

MEMORANDUM

1. On 30 June 2014 the Minister for Planning made an approval decision under s 77 of the *Major Transport Projects Facilitation Act 2009* (Vic) (the **MTPF Act**) (the **approval decision**) for the East West Link Eastern Section (the **Project**).
2. The Moreland City Council and Yarra City Council (the **Councils**) have commenced proceedings in the Supreme Court of Victoria (the **proceeding**) seeking, among other things, a declaration that the approval decision is invalid. The proceeding has been set down for hearing in December 2014.
3. It is possible that, before the proceeding is determined, the State, or a State instrumentality, will enter into contracts with a developer for the delivery of the Project.
4. We are asked to advise on the legal consequences, if any, for contracts entered into by the State for the delivery of the Project (the **proposed contracts**) in the event that the approval decision is declared to be invalid.

Executive Summary

5. The power in the State, either by itself or through the LMA, to contract for the delivery of the East West Link Eastern Section is found in the *Major Transport Projects Facilitation Act 2009* (the **MTPF Act**). That power depends on there being a valid approval decision under s 77 of that Act.
6. In the event that the Supreme Court holds that the approval decision made by the Minister for Planning on 30 June 2014 is invalid, there is no power to enter into contracts for the Project and any contracts entered into will be beyond power and unenforceable.

Advice

7. Determining the legal consequences of the approval decision being held invalid requires consideration of the following questions:
 - (a) What is the source of the State's power to enter into contracts for the delivery of the Project?
 - (b) What conditions, if any, must be fulfilled before the State can enter into those contracts?

- (c) If the power to contract is contingent on a valid approval decision what consequences flow from the finding of the court, after the contract is made, that there was no valid approval?
8. We assume any contracts for the delivery of the Project will be entered into by the State or by the Linking Melbourne Authority (the **LMA**).¹ In performing its functions and exercising its powers, the LMA represents the Crown.² The phrase ‘represents the Crown’ is not synonymous with ‘the Crown’. Rather, ‘represents the Crown’ denotes that the LMA is the servant, or agent, of the Crown.³ That is the manner in which the phrase ‘represents the Crown’, as used in relation to the LMA, must be understood.

The Power to Contract

9. The State has three sources of power to contract: prerogative, executive and statutory. The prerogative power does not arise in this case.

Executive power to Contract

10. The State’s executive power to contract is plenary. It is not subject to any express constraint. However, there is an inherent limitation.⁴ The executive power to contract can be exercised in the ‘ordinary course of administering a recognised part of the government of the State’ provided that the contract is made by an ‘appropriate servant of the Crown’; that is, a person authorised to bind the Crown.⁵ This power has been described as to one contract ‘in respect of matters which are within or incidental to the ordinary and well recognised functions of government.’⁶
11. The State also has such power to contract as may be conferred by statute. Statutory power to contract may overlap with the executive power to contract. It may also go beyond it. A statutory power to contract must be exercised in accordance with the terms of the statute.
12. In the instant case, if contracts for the delivery of the Project do not fall within the ambit of the ‘ordinary course of administering a recognised part of the government of the

¹ The LMA was established on 1 July 2010 by s 134 of the *Transport Integration Act 2010* (the TI Act) and is a body corporate. It is a special purpose statutory authority, responsible for managing complex road projects on behalf of the Government and the wider community.

² *Transport Integration Act 2010* (Vic), s 135.

³ *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376, 388 (Williams, Webb and Taylor JJ).

⁴ The inherent limit has been criticized. Nonetheless, at the present time, it remains good law.

⁵ *New South Wales v Bardolph* (1934) 52 CLR 455 (Bardolph), per Dixon J at 508.

⁶ *Tipperary Developments Pty Ltd v Western Australia* (2009) 38 WAR 488 [3].

State’, the executive power to contract cannot be relied upon and statutory authority is required.

13. There are no hard and fast rules about which activities of Government fall within the descriptor ‘the ordinary course of government business’. Some activities self-evidently do so, including, for example, activities associated with maintenance and repair of the infrastructure, such as road and rail networks, telecommunication systems and the like. Whether an activity falls within the descriptor can often be a question of degree. Relevant factors would include the nature and magnitude of the activity as well as the quantum of public monies expended.
14. The precise manner in which the Project is to be undertaken is not known. Most likely it will involve the State, or a State instrumentality, in some kind of common venture with the developer. This venture will involve, at least in dollar terms, the development of the largest infrastructure investment project in the State’s history. It could not be said that the Project is an activity undertaken in the ‘ordinary course of administering government’, regardless of how broad that concept is.
15. In our opinion the executive arm of government has no inherent power to contract for the Project.

Statutory Power to Contract

16. The LMA is established by s 134 of the *Transport Integration Act 2010* (Vic). It has limited power under that Act to enter into contracts,⁷ none of which would comprehend the proposed contracts. Under the MTPF Act, one type of contract the LMA can enter into is for the development or delivery of an “approved project”. It is the MTPF Act that specifies how a project can become an “approved project”.
17. The MTPF Act sets out the steps that must be taken before a project becomes an “approved project”. Those steps are:
 - (a) the declaration of a transport project under s 10 of the MTPF Act;
 - (b) the making of an approval decision under s 77 of the MTPF Act; and
 - (c) the designation of a project area under s 95 of the MTPF Act.

In order to appreciate the significance of these steps it is necessary to say something about the general operation of the MTPF Act.

⁷ *Transport Integration Act 2010* (Vic), s 152.

18. A central purpose of the MTPF Act is to consolidate all of the regulatory approval requirements that would otherwise apply to a project, such as planning, environment and heritage, in a single repository and confer on the “project authority” the statutory power to enter into contracts for the development or delivery of the approved project. Absent the MTPF Act, the relevant activity would need to comply with the many diverse regulatory processes and need to be the subject of a power to contract.
19. The MTPF Act consolidates the approvals process and confers (subject to what is said below) statutory power to contract for the development or delivery of the Project on the LMA. It does so by operation of ss 101 and 102 of that Act, which confer functions and powers on “project authorities” in relation to approved projects. The LMA, as project proponent, is the project authority for the Project.⁸
20. The functions of a project authority are exhaustively stated in s 101, which provides, among other things, that it is a function of a project authority to enter into contractual arrangements with any persons for the development or delivery of the approved project and to administer and manage such arrangements.⁹
21. Section 101 is not a source of power. Power including the power to contract is conferred by s 102. Relevantly, s 102 provides:
- (1) For the purpose of performing its project functions, the project authority, in addition to all other powers conferred on it by or under any other Act or law, may—
 - (a) exercise a specified project power; and
 - (b) exercise a power conferred on it by or under this Act.
 - (2) In addition, a project authority may do all other things necessary or convenient to be done for, or in connection with, or as incidental to, the performance of its project functions under this Act.
22. The power conferred by s 102 attaches to the performance of the project authority’s functions as set out in s 101. Those functions attach to, and are conditioned on, the existence of an “approved project”.

⁸ *Major Transport Projects Facilitation Act 2009* (Vic), s 3.

⁹ *Major Transport Projects Facilitation Act 2009* (Vic), s 101(e).

23. The MTPF Act defines “approved project” to mean “a declared project in respect of which a project area has been designated under Part 4 of the Act”.¹⁰ A “declared project” is defined to mean a transport project declared under s 10.
24. Once a project is declared under s 10, it will become an approved project if the “project area” has been designated under Pt 4. Section 95 provides for the designation of a project area but, relevantly, that section only applies where the Planning Minister makes an “approval decision” in relation to a declared project”. Putting those elements together, an approved project is one which is subject to a declaration under s 10 and an approval decision under s 77.
25. Here, a declaration under s 10 was made on 20 December 2012. On 30 June 2014, the Minister for Planning made an approval decision under s 77 of the MTPF Act. On 30 July 2014, the Minister for Planning made an Order pursuant to s 95(2) of the MTPF Act designating a project area of land for the East West Link Project (Eastern Section).
26. The Councils do not challenge the declaration under s 10 of the MTPF Act. Rather, it is contended that the approval decision under s 77 was infected by jurisdictional error and is thereby invalid such that, for the purposes of the Act, no approved project exists.

What conditions must be satisfied before the state has power to enter into a contract?

Conditions on the Executive Power

27. There are, outside the ordinary principles of contract, few conditions that must be satisfied before exercising the executive’s power to contract. In particular, the validity of a contract entered into by exercise of executive power does not depend on whether monies have been appropriated for the fulfilment of the contract¹¹ and, unless expressed to be so by the terms of the contract, appropriation of monies to fulfil the obligations under the contract is not a condition precedent to its validity.
28. Nonetheless, contracts by the State contain an implied condition that payments (if payment is required) should only be made out of moneys appropriated by Parliament.¹² They also contain an implied promise by the State to appropriate the necessary funds.

¹⁰ *Major Transport Projects Facilitation Act 2009* (Vic), s 3.

¹¹ *Kidman v Commonwealth* (1925) 37 CLR 233; *New South Wales v Bardolph* (1934) 52 CLR 455.

¹² *New South Wales v Bardolph* (1934) 52 CLR 455.

Conditions on the Statutory Power

29. *First*, the functions and powers in ss 101 and 102 are expressly contingent on the existence of an approved project.
30. *Second*, the better view is that in the absence of a valid “approval decision” there is no approved project.
31. The question arising here is whether a valid approval decision is essential to the designation of a project area under s 95. This involves construing the MTPF Act, a task must begin and end with a consideration of the text of the statute, considered in its context.¹³ That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text.¹⁴
32. The process of approval by the Minister under s 77 is an essential feature of the statutory scheme. A main object of the MTPF Act is to consolidate various regulatory processes that would otherwise be imposed by a range of enactments covering different subject matters. Under s 77 the Minister is required to make an approval decision as to whether or not to grant some or all of the applicable approvals that are necessary for the declared project.
33. The fact that the Minister is under a duty to make a decision, that the approvals are described as being “necessary” for the declared project and that the approvals go to a range of substantive matters and not just points of procedure, all strongly point to the conclusion that an approval decision is an essential precondition to a designation under Pt 4 of the Act.

The power to spend

34. Authority shows that in many cases where the Commonwealth is required to expend money, particularly under contracts that require statutory authority, it is necessary for there to be both an appropriation of the required funds from the consolidated fund as well as statutory authority to make the expenditure before that money can be spent. The rationale for the need for statutory authority to spend is that it is inherent in the form of democratic government adopted in the Commonwealth Constitution that Parliament should have ultimate control over spending by the executive. Although the cases have not applied these principles to State governments we see no reason in principle why the same position should not obtain.

¹³ *Thiess v Collector of Customs* (2014) 88 ALJR 514, 518 at [22]-[23].

¹⁴ *Ibid.*

35. Notwithstanding these requirements for the expenditure of money from the consolidated fund, the absence of an appropriation or authority to pay does not, in our view, undermine the effectiveness of a contract entered into by the State provided the requisite power to contract (administrative or statutory) exists. If Parliament later refuses to appropriate monies, or authorise their expenditure, for the fulfilment of the State's obligations under a particular contract it is unlikely that it could be said that the contract would be frustrated. The doctrine seems to be inappropriate in the supposed circumstances. More likely, in such a case, the contract remains on foot and the party contracting with the State or a State instrumentality would have a claim in damages for breach of implied obligations.
36. The issue to be considered is whether there is authority to spend money that may be appropriated for the Project. A bare appropriation of money does not itself confer a substantive spending power.¹⁵ An appropriation simply earmarks money within the consolidated revenue fund as available for particular purpose: it does not of itself authorise the expenditure. The power to spend monies appropriated by the Parliament must be found elsewhere.¹⁶
37. The source of such power might be executive or statutory (or in an appropriate case, prerogative). The limits of executive power to authorise the expenditure of appropriated monies are unknown.¹⁷ While the plenary powers of the executive conferred by s 16 of the *Constitution Act 1975* (Vic) may confer a power to spend moneys appropriated by the Parliament, the nature and extent of that power is uncertain.
38. For the Project, there would need to be statutory power to spend the money appropriated for that purpose. The power need not be express. Powers are often implied.¹⁸ There is nothing unusual about a significant power being given by implication. By way of example, the *Transport Integration Act 2010* (Vic) confers power on the LMA to enter into a lease.¹⁹ There is no express spending power in the terms of that Act, but a power to expend moneys on the payment of such a lease from the pool of monies appropriated to the LMA can readily be implied from the scheme of that Act as a whole.
39. The Parliament has appropriated funds for the Project.²⁰ The funds are appropriated to the Project generally. They are not appropriated to the fulfilment of any particular

¹⁵ *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at [111] per French CJ, at [178] and [210] per Gummow, Crennan and Bell JJ, at [320] per Hayne and Kiefel JJ, at [606]–[607] per Heydon J.

¹⁶ *Williams v Commonwealth* (2014) 88 ALJR 701 at 708 per French CJ, Hayne, Kiefel, Bell and Keane JJ.

¹⁷ *Ibid.*

¹⁸ *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 618.

¹⁹ *Transport Integration Act 2010* (Vic), s 152.

²⁰ *Appropriation (2014-2015) Act 2014* (Vic).

- contract. The power to expend the moneys so appropriated, if it exists, must be found in the MTPF Act.
40. The MTPF Act does not contain an express power to spend appropriated monies. The question is whether the specific functions and powers of the LMA under the MTPF Act carry with them the implicit power to expend money appropriated to the Project in furtherance of those functions.
 41. Section 101 provides that the project authority has, in relation to an approved project, a range of functions, including ‘to facilitate, on behalf of the State, the development of the approved project’,²¹ ‘to administer and manage agreements and arrangements between the State and any other person for, or relating to, the development or delivery of the approved project’²² and ‘to enter into contractual arrangements with any persons for the development or delivery of the approved project and to administer and manage such arrangements’.²³ By s 102, the LMA, for the purpose of performing its project functions and in addition to all other powers conferred on it by or under any other Act or law, may exercise a specified project power and exercise a power conferred on it by or under the Act. In addition, the LMA has power to do all other things necessary or convenient to be done for, or in connection with, or as incidental to, the performance of its project functions.²⁴
 42. Whether a power to contract, even in terms such as are described above, is sufficient to authorise the expenditure incurred in discharge of contractual liabilities entered into under s 101(e), or whether specific provision authorising the expenditure is necessary, is unclear. The better view, in our opinion, is that the functions and powers of the LMA under the MTPF Act carry with them an implied power to spend appropriated funds.
 43. If ss 101 and 102 do not implicitly authorise the spending of funds, there is no other power to spend funds appropriated to the Project. Further legislation would be required.

What are the consequences for any contract if the approval decision was not validly made?

44. In order for the Councils to succeed in the proceeding, it is necessary for the Court to find that the approval decision is infected by jurisdictional error. Jurisdictional error occurs where a decision maker fails to comply with essential conditions on the exercise of a power. In such cases it has been said that ‘a decision that involves jurisdictional error is

²¹ *Major Transport Projects Facilitation Act 2009* (Vic), s 101(a).

²² *Major Transport Projects Facilitation Act 2009* (Vic), s 101(f).

²³ *Major Transport Projects Facilitation Act 2009* (Vic), s 101(e).

²⁴ *Major Transport Projects Facilitation Act 2009* (Vic), s 102(2).

a decision that lacks legal foundation and is properly regarded, in law, as no decision at all'.²⁵

45. What then are the consequences for contracts entered into if the Court subsequently finds that there was no valid approval decision? That question turns on the nature of the power in s 102 and whether the attachment of functions to the existence of an approved project in s 101 speaks to the existence of the statutory power to contract, or merely its exercise.²⁶ The scope of the functions and powers conferred by ss 101 and 102 is to be determined in accordance with the ordinary principles of statutory construction. Statutory construction involves attribution of meaning to statutory text in the manner described in paragraph [31] above.²⁷
46. In the present case, the MTPF Act does not create the LMA or invest it with general power. The Transport Integration Act has that function.²⁸ The MTPF Act provides that the LMA has particular functions in relation to approved projects for which it is the project proponent and invests it with such power as is necessary for the performance of those functions. Both the functions and the power are conditioned on the existence of the approved project: they are not general powers and they are not at large. That stands to reason in the context of the specific type of project to which the Act applies and the substantial expenditure of public monies associated with such projects.
47. It follows that if the approval decision is invalid, any purported contract entered into pursuant to s 101 of the MTPF Act will be beyond power.²⁹ In such a case, no contract exists.³⁰
48. For completeness, we note that the TI Act is not a source of power to enter into Project contracts. That Act creates the LMA and confers on it general powers.³¹ The MTPF Act is specific legislation designed to cover particular types of transport projects and containing safeguards that the parliament has determined are appropriate for projects of this kind. The general powers in the TI Act will not overcome any lack of power under the MTPF Act.

Consequences of the approval decision being invalid

²⁵ *Minister for Immigration & Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.

²⁶ *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) CLR 454 at 457 (Mason CJ, Deane and Gaudron JJ).

²⁷ *Thiess v Collector of Customs* (2014) 306 ALR 594 [22]-[23].

²⁸ *Transport Integration Act 2010* (Vic), ss 138, 152.

²⁹ *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) CLR 454 at 457 (Mason CJ, Deane and Gaudron JJ).

³⁰ *Ibid.* See also *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1.

³¹ *Transport Integration Act 2010* (Vic), Part 6, Division 3.

49. On the assumption that the Supreme Court sets aside the approval decision on the basis of one or more of the grounds advanced by the Councils and that there was, in law, no 'approved project' for the purposes of s 101 of the MTPF Act the issue arises as to what consequences flow for the validity and enforceability of a contract entered into by the LMA for the delivery of the project.
50. None of that is to say that there is no remedy for harm that might be caused to the contractors, either in restitution³³ or breach of warranty of authority or some similar or like claim.

27 August 2014


Ray Finkelstein QC.


R M Niall QC.


S Keating

³³

See Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221.