The contractual powers and liabilities of the Crown and state participation in petroleum development

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The use of contracts to attract private sector investment and skills by the government generally proceeds on the assumption that a Crown contract is really no different from any other contract and that public contracts offer the same degree of certainty and security as their private sector counterparts. This paper surveys some specific areas of law (without considering the conceptual validity of treating public and private contracts on equal terms) which negate the notion that a Crown contract is no more uncertain than an ordinary private contract.

There is a general legal uncertainty surrounding Crown contracts which is to a large degree attributable to uncertainty as to just what the law at present is. This uncertainty, in my view, is caused by an as yet unresolved conflict in judicial attitudes where public and private law meet. Even where the law is tolerably clear the failure of the courts to recognise or properly evaluate the conflict of public and private interests has led to inequitable and uncertain results.

On the one hand there is a persistent attitude by the courts that the law of contract which applies to the Crown should be no different from that which applies to private individuals. Yet the courts at the same time insist that when the Crown undertakes its public functions under statute it is not free to act like a private individual. The Crown must conform to procedural requirements of fairness (natural justice), it must observe the legislative intent of Parliament, that is, it must not frustrate Parliament's intention by binding itself from exercising its statutory power, and it must exercise its power for purposes consistent with the statute's purpose. The Crown in the public interest also has the benefit of privileges and immunities that a private individual does not possess, for instance a statute will not bind the Crown unless it is so provided, expressly or by necessary implication.

Clearly judicial adherence to the traditional notions of freedom and sanctity of contract are going to conflict with the dictates of administrative law when the Crown undertakes its public functions through contract. Until the courts squarely

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face this issue the legal framework for public contracts will be generally uncertain. Further there can be inequitable results when either the dictates of public law or contract law are permitted to take undue precedence.

The following discussion aims at outlining some of the major issues which arise in this context. In the first section the origin of the Crown's power to enter into contract and the implications of the developing principles of administrative law are considered. In the second section there is a short survey of the doctrine of improper fetter on administrative powers and the consequences of such a doctrine, and in the third section the status of Petroleum Corporation of New Zealand Ltd. as an agent of the Crown and the consequences of agency are speculated upon.

I. THE ORIGINS OF THE CROWN'S POWER TO CONTRACT

A. Powers of the Crown to Enter into Contract in General

There is dispute as to whether or not the Crown possesses a Common Law power to enter into contract.[1] If the Crown has no such Common Law power it is limited to its statutory powers which if exceeded will render the contract void ab initio. The view that the Crown has no Common Law power to enter into contract depends on the proposition that the Crown does not possess the powers of an ordinary individual to contract. This in itself seems unlikely[2] and in other contexts the courts have accorded to the Crown all these legal capacities which an ordinary individual possesses.[3] English judicial authority contains no suggestion that the Crown does not have Common Law powers to enter into contract.[4] The Australian High Court decision, *New South Wales* v. *Bardolph*,[5] can be interpreted as standing for a rule which holds that the Crown does have the power to enter into contract without statutory authority but that this power is restricted to matters relating to the ordinary administration of a recognised government activity, an uncertain test indeed.[6] It is submitted that the supposed restriction referred to in *New South Wales* v. *Bardolph* was nothing more than a recognition of the limited powers of agents who act on behalf of the Crown[7]

1 In support of the view that the Crown does not have Common Law powers to contract see *Report of the Controller and Auditor-General on the Public Accounts of N.Z. for the financial year ended 31st March 1947*. N.Z. Appendix to the Journals H. of R. Vol. 2 1947, B1 — (Pt II) 22-23. The contrary view can be found in Mundell "Legal Nature of Federal and Provincial Executive Governments" (1960) 2 Osgoode Hall L. J. 56, 58-66.

2 The continuity which marks our constitution belies any denial of the sovereign's powers as an ordinary individual when acting in a public capacity as might be argued on the basis of section 35 (1) of the Crown Proceedings Act 1950.

3 *Eastern Trust Company* v. *Mackenzie Mann* [1915] A.C. 750, 759; *Attorney-General* v. *De Keyser's Royal Hotel* [1920] A.C. 508, 567 per Lord Parmoor.

4 *Thomas* v. *R.* (1874) L.R. 10 Q.B. 31, 33; *Rederiaktiebolaget Amphitrite* v. *R.* [1921] 3 K.B. 500, 503.

5 (1934) 52 C.L.R. 455.

6 For general discussion of the Crown's power to contract in Australia, see Hogg *Liability of the Crown* (Law Book Co., Sydney, 1971) Chapter 5; Campbell "Commonwealth Contracts" (1970) 44 A.L.J. 14; Zines *The High Court and the Constitution* (Butterworths, Sydney, 1981) 207-211.

7 See in particular the judgment of Starke J., at p. 502.

and that in any event the decision ought to be confined to its federal context where governmental actions are subject to the Australian Federal Constitution.[8]

Much of the debate over the existence or scope of the Crown's Common Law powers to contract is diffuse by reason of the numerous statutory provisions expressly conferring authority on the Crown or its agents.[9] However, the existence of Common Law powers and their interrelationship with statutory powers is of significant importance when the application of administrative principles is considered.

B. Specific Powers in Relation to Petroleum Development

Set out below are those provisions which expressly confer the right to contract on the Crown in relation to petroleum development.

Section 15 (1) of the Ministry of Energy Act 1977 provides

> The Minister may from time to time, on behalf of the Crown, either alone or jointly with any person or persons, carry on any business relating to exploration for or the discovery, production, processing, supply, distribution, uses or conservation of energy, sources of energy, products from energy or sources of energy, minerals, and mineral products; . . .[10]

Section 15 (11) of the same Act then provides

> The Minister may from time to time, on behalf of the Crown, enter into and execute agreements, contracts ,deeds, and other instruments for the purposes of this section, and do all other acts and things that are reasonably necessary for such purposes.

And finally section 15 (7) provides

> The Crown, acting through any Department of State, may from time to time at the request of any undertaking referred to in subsection (1) of this section —
> Enter into contracts or arrangements with any other persons for the execution or provision of any work or service by the Department for the undertaking, or for the supply of any goods, stores, or equipment by the Department to it —
> on such terms and conditions as may be agreed on.

It is submitted that "business" in the context of section 15 means business in the commercial sense which implies some kind of profit-making ongoing operation.

It is probable therefore that there is a lacuna with respect to contracts let by the Minister of Energy to construct a public facility which is not for business purposes. However, the extensive involvement of wholly or partly owned state corporations in energy resource development, that is, "business" ventures, means that there would be few cases where an express statutory power to contract would be absent.

8 See Campbell and Zines, op. cit. supra n. 6.

9 See e.g. Ministry of Energy Act 1977, s. 15; Railways Corporation Act 1981, s. 23 (f); Post Office Act 1959, s. 242; Education Act 1964, s. 26; Hospitals Act 1957, s. 75; Forests Act 1949, s. 15 (a); Trade and Industry Act 1956, s. 9; Electricity Act 1968, ss. 11 and 12; Geothermal Energy Act 1959, s. 11; Coal Mines Act 1925, ss. 102 and 103; many Finance Acts (e.g. Finance Act 1965, s. 6).

10 Emphasis added.

C. *Limits on the Crown's Contractual Powers to Enter into Contract Imposed by Administrative Law*

Where a governmental power is statutory, that power is limited by the object and purpose of the statute in which it is contained and its exercise may also be subject to procedural requirements, implied as a matter of statutory interpretation (natural justice). It has to be considered how these constraints might apply to the Crown's contractual powers. For instance would a contract award decision be invalid if the Minister of Energy made the decision in a capricious manner, or in bad faith, or on the basis of collateral policies not related to energy development such as political allegiance, or discrimination in favour of racial minorities? Would the Minister of Energy be subject to implied procedural constraints which for instance would legally require him to inform all potential tenderers of any relaxation of tender specifications after they had been issued or to give contractors an opportunity to be heard before being placed on a blacklist?

A recent decision of the New Zealand Court of Appeal has recognised in principle that the exercise of a contractual power under statute by a public authority carries with it public responsibilities.[11]

> But in exercising the contractual powers (a public body) may also be restricted by its public law responsibilities. The result may be that a decision taken by the public body cannot be treated as purely in the realm of contract; it may be at the same time a decision governed to some extent by statute.
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> For instance there are the Wednesbury principles already mentioned, recent recognitions of which in the House of Lords are to be found in *Bromley London Borough Council* v. *Greater London Council* [1982] 1 All E.R. 129. This Court has indicated in several recent cases that while it may be difficult to show that legislation has impliedly made a certain consideration truly mandatory (as distinct from permissible), it is certainly not impossible . . . Conversely there may be implied illegitimate considerations or motives . . .
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> Other principles which may be relevant are those of natural justice or fairness . . . An argument on these lines could be supported, for instance, by the authorities collected and applied in *Daganayasi* v. *Minister of Immigration* [1980] 2 N.Z.L.R. 294.

This decision concerned a local authority contract decision and the courts have traditionally been more willing to intervene in relation to the exercise of their powers than they would be in respect of central government. This however is a matter of degree — the principles of administrative review remain extant. Most importantly a local authority's contractual powers are clearly statutory and they have no Common Law powers. With regard to central government the probable existence of Common Law powers make the application of administrative law principles in this area, to say the least, uncertain. If the Crown possesses, and in fact exercises, a Common Law power to enter into contract then the court's powers of administrative review are very limited. There is no statutory base from which the scope of power can read down, or into which the requirements of natural justice can be implied.

11 *Webster and Thorpe* v. *The Auckland Harbour Board,* Unreported 19 April 1983 C.A. 5/82 per Cooke and Jeffries JJ.

When there is clearly a statutory power to enter into contract it is uncertain what happens to the pre-existing Common Law power (if it is accepted that there is such a power). To the extent that statutory powers are inconsistent with Common Law powers the latter are abrogated by necessary implication. To hold otherwise would be to deny the sovereignty of Parliament. But if a statutory power to enter into contract is limited to certain purposes because it is constrained by the purposes and object of the Act within which it is contained, can the broader Common Law powers be relied upon if these limits are exceeded? If the Minister of Energy desires to pursue collateral purposes not directly related to energy development, for instance stipulating that boilermakers from the plagued Bank of New Zealand building in Wellington are not to be employed, can he reply on general Common Law powers to justify such a term or condition of tender? There are cases which discuss the interrelationship of statute and Common Law or prerogative powers but they provide no conclusive answers.[12]

The second difficulty in applying administrative law principles which is related to the first is the judicial attitude to the law of contract with its allied principle of freedom of contract. The principles of contract law are far more settled than those of the comparatively new area of administrative law. The courts have refused to accept that the power to contract can be fettered[13] and the view is expressed that once exercising a power under contract then the power is solely contractual and not statutory.[14] The problem is further exacerbated by an unnecessary pre-occupation with statutory definitions of the court's statutory review powers.[15]

This judicial attitude is therefore against recognising any implied procedural or substantive constraints derived from statute upon the exercise of the Crown's contractual powers. The Minister of Energy may give one tenderer an unfair advantage but the courts might see this as perfectly within his powers. Not only is it uncertain to what extent principles of administrative review will apply to the exercise of contractual powers, it is also uncertain what the consequences of an ultra vires finding on review would be. If a contract award is found to have been made in breach of the requirements of natural justice but contract performance is well under way will the courts hold that the contract is void and

12 See *New South Wales* v. *Bardolph* (1934) 52 C.L.R. 455, 496 per Evatt J.; *Shand* v. *Minister of Railways* [1970] N.Z.L.R. 615, 633 per North P. and Turner J.; and in relation to prerogative powers see *Attorney-General* v. *De Keyser's Royal Hotel* [1920] A.C. 508, 539-540; *Sabally and N'Jie* v. *Attorney-General* [1965] 1 Q.B. 273, 294-295, 299.

13 Re pre-contractual powers see e.g. *Re Rayney and the Queen* (1974) 47 D.L.R. (3rd) 533; *Wilson, Walton International* v. *Tees Port Authority* [1969] 1 Lloyd's Rep. 120; *Honeywell Information System* v. *Anglian Water Authority* (1976) *The Times,* London, June 30. Re contractual powers see e.g. *Boucaut Bay Co.* v. *Commonwealth* (1927) 40 C.L.R. 98; *Palmer* v. *Inverness Hospitals Board of Management* 1963 S.C. 311; *Dwen* v. *Young,* Ureported December 1978, Barker J. (A 801/77); *A.N.U.* v. *Burns* (1982) 43 A.L.R. 25.

14 Ibid. *Dwen* v. *Young,* and *A.N.U.* v. *Burns.*

15 *Re Rayney and the Queen* (supra n. 13), *Re Midnorthern Appliances Industries Corporation and Ontario Housing Corporation* (1977) 17 O.R. (2nd) 29; *Dwen* v. *Young* (supra n. 13), *A.N.U.* v. *Burns* (supra n. 13).

must be re-let, a sobering thought for the businessman who thought he had a lucky break when he was privately informed that tendering specifications had unofficially been relaxed — or will the courts issue a declaratory judgment holding that an award was illegal but refuse to cancel the contract? Will disappointed tenderers be able to recover damages for wasted tender preparation costs if an award decision is found to be in breach of natural justice when there is no recognised remedy of damages in administrative law? Will the courts imply a collateral contract in such circumstances under which damages can be recovered?[16]

II. IMPROPER FETTER UPON EXECUTIVE POWERS

A. A Fetter on the Powers

The issue discussed here is a continuation of the discussion of the impact of administrative law on the Crown's contractual powers. Because the Crown represents the public interest there is inevitably conflict between the interests of the general public and those of individual businessmen when the Crown enters into contract. The reconciliation of these competing interests results in limitations on the Crown's power to enter into contract with a private individual. A public body (the Crown included) cannot enter into a contract if such a contract would have the effect of improperly fettering its statutory powers.[17]

> If a person or public body is entrusted by the legislature with certain powers and duties expressly or implicitly for public purposes, then those persons or bodies cannot devest themselves of those powers.

It is difficult to generalise as to the circumstances in which a contract will be held invalid as fettering a statutory power. The cases concerned with this issue arise in a wide range of statutory contexts and deal with an equally wide range of contractual provisions. The basic principle is clear, however, even if the consequences of its application or its operation is not. If Parliament in the public interest, confers a power by statute upon a body that body cannot defeat the intention of Parliament by contracting with an individual not to exercise that power. It is the intention of Parliament which the courts are concerned with, so that in any case the question must be asked whether the contract is incompatible

16 In other jurisdictions where the concept of a special law of public contracts is established there is considerable discussion of the issues raised above. See, as to India, general discussion of procedural rights of fairness in exercise of pre-contractual power, D. Rajeer "Government Contract — Right or Privilege?" [1981] Cochin U.L.R. 390; and in the E.E.C. and U.S.A. where there is a significant amount of statutory regulation see L. W. Gormley "Public Works Contracts and the Freedom to Provide Services" [1983] N.L.J. 533; Tieder and Tracey "Forums and Remedies for Disappointed Bidders on Federal Government Contracts" 10 Pub. C.L.J. 92; Beppler "Competitive Bidding on Public Works in Wyoming" (1976) 11 Land and Water L.R. 243.

17 *Birkdale District Electricity Supply Co.* v. *Corporation of Southport* [1926] A.C. 355, 364 per Lord Birkenhead. For cases on this principle where the Crown was the public authority see *Watson's Bay and South Shore Ferry Co. Ltd.* v. *Whitfield* (1919) 27 C.L.R. 268; *Board of Trade* v. *Temperly Steam Shipping Co. Ltd.* (1926) 26 Ll. L.R. 76 affirmed (1927) 27 Ll. L.R. 230; *Commissioner of Crown Lands* v. *Page* [1960] 2 Q.B. 274; *R.* v. *Dominion of Canada Postage Stamp Vending Co.* [1930] S.C.R. 500; *Ansett Transport Industries (Operations) Pty. Ltd.* v. *Commonwealth* (1977) 139 C.L.R. 54. For local authority cases see generally de Smith *Judicial Review of Administrative Action* (4th ed. Stevens, London, 1980) 317-320.

with the exercise of the power Parliament intended. There is also authority for the proposition that the Crown cannot fetter its common law and prerogative powers to prevent itself from acting in the public interest, *R.* v. *Amphitrite*.[18] This decision is much debated and has received much academic attention. However, its practical significance may not be as great as all the discussion would imply, given that the powers the exercise of which are most likely to interfere with the Crown's contractual obligations are statutory — for instance powers to increase import or electricity tariffs, or powers to make regulations for construction safety or quality standards.[19]

The threat to contractual certainty posed by the doctrine of improper fetter of powers is not caused by uncertainty in the law but rather the uncertain results created by the law's operation. At the time of entering into contract, circumstances which necessitate the exercise of a statutory power in conflict with the Crown's contractual obligations may have been quite unanticipated. Yet if there is conflict the courts will hold the contract void ab initio or, and this is perhaps more likely, refuse to imply a contractual term which would ordinarily be recognised in a commercial contract as it would be an improper fetter.[20]

B. Relief where a Government Contract is Interfered With by Administrative Action

If a contract is held to be void then a contractor can claim restitution for any benefit conferred pursuant to the void contract.[21] But if the law of restitution is truly founded on the underlying principle of unjust enrichment it follows that if a contract is interfered with at an early stage when a contractor may have incurred extensive preparation costs but not yet conferred any benefit or where the government is providing a service paid for by the contractor, for instance where the government is a supplier of petroleum, then a quasi-contractual claim for restitution may be to no avail.[22]

In a case where the courts refuse to imply an ordinary commercial term because it would be an improper fetter then the contractor may be able to recover pursuant to the Frustrated Contracts Act 1944.[23] The contract must, however, be frustrated as opposed to simply made unprofitable.

18 [1921] 3 K.B. 500.

19 For general public discussion of the *Amphitrite* see J. D. B. Mitchell *The Contracts of Public Authorities: A Comparative Study* (Bell, London, 1954) 27-66; P. V. Hogg, "The Doctrine of Executive Necessity in the Law of Contract" (1970) 44 A.L.J. 154; E. Campbell, "Agreements about the Exercise of Statutory Powers" (1971) 45 A.L.J. 338; Keir and Lawson, *Cases in Constitutional Law* (6th ed. Oxford, 1979) 320-327; judicial support can be found in *Commissioner of Crown Lands* v. *Page* op. cit. and *Ansett Transport Industries (Operations) Pty. Ltd.* v. *Commonwealth* op. cit., but see *Robertson* v. *Minister of Pensions* [1949] 1 K.B. 227, 231, and *Director of Posts and Telegraphs* v. *Abott* (1974) 22 F.L.R. 157, 168.

20 See e.g. *William Cory and Son Ltd.* v. *City of London Corporation* [1951] 2 K.B. 476.

21 See *Craven-Ellis* v. *Canons Ltd.* [1936] 2 K.B. 403 and generally Jones "Restitutionary Claims for Services Rendered" (1977) 93 L.Q.R. 273.

22 Perhaps the law of restitution can also be related to notions of reliance, see Atiyah *The Rise and Fall of Contract* (Clarendon Press, Oxford, 1979) and see *Sabemo Pty. Ltd.* v. *North Sydney Municipal Council* [1977] 2 N.S.W.L.R. 880.

23 See *William Cory and Son Ltd.* v. *City of London Corporation,* supra n. 20.

In summary, the consequences of the doctrine of improper fetter leave the contractor, perhaps not without a remedy, but in a position likely to be well short of that which had been planned for or expected.

It has been cogently argued by one writer that in this type of case there is no need for the courts to insist that contracts are void should they conflict with the exercise of statutory powers.[24] Providing the remedy of specific performance cannot be insisted upon, which is the case in regard to the Crown, why should the Crown not pay damages for breach of contract when administrative action for the benefit of the general public conflicts with obligations to one individual. The general public purpose is still achieved and the individual is not unfairly prejudiced. The current doctrine of improper fetter which denies this result has given undue precedence to the dictates of public law.

A practical solution in these cases might be to have a contractual arrangement made with government ratified by statute. Clearly a contract would have to be sufficiently important to justify this action. Statutory ratification would eliminate much of the uncertainty, if not all, discussed in the preceding pages.[25] Subject to international obligations where foreign interests are involved, government through Parliament would always be free to alter an agreement by subsequent legislative action. But this represents a considerable step not to be lightly taken.[26]

III. PETROCORP AN AGENT OF THE CROWN?

This part of this paper deals briefly with the status of Petroleum Corporation of New Zealand Ltd. primarily in order to determine whether it enjoys the privileges and immunities of the Crown in the exercise of its contractual powers such as the following: public interest immunity (Crown Proceedings Act 1950, s. 27) from statutes which do not expressly or by necessary implication bind the Crown (e.g. Wages Protection and Contractors' Liens Act 1939), and immunity against injunctive relief (Crown Proceedings Act 1950, s. 17).

> The question at issue is a familiar one. It arises with ever-increasing regularity as governments persistently enlarge the scope of their activities beyond those of a truly governmental character into the sphere of trade and commerce and for that purpose create statutory corporations which are not slow to claim that they are agents or servants of the Crown . . . and as such entitled to the benefit of the prerogatives, privileges and immunities of the Crown.[27]

Generally speaking, the judicial trend is against granting privileges and immunities to public corporations and this no doubt reflects the judicial attitude that such privileges and immunities have little justification in the market place, if indeed they are justified for the Crown's truly governmental functions.[28]

24 Hogg *Liability of the Crown* (supra n. 6) Chapter 5, 129-140.
25 For a discussion on statutory ratification see McNamara "The Enforceability of Mineral Development Agreements" [1982] U.N.S.W.L.J. 263.
26 On entrenchment of legislation ratifying contracts see McNamara op. cit. supra n. 13.
27 *Wynyard Investments Pty. Ltd.* v. *Commissioner of Rlys. N.S.W.* (1955) 93 C.L.R. 376, 382.
28 For a general discussion of this area upon which much of this discussion is based see Hogg *Liability of the Crown* (supra n. 6) Chapter 8.

The starting point in this matter is the intention of Parliament as evidenced in the statute pursuant to which the public corporation was established. The sparse indication given by relevant legislation and the differing approaches adopted by the courts to this question ensures however that a designation of status is not possible with any certainty. There is normally no express provision stipulating whether a public corporatiion is to be an "agent" of the Crown. In the absence of such an express provision the mere fact of incorporation presents a strong theoretical argument against any finding of "agency". The separate legal identity cannot in the ordinary legal sense create a relationship of agency between the shareholder and the company. The Crown may be the sole shareholder of a company (as in Petrocorp) but in the eye of the law the shareholder does not own the property or funds of the company, for such things are the company's own property. Further, the general rule at Common Law is that an agent is not liable on a contract entered into on behalf of the principal. Yet it is clear that a body corporate such as Petrocorp will be itself liable on any contracts it enters into. This general line of reasoning was given by Lord Denning in his often quoted decision of *Tamlin* v. *Hannaford*,[29] but despite the fact of incorporation the status of Crown agent or servant has still been found to exist in other cases.[30] In these cases incorporation is viewed purely as a device for facilitating the conduct of Crown business and so was not intended to result in any loss of privileges or immunities. A broader inquiry is made into the extent of the Crown's control and interest in the public corporation, in regard to which the fact of incorporation is but one relevant factor.[31]

What can we conclude about Petrocorp from all this? Parliament clearly intended that the Minister of Energy be able to establish separate corporate entities for the purposes of energy development. There is no express statutory provision that such bodies should be Crown servants or agents. If Lord Denning's view in *Tamlin* v. *Hannaford* is adopted then Petrocorp and its subsidiaries would not be able to claim agency status and thus the privileges and immunities of the Crown. Other authority, however, has held that incorporation can be seen merely as a device to facilitate business. If this approach was adopted Petrocorp could claim Crown privileges and immunities. As the Crown is the sole shareholder it has a significant degree of control over Petrocorp and it is hard to see how the Crown's interests would not be adversely affected by action detrimental to Petrocorp. Other considerations arise in relation to corporate bodies such as New

29 [1950] 1 K.B. 18. In Canada it is more common for statutes to expressly designate a corporation as a Crown agent — this reinforces the *Tamlin* v. *Hannaford* approach. See e.g. *Bank of Montreal* v. *Bay Bus Terminal Ltd.* (1972) 1 O.R. 657 and *Kawneer Co. of Canada* v. *Bank of Canada* (1976) 9 O.R. (2nd) 471. In Canada even when a statute expressly designates a corporation as a Crown agent, it may not be so for all purposes, see e.g. Canada — *Yeates* v. *Central Mortgage and Housing Corporation* (1950) 3 D.L.R. 81; *British Columbia Power Corporation* v. *Attorney-General* (1962) 34 D.L.R. (2nd) 25; *Washer* v. *British Columbia Toll Highways and Bridges Authority* (1965) 53 D.L.R. (2nd) 620.

30 See *Graham* v. *Public Works Commissioners* [1901] 2 K.B. 781, 789-790; *International Railway Co.* v. *Niagara Parks Commission* [1941] A.C. 328.

31 See e.g. *Metropolitan Meat Industry Board* v. *Sheedy* [1927] A.C. 899; *Bank voor Handel en Scheepvaart N.V.* v. *Administrator of Hungarian Property* [1954] A.C. 584.

Zealand Fuels Corp. Ltd. where the Crown is not the sole shareholder. The Crown still has a controlling interest in this company but the articles of association provide amongst other things that Crown appointed directors may not vote on any matter relating to a contract between the Crown and the company.[32]

Whatever the courts' general conclusion will be in relation to Petrocorp and similar bodies, there are special considerations in relation to immunity from legislation which does not expressly or by necessary implication bind the Crown. Section 5 (k) of the Acts Interpretation Act 1924 provides:

> No provision or enactment in any Act shall in any manner affect the rights of Her Majesty . . . unless it is expressly stated therein that Her Majesty shall be bound thereby . . .

This section has been interpreted to mean that immunity from legislation can be claimed by persons who are not actually agents or servants of the Crown if the Crown's interests would otherwise be affected.[33] A good deal of doubt surrounds how the Crown's "interests" will be characterised but there must be a strong argument that the Crown as sole shareholder has interests which are easily affected by Petrocorp's actions. If Petrocorp has an immunity from the Wages Protection and Contractors' Liens Act 1939 for instance, this could have significant financial implications. Petrocorp would neither be bound to hold retentions at the high levels required by the Act or to pay any monies held to sub-contractors and employees on default of the head contractor.

Perhaps the proper question to be addressed in these public corporation-Crown immunity cases is not whether the corporation should be an agent or servant of the Crown but rather whether the Crown itself should have such immunities and privileges. The existence of some privileges and immunities in specific circumstances may be necessary to protect the public interest but particularly when the Crown undertakes commercial operations either in its own right or through a corporate agent the present extent of its privileges and immunities must be called into question. In this area the demands of the general public interest may have assumed undue precedence over individual interests.

IV. CONCLUSION

It was intended that this paper highlight areas of legal uncertainty peculiar to Crown contracts which militate against that certainty and security which is expected from commercial contracts. It is hoped that the discussion in this paper has borne out the initial proposition that unless the courts, and perhaps Parliament, squarely face the balance of public and individual interests through the application of administrative and contract law principles, uncertainty and inequitable results will persist when government chooses to carry out activities such as petroleum development by contract.

32 Articles of Association of New Zealand Synthetic Fuels Corporation Ltd. — Article 84 (c).

33 See *Lower Hutt City* v. *Attorney-General* [1965] N.Z.L.R. 65; *Wellington City Corporation* v. *Victoria University of Wellington* [1975] 2 N.Z.L.R. 301; *Royal Forest and Bird Protection Society Inc.* v. *Paynters Sawmills Ltd. and Attorney-General* (1976-80) 6 N.Z.T.P.A. 374.