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For Fetter or Worse: The Fettering Doctrine and Government Building Contracts –
Paul Tamburro

Many government contracts contain promises that fetter or restrict how a government can exercise its executive powers in the future. This gives rise to an underlying tension: on the one hand, governments must be free to exercise its powers in the public interest even it means it is in breach of contract; on the other hand, government contracts would be significantly undermined if government could break them anytime and leave the contractor with no right to a remedy. In *Searle v Commonwealth*, the New South Wales Court of Appeal re-examined the “fettering doctrine” that applies to this scenario. It found that a contractual promise that purports to fetter a government’s powers will not be void, but instead is enforceable through action for damages. The Court’s decision, and its analysis of the fettering doctrine, is especially relevant in the context of government infrastructure contracts, which routinely include clauses that fetter government action. This article considers this case, how it will apply to government building contracts and discusses pitfalls which parties should be aware of when drafting government contracts. 433

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