



2012

PARLIAMENT OF TASMANIA

SOLICITOR-GENERAL

REPORT FOR 2011-12

*Presented to both Houses of Parliament pursuant to
section 11 of the Solicitor-General Act 1983*

In accordance with section 11 of the *Solicitor-General Act 1983*, I submit to the Attorney-General my report with respect to the performance and exercise by me of the functions and powers of the Office of Solicitor-General for the "relevant period" being the twelve month period which ended on 30th June 2012.

1. FUNCTIONS OF THE SOLICITOR-GENERAL

Although s 11 of the *Solicitor-General Act 1983* ("the Act") refers to the "functions and powers" of the holder of the Office of Solicitor-General it is notable that, in fact, the Act confers no powers of any kind upon the Office of Solicitor-General and only one (or, if one counts the obligation imposed by s 11 to prepare and submit an annual report) perhaps two, functions.

The primary function of the Office of Solicitor-General, as set out in s 7 of the Act, is to act as counsel for the Crown in right of Tasmania or for any other person for whom the Attorney-General directs or requests the Solicitor-General to act and to perform such other duties ordinarily performed by counsel as the Attorney-General directs or requests.

In addition, s 7(c) of the Act provides that the Solicitor-General has and shall "...perform such duties (if any) as are imposed on him by or under any other Act." Those other duties include or may include;

- certifying that a direction has been given, or a broad policy expectation has been specified in a ministerial charter provided to the Forestry Corporation under the *Government Business Enterprises Act 1995* in contravention of the provisions of s 12(c) of the *Forestry Act 1920*, [See *Forestry Act 1920*, s 12C(3)]
- performing the duties of a Crown Law Officer as specified in the Criminal Code, [See generally, *Criminal Code Act 1924*]
- in the case of a vacancy in the Office of Attorney-General or in the case of the incapacity of the Attorney-General, performing the duties of the Attorney-General under the *Supreme Court Civil Procedure Act 1932*,
- serving as a member of a "committee of review" appointed by the Governor pursuant to s 5 of the *Statutory Authorities Act 1962*, and
- performing the functions of the Director of Public Prosecutions ("DPP") in the event of a vacancy in that office or of the illness or absence from Office of the DPP. [See *Director of Public Prosecutions Act 1973*, s 12(3)].

In practice, the vast majority of the work of the Office of Solicitor-General involves the provision of legal advice to the Crown and its various Agencies (i.e., Departments) and other emanations (e.g., Government Business Enterprises, Authorities, Boards and Statutory office holders). By comparison, very little of my time or that of the very capable officers and employees who assist me, is spent appearing as counsel in litigation involving the Crown. Ordinarily, only litigious matters involving the Commonwealth Constitution or its interpretation or proceedings in which officers of the Civil Division of the DPP are either unable or unwilling to appear as counsel, find their way to this office. This observation is not intended as a criticism of anyone. Indeed, if anything, it reflects favourably on the industry and efficiency of the Civil Division of the DPP.

However, it does mean that, historically, the staff – and particularly the junior staff - of this office, have had relatively few opportunities to gain experience as advocates or in aspects of legal practice other than the preparation of advisings.

That state of affairs tended to be reinforced by the fact that those Agencies and other emanations of the Crown which are entitled to approach this office for advice could obtain that advice without charge whereas advice which was obtained from the Office of the Crown Solicitor had to be paid for. I referred in my 2008-09 and 2010-11 reports to what I considered to be some of the negative consequences of that arrangement.

Accordingly, I am very pleased to be able to report that from 1 July 2012, the Office of the Crown Solicitor will be fully funded from the Consolidated Fund and will no longer be required to charge the great majority of Crown Agencies and Bodies which use its services. It is hoped that this change will remove what appears to be a significant existing disincentive to Agencies obtaining legal advice when it is appropriate to do so. At a practical level, it will also remove the need to differentiate between work that has traditionally been regarded as 'belonging' to this office on the one hand and that which has been regarded as the work of the Office of the Crown Solicitor on the other. In time, this should also mean that, when seeking legal advice, Crown Agencies will no longer need to concern themselves with whether the advice should be sought from the Solicitor-General or from the Crown Solicitor because that decision can, in future, be made by those who are best placed to make it – the Crown's own legal officers.

This change is therefore potentially very significant both from the point of view of reducing the Crown's legal risk – by encouraging Crown servants and agents to obtain legal advice when necessary and from the point of view of enabling a more efficient allocation of work among the Crown's legal officers. It has been made possible by the enthusiasm and encouragement offered by the Attorney-General, the Hon. Brian Wightman MP, and by the hard work of the Crown Solicitor, Mr Alan Morgan, the Manager of Crown Law, Ms Kerry Worsley and by officers of the Department of Treasury and Finance, principally, the Deputy Secretary, Mr Tony Ferrall.

I extend my sincere thanks and congratulations to all of them.

In an unrelated development, in February 2012, the Attorney-General published guidelines for obtaining advice from the Solicitor-General. These may be viewed or downloaded from the following address;

http://www.crownlaw.tas.gov.au/_data/assets/word_doc/0009/191295/Guidelines_for_Briefing_SG.doc

One of the main purposes of the Guidelines, which encourage Agencies and those who routinely seek advice from this office to "...*nominate a small number of designated officers through whom all requests for advice from that Agency to the Solicitor-General are to be directed...*" is set out at paragraph 8 as follows;

8. It is intended that the adoption of [the measures set out in the Guidelines] will result in greater efficiency and a more structured approach to the obtaining, recording and dissemination of legal advice within Agencies by;
 - improving the ability of individual officers within an Agency to ascertain what, if any, advice that Agency has previously requested and/or received from the Solicitor-General.

- reducing the potential for multiple requests from the same Agency for the same advice.
- enabling designated officers to become skilled in the concise and accurate formulation of requests for advice and the interpretation, dissemination and implementation of that advice.
- assisting counsel in the Office of the Solicitor-General by drawing attention to any previous advice which may be relevant to a current request for advice.

As at the end of the period covered by this report (30 June 2012) most, Agencies had nominated officers through whom requests for advice are to be sent and received, although some Agencies had nominated a surprisingly large number of persons. In conjunction with the Attorney-General, with whom I meet fortnightly at his request, I am continuing to monitor the implementation and effectiveness of the guidelines with a view to ensuring that they are having the desired effect. There is some anecdotal evidence to suggest that some people may regard compliance with the guidelines as being onerous and, for that reason, decide not to obtain advice when they might otherwise do so. That is plainly undesirable. On the other hand ill-considered and incomplete requests for advice can be both frustrating and unnecessarily time-consuming for those who are required to deal with them. As with so many things, it will be necessary to try to find a suitable point of balance.

2. DISCHARGE OF FUNCTIONS

Advisings

The attached schedule shows a breakdown, by agency, of the number of advisings provided by this office during the relevant period. It can be seen that there has been a significant reduction in the total number of advisings as compared to the 2010-11 year. This probably reflects general economic conditions and the budgetary constraints facing Agencies which have resulted in lower levels of government activity. A comparison of the figures for each of the Departments of Economic Development, Tourism and the Arts, of Health and Human Services and of Infrastructure, Energy and Resources, in particular, would seem to bear this out.

By contrast, there has, over the past 5 years, been a discernible increase in the average length and the complexity of individual advisings. This may be due, in part, to matters of style and presentation. I would readily accept that my prose style may not be a model of brevity. Nevertheless, I consider that it is desirable, as much for posterity as it is for clarity, that advice produced by this office should fully expose the legal reasoning which underlies its conclusions.

However, and by far the greatest contributor to this trend is, in my opinion, the increasing complexity of legislative provisions and of the interrelationship between new and existing provisions. Added to this, the creation by legislation, and the authorisation by legislation of the creation, of ever more emanations of the Crown as distinct legal entities which are capable of entering into contracts and of suing and being sued in their own names, often adds yet another layer of complexity to the legal issues which routinely confront the Crown. As often as not, legislation is either silent or contains provisions which do not make it clear whether a newly-created or authorised entity is intended by the Parliament to have the identity and all of the privileges and immunities of the Crown. The case of *Queanbeyan City Council v ACTEW Corporation Ltd* (discussed in more detail below) is a striking example from another jurisdiction

of this same phenomenon and illustrates the sort of complex analysis which courts will undertake in order to resolve such questions.

Constitutional Litigation

During the relevant period the Attorney-General intervened, pursuant to s 78A of the *Judiciary Act 1903* (Cwlth), in three matters in the High Court of Australia which involved the Commonwealth Constitution or its interpretation.

***Queanbeyan City Council v ACTEW Corporation Ltd* [2011] HCA 40**

This case was argued on 8 April 2011, and involved the question of whether certain charges in connection with the abstraction and supply of water, which had been imposed by ACTEW Corporation Ltd ("ACTEW"), a water corporation wholly-owned by the government of the Australian Capital Territory, were or were not "excises". The Commonwealth Constitution (s 90) confers exclusive power upon the Commonwealth Parliament to impose "...*duties of customs and of excise...*". In those circumstances, Tasmania and every other State and Territory was interested to ensure that the present law with respect to the definition of what is and what is not an excise for the purposes of the *Constitution*, remained unaltered.

In the Courts below argument had proceeded upon the basis that the charges in question were taxes, the critical question being whether they were taxes of a kind which have been hitherto been characterised for the purposes of the *Constitutions* as an "excise".

In the High Court, the threshold issue became whether, having regard to the fact that ACTEW was wholly-owned and controlled by the government of the Australian Capital Territory and the charges imposed by the government of the Territory on ACTEW were, in truth, not taxes but merely internal or intra-mural government financial arrangements.

In the result, the majority of the Court concluded that the legal relationship between ACTEW and the Territory government, including, in particular, the degree of control exercised by the Territory government over ACTEW, was such that "ACTEW [had] *the identity of the Territory for the purposes of the Constitution.*" So that the charges were not taxes (because the ACT government could not tax itself) and therefore not "excises."

The decision in this case appears to mean that the States and Territories may lawfully impose charges of virtually any magnitude upon trading entities which they own and closely control and that those entities may recoup those charges as part of their ordinary trading without fear that either the charges themselves or any resulting increase in prices or costs payable by customers will be characterized as "excises" for the purposes of s 90 of the *Constitution*.

***Williams v Commonwealth of Australia* [2012] HCA 23**

Perhaps better known as "*the School Chaplains Case*", this action attracted the intervention of every State Attorney-General, not because of the plaintiff's argument that the Commonwealth government's National School Chaplaincy Programme ("the NSCP") "established a religion" contrary to s 116 of the *Constitution* (an argument that ultimately failed) but because of a more far-reaching proposition put by the Commonwealth.

In response to an alternative argument put by the plaintiff that, in the absence of specific legislation, the Commonwealth had no power to spend money pursuant to a particular contract which formed part of the NSCP, the Commonwealth government asserted that it was free to spend its money for *any* purpose it chose, or at least for any purpose in respect of which the Commonwealth Parliament could make a valid law – even if no such law had been made, *provided* that the money had been validly appropriated by the Parliament for that purpose. The power to do so was said by the Commonwealth government to arise from a number of possible sources including “the executive power” conferred by s 61 of the *Constitution*. Section 61 of the Constitution provides as follows;

“The Executive Power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.”

Six of the seven justices of the High Court found that, despite the fact that funds had been appropriated by the Parliament for the purpose of the NSCP, the expenditure of those funds for the purposes of the particular contract in question, was not lawful.

Two of the six held that even assuming that the Commonwealth could spend money for a purpose for which the Parliament could, but had not yet, made a law, the Commonwealth Parliament nevertheless had no power under the *Constitution* to make a valid law to implement a National School Chaplaincy Programme.

The remaining four of the six justices (and therefore an overall majority of the Court) held that, an expenditure of Commonwealth funds which is not authorised by a valid law of the Commonwealth (other than an *Appropriation Act*) will not be a valid exercise of the executive power of the Commonwealth *only* because it would have been within the legislative competence of the Commonwealth Parliament to have made such a law. In other words, the fact that the Commonwealth Parliament might have made a valid law with respect to a particular matter does not mean that the Commonwealth government may spend money in relation to that matter even although the Parliament has not made any such law.

The immediate effect of the decision in *Williams* was to cast doubt upon the validity of many forms of direct Commonwealth funding to the States and to local government, community and not-for-profit organisations unless that expenditure by the Commonwealth was authorised and regulated by valid Commonwealth legislation. Programmes which, like the NSCP, were regulated entirely by policies or guidelines that had been developed and were administered by Commonwealth government Departments without any underlying legislation, became particularly vulnerable in this regard.

The response of the Commonwealth government to the decision in *Williams* was to secure the enactment by the Commonwealth Parliament of the *Financial Framework Legislation Amendment Act (No 3) 2012*, the effect of which was to amend certain provisions of the *Financial Management and Accountability Act 1997* (Cth) in the hope of providing the missing legislative basis for Commonwealth expenditure on over 350 Commonwealth-funded schemes and programmes. Only time will tell whether those amendments have achieved their intended purpose.

***Public Service Association of South Australia Incorporated v Industrial Relations
Commission of South Australia [2012] HCA 25***

This matter was heard on 29 November 2011. Judgment was delivered on 11 July 2012. The matter found its way to the High Court after the Supreme Court of South Australia held that it had no power to review a decision of the Industrial Relations Commission of South Australia because the relevant legislation excluded such review except in cases of “*excess or want of jurisdiction*”. The Supreme Court had held that the Commission’s conclusion that it had no jurisdiction because the matter before it was not an “industrial dispute” could not be said to involve an “excess or want of jurisdiction” and was therefore *not* reviewable.

On appeal, the High Court held that *if*, as the appellant argued, the Industrial Relations Commission was wrong when it concluded that the matter before it was not an industrial dispute, then it had wrongly failed to exercise its jurisdiction and that such a failure would amount to a “jurisdictional error” – the review of which by the Supreme Court could not, following the decision in *Kirk v Industrial Court (NSW) (2010) 239 CLR 531*, be lawfully excluded by State law.

The importance of this decision is that it may now be said with some assurance that if a Court or Tribunal (and, I would venture to suggest, also, an administrative decision-maker) *wrongly* denies the existence of its own jurisdiction, it makes a “jurisdictional error”, the review of which, by an appropriate Federal or State Supreme Court, can *never* be excluded by statute.

Other Litigation

Myer Stores Ltd & Anor v State Fire Commission & Anor [2012] TASSC 54

This was an action brought by the plaintiff’s insurers in the aftermath of the fire which substantially destroyed the Myer Store in Liverpool Street, Hobart in September 2007. The parties had sought the determination by the Supreme Court of Tasmania of two questions in advance of all other issues in the action. Both of those questions concerned the construction of s 121 of the *Fire Service Act 1979* and the answers to them had the capacity to determine whether the plaintiffs’ action – which sought damages for negligence in connection with matters antecedent to the date of the fire – was effectively precluded by the provisions of s 121.

Pursuant to his right to do so under s 16 (1)(a) of the *Crown Proceedings Act 1993*, the Attorney-General intervened in the action to make submissions concerning the construction and operation of s 121 of the *Fire Service Act 1979*, the tenor of which were that the section operated in the circumstances to confer a complete immunity upon both of the defendants.

The matter was heard by Justice Blow on 21 March 2012 at which time I appeared for the Attorney with Ms Adrienne Morton of this office. Judgment was delivered on 24 August last. The Court answered both questions in favour of the defendants, holding that s 121 of the *Fire Service Act 1979* provided a complete indemnity against suit to both the Fire Service and the Chief Officer of the Fire Service. I understand that the plaintiffs have subsequently advised the Fire Service and/or its solicitors that they do not intend to appeal against the decision of Blow J.

Auton v Beautiful Blinds

This matter concerns the operation and validity of the “guidelines” for the assessment of permanent impairment pursuant to the provisions of the *Workers Rehabilitation and Compensation Act 1988*.

The Attorney-General sought and was granted leave to intervene in the proceedings after doubts arose concerning the applicability and validity of guidelines which had been purportedly issued by the Workplace Safety Board of Tasmania in or about April and October of 2011.

Subsequently, in August this year, the Parliament enacted the *Workers Rehabilitation and Compensation Amendment (Validation) Act 2012* (“the Validation Act”), the purpose of which was to place the validity of both the “April 2011 Guidelines” and the “October 2011 Guidelines”, beyond doubt.

The Validation Act also explicitly provides that assessments of permanent impairment are not to be taken to have been made under the *Workers Rehabilitation and Compensation Act 1988* or the *Asbestos-Related Diseases (Occupational Exposure) Compensation Act 2011* unless they were made in accordance with the guidelines which were in force on the date on which the assessment was undertaken. However, the Validation Act does not appear to contain any mechanism or rule by which any inconsistencies which may arise between assessments validly undertaken on different dates and pursuant to different guidelines, may be resolved.

As the proceeding is still pending before the Workers Rehabilitation and Compensation Tribunal I do not consider that it is appropriate to make any further comment.

Hague Convention

During the relevant period no matters arising under the *Convention on the Civil Aspects of International Child Abduction* (“the Hague Convention”) were referred to this office.

Special Committee of Solicitors-General

The Special Committee of Solicitors-General (SCSG) continues to meet about two to three times each year. The committee is a sub-committee of the Standing Council on Law and Justice (formerly, the Standing Committee of Attorneys-General) and comprises the Solicitors-General of the Commonwealth and of each of the States and Territories and of New Zealand.

From time to time the SCSG is requested to provide advice to the Standing Council on Law and Justice on various matters. In addition, meetings of the SCSG provide a valuable opportunity to discuss and consider all pending litigation in Courts throughout Australia which involve the Commonwealth Constitution or its interpretation being cases in which the Commonwealth Attorney-General and the Attorneys-General of each State and Territory are entitled, by virtue of s 78A of the *Judiciary Act 1903* (Cth), to intervene.

During the relevant period the long-serving Solicitor-General of Western Australia, Robert Meadows QC retired from office. Mr Meadows was succeeded by Grant Donaldson SC. In addition, the Solicitor-General of New Zealand, Dr David Collins QC, was appointed a judge of

the High Court of New Zealand and in August this year (just outside the period covered by this report) the Commonwealth Solicitor-General, Stephen Gageler SC, was appointed a justice of the High Court of Australia to replace Justice William Gummow. To all of those appointees I extend my sincere congratulations and good wishes.

Other Functions and Duties

Of the "other duties" arising by reason of s 7(c) of the Act, I was, during the relevant period, required to perform only the last of them and then only from time to time during short absences from Office of the Director of Public Prosecutions whilst he was on leave.

Section 12(4) of the *Director of Public Prosecutions Act 1973* ("the DPP Act") provides that, if, for various reasons, it is not possible or practicable for the functions of the Director of Public Prosecutions to be performed by the Solicitor-General when that becomes necessary, the Governor may appoint a person who is eligible for appointment as Director of Public Prosecutions to act as Director of Public Prosecutions.

For a variety of reasons (which include the avoidance of possible conflicts between the duties of the Offices of Solicitor-General and Director of Public Prosecutions) I consider that the DPP Act ought to be amended so as to provide for a senior Crown Law Officer other than the Solicitor-General to perform the functions of the Director of Public Prosecutions in the event of a vacancy or absence from the latter office. I recognize that an arrangement under which an officer or employee in the State Service is designated or appointed to carry out the duties of an independent statutory office may be open to the criticism that that officer or employee lacks the necessary independence from the Crown. However, as mentioned, the provisions of the DPP Act already enable such an appointment to be made where it is not possible or practicable for the functions of the Office of the DPP to be performed by the Solicitor-General.

Other Activities

During the relevant period I and the professional staff of this office continued to give presentations and addresses to various groups within and outside the State service. These included topics such as statutory interpretation, the rules of procedural fairness, statutory judicial review of administrative decisions, jurisdictional error, the implication for Tasmania of the decision of the High Court in *Williams v Commonwealth* (referred to above) and the limits of authority of servants and agents of the Crown.

These addresses seem to have been generally well-received. Many have been delivered during the State service lunch-hour and the consistently high levels of attendance demonstrate to me both the need and the desire of many State servants to be better-informed about their duties and responsibilities. It is not however surprising to see that those who regularly attend these presentations tend to be those who are in least need of instruction.

Unfortunately, it remains the case that there is no systematic, regular and compulsory scheme for the continuing education and professional development of State servants whose principal functions involve statutory decision-making or advising statutory decision-makers, including Ministers.

3. ADMINISTRATION

During the relevant period there were a number of changes in personnel.

In early December 2011, Crown Counsel, Mr Simon Gates was seconded to the Office of the Attorney-General for the duration of the current government.

In June 2012, Mr Gates' position was filled by the temporary appointment, from a strong field of candidates, of Ms Jenny Rudolf, formerly research assistant to the Chief Justice.

On 31 December 2011, Mrs Cheryl Cook retired after more than 25 years in the service of the State – the last 15, or so, of those as Executive Assistant to myself and to my predecessor, Bill Bale QC. Mrs Cook was, in many ways, the “tribal memory” of the office, being able to recall events and advices unknown or long-forgotten by others. The loss of Mrs Cook's homemade sausage rolls will be felt almost as keenly as the loss of her accuracy, speed and attention to detail as a typist and stenographer.

The vacancy created by the retirement of Mrs Cook was eventually advertised in February of this year and attracted a large number of very impressive applicants. Following interviews with selected applicants, Ms Melissa Reed was appointed and commenced work in March of this year.

During the relevant period, former Principal Crown Counsel, Mr Frank Neasey was formally designated “Assistant Solicitor-General” which designation more accurately describes and recognises his valuable role within the office and more generally, within Crown Law, both as counsel and as a mentor to junior practitioners.

Ms Sarah Kay and Ms Adrienne Morton, both of Crown Counsel, continued to assist me in the discharge of my duties throughout the whole of the relevant period and despite the seemingly ever-increasing complexity of requests, have continued to provide advice of the highest standard, often involving some of the more obscure and arcane areas of the law.

A handwritten signature in black ink, appearing to read 'Leigh Sealy', with a stylized flourish at the end.

Leigh Sealy SC
Solicitor-General of Tasmania

Schedule

SCHEDULE OF ADVISINGS

	2010-2011	2011-2012
Department of Economic Development, Tourism and the Arts	16	4
Department of Education	51	44
Department of Health and Human Services	122	74
Department of Infrastructure, Energy and Resources	92	48
Department of Justice	193	149
Department of Police and Emergency Management	5	9
Department of Premier and Cabinet	48	61
Department of Primary Industries, Parks, Water and the Environment	182	133
Department of Treasury and Finance	29	37
Tasmanian Audit Office	7	9
Retirement Benefits Fund Board	7	8
The Public Trustee	6	0
Other bodies and offices	43	39
TOTAL ADVISINGS	801	615
Section 78B Notices	265	198