2008

PARLIAMENT OF TASMANIA

SOLICITOR-GENERAL

REPORT FOR 2007-2008

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

SOLICITOR-GENERAL REPORT FOR 2007-2008

SUMMARY

The year under review saw the retirement as Solicitor-General of Mr Bill Bale QC after a record 21 years in office. Mr Frank Neasey was appointed Acting Solicitor-General between September 2007 and January 2008 shortly after which I took up office as Solicitor-General on 3 March 2008.

There was a marked (but apparently temporary) reduction in the number or requests for advice which, happily, appears to have coincided with a period during which the Office was not at full capacity. The ability of the Office to satisfy the continuing demand for advice while at the same time giving adequate consideration to the preparation and presentation of constitutional litigation remains a concern. There has evidently also been a reduction in the provision to State Service employees of information and education on legal and ethical issues as compared with previous years and this should be addressed.

In March 2008 the High Court delivered its decision in *Betfair v Western Australia*. The full implications for Tasmania of this decision may not yet have been fully realised.

RETIREMENT OF WCR BALE QC

On 3 August 2007 the Solicitor-General, WCR ("Bill") Bale QC retired after a remarkable 21 years of service to successive governments and to the people of this State.

Only a matter of weeks after Mr Bale QC took office, the hearing of charges against David Wayne Cole and J and D Investments Pty Ltd commenced in the Court of Petty Sessions at Hobart. Those proceedings were eventually removed into the High Court of Australia and resulted, on 2 May 1988, in the now famous decision in *Cole v Whitfield*.

Almost exactly 20 years later, on 27 March 2008, the High Court handed down its decision in *Betfair Pty Ltd v Western Australia.* A brief summary of that decision appears later in this Report.

Bill Bale QC was intimately involved in the preparation and presentation of the successful arguments in both cases. It is therefore entirely fitting that these two truly landmark decisions on s92 of the Commonwealth Constitution should stand as the bookends to a distinguished career.

During the unusually long period between the retirement of Bill Bale QC and the commencement of my appointment on 3 March 2008, Principal Crown Counsel, Mr FC Neasey, more than ably fulfilled the office of Acting Solicitor-General between 17 September 2007 and 18 January 2008. Despite press reports which suggested that Mr Neasey had retired, he remains as an experienced and integral member of the staff of this Office.

THE FUNCTIONS OF THE SOLICITOR-GENERAL

Section 7 of the *Solicitor-General Act 1983* ("the Act") provides that the Solicitor-General has and shall exercise the following functions:

(a) to act as counsel for the Crown in right of Tasmania or for any other person for whom the Attorney-General directs or requests him to act;

(b) to perform such other duties ordinarily performed by counsel as the Attorney-General directs or requests him to perform; and

(c) to perform such duties (if any) as are imposed on him by or under any other Act. Section 8 of the Act authorises the Attorney-General to delegate responsibility for the performance of any of his or her functions and powers (other than a function or power where another enactment provides or contemplates that the function or power may be delegated to the holder of an office other than that of Solicitor-General) to the Solicitor-General. There is currently no such delegation.

DISCHARGE OF FUNCTIONS

Advice

The provision of advice to Ministers, their respective staffs and to Agencies and other bodies continues to occupy the overwhelming majority of the resources of the Office.

Schedule 1 reveals that, in the period under review, the Office of the Solicitor-General furnished a total of 978 written Advices to the various Agencies, State Authorities and other bodies shown. These figures do not include short advice provided by way of clarification or amplification of earlier Advices or brief advice given in reply to the less formal email queries which are regularly received.

Nevertheless, the Schedule also reveals a marked decrease in the total number of Advices provided in the period covered by this Report. It is possible that this decease in numbers corresponds with an increase in the complexity of the advice being sought and given (a trend noted in earlier Reports by my predecessor) and with the period between the retirement of Mr Bill Bale QC in August 2007 and the commencement of my term in March 2008, during which time the Office was not fully complemented.

In any case, preliminary indications for the forthcoming year are that the decline in the number of Advices has halted, if not reversed.

Section 78B Notices

Section *78B of the Judiciary Act 1903* (Cth), in substance, provides that where any cause in any Australian court involves a matter arising under the Commonwealth Constitution or involving its interpretation, it is the duty of the court not to proceed in the cause unless and until the court is satisfied that notice of the cause specifying the nature of the 'constitutional matter' has been given to the Attorneys-General of the Commonwealth and of each of the States and that reasonable time has elapsed to enable each to consider whether to intervene in the proceedings or to seek the removal of the cause into the High Court of Australia.

This important provision ensures that whenever any court in Australia is asked to interpret any provision of the Commonwealth Constitution, the Commonwealth and each member of the Federation is given notice so that they may exercise their respective rights to be heard in relation to the matter.

In the period covered by this Report the Attorney-General of Tasmania received 171 notices under s78B of the *Judiciary Act 1903*. Ideally, the Attorney-General, if not the Government, would give individual consideration to each one of these. However, in reality, the number of such notices makes this impractical — in addition to which, the vast majority can best be described as being highly speculative.

In those circumstances it has been, and continues to be, the practice that the Solicitor-General gives consideration to every 'section 78B notice' served upon the Attorney-General only referring to the Attorney those notices which raise questions which the Solicitor-General considers do, or may, warrant intervention or other action by the Attorney-General on behalf of Tasmania.

Notwithstanding its obvious administrative convenience, in some respects this practice might be thought to be unsatisfactory in that it reposes in the Solicitor-General a very broad (some would say, political) discretion to determine which questions of constitutional interpretation are referred to the government of the day and those which are not.

It is therefore my intention to develop a protocol or guidelines, for approval by the Attorney-General, which seek to define, so far as that may be possible, the manner and the circumstances in which constitutional issues raised by section 78B notices are referred to the Attorney-General.

It is likely that the implementation of such a protocol would involve the frequent preparation of submissions to the Attorney-General detailing the likely consequences for the Federation, and for Tasmania, of the High Court adopting particular interpretations of various provisions of the Constitution. In some instances it would be desirable (if not necessary) for there to be a more or less detailed analysis of the probable economic or other consequences. This would require resources which this Office does not presently have and may require the assistance of other Agencies (*e.g.* Treasury). However, if Tasmania is to play its part as an integral member of the Federation, it will have little choice but to make those resources available. In this regard I venture to repeat and endorse the observations of my predecessor in his 2006-2007 Report, viz:

> "Constitutional argument is usually complex and its proper presentation involves detailed preparation taking a considerable time. The smallness of the professional complement available to me has continued to limit the number of cases in which Tasmania can be involved as compared with the number in which it should be involved and, when a case requires preparation, considerable strain is normally placed on the Office to ensure that its core advisory function is not adversely impacted. I strongly maintain the view that Tasmania should be more active than it has been able to be in recent years in litigation which is likely to see evolvement in the interpretation of the Constitution, which could be achieved by the engagement of just one additional legal professional. I strongly urge that budgetary provision be made for this to happen."

Constitutional Litigation

Forestry Tasmania v Brown

On 30 November 2007 the Full Federal Court unanimously upheld Forestry Tasmania's appeal against a decision declaring (*inter alia*) that Forestry Tasmania had undertaken forestry operations otherwise than in accordance with the *Tasmanian Regional Forest Agreement 1997* and granting an injunction restraining Forestry Tasmania from undertaking "forestry operations" in the Wielangta Forest area.

On 23 May 2008, the High Court refused an application by Senator Brown for special leave to appeal to that Court, effectively affirming the earlier decision of the Full Federal Court.

Betfair Pty Ltd v Western Australia

On 27 March 2008 the High Court handed down its decision in relation to a challenge by Betfair Pty Ltd ("Betfair") to the validity of two sections of the Western Australian *Betting Control Act 1954*. Betfair had argued that the two provisions in question operated so as to place an impermissible disadvantage upon its Tasmanian-based betting exchange business when compared with Western Australian-based wagering operators.

The first provision made it an offence for a resident of Western Australia 'to bet through the use of a betting exchange'. The second provision made it an offence for a person to publish or otherwise make available "a WA race field" either in Western Australia or elsewhere unless authorised to do so by an approval granted under the Act.

Betfair contended that the provisions were invalid as offending s92 of the Commonwealth Constitution which provides for "free trade" between the States. Tasmania intervened in support of Betfair. Every other State (and the Commonwealth) intervened to support Western Australia and the validity of the challenged provisions of the *Betting Control Act*.

In a near-unanimous judgment (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ delivered joint reasons while Heydon J delivered separate reasons but came to the same conclusion) the Court upheld Betfair's (and Tasmania's) arguments and declared the two sections of the Western Australian Act to be invalid. In doing so the Court concluded that a statutory provision which has the effect (irrespective of intention) of discriminating against interstate trade in a protectionist sense will offend s92 unless that provision is appropriate and adapted (or "reasonably necessary") to meet the competitively neutral objective at which it is aimed. The Court found that the total prohibition on the use of betting exchanges by residents of Western Australia was not reasonably necessary to meet the stated objective of protecting the probity and integrity of the racing industry in Western Australia.

The ramifications of this decision for the regulation by each of the States of trade and commerce within and across their borders — and particularly electronic trade and commerce — may not yet be fully appreciated. It is sufficient for present purposes to say that in future it may be the High Court and not the Parliament of this State which will decide what is "reasonably necessary" for the regulation of a wide range of commercial activities.

Commonwealth of Australia v Anti-Discrimination Commission (Tasmania)

In July 2006 a resident of Tasmania made a complaint to the Anti-Discrimination Commission alleging that he had been the subject of unlawful discrimination by "the staff of Centrelink". Centrelink is a statutory agency of the Commonwealth.

The complaint was accepted for investigation and was eventually referred to the Anti-Discrimination Tribunal ("the Tribunal") for inquiry pursuant to s78 of the *Anti-Discrimination Act 1998* (Tas) ("the ADA").

When the matter came before the Tribunal the Commonwealth objected to the jurisdiction of the Tribunal on numerous grounds including that, because Centrelink is an agency of the Commonwealth the only judicial power that can be exercised in relation to Centrelink is the judicial power of the Commonwealth; that the Tribunal is not a "court of a state" within the meaning of Chapter III of the Commonwealth Constitution and cannot therefore exercise the judicial power of the Commonwealth; and that the Tribunal therefore has no jurisdiction over Centrelink.

The Commonwealth also applied to the Federal Court for declarations that neither it nor Centrelink is a "person" to whom the ADA applies and that the Tribunal has no jurisdiction to hear and determine a complaint made against Centrelink for (*inter alia*) the reasons set out above. Gray ACJ ordered that the matter be heard by a Full Federal Court.

In reasons for decision published on 13 June 2008 a majority of the Court (Weinberg & Kenny JJ) found that the ADA does not bind the Crown in right of the Commonwealth and that, in any case, Centrelink is not a 'person' within the meaning of the ADA. Kenny J also held that the Tribunal is not "a court of a state" and is therefore unable to exercise the judicial power of the Commonwealth and had no jurisdiction in the matter.

The practical effect of this decision is that Tasmanian Anti-Discrimination legislation does not apply to the Commonwealth or its agencies or to the conduct of servants or agents of the Commonwealth while acting as such.

"Hague Convention"

This Office continues to act on behalf of the State Central Authority in matters falling under the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Acting on instructions from the Central Authority in Canberra, the Office provides advice and representation to persons who claim that their children have been unlawfully abducted to or from Australia and specifically Tasmania, from or to another Contracting State.

During the period covered by this Report the office has had significant involvement in an as-yet-unresolved application in the state of Florida in the United States of America seeking the repatriation of a child alleged to have been unlawfully abducted from Tasmania by the child's mother.

LEGAL INFORMATION/EDUCATION

Members of this Office have continued to provide presentations to newly-inducted employees in the State Service designed to explain the functions of this Office and also some fundamental legal concepts applicable to the Crown.

I am aware that in past years the Office has been involved in a much more comprehensive educative programme but this has tended to wax and wane in accordance with perceived or actual demand.

In my opinion there is a clear need for a more or less comprehensive and continuing programme of education for members of the State Service which deals with both the legal and ethical responsibilities of the Crown and its servants.

The Crown is not only subject to 'the rule of law', it also has a positive obligation to ascertain what the law is and then, to comply with and enforce it. It has been said that the Crown must act as a 'moral exemplar'. Inasmuch as these things are true for the Crown they are also true for every servant and agent of the Crown.

However, it is probably unreasonable to expect exemplary standards of conduct from those who may be unaware of those standards.

SPECIAL COMMITTEE OF SOLICITORS-GENERAL

The Special Committee of Solicitors-General consists of the Solicitors-General of each of the Australian States, the Commonwealth and the Territories and of New Zealand. The Committee is a sub-committee of the Standing Committee of Attorneys-General ("SCAG") and continues to meet about three times per year at various locations to consider and to provide advice in relation to matters referred to it by SCAG and to discuss other legal issues of national and international significance.

The Committee is not only a valuable forum for the discussion of constitutional and other legal issues which are before the courts or are otherwise current topics of debate but also serves to establish professional and personal relationships which assists the mutual exchange of ideas and tends to enhance co-operation and uniformity between the Commonwealth, the States and Territories and New Zealand.

ADMINISTRATION

As at 30 June 2008 the staff made available to me consisted of one full-time Principal Crown Counsel, and two Crown Counsel (one full time and one 0.52 full-time equivalent) and a Personal Assistant. Arrangements were in hand to employ an additional junior practitioner to take up the unused 0.48 full-time equivalent.

In the approximately 6 months leading up to the commencement of my appointment the Office was operating below establishment as a result of the retirement of Mr Bale QC — the loss of whose energy and vast experience cannot be overestimated.

Generally speaking, staffing levels appear to be adequate although, like my predecessor, I am concerned that the Office may not be able to satisfactorily meet ongoing demands for advice in the event that constitutional or other litigation of any significance were to arise.

Material and administrative support have continued to be capably and efficiently provided by Crown Law Manager, Kerry Worsley, and her colleagues.

I also take this opportunity to thank all of the staff of the Office (and particularly my Personal Assistant, Ms Cheryl Cook) for their patience, understanding and good humour. Without exception they have willingly assisted me in what would otherwise have been a very much more difficult transition.

G L Sealy SC
SOLICITOR-GENERAL

SCHEDULE OF ADVICES

Agencies (including State Authorities)	**Number of Advices**	
	2007-2008	**2006-007**
Department of Economic Development	19	13
Department of Education	50	47
Department of Health and Human Services	146	162
Department of Infrastructure, Energy and Resources	75	124
Department of Justice	203	254
Department of Police and Emergency Management	10	10
Department of Premier and Cabinet	56	106
Department of Primary Industries and Water	156	272
Department of Tourism, Arts and the Environment	128	154
Department of Treasury and Finance	47	63
Tasmanian Audit Office	3	10
Rivers and Water Supply Commission	6	10
Retirement Benefits Fund Board	16	17
TAFE Tasmania	18	15
The Public Trustee	2	3
Other bodies and offices	43	80
TOTAL ADVICES	**978**	**1340**
Section 78B Notices	**171**	**228**