tending to make projects simpler, treating one block at a time instead of looking at the overall project. "They are taking an easy way out and we are really digging our own graves," he says.

The Gold Coast City Council presided over the fastest developing part of Australia. Lex Bell, mayor of the Gold Coast, says the council has to make the rules as it goes along, and recalls the changing focus of public concerns from high-rise developments to shadowing.

Bell, a lawyer by training, says the council brought in requirements from 1975 to ensure that buildings are set back from the beach to overcome the shadowing problem. The council introduced two planning initiatives that were adopted elsewhere in Australia and overseas.

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NEW ACT ENABLES VICTORIAN COUNCILS TO COMPETE WITH PRIVATE SECTOR

Victorian councils are now able to compete with contractors under the new Victorian Local Government Act which came into force on 1 November 1989.

Unlike the old Local Government Act of 1958, which laid down fairly restrictive requirements on what a council could or could not do, the Local Government Act 1989 gives councils more power to act as they wish.

Basically the old Act prohibited everything not specifically permitted in some 1000-odd sections. Under that Act, a council could only contract to do work on private land if, in the opinion of the council, it "would be uneconomic or impracticable for such owner or occupier to employ a private contractor".

The philosophy of the new Act is to grant general competence powers; a council can do virtually anything, subject to a limited number of restrictions on council powers in the new Act. One of the most important of these is the requirement for councils to provide full disclosure to their communities.

Under the new Act, a council can virtually undertake any activity it wishes to that is in line with its council responsibilities, according to Paul Kenna, legal officer with the Municipal Association of Victoria.

Council responsibilities include roads, bridges, footpaths and traffic control, and the power to open or divert roads. Consequently, a council would probably not have any great difficulty in contracting to build a driveway for a private individual under the new Act. A council might also be able to contract to carry out pool excavations, land clearing, dam construction and similar activities, although Kenna said any council doing so would need to be cautious about involving itself in non-traditional activities. However, any form of road building, drainage works or general sub-division works for private developers, which relate to traditional council activities, would be no problem for a council under the new Act, he said.

Kenna also suggested that a council with excess plant would be free to place equipment and operators with a plant hire agency.

> "It would make very good sense from a council point of view for under-utilised plant to earn extra income, and this could [include] allow[ing] the plant to work outside the council district, because it would be working as directed by clients of the agency.
>
> "Using excess capacity in this way is the sort of thing that is encouraged by the philosophy of the Act".

The new Act also allows councils to establish "municipal enterprises", designed to compete in the private sector and to make a profit. A municipal enterprise is defined as something that is outside a council's normal line of activity, such as the operation of amenities for tourists.

- This is an edited version of an article from The Earthmover and Civil Contractor, reprinted with permission.

CAPE YORK SPACE PORT - INTERNATIONAL RESPONSIBILITIES

- Kevin Bartlett, Associate, Henderson Trout, Solicitors, Brisbane.

There are a number of interesting legal issues which will have to be addressed, in the event that the proposals for a launch facility at Cape York go ahead. Kevin Bartlett of Henderson Trout is well placed to comment, as he has concentrated on the legal issues of the proposed Cape York Space Port in a recent Master thesis; he also took part in the preparation of a report on the subject.

The development of a launch facility at Cape York will enliven various international obligations imposed upon the Commonwealth Government as a result of Australia's being party to the major United Nations Space Treaties. At present, there is no domestic legislation in Australia to govern commercial space activity. The Commonwealth Government will therefore need to legislate to ensure compliance with its Treaty obligations.

Parties to the Outer Space Treaty of 1967 are required to retain jurisdiction and control over space objects launched from their territories. Treaty parties must also authorise and continuously supervise their national space activities in accordance with Treaty provisions. It is generally accepted that those obligations extend to the regulation of commercial space activities, e.g. launches, outer space activities and re-entries.

There are serious national implications concerning liability for damage caused by space activities.

The Liability Convention of 1972 sets up two regimes for imputing liability to a launching-State. The first applies where there has been damage or injury to persons or property on the earth's surface or to aircraft or passengers in flight. The second applies where there has been damage or injury to other space objects or to persons or property on board such objects.

For the purposes of the Convention, a launching-State

includes a country which launches or procures the launching of a space object, as well as a country from whose territory or facilities a space object is launched. Therefore, if the Cape York facility goes ahead, Australia will be treated as a launching-State even in respect of launches carried out from the facility by or on behalf of other countries.

Under the Convention, a launching-State is absolutely liable to pay compensation for damage or injury caused by its space object to persons or property on the earth's surface or to aircraft or passengers in flight. Fault or negligence on the part of the launching-State need not be established. However, where the damage has resulted wholly or partially from an act or omission by the claimant-State (or persons whom it represents) done with intent to cause damage or from gross negligence by that State (or the persons whom it represents), then the launching-State will be exonerated from absolute liability provided it has acted in conformity with international law, including the United Nations Charter and the Outer Space Treaty.

Importantly, the absolute liability provisions of the Liability Convention do not apply for the benefit of nationals of a launching-State or foreign nationals who participate in the launching or operation of a space object or who are in the immediate vicinity of a launching or recovery area. Therefore, nationals of a launching-State and participating nationals of a foreign State cannot claim damages against the launching-State pursuant to the Convention. By way of example, if a launching operation from Cape York injured an Australian citizen or his or her property, that person would have no claim against the Commonwealth Government under the Liability Convention. As things presently stand, the injured citizen would have to rely upon his or her common law rights in the domestic courts.

The Liability Convention is less onerous from the point of view of a launching-State in the case where a space object causes damage or injury to another space object or to persons or property on board another space object. In such a case, the liability of the launching-State is not absolute and only arises if there has been fault on its part or on the part of persons for whom it is responsible.

It has been argued that participation by private entities or individuals in the launching of a space object will render the countries of which those persons are nationals liable as launching-States. Although this view seems to run contrary to the strict language of the Liability Convention, it is thought that where a country has knowledge of the participation by one of its nationals in a launch and that country expressly or impliedly accepts that participation, then it would be treated as a launching-State for the purposes of the Convention.

It is obvious that careful domestic legislation and indemnity provisions will be required if proposals for the Cape York space port go ahead.

RECENT CASES

Application to Restrain Arbitration to Raise Arguments Under The Fair Trading Act (Vic)

Morrison v Inmode Developments Pty Ltd, Supreme Court of Victoria, Nathan J.

This case is a warning that taking unduly technical points in order to defeat the arbitration process under building contracts is not to be taken lightly.

The plaintiff proprietors sought a Supreme Court injunction restraining the continuation of an arbitration on the ground that they wished to raise arguments under the Fair Trading Act of Victoria (which reflects the provisions of the Commonwealth Trade Practices Act). The injunction was sought because it was argued (correctly) that an arbitrator under the Commercial Arbitration Act does not have power to hear matters falling within the ambit of the Fair Trading Act.

The facts of the case were relatively commonplace. A dispute arose under a building contract between the builder and the owners as to the true price of the building. The owners, having failed to pay the last two progress payments found themselves in receipt of a Notice of Dispute from the builder which eventually lead to the Institute of Arbitrators appointing Mr James Earle as arbitrator. A preliminary conference was set and, on the day before the preliminary conference, the owners issued a writ in the Supreme Court and duly seved the builder. The preliminary conference took place, but objections were made in that the owners alleged deficiencies in the defendant's Notice of Dispute, although the builder countered this by serving a second Notice of Dispute at the time of a second preliminary conference. As Mr Justice Nathan observed, there was no substance in these objections because notices under the Commercial Arbitration Act did not require the precision of pleadings, they were not documents of art, they merely required the parties to have brought before them the substance of the dispute and as the Notices did so, they did not fail for insufficiency, vagueness or uncertainty.

Mr Justice Nathan noted that the Writ which raised the issue of the Fair Trading Act was the first time in which this issue was raised. The plaintiff had not raised the issues of misleading conduct or false representation prior to the issue of the Writ and nor were these issues brought to the attention of the arbitrator at either of the two preliminary conferences.

Mr Justice Nathan therefore concluded the purpose of the Writ was to avoid proceeding with the arbitration under the contract and this the judge refused to allow the plaintiffs to do. He stayed the legal proceedings until the resolution of the arbitration between the parties leaving it open for the plaintiffs to later raise the issues of misleading conduct and false representation should the matter ever proceed to court after the arbitration had been completed.

Mr Justice Nathan observed:

> "The provisions of the Fair Trading Act should not be used as a flocculent to launder the Commercial