertson* v. *Minister of Pensions* [1949] K.B. 227; *Reilly* v. *The King* [1934] A.C. 176, where the rule was not applied. The rule has on occasions been selectively applied, for example it was not applied to contracts entered into by a Crown agency, even in the context of a contract pertinent to the defence of the realm in *Attorney-General* v. *Lindgren* (1819) 6 Price 287; 146 E.R. 811; J. D. B. Mitchell note 7 *supra*, 54-56. The rule was applied in support of the right of the Crown to dismiss or transfer a public servant in *Deynzer* v. *Campbell* [1950] N.Z.L.R. 790 but *cf. Nobrega* v. *Attorney-General of Guyana* (1966) 10 W.I.R. 6, 187.

11 *Cudgen Rutile (No. 2) Pty Ltd* v. *Chalk (P.C.)* [1975] A.C. 520, 533-534.

12 See *e.g.*, Mining Act 1971 (S.A.) ss. 28, 34; Petroleum Act 1940-1981 (S.A.) s.14; Petroleum (Submerged Lands) Amendment Act 1980 (Cth) s.22; Minerals (Submerged Lands) Act 1981 (Cth) ss. 25, 33.

13 *Watson's Bay & South Shore Ferry Co. Ltd* v. *Whitfield* (1919) 27 C.L.R. 268; *South Australia* v. *Commonwealth* (1962) 108 C.L.R. 130, 141; *Ansett Transport Industries (Operations) Pty Ltd* v. *Commonwealth* note 8 *supra*, 74-77, *per* Mason J.; 113, *contra*, Aickin J.

14 *Ayr Harbour Trustees* v. *Oswald* (1883) 8 App. Cas. 623; *The Amphitrite* note 6 *supra; Commissioners of Crown Lands* v. *Page* [1960] 2 Q.B. 274, 291; *Buttigeig* v. *Cross* [1953] P.C. (not reported, see J. M. Ganado, "British Public Law and the Civil Law in Malta" (1950) 3 *Current Legal Problems* 195, 209); *Birkdale District Electric Supply Co. Ltd* v. *Southport Corporation* [1926] A.C. 355, 364.

15 *William Cory and Son Ltd* v. *London Corporation* [1951] 2 K.B. 476.

16 See generally the cases cited in nn. 11 and 13 *supra*, and *Buchanan* v. *Redcliffe Town Council* [1950] St.R.Qd. 24 (whose correctness is doubtful). In addition, there are dicta extending the principle to exercise of the prerogative and of trustee's powers.

17 See generally J. D. B. Mitchell, note 7 *supra*, 24, 222. The rule is criticised by S. A. de Smith, *Review of Administrative Action* 319.

18 J. D. B. Mitchell, note 7 *supra*, 7.

19 J. G. Starke, P. F. P. Higgins and N. Sneddon, (eds) *Cheshire and Fifoot: The Law of Contract* (4th Aust. ed. 1981) 132-135; but see *Commissioner of Crown Lands* v. *Page* note 14 *supra*, 293.

20 See *e.g.*, the dictum of the Privy Council, note 11 *supra*.

21 *Bilston Corporation* v. *Wolverhampton Corporation* [1942] 1 Ch. 391, 393; W. S. Holdsworth, Case Note (1943) 59 *L.Q.R.* 1, 2-3; *Harper* v. *Secretary of State* [1955] 1 Ch. 238.

22 See *e.g.*, Mining Regulations 1977-1979 (S.A.) reg. 25(3).

23 See *e.g.*, *Bradley* v. *Commonwealth* (1973) 128 C.L.R. 557; *Director of Posts and Telegraphs* v. *Abbott* (1974) 22 F.L.R. 157, 168; *Robertson* v. *Minister of Pensions* note 10 *supra; Re Liverpool Taxi Owners' Association* [1972] 2 All E.R. 589, 594, 596. Compare *Bennett and Fisher Ltd* v. *Electricity Trust of South Australia* (1961-1962) 106 C.L.R. 492.

24 *York Air Conditioning and Refrigeration (A/Asia) Pty Ltd* v. *Commonwealth* (1949) 80 C.L.R. 11; *Southend-on-Sea Corporation* v. *Hodgson (Wickford) Ltd* [1962] 1 Q.B. 416, 424.

25 D. L. Keir and F. H. Lawson, *Cases in Constitutional Law*(1967) 9-12; *Metropolitan Asylum District* v. *Hill* (1881) 6 App. Cas. 193.

26 Note 9 *supra*. Reference should also be made to the Supreme Court Civil Procedure Act 1932 (Tas) s.73(g) which achieves an antithetical effect.
27 *Cudgen Rutile* v. *Chalk* note 11 *supra*, 533; *O'Keefe* v. *Williams* (1907) 5 C.L.R. 217, [1910] 11 C.L.R. 171, 190; *De Britt* v. *Carr* (1911) 13 C.L.R. 114, 122; *Nicholas* v. *Western Australia* [1972] W.A.R. 168, 172, 174.
28 *Halsbury's Laws of England*, note 4 *supra*, Vol. VIII, para. 966.
29 Crown Proceedings Act 1972-1980 (S.A.) s.5; Claims Against the Government and Crown Suits Act 1912-1972 (N.S.W.) s.3; Supreme Court Civil Procedure Act 1932 (Tas) s.64; Crown Proceedings Act 1958 (Vic) s.22; Crown Suits Act 1947-1954 (W.A.) s.5; Crown Proceedings Act 1980 (Qld) ss. 8-10.
30 *Churchward* v. *The Queen* (1865) L.R. 1 Q.B. 173; *Mackay* v. *Attorney-General (British Columbia)* [1922] 1 A.C. 457.
31 See *e.g.*, *N.S.W.* v. *Bardolph* note 5 *supra*, 471, 502.
32 Crown Proceedings Act 1972-1980 (S.A.) s.8(5); Crown Proceedings Act 1958 (Vic) s.26; Crown Suits Act 1947-1954 (W.A.) s.10.
33. Claims Against the Government and Crown Suits Act 1912-1972 (N.S.W.) s.11; Crown Proceedings Act 1980 (Qld) s.11; Supreme Court Civil Procedure Act 1932 (Tas) ss. 67, 68.
34 Claims Against the Government and Crown Suits Act 1912-1972 (N.S.W.) ss. 4, 9; Crown Proceedings Act 1980 (Qld) ss. 9, 10; Crown Proceedings Act 1958 (Vic) s.25; Crown Suits Act 1947-1954 (W.A.) s.9; Crown Proceedings Act 1972-1980 (S.A.) ss. 5, 10; Supreme Court Civil Procedure Act 1932 (Tas) s.69
35 1903-1979 (Cth) s.60.
36 See *e.g.*, the many Aluminium Refinery Agreement Acts and Iron Ore Agreement Acts of Western Australia which are in common form.
37 *E.g.*, Commonwealth Aluminium Corporation Pty Ltd Agreement Act 1957 (Qld) s.3; Alcoa (Portland Aluminium Smelter) Act 1980 (Vic.) s.4(1).
38 *E.g.*, Cooper Basin (Ratification) Act 1975 (S.A.) s.6; Stoney Point (Liquids Project Ratification) Act 1981 (S.A.) s.3; Roxby Downs (Indenture Ratification) Act 1982 (S.A.) ss. 5, 6.
39 E. Campbell "Legislative Approval of Government Contracts" (1972) 46 *A.L.J.* 217. See also L. Warnick "State Agreements — The Legal Effect of Statutory Endorsement" (1982) 4 *A.M.P.L.J.* 1.
40 *Ansett Transport Industries (Operations) Pty Ltd* v. *Commonwealth*, note 8 *supra* 77 *per* Mason J.; Campbell, note 39 *supra; Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* [1900] 2 Ch. 352, 362; *cf. Sarkey* v. *Whitlam* (1978) 21 A.L.R. 505, 518-529, 556, 567. It is generally accepted that, at Common Law, a decree of specific performance cannot be made against the Crown: see authorities note 4 *supra*.
41 There are dicta to the effect that the Crown has an overriding inherent power to vary or terminate contracts to which it is a party, if the public interest requires it, *e.g.*, *Page's* Case note 14 *supra*, 292-293. This view is not tenable in the light of recent authorities noted above.
42 *Vauxhall Estates Ltd* v. *Liverpool Corporation* [1932] 1 K.B. 733; *Ellen Street Estates Ltd* v. *Minister of Health* [1934] 1 K.B. 590, 597; *Magrath* v. *Commonwealth* (1949) 69 C.L.R. 156; H. W. R. Wade "The Basis of Legal Sovereignty" [1955] *C.L.J.* 172.
43 Keir and Lawson note 25 *supra*, 11-14; *Perpetual Executors and Trustees Association of Australia Ltd* v. *F.C.T.* (1948) 77 C.L.R. 1; *Midland Railway Co. of W.A.* v. *Western Australia* [1956] 1 W.L.R. 1037; *Reilly* note 10 *supra*, 180.
44 Note 38 *supra*. See also cl. 52 of the Roxby Downs (Indenture Ratification) Act, note 34 *supra*.
45 [1976] Qd. R. 231. There is an analysis of this judgment in L. Warnick, note 39 *supra*, 7.
46 28 and 29 Vict. c.63 (1865).
47 *Commonwealth Aluminium Corporation Ltd* v. *A.G. (Qld)* note 45 *supra*, 236-237.
48 *Id.*, 237 (His Honour's emphasis).
49 *Id.*, 236. In this respect, His Honour's reasons are similar to those of McTiernan J. (dissenting) in *A.G. (N.S.W.)* v. *Trethowan* (1931) 44 C.L.R. 394, 442. See also, W. Friedmann "Trethowan's Case, Parliamentary Sovereignty, and the Limits of Legal Change" (1950) 24 *A.L.J.* 103.
50 *Cth Aluminium Corporation Ltd* note 47 *supra*, 238.
51 *Id.*, 239.
52 *Id.*, 260.
53 *Id.*, 261-263.
54 *Id.*, 248-249.
55 *Id.*, 249-250. His Honour was prepared to uphold s.4 of the Agreement Act, despite that it did require the consent of Comalco to legislative action, because of the special nature of the agreement and because, reading the agreement as a whole, the provision as to variation did not constitute an

abdication of parliamentary responsibility.
56 (1980) 25 S.A.S.R. 389.
57 *Id.*, 390-391, 406-407.
58 *Id.*, 407.
59 *Id.*, 399, 422. Zelling J. decided that the Court had jurisdiction to intervene but he decided that it ought not to intervene.
60 *Id.*, 400, 409, 420.
61 *Id.*, 400, 410-414, 422.
62 *Id.*, 400, 414.
63 *Id.*, 400, 415.
64 *Id.*, 390, 399.
65 *Id.*, 407, 414.
66 *Id.*, 422.
67 *Id.*, 420.
68 *Id.*, 396-398.
69 *Id.*, 413.
70 *Id.*, 397-398.
71 [1965] A.C. 172; see also the statements of Gibbs J. in *Victoria* v. *Commonwealth* (1975) 134 C.L.R. 891, 163-164; *contra*, Matheson J. in *West Lakes*, note 56 *supra* 422. See R. D. Lumb "Fundamental Law and The Processes of Constitutional Change in Australia" (1978) 9 *F.L. Rev.* 148, 180; *Harris* v. *Donges* [1952] 1 Times L.R. 1245; G. Winterton, "The British Grundnorm: Parliamentary Supremacy Re-examined" (1976) *L.Q. Rev.* 591, and "Can The Commonwealth Parliament Enact 'Manner and Form' Legislation?" (1980) 11 *F.L. Rev.* 167.
72 [1965] A.C. 172, 197-198.
73 (1981) 25 S.A.S.R. 389, 413, 422.
74 *Attorney-General* v. *Great Southern & Western Railway of Ireland* [1925] A.C. 754; *Craven-Ellis* v. *Canons Ltd* [1936] 2 K.B. 403; *Attorney-General* v. *De Keyser's Royal Hotel Ltd* [1920] A.C. 508, 542. The proposition in the text may not be true where the Commonwealth was a party to the Agreement.
75 *Edinburgh & Dalkeith Railway Co.* v. *Wauchope* (1842) 8 Clark & Finnelly 710, 725; 8 E.R. 279, 285; *British Railway Board* v. *Pickin* [1974] A.C. 765, 786-787, 790, 793, 799-800, 801-802.
76 (1974) 131 C.L.R. 432.
77 *Id.*, 453-454, 466.
78 *Id.*, 454, Stephen J. at 472 expressly dissented from this conclusion.
79 (1954) 90 C.L.R. 203.
80 (1960) 105 C.L.R. 214, 234-235. Two members of the Supreme Court, Evatt C.J., and Sugerman J. were of the view that the plaintiffs had an interest sufficient to warrant the Court's intervention: (1961) 61 S.R. (N.S.W.) 768; 798-799.
81 [1953] V.L.R. 411.
82 (1930) 31 S.R. (N.S.W.) 183. See [1953] V.L.R. 411, 419, 425-426, 438.
83 [1953] V.L.R. 411, 420, 427, 438-439.
84 [1962] W.A.R. 2.
85 [1980] A.C. 458, 474.
86 Note 84 *supra*, 14, 21.
87 See R. D. Lumb, "The New South Wales Legislative Council Abolition Case" (1964) 4 *U. of Qld. L.J.* 23, 43; O. Dixon, "The Common Law as An Ultimate Constitutional Foundation" (1957) 31 *A.L.J.* 240, 242-245.
88 Note 76 *supra*, 460.
89 *Id.*, 466.
90 Compare His Honour's statements at *id.*, 473, 474, where His Honour expressly refrained from deciding the jurisdiction point and held that, even if the Court had power to make the orders sought by the plaintiffs, it should not do so because the impugned law could be declared invalid after assent.
91 *Id.*, 454.
92 *Id.*, 467.
93 *Id.*, 461.
94 *Id.*, 464-465 and 472, respectively.
95 See *Rediffusion (Hong Kong) Ltd* v. *Attorney-General (Hong Kong)* [1970] A.C. 1136, 1160 (Lord Morris dissenting).
96 *Queensland* v. *Whitlam* (1974) 131 C.L.R. 432, 475-476.
97 *Victoria* v. *Commonwealth* note 71 *supra*, (McTiernan and Jacobs J.J. dissenting). See also *Western*

Australia v. *Commonwealth* (1975) 134 C.L.R. 201 and *Attorney-General (Cth); ex rel. McKinlay* v. *Commonwealth* (1975) 135 C.L.R. 1, 26, 41-42, 54, 76.

98 On this aspect, McTiernan J. dissented vigorously: *Victoria* v. *Commonwealth* note 71 *supra*, 138-139.

99 *Teh Cheng Poh* v. *Public Prosecutor (Malaysia)* note 85 *supra; Ranasinghe's* Case, note 71 *supra*.

100 Note 95 *supra*.

101 *Id.*, 1275.

102 *Id.*, 1277-1278.

103 *Id.*, 1280.

104 Note 73 *supra*, 413 *per* Zelling J.

105 Compare the comments of Barwick C.J. in *Cormack* v. *Cope* note 76 *supra* 452-453, and of Gibbs J. in *Victoria* v. *Commonwealth* note 71 *supra*, 163-164 in favour of a broad interpretation of the dictum in *Ranasinghe*, with the restrictive comments of Zelling and Matheson J.J. in the *West Lakes* Case note 56 *supra*, 413, 422 respectively.

106 State governments are showing an increasing reluctance to entrench development agreements. Even the politically contentious Portland Smelter Agreement and the Roxby Downs Indenture are not the subject of attempted entrenchment. Furthermore, the Rundle Oil Shale Agreement 1980 (Qld), provides in s.3(3) that the provisions in the Agreement authorising consensual amendment "shall not be construed to restrict the Parliament in making laws that affect the rights and obligations of the parties to the Agreement under the agreement".

107 See, for example, the result reached in *The South-Eastern Drainage Board (S.A.)* v. *The Savings Bank of South Australia* (1939) 62 C.L.R. 603.

108 Note 34 *supra*. Section 6(3) provides: "No person shall do or omit to do anything that frustrates, hinders, interferes with or derogates from the operation or implementation of the Indenture, or any aspect of the Indenture, or the ability of the parties to the Indenture or any other person to exercise rights or discharge duties or obligations under the Indenture". See also s.5(3) of the Stony Point (Liquid Project) Ratification Act, note 38 *supra*.

109 See, *e.g.*, clause 6(1) and 6(4)(b) of the Cooper Basin Indenture.

110 Note in this regard cl. 52 of the Roxby Downs Indenture which in the event that the State Parliament enacts "derogating legislation", entices the developer to convert the special tenements provided for in the Indenture to ordinary tenements provided for in the Mining Act.