ANTICIPATING LEGISLATION

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When it is known that legislation is about to be made or amended, what, if any, action can be taken by bodies concerned with the operation or enforcement of that law prior to the commencement of the relevant legislation? The issue can be looked at by considering separately the position of the Executive and the courts.

Executive action

Robert Muldoon was elected Prime Minister of New Zealand in 1975. His National Party had a clear majority in New Zealand's single house Parliament. The Party's platform included an undertaking to repeal the New Zealand *Superannuation Act 1974.* This Act required employers and employees to make payments into a State-run superannuation fund.

Three days after being sworn in as Prime Minister, Mr Muldoon issued a press release stating that legislation to give effect to the promise to repeal the Superannuation Act would be introduced in the next Parliamentary session. The legislation would have retrospective effect to the date of the press release. In the meantime, the compulsory requirement for contributions to be made to the superannuation fund would cease.

A public service employee sought a declaration from the NZ Supreme Court that the Prime Minister's press statement was illegal and mandatory injunctions requiring the bodies charged with administering the Superannuation Act to continue to enforce the obligation to make payments as required by that Act.

The applicant asserted that the Prime Minister's action was in breach of s 1 of the Bill of Rights (1688) (Eng) which reads:

> That the pretended power of suspending laws or the execution of laws by regall authority without consent of Parlyament is illegal.

Wild CJ in the Supreme Court accepted this argument and made the declaration sought[1]. However, he declined to grant the other relief sought because the government had indicated its intention to introduce the relevant legislation into the Parliament. He said that 'it would be an altogether unwarranted step to require the machinery of the New Zealand *Superannuation Act 1974* now to be set in motion again, when the high probabilities are that all would have to be undone again within a few months'. Instead he adjourned the injunction applications for 6 months.

The high point of principle on which the decision in the case is based is cited reasonably regularly[2]. However, it tends to be overlooked that the government won the day in that the compulsory payment requirement was not enforced after the date of the Prime Minister's press statement. By the time that judicial intervention was secured, the government was in a position to argue that any mandatory order would be ineffectual. Thus the government

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achieved its desired result, albeit at the cost of a slap on the wrist from the Court and effectively a warning not to try the tactic again.

One can speculate whether an Australian court today would adopt such an approach to the grant of remedies. In practical terms it permitted the government to do what the NZ Court said was not permitted. One would hope that the inconvenience that might have resulted in the government having to unpick its illegal action would not be accepted as a basis for not making the order that its action demanded.

It is understandable that, where a government has announced that it intends to change the law on a topic, it can become impatient with the time that it might take to pass or amend the relevant legislation. The proposal may have been part of the policy that it put to electors prior to a general election. The government can thereby claim to have a 'mandate' to change the law in the manner proposed. There is a temptation then for it to administer the law in the way that it wants and secure the passage of retrospective legislation to authorise the action that it has taken.

However, to accept this approach is to deny the most fundamental aspect of the rule of law - that it governs the action of the executive as much as it does citizens and other entities. Section 1 of the Bill of Rights was adopted in 1688 to assert the supremacy of parliament and to negate the tyranny of the executive as then represented by 'regall authority'. In *Fitzgerald's* case, the court said that the Prime Minister was exercising such authority. In directing that superannuation contributions not be made, despite the requirements of the Superannuation Act, the Prime Minister 'was purporting to suspend the law without consent of Parliament. Parliament had made the law. Therefore the law could be amended or suspended only by Parliament or with the authority of Parliament'[3].

A similar approach was taken in Australia in relation to the complementary right claimed by the Crown but revoked by the Bill of Rights – the power to dispense with obedience to the law. Brennan J in *A v Hayden*[4] said in a powerful statement that is relevant to the present context and therefore worth quoting in full:

> The incapacity of the Executive Government to dispense its servants from obedience to laws made by Parliament is the cornerstone of a parliamentary democracy. A prerogative to dispense from the laws was exercised by mediaeval kings, but it was a prerogative "replete with absurdity, and might be converted to the most dangerous purposes" (Chitty Prerogatives of the Crown (1820), p.95). James II was the last King to exercise the prerogative dispensing power … and the reaction to his doing so found expression in the Declaration of Right. It was there declared that "the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal". By the Bill of Rights the power to dispense from any statute was abolished … Whatever vestige of the dispensing power then remained, it is no more. The principle, as expressed in the Act of Settlement, is that all officers and ministers ought to serve the Crown according to the laws. It is expressed more appropriately for the present case by Griffith C.J. in *Clough v. Leahy* (1904) 2 CLR 139, at pp 155-156: " If an act is unlawful - forbidden by law – a person who does it can claim no protection by saying that he acted under the authority of the Crown."
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> This is no obsolete rule; the principle is fundamental to our law, though it seems sometimes to be forgotten when Executive Governments or their agencies are fettered or frustrated by laws which affect the fulfilment of their policies. Then it seems desirable to the courts that sometimes people be reminded of this and of the fate of James II.

So what can a government do in anticipation of legislation? To answer this it is necessary to consider what a government can do without legislative authorisation.

There are two sources of extra-legislative authority – the common law and the prerogative[5].

1. Common law

In *New South Wales v Bardolph*[6] Evatt J said that 'No doubt the King had special powers, privileges, immunities and prerogatives. But he never seems to have been regarded as being less powerful to enter into contracts than one of his subjects'[7]. The other judges of the court expressed some reservations as to the scope of this general power to contract. Dixon J suggested that the subject matter of the contract must be concerned with a recognised and regular activity of government[8]. This suggested limitation on the scope of the power to contract has been criticised by some commentators and has not been followed in subsequent decisions[9]. Generally, it is taken that a government can exercise the same powers as a citizen within constitutional limits.

In regard to the Commonwealth there is considerable discussion and difference of opinion over the extent to which the Constitution limits the power to contract[10]. Seddon suggests that it is necessary to consider the particular contract and ask, first, what is the subject matter of the contract? And then: is that subject matter within the enumerated or implied powers of the Commonwealth?. Alternatively, he suggests, the issue may be tested by asking whether the Commonwealth could, instead of contracting under the Executive power, legislate to engage in the relevant activity.[11] This seems to be a safe way for a government contractor to approach the issue.

Whatever limitations may be imposed by the Constitution, it is accepted that, subject to those limitations, it is not necessary for there to be legislation empowering the Executive to enter into a contract. Nor is it necessary for there to have been an existing appropriation to support the contract at the time of its making.[12] Nonetheless, there will have to be an appropriation to meet obligations arising under the contract. This will usually be achieved through the general appropriations for the ordinary services of the government departments.

It is thus open to a government wishing to give effect to its policies to enter into contracts without awaiting legislation - provided that there is no existing legislation on the topic that requires a different outcome than the contract. The Executive, like an individual, cannot contract out of its statutory obligations unless the relevant legislation permits it to do so.

However, there are limits to how far a government can execute its policy through contractual arrangements. The most significant is that a contract only applies to the parties to it. It therefore requires the precise identification of the individuals or entities that are to be involved in the activities with which the government is concerned and the entry into a specific arrangement with them. In general, no obligation can be imposed on parties who are not privy to the contract. Legislation, on the other hand, enables the affected parties to be described generally.

Funding for the activity that is the subject of the contract is not a significant issue having regard to the broad view taken by the High Court in the *AAP* case as to the ability to fund government activities through Appropriation Acts.[13] However, a significant limitation on the execution of policy through contract is that it is not possible to impose penalties for non-compliance. Enforcement regimes beyond ordinary contractual remedies have to be supported by legislative authority.

The upshot of this is that, prior to the making of legislation, unless there is a constraint arising from the Constitution or existing legislation, a government can set up much of the machinery that will be necessary for the execution of the new legislation. Employment contracts can be entered into; leasing of premises can occur; equipment can be purchased; publicising the proposed policy can be undertaken. However, nothing that has an element of compulsion such as acquisition of property or requiring persons not parties to the contract to provide information would be possible before the legislation was made.

Prerogative power

The other power that a government can exercise without the need for legislation is the prerogative power.[14] It is well settled that the Executive can exercise powers without legislative authority in regard to a wide array of matters, including foreign relations, treaties, war and peace, award of honours and grant of pardons. Beyond these topics, it is necessary for the existence of a prerogative power to be established by evidence[15]. It is also necessary to show that the claimed power has not been displaced by legislation and has not fallen into desuetude[16].

The leading authority on the issue of displacement of prerogative powers is *Attorney-General v De Keyser's Royal Hotel Ltd*[17]. The most frequently cited of the Law Lords' judgments is that of Lord Parmoor[18]. He said:

> The constitutional principle is that when the power of the Executive to interfere with the property or liberty of subjects has been placed under Parliamentary control, and directly regulated by statute, the Executive no longer derives its authority from the Royal Prerogative of the Crown but from Parliament, and that in exercising such authority the Executive is bound to observe the restrictions which Parliament has imposed in favour of the subject. … In this respect the sovereignty of Parliament is supreme. The principles of construction to be applied in deciding whether the Royal Prerogative has been taken away or abridged are well ascertained. It may be taken away or abridged by express words, by necessary implication…. I am further of opinion that where a matter has been directly regulated by statute there is a necessary implication that the statutory regulation must be obeyed, and that as far as such regulation is inconsistent with the claim of a Royal Prerogative right, such right can no longer be enforced.

The High Court in *Barton v Commonwealth*[19] seemed to water this approach down a little by saying that 'the rule that the prerogative of the Crown is not displaced except by a clear and unambiguous provision is extremely strong'[20]. Winterton suggests that this statement reflects the nature of the prerogative (request for extradition) involved and is not universally applicable[21]. It certainly does not fit comfortably with *De Keyser's* case itself and the general approach to implied repeals. The safer approach in the present context is to assume that where legislation has already dealt with a prerogative power, the power should not be considered to be available to be used as a means of anticipating legislation.

However, if there has not been a displacement of a prerogative power, it can be invoked to support action by the government even where legislation that is in contemplation may appear to abrogate in whole or in part an existing prerogative.

A recent example of this, together with the power to enter into contracts in anticipation of legislation, is provided by the government's decision to establish the Defence Honours and Awards Tribunal. The award of Honours is an accepted prerogative of the Crown. This has been exercised in relation to the Armed Services by the Queen or the Governor-General acting on the advice of the government of the day. However, in its election policy statement the Labor Party said: 'A Rudd Labor Government will form a permanent independent tribunal arising in the area of Defence Honours and Awards, to take the politics out of medal policy…The tribunal's decisions will be binding upon the Government.'[22]

Since the election, the Government has indicated that it will introduce legislation to establish the tribunal. However, it has acted in anticipation of that legislation by setting up a tribunal and appointing members to it. This has been done by invoking the prerogative power in regard to award of honours and entering into appropriate contracts with the members.

Until legislation is made, the tribunal will have an advisory role only. It will also not have any compulsory powers so it will not be able to require the attendance of witnesses nor the production of papers. The members will have no protection for their actions. All these will have to await the legislation but, provided that the tribunal acts with due circumspection, the

absence of these powers should not cause difficulties to its being able to operate. Of course, until the legislation is made, the decisions will continue to be made in fact and in law by the government. While this limits the concept of the tribunal being an independent decision-maker, the government can at least claim that it is acting on independent advice.

Existing legislation

The attainment of policy goals in advance of legislation through use of the prerogative and contracts is posited on the action not being contrary to existing legislation. This is less likely to present a problem where the proposed legislation relates to a topic not previously the subject of statute. However, where it is proposed to amend existing legislation or to substitute a new scheme for that already in existence, the position may be more complicated.

Action of this kind will expose the issue referred to above in relation to the displacement of prerogative powers -- the extent to which the proposed anticipatory action is prevented by legislation, either directly or by implication. The action taken by Prime Minister Muldoon to suspend the existing obligations under the Superannuation Act is an obvious example of attempting to abrogate the requirements of the legislation. Clearly this cannot be done and it should not be assumed that an Australian court would be as constrained in regard to remedies granted as was the New Zealand court.

However, a recent UK Court of Appeal decision has indicated that it will be necessary to show that the action taken in anticipation of the new legislation does run counter to the existing legislation.

Shrewsbury and Atcham Borough Council v Secretary of State for Local Government (*Shrewsbury*)[23] arose out of the perennial headache of local council amalgamations. The *Local Government Act 1992* (UK) laid down a procedure to deal with such amalgamations. The Government issued a white paper in which it indicated that it proposed to change this procedure. It set out its proposed new procedures and invited councils not only to comment on those proposals but also to make suggestions for possible amalgamations following the procedures set out in the paper. The Government pursued these suggestions in accordance with the new procedure that it proposed but which at that point had no legislative backing. This involved the councils affected in providing information to the Government. The Government noted that it could not oblige the councils so to act but it indicated that it would expect cooperation. (An invitation that it would seem difficult to refuse!)

The procedures were carried through to the point where recommendations for amalgamations were formulated for consideration by the Minister. It was only after this had occurred that the promised legislation was enacted. It validated actions that had been taken previously. Evidence led to the court also asserted that the recommendations made prior to the new legislation had not simply been rubberstamped but had been given due consideration.

Some councils affected by the amalgamation decisions sought review on the basis that the procedure followed did not adhere to that set out in the 1992 Act and that this made the final decisions that had been taken a nullity.

There was no doubt that the procedure adopted did not follow the requirements set out in the 1992 Act. The question that the court had to consider was whether it was permissible for the government to adopt another procedure in anticipation of the authorising legislation. It held that it could do so - or at least that the failure to follow the existing procedure did not invalidate the decisions made in view of the fact that they were taken after the new

legislation and the procedures followed were validated. The failure to follow the legislated procedure did not render the ultimate decision a nullity.

What would have made a more interesting test would have been if the challenge had been brought before the passage of the new legislation. Carnwarth and Waller LJJ expressed the view that the procedures adopted treated the 1992 Act as if it had already been repealed. For the reasons set out above, this did not affect the final decisions. However, the judges indicated that, had the failure to follow the existing statutory procedure affected the rights of the councils involved, a different conclusion could well have been reached. Richards LJ more directly indicated that the processes engaged in did not produce a decision that affected people's rights and therefore could be followed despite the 1992 Act.

This reasoning might be attractive in the Australian context as it reflects the approach taken in the ADJR cases of declining to review the steps taken in the making of a decision. If action is taken that does not follow a prescribed procedure but the ultimate decision does not turn on that action or is validated, the likely ruling of the court would be to decline to hold the decision invalid as having been made contrary to the existing legislation.

The position is different if the prescribed procedure was intended to protect the rights of persons who might be affected by the final decision and the procedure followed in anticipation of amending legislation does not afford that protection. In such a case it would be difficult to claim that the action taken was not in breach of the existing law. A distinction must be drawn between actions by a government that are directed to policy formulation, including the exploration of options for legislation or for decisions under that legislation, and actions that involve the implementation of the existing law. The former permits the pursuit of issues as part of the prerogative and general management of government. The latter requires compliance with the current legislative edict.

Interpretation Acts

The issue of what may be done before legislation commences also arises where an Act or delegated legislation has been made but its commencement is postponed. Provision is made in the Interpretation Acts of all Australian jurisdictions permitting the exercise of certain powers included in the legislation before its commencing date[24]. Were it not for this provision, it would be necessary to include in each Act specific power, for example, to make regulations or appointments that have to be in place when the Act commences operation.

The sections prevent the result of the exercise of the power having effect prior to the Act's commencement but things can be in place to operate on that day. The power is applicable to amending Acts as well as to original Acts. In the absence of express provision to this effect, it was difficult to claim the Interpretation Act section could justify the exercise of powers under a section of the principal Act, as amended, when it was the amending Act and not the principal Act that had the postponed commencement.

Earlier versions of the Interpretation Act provision also limited the exercise of the power to those things necessary to bring an Act into operation, for example a proclamation fixing the commencement date. The present form of the sections is not confined in this way.[25]

The sections only apply to the exercise of powers recognised by the Act in question. It is not a general right to do anything which might be thought to relate to the subject matter of the legislation. However, the power is probably wide enough to cover all activities that will probably need to be engaged in for the purpose of anticipating the operation of the legislation.

It should be noted that in the Commonwealth and New South Wales Acts there is a limitation on the power to act prior to the commencement of legislation. The Interpretation Act provisions only apply to the making of instruments to give effect to a power in the legislation. The Acts of all the other jurisdictions permit the doing of anything for the purpose of enabling the exercise of the power. In practice this may not matter greatly as most pre-commencement actions will involve the making of an instrument (which is not limited to an instrument of a legislative character). The expression 'instrument' is probably sufficient to cover any written document.

It could be argued that the Interpretation Act sections are intended to cover the field of post-making/pre-commencement activity thereby limiting the range of actions that might be taken in reliance on the prerogative or contract. Again it probably matters little as the actions to be taken would generally fall within the powers referred to in the legislation.

Retrospectivity

Where action has been taken in anticipation of legislation, it is common to find that the legislation when made validates the action taken with retrospective effect. This can create some issues additional to those which arise from the application of the general interpretation presumption that legislation is to be construed as not operating retrospectively[26].

The Senate takes a particular interest in retrospective tax legislation. *Odgers Senate Practice* (11th ed)[27] notes that the *Customs Act 1901* (ss 226 and 273EA) and the *Excise Act 1901* (ss 114 and 160B) contain provisions which allow the collection of customs duties and excise duties from the time of the announcement of proposals by the Government, within a period of 12 months before the passage of legislation to validate the duties. The purpose of these provisions is said to be to ensure that windfall profits may not be made between the time of announcement of duties and the enactment of legislation to levy the duties. However, the commentary notes that while the Senate has not declined to pass a Bill validating increases in duties, there have been instances of the Senate acting to limit the effect of a retrospective Bill.

Odgers continues that, in relation to other taxes, the Senate in 1988 passed a declaratory resolution, as part of an amendment to the motion for the second reading of a bill, to the effect that if more than six months elapses between a government announcement of a taxation proposal and the introduction or publication of a bill, the Senate will amend the bill to reduce the period of retrospectivity to the time since the introduction or publication of the bill.

The Scrutiny of Bills Committee has also adopted a role in relation to retrospective legislation. As a matter of course, the Committee draws the attention of the Senate to retrospective legislation, particularly tax legislation.

The Committee has stated its attitude to retrospectivity as follows[28]:

> The Committee endorses the traditional view of retrospective legislation. Its approach is to draw attention to Bills that seek to have an impact on a matter that has occurred prior to their enactment. It will comment adversely where such a Bill has a detrimental effect on people. However, it will not comment adversely if:
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> - apart from the Commonwealth itself, the Bill is for the benefit of those affected;
> - the Bill does no more than make a technical amendment or correct a drafting error; or
> - the Bill implements a tax or revenue measure in respect of which the relevant Minister has published a date from which the measure is to apply, and the publication took place prior to the date of application.

> In the Committee's view, where proposed legislation is to have retrospective effect, the explanatory memorandum should set out in detail the reasons retrospectivity is sought.

It can thus be seen that, as far as the Commonwealth is concerned, the passage of retrospective legislation validating action taken in anticipation of the legislation is not completely straightforward. The Senate will require the action to be justified.

A greater limitation is imposed on backdating of delegated legislation. A provision is to be found in all jurisdictions except Western Australia that imposes a limitation on the making of such legislation.[29] However, the form of limitation provided in the different jurisdictions varies.[30]

Broadly speaking, delegated legislation either cannot be given retrospective operation or has no effect if the rights of a person would be affected adversely. It is thus not possible to validate action taken in anticipation of delegated legislation if so to do would be to disadvantage a person. If such validation is to occur, it must be done by an Act.

Conclusion

The discussion above indicates that the Executive can take action in anticipation of legislation provided that the action does not contradict existing legislation. The exercise of prerogative powers and the entry into contracts provides a means of enabling a government to set up mechanisms to carry out the legislative mandate once the legislation is passed. The Interpretation Acts give like power once the legislation is passed and is awaiting commencement. What cannot be achieved is the imposition of obligations on persons or the interference with established rights. Legislation is needed for these purposes. Any such legislation will have to contend with the limitations on the use of retrospective legislation that are outlined above.

2. Courts and tribunals

Can a court or tribunal tailor its orders in anticipation of a change to be made to legislation? The short answer is No. Courts and tribunals must apply the law that is relevant to the matter before them. The fact that a change is about to occur in that law is not something that can be taken into account in determining the result that flows from the existing law. 'A Court of law has no power to grant a dispensation from obedience to an Act of Parliament'[31].

The issue seems to have arisen most frequently in relation to a request to adjourn an application before a court because the relevant law is about to be amended. While there have been instances where the court has adhered to such a request, the general approach is to refuse it. McHugh JA in *Sydney City Council v Ke-Su Investments Pty Limited* summarised the position[32]:

> …as a general rule it is not a proper exercise of the discretion to grant an adjournment on the ground that it is believed that the law may or will be changed in the near or remote future. As Dean J pointed out in *R v Whiteway; Ex parte Stevenson* [1961] VR 161 at 171, ´I think it was the duty of the court when the applications came on for hearing to deal with them in accordance with the law as it then stood. It would be a cause of injustice if courts could adjourn cases because they had some real or imagined belief that the law might be amended.'

In *Meggits* case[33] the NSW Court of Appeal rejected an argument that a different approach should be adopted where the proposed change is beneficial to an applicant. It said that this was not relevant to the application of the general principle.

However, the Court acknowledged that an adjournment might be possible in two circumstances. First, where the adjournment is sought to enable a proposition established in

a decided case to be tested in an appeal brought by the parties to that case. The reason given for this was that a pending appeal is different from a proposal for legislative amendment in that there is a level of certainty that the point will be addressed and knowledge that, if and when it is, the decision of the court higher in the appellate chain will declare the law on the relevant topic with retrospective effect.

Second, it was postulated that it may be proper to have regard to imminent legislative changes where the court is dealing with an application for a discretionary remedy such as a prerogative remedy or an injunction or declaration. Such relief may be refused on the ground of futility and a proposed change in legislation may be relevant to that issue.

As these decisions show, the refusal to grant an adjournment may be to the disadvantage of an applicant. The relevant proposals before the court in *Meggitt's* case were to reverse a previous ruling of the court. The proposed changes had been announced by the responsible Minister. It seems that the courts take a sceptical view of promises contained in Ministerial statements and the speed with which they may be executed.

Tribunals that deal with review of the merits of government decisions find themselves in a difficult position when a government has announced an intention to change the law. While it may not be legally correct to do so, where a government proposes to adopt or change a law in a manner *favourable* to a citizen, it will often implement that change in advance by advising agencies to act as if the change had been made. It is unlikely that such action will attract a challenge. However, a tribunal is bound by the law as it stands. It does not have the luxury of being able to act in the way that the executive can choose to proceed. It cannot make the allowance that the agency can.

An example of this position is provided by *Re Waterford and Department of Health (No 2)*[34]. The government had decided to widen the range of documents that were to be available under the *Freedom of Information Act 1982* (Cth) by including documents that had been brought into existence prior to the commencement of the Act. It had introduced a Bill into the Parliament to achieve this purpose. It had instructed agencies to act as if the Bill had been passed. The Administrative Appeals Tribunal nonetheless said that it was bound by the law. Despite the fact that, in reaching a decision it is to exercise all the powers of the decision-maker, it could not consider the applicability of exemption provisions to prior documents as the Act still did not apply to these.

The ruling of courts and tribunals that they are bound to apply the law as it stands seems the only approach open to them to take. To anticipate a change and purport to apply the law in a form that the court or tribunal is told it is about to take would negate the rule of law. This is so even in the case of legislation that has been made but has not yet commenced. The role of the courts is to interpret and apply legislation, not to make it.[35]

However, the approach adopted to applications to adjourn proceedings pending a change in the law seems to take the matter too far. The court is able to avoid abuse of its processes by specifying the length of the adjournment and monitoring subsequent proceedings. *Meggitt's* case stands as an example of when insistence on clearing the appeal lists resulted in unfairness to a party. The appellant had no capacity to control the commencement of the change in the law that was intended to overturn an existing ruling of the court that determined his position adversely. The courts should not adopt a rigid approach. There may well be circumstances where the clear justice of the outcome may warrant the adjournment of proceedings where it is apparent that a change is to be made in legislation.

Endnotes

1 *Fitzgerald v Muldoon* [1976] 2 NZLR 615.
2 See *Meggitt Overseas Limited v Grdovic* (1998) 43 NSWLR 527 and most recently in the High Court *O'Donoghue v Ireland* (2008) 244 ALR 404 at 417[46]. In *Gribbles Pathology (Vic) Pty Ltd v Minister for Human Services & Health* [1996] FCA 478 the Full Federal Court cited *Fitzgerald's* case as authority for rejecting the argument that the Minister could choose which of two Determinations to follow where both were applicable but incompatible. To allow this would be 'tantamount to conferring on the Minister a power to suspend law having statutory force'.
3 Above n 2 at 622.
4 (1984) 156 CLR 532 at 580.
5 There is authority suggesting that the prerogative includes all non-legislative powers of the Crown, ie common law powers are a part of the prerogative: see George Winterton *Parliament, The Executive and the Governor-General*, (MUP, 1983), 112 and authorities cited. Others take a different view and for convenience in the present context the division is maintained.
6 (1934) 52 CLR 455.
7 At 475.
8 At 507.
9 Notably Professor Enid Campbell, see 'Commonwealth Contracts' (1970) 44 *ALJ* 14. For further discussion, including contrary views, see Leslie Zines *The High Court and the Constitution* (4th ed, 1997, Butterworths), 257; Nicholas Seddon *Government Contracts* (3rd ed, 2004, Federation Press), 54; Winterton, op cit n 5, 44.
10 Ibid.
11 Seddon, op cit n 9, 62.
12 *Bardolph's* case, n 6, per Dixon J at 509.
13 *Victoria v Commonwealth* (1975) 134 CLR 338.
14 See Winterton, op cit n 5, ch 6.
15 But cf *Johnson v Kent* (1975) 132 CLR 164 where the High Court seemed to endorse the view that the prerogative authorised the Commonwealth to establish social and recreational facilities on Commonwealth land in the ACT.
16 Winterton, op cit n 5, 113 ff.
17 [1920] AC 508.
18 At 575.
19 (1974) 131 CLR 477.
20 Per Barwick CJ at 488 with the other judges agreeing.
21 Op cit n 5, 115.
22 Labor's Plan for Veterans' Affairs, November 2007, p24.
23 [2008] EWCA Civ 148 (4 March 2008).
24 Cth, s 4; ACT, s 81; NSW, s 26; NT, s 8; Qld, s 17; SA, s 14C; Tas, s 11; Vic, s 13; WA, s 25.
25 See D C Pearce and Robert Geddes *Statutory Interpretation in Australia* (6th ed, 2006, Lexis Nexis) 199 for further detail of the operation of the sections, including judicial decisions.
26 See generally Pearce and Geddes, op cit n 25, ch 10.
27 Chapter 13 Financial Legislation, heading 'Retrospectivity of tax legislation'.
28 Scrutiny of Bills Committee*, Work of the Committee during the 40th Parliament February 2002-August 2004*, 14
29 ACT *Legislation Act 2001* s 76; Cth *Legislative Instruments Act 2003* s 12 (AIA s 48); NSW *Interpretation Act 1987* s 39; NT *Interpretation Act* s 63; Qld *Statutory Instruments Act 1987* ss 32, 34; SA *Subordinate Legislation Act 1978* s 10AA; *Tas Acts Interpretation Act 1931* s 47; Vic *Subordinate Legislation Act 1994* s 16.
30 See Dennis Pearce and Stephen Argument *Delegated Legislation in Australia* (3rd ed, 2005, LexisNexis), 387 for the details.
31 Per Earl Loreburn LC *Attorney-General v. Birmingham, Tame, and Rea District Drainage Board* [1912] AC 788 at 795; cited by Brennan J in *P v P* (1994) 181 CLR 583 at 620 and Mason P in *Meggitt's* case, n 2, at 532.
32 [1985] 1 NSWLR 246 at 258.
33 See n 2.
34 (1983) 5 ALNN197; see also *Re Seale and Repatriation Commission* (2004) 83 ALD 735.
35 This view of the role of the judge in interpretation is not accepted in other jurisdictions: see the discussion by Suzanne Corcoran, 'The Architecture of Interpretation: Dynamic Practice and Constitutional Principles' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005), ch 3, particularly at n 4, citing Basil S Markenis (ed), *Law Making, Law Finding and Law Shaping: The Diverse Influences* (OUP, 1997) 91.