

Government Contracts

Federal, State and Local

Third edition

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therefore speculative¹¹⁵ and, in the end, is probably not supported by what was said in *Bardolph's* case. Consequently, it is submitted that the only limits to a State or Territory's power to make contracts are those that arise from the division of powers between the Commonwealth, on the one hand, and the States and Territories, on the other.

It is therefore possible for a State or Territory government to engage in ordinary commercial activity that has no connection to what might be considered government concerns or activities. As a matter of law there is no limit. This is shown in the WA Inc aftermath¹¹⁶ where there was no allegation that the State government could not, as a matter of law, enter into entrepreneurial activities. As a matter of public administration and political accountability, the ability of a State or Territory government to engage in ordinary commercial activities is quite another question.

Statutory Corporations and Local Government

2.201 Specific legislative power. A statutory corporation's capacity to contract is usually dictated by a specific provision found in the legislation that establishes the corporation.¹¹⁷ This is equally true of local government which is always constituted as a corporation with specific powers under local government legislation.¹¹⁸

At Commonwealth level it may also be possible to argue that the very creation of a corporation, or the conferral of certain powers on a corporation by legislation, is unconstitutional if the legislation is not referable to some recognised head of constitutional power.¹¹⁹ This is a higher level enquiry than ascertaining whether the corporation is empowered to act in a certain way.

As to assessing whether a corporation may act in a certain way, it is necessary to examine the relevant statutory provisions¹²⁰ in order to assess whether or not the corporation is empowered to make a particular contract. It should be borne in mind that a statutory corporation will often have in its constituting statute an essential power and that whatever may fairly be regarded as coming within that

power ought not (unless there is a specific provision to the contrary) to be held to be beyond power.¹²¹

It is therefore possible for a statutory corporation or local government to make a contract that is beyond power. There is no general equivalent in the public sector to the *Corporations Act 2001* (Cth) ss 124-125 which have abolished the doctrine of *ultra vires* for private sector corporations. However, under some government-owned corporations legislation,¹²² the doctrine has been abolished or modified with respect to those corporations not bound by the *Corporations Act*. The position is somewhat patchy. Two jurisdictions, the Northern Territory and Western Australia, have no special legislation dealing with the governance or capacities of government-owned corporations. The government-owned corporations legislation of the Commonwealth,¹²³ the Australian Capital Territory,¹²⁴ and Tasmania¹²⁵ is silent on the issue of *ultra vires* transactions. The New South Wales legislation¹²⁶ abolishes the *ultra vires* doctrine with respect to dealings by statutory State-owned corporations.¹²⁷ The Queensland legislation similarly abolishes the *ultra vires* doctrine with respect to both statutory and company government-owned corporations.¹²⁸ In South Australia the legislation validates transactions made by certain statutory corporations¹²⁹ despite a deficiency of power in the statutory corporation or a procedural irregularity, but not in a case where the other party is aware of the deficiency or irregularity or where the other party ought to be so aware because he or she "has a connection or relationship with the corporation".¹³⁰ The Victorian legislation provides that nothing done by a

121 *Corporation of the City of Unley v South Australia* (1996) 67 SASR 8 at 25. Nevertheless, in that case Debelles J held that it was beyond power for a health service to let surplus property on a commercial basis because this was a separate enterprise from its statutory functions of providing health care. The case was successfully appealed on a different point that made the *ultra vires* question no longer relevant. (1997) 68 SASR 511.

122 See also at [4.6] where this legislation is discussed in relation to the question whether government-owned corporations enjoy Crown immunity.

123 *Commonwealth Authorities and Companies Act 1997* (Cth).

124 *Territory Owned Corporations Act 1990* (ACT). This Act only deals with Territory-owned companies incorporated under the *Corporations Act 2001* (Cth) and so there is no need for a specific provision dealing with the *ultra vires* problem. Territory statutory corporations may therefore possibly enter into *ultra vires* transactions that are void.

125 *Government Business Enterprises Act 1995* (Tas). Section 10 imposes some detailed restrictions on a government business enterprise's powers.

126 *State Owned Corporations Act 1989* (NSW) ss 202C and 202D.

127 No all New South Wales statutory corporations are covered by this legislation. See s 20A which provides that a corporation becomes a statutory State-owned corporation when its name is inserted in Sch 5 by Act of Parliament. Company State-owned corporations are in any case bound by the *Corporations Act 2001* (Cth).

128 *Government Owned Corporations Act 1993* (Qld) ss 148-153. A government-owned corporation is one that is either a statutory corporation or a *Corporations Act 2001* (Cth) company that is declared by regulation to be a government-owned corporation. s 6.

129 That is, those which are bound by this legislation under a provision in the statutory corporation's own Act or declared by regulation to be bound. *Public Corporations Act 1993* (SA) s 5.

130 *Public Corporations Act 1993* (SA) s 39.

115 *Ryegatec Shire Council v White* (1910) 11 CLR 123 at 136 (Barton J).
116 An unsuccessful challenge was mounted to the existence of Australian National Airlines Commission in *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29.
117 In *Victoria v Commonwealth and Connor* (1975) 134 CLR 81 legislation purporting to establish the Petroleum and Minerals Authority was declared to be wholly invalid for non-compliance with s 57 of the Constitution with the result that the Authority never existed. See also *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46, *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492.
118 Usually the functions and powers sections of the legislation.

119 The argument is supported by Renfrew, HE, *The Executive Power of the Commonwealth of Australia* (1984), Legal Books, 469. The author, however, takes a very wide view, at 470-471, of what are the proper functions of government.

120 Western Australia, *Report of the Royal Commission into the Commercial Activities of Government and Other Matters* (1992), WA Government Printer.

121 A statutory corporation's powers may be affected by other legislation. For example, generic government-owned corporations legislation may affect a statutory corporation's powers and capacities.

122 *Ryegatec Shire Council v White* (1910) 11 CLR 123 at 136 (Barton J).

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125 See also *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46, *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492.

126 Usually the functions and powers sections of the legislation.

State business corp^a (that is, a statutory corporation declared to be a State business corporation s 17) is void or unenforceable merely because the corporation has failed to comply with Part 3 of the Act (which is the Part that sets out the powers and functions of State business corporations).¹³¹

Local government legislation generally does not contain a provision that abolishes the *ultra vires* doctrine but the chances of arguing *ultra vires* in connection with local government commercial activity has been considerably diminished in modern local government legislation.¹³² There are random instances of other statutory corporations exempt from the operation of the *ultra vires* doctrine.¹³³

The discussion is confined to the power to contract. It may be the case that a statutory council or a local government body purports to make a contract without obeying some statutory requirement that does not go to its powers so much as to procedures. The question whether the contract is validly made then depends either the observance of the procedure is mandatory or merely directory. This is discussed in Chapter 8, [8.181-18.30].

The cases are rare in which a contract has been successfully challenged on the basis that it was beyond the legal capacity of a statutory corporation (other than local government). An example is found in *Commonwealth v Australian Common Shipping Board*.¹³⁴ The Board was empowered under the *Commonwealth Shipping Act 1923* (Cth) to run a shipping line established under the Act. The Board, doubtfully authorised the establishment of engineering works for the purpose of maintenance and repair of ships. It was held that it was beyond the power of the Board to use its facilities to enter into a contract to supply steam turbo-generators to the Municipal Council of Sydney. This was a commercial activity that was not referable to the powers conferred on the Board.¹³⁵

[2.21] Local government. As already noted, each local government is constituted as a corporation under local government legislation in each State and in the Northern Territory.⁶ Local government is not recognised in the Commonwealth Constitution in the State Constitutions. This recognition, however, does not give local government some special or protected status: it is merely a creature of statute and therefore, in a sense, at the mercy of the State or Territory government. It follows from its statutory basis that a local government

131 *State Owned Enterprises Act 1992* (Vic) s 44.

132 See [2.21].

133 An example is the *Treasury Corporation Act 1983* (NSW) ss 6 and 11. Contrast the *Treasury Corporation (Victoria) Act 1992* (Vic) which has no such provision. (1926) 39 CLR 1.

134 See also *Benefficial v Corp Ltd v Multiplex Constructions Pty Ltd* (1995) 36 NSWLR 510 in which it was held that a contract entered into by a statutory corporation, the Darling Harbour Authority *via* its *ultra vires* and therefore void. In *Kahlehen Investments (Asia) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 at 132 Barwick CJ in the minority said that acquisition of shares by the Atomic Energy Commission was *ultra vires* and therefore void. See also Gibbs J at 138-139 and Stephen J at 147-151.

135 There is no separate government in the Australian Capital Territory, that is, there are only two tiers of government.

137 *City of South Melbourne v Hallam* [1995] 1 VR 247.

ment's powers are determined by the relevant enabling legislation. It is therefore possible for local government to step outside the bounds of its legislation and engage in *ultra vires* activities.¹³⁸ As already noted in [2.20], there is no general provision in local government legislation, with the limited exception of Queensland, which abolishes the *ultra vires* doctrine.¹³⁹

In examining whether a local government contract is validly made a distinction must be drawn between old-style local government legislation, which tended to be detailed in setting out the various heads of power, and new-style local government legislation which is more general and plenary.¹⁴⁰ The courts in Australia tended to adopt a restrictive approach to the old-style legislation so that if the particular subject-matter was not detailed in the legislation then there was a risk that the activity in question¹⁴¹ would be held to be beyond power. The consequence was an unsatisfactory case law in which the result in each case was determined by fine nuances of statutory interpretation.¹⁴² Sometimes the power was found to be present despite the court's misgivings about the appropriateness of the particular activity. In *Blue Metal & Gravel (Country) Pty Ltd v Bombala Shire Council*¹⁴³ the New South Wales Court of Appeal came to the conclusion that the Council was acting within its powers when it engaged in commercial activities outside the geographical boundaries of the shire. The judges were nevertheless disturbed that the *Local Government Act 1919* (NSW)¹⁴⁴ allowed such activities.¹⁴⁵ On the other hand, in *Thompson v Randwick Corp*¹⁴⁶ it was held that

138 In a number of spectacular (in terms of the amounts involved) English cases local councils entered into unsuccessful speculative financial transactions with a number of banks in an attempt to make profits. Such transactions were held to be *ultra vires* in the sense that they were simply not permitted by the bodies' contract-making powers. See *Hazell v Hamner-Smith and Fulham London Borough Council* [1992] 2 AC 1; *Westdeutsche Landesbank Girozentrale v Islington Borough Council* [1996] AC 669; *Kleinwort Benson Ltd v Birmingham City Council* [1996] QB 380. See Cane, P, "Do Banks Dare Lend to Local Authorities?" (1994) 110 *LQR* 514. There are some 500 cases stemming from this debacle.

139 See the limited abolition of *ultra vires* with respect to "corporatised corporations" in *Local Government Act 1993* (Qld) ss 700-702.

140 See Hood, A, "Unlikely Entrepreneurs - The Commercial Dealings of Australian Local Governments" in Horrigan, B (ed), *Government Law and Policy: Commercial Aspects* (1998), Federation Press, 214-221.

141 Many of the cases did not deal with making contracts but with whether delegated legislation, such as a by-law, was valid.

142 For example contrast *Attorney-General (Vic) v Shire of Frankston and Hastings* [1935] VLR 5 (no power to carry on business of quarrying and selling road making materials) with *Boral Resources (Qld) Pty Ltd v Johnstone Shire Council* (1989) 69 LGRA 261 (council validly sold quarried materials in competition with private sector).

143 (1992) 26 NSWLR 292.

144 The Act has been replaced by the *Local Government Act 1993* (NSW). Section 357 specifically allows a council to engage in extra-territorial activities except in relation to its regulatory activities.

145 See (1992) 26 NSWLR 292 at 295-296 where Kirby P speculated about whether there are possible limits to a local government's power to engage in entrepreneurial activities.

146 (1950) 81 CLR 87. See also *Sutherland Shire Council v James* (1963) 63 SR (NSW) 273 (*ultra vires* lease).

the acquisition of more land than was needed for public purposes in order to sell off some parcels to make a profit was beyond the powers conferred by the *Local Government Act 1919* (NSW).

Under modern local government legislation,¹⁴⁷ the risk of finding that a particular activity was not permitted under the legislation has been diminished.¹⁴⁸ There has been a concerted attempt to confer on local government broad general powers, such as that the council has the same capacity as a natural person. "In most jurisdictions, the ultra vires argument should be laid to rest once and for all."¹⁴⁹ Nevertheless, Hood notes¹⁵⁰ that the legislation varies widely in dealing with the extent to which local government may engage in entrepreneurial activities. The powers and function range from apparently wide ones in Western Australia,¹⁵¹ and Victoria¹⁵² to more restricted or enumerated powers, as in the Northern Territory,¹⁵³ to those that arguably are limited by reference to the local government's public functions¹⁵⁴ or must be for the public benefit.¹⁵⁵ In addition, there may be procedural requirements under the legislation, such as obtaining the approval of the minister, public advertising, including proposed projects in draft management plans or keeping a register of business enterprises in which local government participates.¹⁵⁶ Failure to adhere to these types of requirements could render the activity and its associated contracts *ultra vires* depending on whether a court regarded the legislative requirement as mandatory or merely directory.¹⁵⁷

¹⁴⁷ See *Local Government Act 1993* (NSW) ss 8, 21-24, *Local Government Act 1993* (NT) ss 7(1)(g), 115-117, *Local Government Act 1993* (Qld) ss 25 and 36(1), *Local Government Act 1999* (SA) ss 36-37 and Part 2, *Local Government Act 1993* (Tas) ss 20-21 and Part 12, *Local Government Act 1989* (Vic) ss 5(2)(e), 6-8, Sch 1; *Local Government Act 1995* (WA) ss 2.5(3), 3.1(1).

¹⁴⁸ Under the *Local Government Act 1993* (Qld) ss 700-702 the *ultra vires* doctrine has been abolished with respect to local government controlled "corporatised corporations".

¹⁴⁹ Hood, A, "Unlikely Entrepreneurs - The Commercial Dealings of Australian Local Governments" in Horrigan, B (ed), *Government Law and Policy: Commercial Aspects* (1998); Federation Press, 219-220 citing as examples of the more expansive interpretation of local government powers *JR & EG Richards (NSW) Pty Ltd v Scone Shire Council* (unreported, NSWLBC, Stein J, 24 November 1995) (power to enter into trade waste disposal contracts although no express power to do so) and *Friends of Pryor Park Inc v Ryde City Council* (1996) 91 LGERA 302 (whether to lease or license a public reserve was the Council's decision and the Court could not intervene because the Council was empowered to make such a decision).

¹⁵⁰ Hood, A, *ibid* at 225-226.

¹⁵¹ *Local Government Act 1995* (WA) s 3.59.

¹⁵² *Local Government Act 1989* (Vic) ss 8 and 193.

¹⁵³ *Local Government Act 1993* (NT) s 121(2) and Sch 2. A municipal council's powers may be limited by the Administrator on its establishment (s 121(2)-(4)) and, in any case, are described in a list in the Schedule.

¹⁵⁴ *Local Government Act 1993* (Tas) s 21(1).

¹⁵⁵ *Local Government Act 1993* (NSW) ss 23-24; *Local Government Act 1993* (Qld) Part 4.

¹⁵⁶ Hood, A, "Unlikely Entrepreneurs - The Commercial Dealings of Australian Local Governments" in Horrigan, B, (ed) *Government Law and Policy: Commercial Aspects* (1998), Federation Press, 227-228.

¹⁵⁷ This vexed distinction is discussed at [8.18]-[8.28].

Clearly it is necessary in each jurisdiction to examine closely the relevant legislation before commercial activity is undertaken.

The Consequences of Lack of Power

[2.22] **Contracts made without power are void.** We have seen that there are possible limits to the Commonwealth government's power to contract and to a statutory corporation's (including a local government's) power to contract. A State or Territory could exceed its power to contract, either because of a statutory provision governing the capacity to contract or because it makes a contract within an area of Commonwealth responsibility or otherwise in breach of the Constitution. The effect on a contract if power is lacking, or it is exceeded, is that the contract is void.¹⁵⁸ The oxymoronic term "void contract" means that the purported contract never existed. This means that the usual consequences of a contract - the enforcement of terms, the passing of property, the claiming of damages or a debt - do not follow.

In some cases, the result of finding a "contract" to be void is not very significant. So, when the "contract" is entirely executory, neither party can enforce.¹⁵⁹ However, when work has been done,¹⁶⁰ goods have been delivered or money paid, the consequences of declaring a contract to be void can be potentially chaotic, not to mention unfair.¹⁶¹ This was acknowledged by the House of Lords in *Hazell v Hammersmith and Fulham London Borough Council*¹⁶² and, although the House of Lords was not required to pronounce on the ultimate consequences of the transactions being declared void, Lord Templeman did remark:

It may not follow that, as between the council and the banks, payments made by the council ... can be recovered by the council. Nor does it follow that payments received by the council ... can be recovered by the banks. The consequences of any ultra vires transaction may depend on the facts of each case.¹⁶³

¹⁵⁸ Cases involving a simple want of power to make the particular contract are less usual. More common is a failure to observe some regulatory or procedural requirement - as to which see Chapter 8. [8.18]-[8.28]. Very rarely the effect of non-observance of legislation renders the contract illegal and therefore void for that reason - see *Cope v Rowlands* (1836) 2 M & W 149 at 157; 150 ER 707 at 710. See [8.28].

¹⁵⁹ See *Wade v Gold Coast City Council* (1972) 26 LORA 349; *Re KL Tractors Ltd* (1961) 106 CLR 318 at 337 (Phillagar J).

¹⁶⁰ In *Meyer v Richmond v Edwards* (1883) 9 VLK 348 an engineer who claimed for services performed was unable to do so because the "contract" was held to be *ultra vires*.

¹⁶¹ In *Airways Corporation of New Zealand Ltd v Geysersland Airways Ltd* [1996] 1 NZLR 116 it was found that no contract existed for the provision of air traffic control services with the result that the airline did not have to pay for services. Counsel for the Airways Corporation specifically refused to put his argument on the basis of restitution. Had he done so, there is little doubt that the airline would have had to pay for services actually used on the basis of a *quantum meruit*. The case is discussed at [1.4].

¹⁶² [1992] 2 AC 1.

¹⁶³ *Ibid* at 36. As to the consequences of litigation in similar cases, see below discussion of *Westdeutsche Landesbank Girozentrale v Islington Borough Council* [1996] AC 669.

It may be possible to resort to public law remedies to restrain the entering into of a contract that is beyond power. This is discussed at [8.29].

[2.23] **Restitutionary remedies.** The law of restitution, based at least in part on a notion of unjust enrichment, may provide some limited assistance in the case of void government contracts. It is beyond the scope of this book to set out all the possible restitutionary consequences that follow from the existence of a void contract.¹⁶⁴ Whether a contract is void or merely unenforceable does not affect the basis for recovering a restitutionary payment.¹⁶⁵ This is of some importance because the case law on void government contracts is sparse and so it may be necessary to turn to cases where a contract is merely unenforceable for guidance. The High Court's decision in *Payey & Matthews Pty Ltd v Paul*¹⁶⁶ is important here because a restitutionary remedy was available in respect of an unenforceable contract.

There is very little authority on the operation of restitutionary remedies in the public sphere, though there is no reason why they should not operate in the same way as in the private sphere.¹⁶⁷ In the past, before the law was changed, transactions entered into by a private sector corporation that were beyond its powers, as set out in the articles and memorandum of association, were void. Therefore cases from that era could provide some guidance as to the consequences of a public body entering into a void transaction,¹⁶⁸ though, as will be seen below, some caution has to be exercised in this regard because of the differing underlying policy in the private and public spheres and because that case law produced such unfair results that the law was changed.

[2.24] **Claims by the government party.**¹⁷⁰ One point seems to be reasonably clear. The government party is able to claim under the principles of restitution. If

164 Mason, K and Carter, JW, *Restitution Law in Australia* (1995), Butterworths, Chapter 10; Goff, R and Jones, G, *The Law of Restitution* (6th edn 2002), Sweet and Maxwell, Chapters 19-27 which deal with Ineffective Transactions and in particular 641-651 on *ultra vires* contracts.

Payey & Matthews Pty Ltd v Paul (1987) 162 CLR 221. See Mason, K and Carter, JW, *Restitution Law in Australia* (1995), Butterworths, 316-318. Byrne J, however, in *Brenner v First Artists' Management Pty Ltd* [1993] 2 VLR 221 at 256-257 said that "services performed under a contract which is valid but unenforceable or avoided through no fault of the plaintiff may be treated differently from services performed where there is no contract at all". His Honour did not enlarge on this possibility.

166 (1987) 162 CLR 221.

See Mason, K and Carter, JW, *Restitution Law in Australia* (1995), Butterworths, para [2007] who make the point that the Crown possessed no immunity from restitutionary claims and that, apart from a special category of cases involving improperly imposed tax or similar impost, the ordinary principles of restitution apply to government.

See *Attorney-General (Vic) v Commonwealth* (1935) 52 CLR 533 at 562 where Rich J drew on the old company law *ultra vires* cases. But compare Windeyer J in *Re KL Tractors Ltd* (1961) 106 CLR 318 at 339: "*Ultra vires* acts of trading corporations are only indirectly relevant to the present question [viz a possible *ultra vires* contract made by the Commonwealth under which the Commonwealth was seeking to be paid]".

170 A different principle applies to the government claiming back money paid out of consolidated revenue without statutory authorisation. See [3.21].

work has been performed, goods provided or money paid under a void government contract, then the government party can recover an appropriate amount.¹⁷¹ There is no dilemma here about the policy underlying the rule that renders the supposed contract void, namely, that it is necessary to protect public funds. In allowing a restitution claim to the government party, the public purse is protected. In *Re KL Tractors Ltd*¹⁷² the Commonwealth sold tractor parts manufactured in its ordnance factories to, and performed work for, KL Tractors Ltd. The Commonwealth was owed money when KL Tractors went into liquidation. The Commonwealth used its prerogative¹⁷³ to claim that the debt owed to it had priority over other creditors. One of these creditors challenged the Commonwealth's debt, arguing that the contracts with KL Tractors Ltd were beyond power. The High Court discussed,¹⁷⁴ but ultimately avoided, the question of whether the contracts made by the Commonwealth were beyond power and held that, whatever the position on that issue, the money was in any case owing to the Commonwealth for goods sold and delivered and for work performed, that is, on the basis of restitution.

In restitution cases the amount that must be paid for goods or services is determined by the reasonable market value of the goods delivered or services performed.¹⁷⁵ In *KL Tractors* this issue was not raised and it was assumed that the amount claimed by the Commonwealth was the correct amount.

It may be possible for a government to use restitutionary remedies against the recipient of a grant on conditions if that party has failed to discharge its obligations under the agreement. It will be seen in Chapter 3 that such arrangements are arguably not contracts (see [3.2]-[3.3]) and so there may be scope for the operation of the law of restitution. The key question is: should restitution be available to the government when a recipient of public money has received a grant on conditions and has failed to honour those conditions? This is, however, speculative¹⁷⁶ and, in any case, may be impractical if the recipient body has no funds. Another speculative possibility is for the government to argue that the recipient is a trustee under a fiduciary obligation to account for the money received.¹⁷⁷

[2.25] **Claims against the government party.** When it comes to restitutionary claims against the government party arising out of a void contract, the case law is

171 As to which see [2.26].

172 (1961) 106 CLR 318.

173 See [4.38] for a discussion of this (now defunct) prerogative.

174 See [2.11].

175 Discussed further below [2.26].

176 There is relevant discussion, though not directly on this point, in Goff, R and Jones, G, *The Law of Restitution* (6th edn 2002), Sweet and Maxwell, 43-46.

177 Such an argument was not successful in *Aboriginal Development Corporation v Treka Aboriginal Arts & Crafts Pty Ltd* [1984] 3 NSWLR 502 but this was because the money that was paid was paid by one statutory corporation to another statutory corporation rather than to the eventual recipient and so it was concluded there was no intention to create a trust. It would be possible for the government body to constitute itself a trustee in a grant situation: *ibid* at 519 (Priestley JA).

sparse and the principles not very certain. The spate of cases arising in the United Kingdom out of *ultra vires* interest rate swap transactions engaged in by many local councils have established that money lent to the councils could be recovered by the banks. It will be recalled that this question was left unanswered in the *Szevel* case mentioned in [2.22]. In *Westdeutsche Landesbank Girozentrale v. Islington Borough Council*¹⁸⁴ the House of Lords had to consider what were the consequences of the Council entering into a speculative interest swap "contract" that was beyond the power of the council and under which the council "owed" money to the bank. By the time the case reached the House of Lords it was accepted that the claimant bank was entitled under the law of restitution to recover money lent to the council under the void contract.¹⁸⁵ The only questions that had to be decided by the House of Lords were whether the bank was entitled to compound interest and from what time interest should run. The compound interest question, in turn, required a re-consideration of the basis upon which money is held when there is a right to recover it.¹⁸⁶ Suffice it to say here that the bank was only entitled to simple interest and not compound interest.¹⁸⁷ The Australian courts would probably award compound interest in the light of the High Court's decision in *Hungeford v Walker*.¹⁸⁸

If money has been paid under a void contract it may be recovered only if there is what is called a total failure of consideration. Traditionally, the meaning of "total failure of consideration" was not to be confused with the doctrine of consideration and meant that the person paying the money had received nothing by way of *performance* in return.¹⁸⁹ In such a case the money could be recovered. The traditional approach to the idea of total failure of consideration is in need of revision in the light of the results of the United Kingdom interest swap cases and in the light of comments made in *David Securities Pty Ltd v Commonwealth Bank of Australia*.¹⁸⁴ It could hardly be said in the swap cases that either of the parties had had no benefit whatsoever from the existence of the trans-

¹⁸⁴ [1996] AC 669. See also *Kleinwort Benson Ltd v Birmingham City Council* [1996] QB 380.

¹⁸⁵ As a consequence of the relatively narrow question before the House of Lords, the judgment of Hobhouse J at first instance has come to be regarded as influential: [1994] 4 All ER 890. See also at 957 for the Court of Appeal decision.

¹⁸⁶ Specifically, whether the holder of the money is a fiduciary or trustee. The case of *Sturtevant v Boroughs* [1914] AC 398 had to be re-considered and was overruled by the majority.

¹⁸⁷ Lord Goff and Lord Woolf dissented.

¹⁸⁸ (1989) 171 CLR 125. This case was, however, one for recovery of common law damages rather than a restitutionary payment but the reasoning employed, based as it was on the practicalities of modern finance, would apply to any claim where one party has been kept out of money that is rightfully his or hers.

¹⁸⁹ *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 49-50 (Viscount Simon), at 54-55 (Lord Atkin). See discussion by Mason, K and Carter, JW, *Restitution Law in Australia* (1995), Butterworths, 286-300, 329-339, 385-408, 467-476, 537-543; Stojlar, S, "The Doctrine of Failure of Consideration" (1959) 75 LQR 53. But cf Lord Goff in *Westdeutsche Landesbank Girozentrale v Islington Borough Council* [1996] AC 669 at 682-683.

¹⁸⁴ (1992) 175 CLR 353 at 380-383 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

action.¹⁸⁵ Yet the cases established that money lent to the local government party had to be paid back. It seems that the expression "total failure of consideration" can also mean that there was simply no consideration, that is, the consideration for the purpose of formation of contract was non-existent (which is the case when a "contract" is void).

In relation to claims by parties who have delivered goods or performed services for the government under a void contract the law is in an uncertain state.¹⁸⁶ According to the old corporations cases, services or goods provided to the corporation under a void contract did not have to be paid for because that would have thwarted the policy behind the *ultra vires* doctrine.¹⁸⁷ It was because this principle was so unfair to outsiders dealing with the company that the law was changed in the private sector. It is here where the guidance provided by the old corporations cases may not be particularly helpful when considering whether a government party should pay for services or goods delivered under a void contract. Nevertheless, there have been cases where the other party has been unsuccessful in a claim for payment with the result that the government body was able to obtain the benefit of the goods or services free,¹⁸⁸ though there was an exception if the reason for invalidity of the contract was that a corporation failed to use its seal.¹⁸⁹ It is suggested that, to the extent that these cases prevented the outsider who had performed work or delivered goods from recovering, that result should not occur in relation to void government transactions. It may be argued that the evident policy underlying legislation that renders the supposed contract void was to protect the public purse. So, for example, local government should not be made to spend money on items or services that it has no power to buy. The countervailing arguments are, it is suggested, stronger. The government body has benefited from the service or the goods and it would be very unfair on the supplier if it were unable to recover a reasonable remuneration for its performance.¹⁹⁰ The

¹⁸⁵ See Goff, R and Jones, G, *The Law of Restitution* (6th edn 2002), Sweet & Maxwell, 45-46, 485-492 and 643-646 and the bizarre result in *Guinness Mason & Co Ltd v Royal Borough of Kensington and Chelsea* [1998] 2 All ER 272 where money had to be repaid after the "contract" had been completed on each side. In this case the local council had made money out of the transaction but had to repay it to the bank! A similar case is the "twin" of *Westdeutsche* decided by Hobhouse J *Kleinwort Benson Ltd v Sanchez* [1996] 4 All ER 890.

¹⁸⁶ A very helpful discussion can be found in Arrowsmith, S, "Ineffective transactions, unjust enrichment and problem of policy" (1989) 9 *Legal Studies* 307 particularly at 310-313.

¹⁸⁷ *Re Jon Beaufort (London) Ltd* [1953] Ch 131.

¹⁸⁸ *Young & Co v Mayor, etc of Royal Leamington Spa* (1883) 8 App Cas 517; *Mayor of Richmond v Edwards* (1883) 9 VLR 348; *Denton v Ryde Municipal Council* (1953) 19 LGR (NSW) 152; *John Mackey & Co v Toronto City Corporation* [1920] AC 208. One way of avoiding the unsatisfactory result in this type of case is to argue that the relevant legislative provision is merely directory and not mandatory with the result that the contract remains valid despite non-compliance with the legislation. See, for example, *Johnsons The Foundry Pty Ltd v Shire of Maffra* (1948) 72 CLR 544.

¹⁸⁹ As to which see [3.19].

¹⁹⁰ See *Wade v Gold Coast City Council* (1972) 26 LGR 349 in which Hoare J by way of *obiter dicta* expressed the opinion that a supplier to the government could claim on the basis of a *quantum meruit* citing *Lynford v Billerica Rural District Council* [1903] 1 KB

reason for the supposed contract being void is, almost universally, one that is hidden from the outsider, that is, it turns on a technical and painstaking exercise in statutory interpretation or possibly an assessment of the opaque boundaries of the executive power. In addition, as Burrows has argued,¹⁹¹ it does not infringe the duty of protecting public money to reverse an unjust enrichment. In a sense, the government party has committed a wrong by entering into the *ultra vires* procurement and, by analogy with the law of torts,¹⁹² the proper outcome is for the wronged party to be compensated.¹⁹³ Finally, the law of restitution has moved on in how it was in the days of the older cases that disallowed recovery, particularly in light of the High Court's decision in *Pavey & Matthews Pty Ltd v M'Grath*¹⁹⁴ which shows that statutory prohibition does not necessarily rule out a claim in restitution.

[2.26] Assessment of the amount. Services, which includes labour and materials, provided under a void contract must be paid for at a fair market rate, that is, what it would have cost the defendant to have the services provided.¹⁹⁵ The contract price may provide a guide¹⁹⁶ or possibly a ceiling¹⁹⁷ on the amount that can be recovered, though this is not certain.¹⁹⁸

(cont)

1772. See also *Sabemo Pty Ltd v North Sydney Municipal Council* [1977] 2 NSWLR 880, a case not so much involving an *ultra vires* contract but one involving no contract at all and yet substantial services were delivered and had to be paid for; and *Defence Construction (1951) Ltd v Municipal Enterprises Ltd* (1985) 23 DLJ 440 (4th) 653; *Cardinal Construction Ltd v Brockville (City)* (1984) 4 CLR 149 (Ontario High Court).

191 Burrows, A., "Public Authorities, Ultra Vires and Restitution" in Burrows, A. (ed), *Essays on the Law of Restitution* (1991), Clarendon Press, 69.

192 I am indebted to Sue Arrowsmith for this argument. She points out that a tort committed by the government is invariably *ultra vires* and yet the public purse must meet the claim. See Arrowsmith, S., "Ineffective transactions, unjust enrichment and problems of policy" (1989) 9 *Legal Studies* 307 at 311.

The same point can be made in a case like *Sabemo Pty Ltd v North Sydney Municipal Council* [1977] 2 NSWLR 880, that is, the government body is obliged to make a payment out of public funds to compensate a victim of wrongdoing.

194 (1987) 162 CLR 221.

195 *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 263 (Deane J); *Renard Construction (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 276 (Meagher JA); *Brenner v First Artists Management Pty Ltd* [1993] 2 VR 221 at 262-264 (Byrne J). Neither the actual cost to the plaintiff to render the services (if this diverges substantially from the market cost) nor the benefit (or lack of it) conferred on the defendant is a guide to the proper remuneration.

Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221 at 257 (Deane J); *Phillips v Ellisons Bros Pty Ltd* (1941) 65 CLR 221 at 246 (Williams J); *Horion v Jones (No 1)* (1934) 34 SR (NSW) 359 at 368 (Jordan CJ).

See the discussion by Meagher JA in *Renard Construction (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 276-278. His Honour said that the contract price does not represent a ceiling. See also letter to the editor and reply in (1990) 3 *JCL* 158.

198 See generally Mason, K and Carter, JW, *Restitution Law in Australia* (1995), Butterworths, 568-581.

If goods have been delivered and accepted, they must be paid for on the basis of a reasonable market price. If title has not passed, they may either be recovered or be the subject of an action in conversion.

In seeking payment for goods delivered or services rendered the law of restitution has not developed a clear answer to the problem of defective quality. Is it possible for the person who has to pay to argue that, for example, the services were not properly performed and thus that the amount to be paid should be reduced? It could be argued that there is no standard by which to judge performance because there is no contract and thus there is no "breach". This problem can probably be resolved because the court's task is, after all, to provide compensation at a fair market value.¹⁹⁹ That value will be less if the services were performed badly or the goods were defective.

199 The court can make adjustments to cater for the particular circumstances of the case or a particular market: *Hansen v McKayair Trading Co Pty Ltd* [1962] WAR 148. See also Goff, R and Jones, G, *The Law of Restitution* (6th edn 2002), Sweet and Maxwell, 32-33.