



2021

PARLIAMENT OF TASMANIA

SOLICITOR-GENERAL

REPORT FOR 2020-21

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

In accordance with s 11 of the *Solicitor-General Act 1983* ('the Act'), I submit to the Attorney-General my report on the performance and exercise of the functions and powers of the Office of Solicitor-General for the relevant period, namely the twelve month period ending on 30 June 2021.

1. THE OFFICE OF SOLICITOR-GENERAL

The Supreme Court of Tasmania has referred to the status of the Office of Solicitor-General of Tasmania in the following terms:

...the legislative scheme of the *Solicitor-General Act 1983* results in the creation of an independent statutory office ultimately accountable to Parliament and... it is in the public interest that the office remains 'steadfastly independent as part of the State's constitutional fabric and its adherence to the rule of law.'¹

The functions of the Solicitor-General are set out in s 7 of the Act in the following terms:

7. Functions of Solicitor-General

A person holding the Office of 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 a legal practitioner 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.

By a direction given by the Attorney-General on 20 February 2020 I am responsible for and control the State's functions in respect of civil proceedings,² and I am also given limited authority to provide advice to the Clerks of the Houses of Parliament in matters concerning the employment of employees in the Tasmanian Parliament and to act for them in civil proceedings arising under the *Industrial Relations Act 1984*, and the *Workers Rehabilitation and Compensation Act 1985* (Tas).

In addition to s 7, s 8 of the Act provides for the delegation to the Solicitor-General by instrument in writing by the Attorney-General of:

...responsibility for the performance or exercise of such of the functions and powers (other than th[e] power of delegation) which may be performed or exercised by the Attorney-General under the laws of Tasmania as may be specified in the instrument of delegation...

No delegation pursuant to s 8 of the Act was in force at any time during the relevant period.

The Office of Solicitor-General is accurately described in the following passage.

¹ *The Hon Will Hodgman, as Minister Administering the State Service Act 2000 v Tasmanian Industrial Commission* [2019] TASSC 40, [36].

² Except for proceedings under the *Crime (Confiscation of Profits) Act 1993*.

The most familiar of their roles is the argument, on behalf of the executive government of their respective polities, of the most important cases affecting the interests of the government and the governed and between the governments of the federation in the highest courts in the land. No less important, however, are the duties performed by these officers in ensuring the observance of the rule of law by advice given to the governments they serve on issues of constitutional, administrative and even commercial law.³

A brief history of the office in Tasmania is set out in Schedule 3.

2. COVID-19

During the reporting period, the restrictions required to manage the virus COVID-19 continued to present novel questions for my office. However, following the High Court decision in *Palmer v Western Australia*⁴ (in which Tasmania intervened) we began to feel more confident about the States' position regarding border restrictions and the concern that s 92 of the Commonwealth Constitution may operate to invalidate State laws to manage COVID was alleviated.

Physical access to some courts and tribunals, particularly federal courts, has continued to be restricted. The use of audio visual platforms remains necessary. These media are manageable for substantial court appearances, but are not ideal, because of occasional technological problems. Fortunately, this has not been the experience in Tasmanian courts, where practitioners and parties are able to appear in person. It may equally be said that the opportunities presented for the use of audio visual media in matters that require brief, or formal attendances before the courts has been entirely embraced by our courts. The time and cost savings associated with the use of audio visual platforms for these matters would seem obvious. Given the ease with which their use can be mastered, I find it difficult to understand why some courts continue to require the personal attendance by practitioners for formal appearances.

2. ADMINISTRATION

The Solicitor-General's Office consists of two sections: the Office of the Solicitor-General (Advisings) and the Office of the Solicitor-General (Litigation). The Litigation section is on level 5 and the Advisings section on level 8 of the Executive Building at 15 Murray Street. The physical separation of the two sections has always presented challenges.

The Office of the Crown Solicitor, with whom the Advisings section of my office is required to work closely, is now located on level 4 of the Reserve Bank Building at 111 Macquarie Street. This does not seem to have presented any immediate problems in relation to the work, or collaboration of the respective offices. However, that situation rests on established relationships built whilst the offices were readily accessible to one another in a physical sense. How the relationship between the two offices will continue in future, as the natural turn over in staff occurs, remains to be seen.

³ Hon Patrick Keane in the Foreword to *Public Sentinels: A comparative study of Australian Solicitors-General*, Gabrielle Appleby, Patrick Keyzer, and John Williams (Eds) Ashgate, 2014, page xi.

⁴ [2021] HCA 5.

Litigation

As at the reporting date, the structure of the Litigation section comprised of the following legal practitioner positions: the Assistant Solicitor-General (Litigation), one Level 4 legal practitioner, four Level 3 legal practitioners, and three Level 2 legal practitioners.⁵ Two of these positions are devoted to the program to reduce long term workers compensation cases being at Level 3. Two positions are devoted to the management and conduct of Child Abuse claims, being at Level 4 and Level 3.

The legal practitioners in the Litigation section are supported by one Legal Administration Officer, one Law Clerk, two Administrative Assistants and one Office Assistant.

Legal Practitioners

- Paul Turner SC, Assistant Solicitor-General (Litigation)
- Kirsten Hodgson (LP4)
- Gretel Chen (LP3)
- Louise Brooks (LP3)
- Teshi Zacharek (LP3)
- Oliver Robinson (LP3)
- Mark Jehne (LP2)
- Dashini Elankovan (LP2)
- Erin Lim (LP2)

Administration

- Pam Cawthorn (Legal Administration Officer)
- Anne-Maree Emmerton (Law Clerk)
- Lindsey Reed (Administrative Assistant)
- Kyra Wing (Administrative Assistant)
- Emma Carson (Office Assistant)

The Assistant Solicitor-General (Litigation), Paul Turner SC, manages the work flow and allocation of files in the Litigation section.

From the open files recorded in Schedule 2 it will be apparent that the volume of matters dealt with by the Litigation section is significant. However, with the increase in administrative staff, the Litigation section has been able to attend to more file closures than previous years. As noted in last year's report, the increase in administrative staff has the additional benefit of ensuring that our legal practitioners' time is devoted to practising law; not distracted by administrative tasks.

I thank all the administrative staff in the Litigation section for their hard work and dedication.

⁵ The level classifications are provided for in the *Legal Practitioners Award*.

Advisings

The practitioners in the Advisings section give legal advice, both written and verbal, to Ministers, agencies and statutory authorities and Crown instrumentalities. They also appear in cases in which constitutional issues arise and in which Tasmania is a party, or elects to intervene. In addition to those functions, there have been continuing opportunities for practitioners in Advisings to appear as counsel in a range of matters in the Supreme Court and in coronial proceedings.

As at the reporting date the Advisings section comprised of: the Assistant-Solicitor-General (Advisings), one Level 3 practitioner, two Level 2 practitioners and one Level 1 practitioner. During the reporting period, those positions were filled as follows.

Legal Practitioners

- Sarah Kay, Assistant Solicitor-General (Advisings)
- Jenny Rudolf (LP3)
- David Osz (LP2)
- Emily Warner (LP2)
- Nicole Winton (LP1)

Administration

- Melissa Xepapas (Executive Officer)

We were fortunate to welcome Nicole Winton to the Advisings section 7 June 2021. Nicole previously worked in DPAC and has previous experience in private practice.

Particular thanks are due to our Executive Officer, Ms Melissa Xepapas. Melissa is in charge of the administrative functions of the whole of the office, and reports to the Director, Crown Law. Melissa continues to be responsible for a number of improvements to our systems and has strongly promoted better communication between the Litigation and Advisings teams.

During the reporting period, Michael Varney indicated that he would retire from the position of Director, Crown Law. Michael started with Crown Law on 23 November 2015. The role of Director, Crown Law, is particularly challenging for an administrator. It involves dealing with the demands of, effectively, three legal practices, each with its own needs. Nevertheless, Michael discharged the functions of his position with considerable efficiency, and managed a number of significant improvements in each of the offices. His style, good humour and persistence will be missed. I wish him the very best for a long and enjoyable retirement.

During the reporting period, apart from contributions received from agencies to manage the workers compensation program and to manage abuse in care cases, the Office of the Solicitor-General is fully funded from the Consolidated Fund and accordingly does not charge agencies and other entities for the use of its services.

3. PROFESSIONAL

Advisings

A summary of the advice files opened by my office during the relevant period; categorised by reference to the agencies and other bodies that requested advice is annexed at Schedule 1. For ease of comparison the same details for the immediately preceding 12 month period are also included.

While the statistics in Schedule 1 reflect the number of files opened; they do not reflect the number of written opinions given for the reporting period, which was 862; which is higher than the number of files opened and confirms the trend from previous years. That figure also shows an increase of written opinions, when compared with the last reporting period.

I add that a considerable amount of advice is given during short telephone, or email attendances. Occasional requests received for 'informal advice' confirm the mistaken understanding that there is a category of advice that does not bind the recipient. A request for informal advice, whether in the nature of telephone, or short email advice does not make the advice any less binding on the recipient, or the State.

A considerable part of our core function to provide legal advice is taken up with statutory interpretation. This is a complex task, which concerns the text of the statute, a consideration of its history, context and purpose, including the policy it is intended to pursue. There is a significant body of principle relating to the interpretation of statutes. It is important for the State to have legal practitioners who are skilled in this discipline.

A statute should communicate the law efficiently and effectively to those who have recourse to it. This does not just mean lawyers, it means citizens and institutions who must obey legal commands. While some laws convey difficult legal concepts that are not capable of expression in simple language, that is not true of all laws. The Parliament's endeavour should be to make laws that ordinary people can readily understand.

The complex and prescriptive nature of the provisions of some Tasmanian statutes do not lend themselves to this aspiration. For example, an ordinary person, unskilled in the law, would have great difficulty understanding Schedule 6 of the *Land Use Planning and Approvals Act 1993*. I have spent many many hours reading it and I still find some of its provisions very difficult to construe.

Constitutional problems⁶ arise if members of Parliament responsible for the passage are unable to explain its intricacies, from reading the legislative text, as opposed to fact sheets and clause notes. The will of Parliament is expressed in the words of a statute, not in what Parliament thought it was enacting. If members of Parliament are unable to understand the terms of the legislation they are debating, how can they be sure it is law for peace, order and good government⁷ of the State? Moreover, how can a citizen, without the means, or desire to consult a lawyer, be expected to obey the law?

⁶ For a critique of complex legislation, see the Hon Justice Nye Perram, *Content and Complexity: Some Reflections by a New Judge: The Perils of Complexity: Why More Law is Bad Law*, Paper delivered to the Challis Taxation Discussion Group, 6 August 2010.

⁷ See the *Australia Act 1986*, s 2(1).

Section 78B Notices

This section refers to the number of notifications formally given to the Attorney-General pursuant to s 78B of the *Judiciary Act 1903* (Cth) of matters involving the Commonwealth *Constitution* or its interpretation during the relevant period. The Advisings section of my office is responsible for providing advice to the Attorney-General in relation to these matters. We only refer those matters that are considered appropriate for intervention by the State. That is because, when analysed, many of them lack substance or are of no legal interest to the State.

When compared with the previous reporting period, the number of notifications significantly increased during the relevant period.⁸

Interventions in Constitutional Matters

During the relevant period, the Attorney-General exercised the right to intervene under s 78B of the *Judiciary Act 1903* (Cth) in respect of three matters.

Palmer v Western Australia [2021] HCA 5

This case was heard by the High Court, using video conferencing facilities, in November 2020. It concerned well known Australian mining and political identity Clive Palmer. He wanted to fly from Queensland to Western Australia to participate in the management of a mining company, of which he was a principal. However, directions under the *Western Australian Emergency Management Act 2005* (WA) effectively closed the borders of Western Australia to people travelling from interstate. Mr Palmer challenged the directions on the basis that they contravened s 92 of the *Constitution*, which provides:

...trade, commerce and intercourse among the States ...shall be absolutely free.

The High Court rejected the challenge. Although the members of the Court took the opportunity to explain the operation of the ‘intercourse’ limb of s 92, each of them found that there was no constitutional issue raised by Mr Palmer. That was because s 92 operates to restrict legislative power and Mr Palmer had challenged the directions, not the EM Act itself. The Court found, in any event, that the Act was ‘reasonably necessary’ for the protection of public health and that the directions were within the power conferred by the Act.

Gerner v Victoria [2020] HCA 48

This case was heard in the same week as *Palmer v Western Australia* also through the use of video conferencing facilities. Mr Gerner (a restaurateur) and his company launched a challenge to Victoria’s *Public Health and Wellbeing Act 2008*, s 200(1)(b) and (d) and the ‘Lockdown Directions’ made pursuant to those provisions. It was asserted that the Act and/or the Lockdown Directions were invalid as being contrary to an implied freedom of movement within a State. The question put before the Court was:

Does the *Constitution* provide for an implied freedom for the people in and of Australia, members of the Australian body politic, to move within the State where they reside from time to time, for the purpose of pursuing personal, recreational,

⁸ See Schedule 1.

commercial, and political endeavour or for any reason, free from arbitrary restriction of movement?

The Court answered the question against the plaintiffs primarily on the basis that there is nothing in the text and structure of the Constitution to support such an implication. Their Honours further found against the plaintiffs' argument that movement for any purpose amounts to political communication so as to find protection in the implied freedom of political communication and also rejected the plaintiffs' argument that freedom of movement is implicit in s 92 of the Constitution.

Citta v Cawthorn [2021] HCATrans 126

I mention this case, in which the State intervened during the reporting period, although the special leave application to the High Court was heard after the reporting period.

The Attorney-General accepted my advice to intervene in the special leave application in this matter as a result of concerns that the judgment of the Full Court of the Supreme Court did not appear to accord with the constitutional principle that a State is unable to invest the judicial power of the Commonwealth in a body which is not a court, in this case, the Anti-Discrimination Tribunal. As was pointed out in the High Court, the case is of national significance. The special leave application has been allowed, and so the matter will go on appeal to the High Court during the next reporting period.

I mention the case to clarify two matters that have been misrepresented in the public domain. The first is that the State's case does not involve an attack on the validity of the *Anti-Discrimination Act 1995*. The second is that the State's case does not attack the merits of the cases advanced by either party. The State's concern is that, until the Full Court's decision is authoritatively ruled on by the High Court, State Tribunals will be left in the difficult position in which they are bound to follow a decision of the Supreme Court, which may lead them into error, and occasion inconvenience and expense to the parties.

Royal Commissions

In accordance with the Attorney-General's direction 20 February 2020, Royal Commissions, and Commissions of Inquiry are civil litigation, in respect of which I have carriage on behalf of the State.

During the reporting period, the State was also involved in three Royal Commissions, namely,

- the Royal Commission into Aged Care Quality and Safety;
- the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability;⁹
- the Royal Commission into National Natural Disaster Arrangements.

The Natural Disaster Royal Commission presented its report to the Governor-General on 28 October 2020 and it was tabled in Federal Parliament on 30 October 2020.

⁹ The Disability Royal Commission is established concurrently as a Commission of Inquiry under State law.

The Aged Care Royal Commission presented its final report to the Governor-General on 26 February 2021. It was tabled in Federal Parliament on 1 March 2021.

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability is ongoing.

The Department of Premier and Cabinet is the responsible Agency for managing the State's interactions with all current Commonwealth Royal Commissions.

The Assistant-Solicitor General (Advisings), Sarah Kay and Emily Warner continue to provide assistance to Agencies and statutory officers in the preparation of responses to various notices to produce statements and information to the Royal Commissions. While once Royal Commissions were relatively infrequent, they are now a much more prevalent part of the Australian political landscape.¹⁰ It is important for governments to participate in and assist a Royal Commission with its inquiries. But it should also be remembered that a Royal Commission can involve an intensely forensic process, in which the State's interests may be at play. Careful preparation is necessary, including the provision, where necessary, of timely and accurate advice from this office. The proper preparation and presentation of responses is indispensable to the assistance the State ought to provide to a Royal Commission, should it become necessary.

Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings

The Commission of Inquiry ('the Commission') was established by Order, under the *Commissions of Inquiry Act 1995*, to inquire into matters relating to child sexual abuse in institutional settings in Tasmania. The Commission's focus will be on the State government.

The Commission's work commenced during the reporting period.

My office is generally responsible for the conduct and presentation of the State's legal case to the Commission. For that purpose a unit has been assigned to my office, to act as the solicitor to the Commission. Counsel instructed by my office will attend Commission hearings.

I also sit on the Inter Departmental Committee established to manage the State's response to the Commission.

Litigation

Apart from those litigious matters mentioned above, the Litigation section of my office undertakes all civil litigation for the State. Civil litigation is defined in the Attorney-General's written direction to me as:

¹⁰ For an incisive commentary, see Hon Kenneth Hayne, *On Royal Commissions*, Speech to the CCCS Conference, Melbourne Law School 26 July 2019.
https://adminau.imodules.com/s/1182/images/editor_documents/MLS/cccs/on_royal_commissions_-_the_hon_k_m_hayne.pdf?_ga=2.33611425.1211677524.1597385946-16107117.1597385946&sessionid=d9a5afb2-bae9-4de1-bb2f-1d7b13005c44&cc=1

“civil proceedings” includes actions, applications, appeals, claims, proceedings or suits of any nature in the civil jurisdiction of any Federal Court or a Court of any State, or in the jurisdiction of any commission, tribunal, arbitrator or other body.

It can be seen that the functions of the office are extremely broad. Nearly all litigious matters in which the State is a party, or is otherwise concerned, are dealt with by the Litigation section, the notable exception being matters which involve the Commonwealth *Constitution* or its interpretation. Those matters are generally dealt with by the Advisings section.

I have attached in Schedule 2 a list of civil files opened and closed during the relevant period. The number of files opened represents an increase on the files opened during the previous period.¹¹

As adverted to in relation to Advisings, the number of files is a coarse measure of the amount of work performed. Many litigious matters are resource intensive; and practitioners are observing increasing factual and legal complexities in much of their work. Litigation practitioners are constantly required to meet deadlines, in the form of limitation periods, or court timetables. Practitioners working for the Crown must also take care to ensure that the State acts as a model litigant. I discuss this further, below.

Abuse in care cases

As a result of the recommendations of the Royal Commission into Institutional Child Sexual Abuse, there has been a marked increase in litigation against the State in relation to historical allegations of child sexual abuse. As we anticipated, there has been a significant increase in cases relating to child sexual abuse, following the State’s response to the Royal Commission into the Institutional Responses for Child Sexual Abuse. Those responses included:

- amendments to the *Limitation Act 1974*, to allow plaintiffs with time barred actions to apply to the Court for an extension of time;
- the adoption of and participation in the National Redress Scheme.

Further, as part of the response, the State has now adopted guidelines for the conduct of the civil claims, a copy of which is attached at Schedule 5.

As can be seen from Schedule 2, there are now a number of abuse in care claims. These claims are challenging on all sides. We have work health and safety checks in place to ensure that our practitioners do not suffer from the confronting nature of the work.

Civil claims in negligence and breach of statutory duty present an avenue for claimants to recover damages against the State. Claims are not limited to a particular figure, as are claims under the National Redress scheme. Many claimants, and their legal advisers, consider this to be an advantage.

As a result of the increase in these claims, it has been necessary to increase the staff in the Litigation section. This will assist the government to meet the requirements of the guidelines published in relation to civil litigation following the Royal Commission. Relevantly, these

¹¹ In the previous period from 1 July 2018 to 30 June 2019, the number of files opened was 574.

require the State to attempt to settle claims expeditiously, and without re-traumatising claimants.

Regrettably, the process of settling claims early has been substantially retarded by a number of factors. The first relates to a number of provisions in State legislation that requires information to be kept confidential by the agency with its possession, with the result that my office has been unable to obtain the documentation and instructions necessary to comply with the guidelines. The results are absurd. They mean that my office is unable to properly discharge its professional responsibilities to provide accurate and timely advice to the State about claims, unless an action is commenced in a court, which the guidelines expressly discourage. Non-government institutions do not labour under these constraints. Neither do other State governments, with less restrictive legislative requirements.

Attempts to alleviate this problem have been met with both internal and external resistance. Internally, there has been a failure to adequately articulate a policy solution. I take part of the responsibility for this, but, having said that, my functions do not include the development of policy. Another aspect relates to a lack of understanding about the processes involved in civil litigation. The focus has been on what appears to be politically palatable, as opposed to what is legally required. Externally, there has been considerable mis-informed political and media commentary about the disclosure of the information necessary to permit the parties to a civil claim to negotiate an appropriate and early outcome. I regret to say that some of the political commentary has been generated from legal practitioners, some of whom do not routinely practice civil litigation and others whose views are simply misconceived.

Fertile and accurate sources of what is required by way of documents and information necessary to participate in early settlement processes are experienced and trusted firms who act for claimants. I am looking forward to a better informed and more mature approach on all sides to this problem in the coming reporting period.

The second factor retarding the civil claims process in this area relates to a lack of resources in agencies. Considerable work has been done in this area and, again, I would expect to see a sharp improvement in resourcing and the resultant acceleration of disposition of claims in the next reporting period.

It is an important function of my office to accurately assess liability, and the State's exposure to damages, before committing the expenditure of public funds to the resolution of a claim. That necessarily requires a process of factual investigation and legal analysis.

Construction disputes

As reported last year, the Litigation section is not sufficiently resourced to manage complex construction disputes brought against the State. Claims of this nature must be briefed to legal firms specialising in construction law. However, in order to ensure that the externally briefed firms are managing the interests of the State and behaving consistently with model litigant obligations it remains necessary for Crown Law practitioners to maintain oversight of the claims. Until recently this has been taken up in an *ad hoc* manner, between the Crown Solicitor's office and my office.

As at the reporting date, a new position has been created to manage construction disputes. It has a dual reporting function to the Solicitor-General and the Crown Solicitor. Tom Carr,

formally of DPIPWE, was selected for the position. He took up the role on 7 July 2021, shortly after the reporting date. I welcome him to the team.

Model Litigant Guidelines

In previous reports, I have noted the government's Model Litigant Guidelines for the conduct of civil litigation by the Crown. I have again attached the guidelines at Schedule 4.

The government authorised me to issue the guidelines. I circulated them to Heads of Agency, the Law Society and the Tasmanian Bar.

In summary, the guidelines are indicative of the long recognised conventions of the Crown to act fairly. It will be noted that they indicate that the Crown's obligations are not confined to legal practitioners in the service of the Crown, but extend to all Crown instrumentalities. For good reason they apply generally to the executive government of the State. It also needs to be understood that the obligations do not require the Crown to 'fight [litigation] with one hand behind its back'. They require it to fight it fairly.

Other Litigation

During the reporting period, the State sought special leave to appeal to the High Court in the case of *Tasmania v Mulreany*.¹²

During the reporting period, the Supreme Court published its reasons in a number of matters in which practitioners from my office appeared, including,

- *The Wilderness Society v Wild Drake Pty Ltd* [2020] TASSC 34 (6 July 2020)
- *Tasmanian Health Service v Public Trustee as Administrator of the estate of J* [2020] TASFC 6 (21 October 2020)
- *B v A Legal Practitioner* [2020] TASSC 50 (27 October 2020)
- *Cambria Green Agriculture & Tourism Management Pty Ltd v Tasmanian Planning Commission* [2020] TASSC 58 (3 December 2020)
- *Gutwein v Tasmanian Industrial Commission* [2020] TASSC 59 (4 December 2020)
- *Attorney-General v University of Tasmania* [2020] TASFC 12 (15 December 2020)¹³
- *Gutwein v Tasmanian Industrial Commission* [2021] TASSC 2 (3 February 2021)
- *Coad v State of Tasmania* [2021] TASFC 2 (17 February 2021)
- *Jago v Anti-Discrimination Tribunal* [2021] TASSC 10 (26 February 2021)
- *CMB v Mental Health Tribunal* [2021] TASFC 4 (26 March 2021)
- *CMB v Mental Health Tribunal (No 2)* [2021] TASFC 7 (19 May 2021)
- *Cambria Green Agriculture & Tourism Management Pty Ltd v Attorney-General* [2021] TASFC 8 (3 June 2021)
- *Gutwein v Tasmanian Industrial Commission* [2021] TASFC 9 (23 June 2021)

¹² H6/2021, on appeal from the Full Court of the Supreme Court in *State of Tasmania v MFC* [2021] TASFC 6 and listed for hearing on 15 October 2021.

¹³ Heard on 5 June 2019, as referred to in last year's report.

Gutwein v Tasmanian Industrial Commission [2021] TASFC 9

The last case in that list requires some further comment.

The matter concerned an application to the Tasmanian Industrial Commission ('the TIC') by the Australian Workers Union for an industrial dispute involving back pay alleged to have been due to a number of former employees. The dispute arose out of an industrial agreement that was registered on 20 August 2019, the operation of which was backdated to 1 July 2018.

With the agreement of the State and the Union, the President of the TIC agreed to answer a preliminary question about the TIC's jurisdiction to hear and determine the dispute. The State's position was that the TIC did not have jurisdiction, because:

- (a) an industrial dispute in relation to back pay could not arise in respect of former employees at the time that the agreement was made; and
- (b) the Commission had no jurisdiction to make an industrial agreement about former employees.

The State also contended that, in its terms, the agreement did not apply to former employees.

The President determined that the agreement covered the employees. However, he made no order under s 31 of the *Industrial Relations Act 1984* to settle the dispute. The State applied to the Supreme Court to have the President's decision reviewed. Brett J dismissed the application for review. The State appealed to the Full Court. The appeal was dismissed.

The Full Court held at [33], in effect, that, in its terms, the agreement applied to the former employees.¹⁴

It then went on to determine that an industrial dispute about wage levels could extend to a dispute about former employees. The Court held that a dispute by a Union as a 'party principal' to the agreement was 'on behalf of, not only existing employees but also of persons in that occupation who are currently members, or eligible for membership of the Union'. It found that s 55(6)(b) of the Act was sufficient to permit the agreement to operate retrospectively.

At paragraph [6] of his reasons for judgment, the Chief Justice said:

At the hearing of the appeal I asked counsel for the appellant whether the former employees to which the appeal related had been paid the money that was in dispute. The Court was informed that all but one of them had been re-employed and paid, but that no payment had been made to the individual who had not been re-employed. The fact that no payment had been made to that person after a judge of this Court had given judgment against the Minister indicates a lamentable disregard for the rule of law, or perhaps an unfortunate ignorance concerning the rule of law at some level.

The fact that this was said at all caused me great concern. A critical mission of this office is to ensure, to the best extent possible, that the Crown obeys the law. I have continually pointed that out in annual reports since being appointed in 2014. However, I firmly believe that the broad class of persons to whom the comments might apply did not deserve the criticism.

¹⁴ *Gutwein v Tasmanian Industrial Commission* [2021] TASFC 9 (Marshall AJ, Blow CJ and Martin AJ agreeing).

At the conclusion of the hearing of the appeal the Chief Justice asked me the question, and, having taken instructions, I gave the answer set out in paragraph [6] of the Chief Justice's reasons. Had I anticipated the Chief Justice's comments, I would, at the very least, have made a submission that the TIC had not made an order against the Minister and that all Brett J had done, and expressly said that all he intended to do, was dismiss the application for relief.

Following the Full Court decision, I made inquiries about what had in fact happened at the conclusion of the proceedings before Brett J. Those inquiries revealed that advice was given by my office to the effect the employees should be paid. In the period following Brett J's decision there was also considerable deliberation about whether to institute an appeal to the Full Court given the ramifications of the decision for another 18 industrial agreements in nearly identical terms which had been registered on or about the same day. At some stage during those deliberations the payment due to the particular employee was overlooked.

None of that is to say I did not, or do not take the Chief Justice's comments seriously. I take them very seriously. Following the reasons being published, I immediately wrote to all Heads of Agency, sending a copy of the reasons, emphasising the Chief Justice's comments and drawing attention to some relevant legal principles concerning the nature and effect of appeals.

In the events I have outlined, I accept that some fault is attributable to the Crown and, to the extent it is attributable to my office, I share it. However, in my experience, it is very rare that a State servant deliberately sets out to disobey the rule of law.¹⁵ I am confident that no one did in this case. For those reasons, I do not accept that the failure to pay the employee deserved the epithets 'lamentable disregard' or 'unfortunate ignorance'.

Hague Convention

During the reporting period, this office continued to act on behalf of the State Central Authority in Tasmania (being the Secretary, Department of Communities) under the *Hague Convention on the Civil Aspects of International Child Abduction*. However, during the relevant period, no requests to act were received.

Special Committee of Solicitors-General

The Special Committee of Solicitors-General (SCSG) which is comprised of the Solicitors-General of the Commonwealth and of every State and Territory (and, by invitation, the Solicitor-General of New Zealand) last met in person in Brisbane on 25 October 2019. A number of attempts to meet in person during the reporting period have failed, during the restrictions imposed by COVID-19. SCSG meetings have, however, continued to be held by audio visual links.

The SCSG is a subcommittee of the Standing Committee on Law and Justice (or 'SCLJ', formerly the Standing Committee of Attorneys-General) and is periodically requested by the SCLJ to provide joint advice to it in relation to various matters usually involving more or less contentious *Constitutional* issues.

The SCSG also routinely reviews and discusses the implications of any recent decisions involving the Commonwealth *Constitution* or its interpretation together with all pending and

¹⁵ cf *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170, 171.

reserved cases in Australia in which a constitutional issue has arisen or is thought to be likely to arise.

The meetings of the SCSG also provide a valuable opportunity for the exchange of information and views regarding proposals for law reform and legislative amendment which may have come from other jurisdictions.

The Whole of Government CLE program

During the second half of 2019, the CLE program continued to show strong results. Regrettably, with the onset of COVID-19, the program was suspended.

Seminars run during the reporting period are set out in the following table.

Name of course	Course content	Presenter	Date Presented	Total Participant Regn. No. [including Teams attendees]
WH&S Training		Michael O'Farrell Simon Nicholson & Sam Thompson	24th, 25th, & 26th February 2021	
Crown Law Legal Update: Some issues from 2020	The duties of a State Servant: <i>Comcare v Banerji</i> Approaches to delegation: <i>Northern Land Council v Quall</i> COVID directions as an example of executive power	Michael O'Farrell	10 March 2021	128
Child Safety & Family Law	Who are Child Safety Services; What the Child Safety Legal Group does; <i>Children Young Persons and Their Families Act 1997</i> (Tas); <i>Family Law Act 1975</i> (Cth); Interrelationship between State and Cth law; Receiving a summons or subpoena – what to do; Being asked to write an affidavit - and how to do it; Preparing to give evidence in court; and Practical tips on what to do in the court room.	Cameron Lee	22 March 2021	39

Name of course	Course content	Presenter	Date Presented	Total Participant Regn. No. [including Teams attendees]
Additional Session “as requested basis”	Forestry Session Topics including: <ul style="list-style-type: none"> • giving evidence • giving advice • how to impart information, if requested, in an appropriate way • being a witness • explanation on how issues in respect of negligent advice works 	Michael O’Farrell	14 April 2021	
Who are you contracting with?	<ul style="list-style-type: none"> • An overview of the different types of entities that you may encounter during commercial transactions, including: <ul style="list-style-type: none"> ○ Bodies politic (the Commonwealth, States) ○ Bodies corporate specifically created by legislation (municipal councils and statutory corporations) ○ Corporation soles ○ Instrumentalities of the Crown ○ Companies ○ Incorporated associations ○ Sole traders ○ Partnerships and Joint ventures ○ Trusts • Key issues to consider when contracting with different kinds of entities • Due diligence tips and tricks • Ensuring that documents are properly signed: <ul style="list-style-type: none"> ○ requirements of an agreement versus a deed ○ to seal or not to seal ○ signing on behalf of the Crown • Tales from the trenches 	Alan Morgan & Nigel Oates	24 May 2021	192

Name of course	Course content	Presenter	Date Presented	Total Participant Regn. No. [including Teams attendees]
Delegations of statutory functions and powers, and authority to contract	<ul style="list-style-type: none"> • Issues arising in relation to delegations and the formation of government contracts • Consideration of the nature of the Crown • Who is authorised to bind the Crown • The consequences arising from a lack of authority 	Sarah Kay & David Osz	22 June 2021	131

During the reporting period the program was overseen by a Steering Committee, made up of Alan Morgan (Crown Solicitor), Chelsea Trubody-Jager (Director, Secretariat & Legal Services, DSG), Megan Hutton (General Manager, Legal Services, DOH), Heather Schnerer (Legal Practitioner, Crown Solicitor's Office) and me. I thank my colleagues on the Committee for their work and contribution to this important program.

I wish to record the considerable contribution of Rowanne Brown, a former member of the Steering Committee, who tragically died in 2020. Rowanne was a driving force in the State's legal education program well before I took up office in 2014, having administered the 'legal lunchbox' series before that. We are all indebted to Rowanne for her unsurpassed commitment to legal education in the Tasmanian government.

Heather Schnerer also acts as the program's administrator. As in past years Heather's commitment to the program has kept it on track, which has not been easy due to COVID-19.

We also have a reference group made up of senior representatives from Agencies, who assist the Steering Committee in identifying relevant topics to be delivered. I thank them for their participation.

Other activities

I remain a member of the Board of Legal Education.

Acknowledgments

On 3 August 2021 I tendered my resignation to Her Excellency, the Governor, effective 24 December 2021. I have held the office since 1 September 2014. It has been a fascinating and rewarding journey as well as the greatest privilege of my professional life.

I have worked with three Attorneys-General, as well as one Acting Attorney-General, all of whom brought different perspectives to the office. I would particularly thank the present Attorney, the Hon Elise Archer MHA, for her commitment to and decisive instructions in relation to matters requiring her to perform the non-political functions of her office, which require the Attorney, as first law officer, to act in the public interest.

I have had the great pleasure of working with some exceptionally dedicated, bright and talented people in the State Service. I have enjoyed the support and, when needed, encouragement of three Secretaries of the Department of Justice. I thank all of them, and in particular, the present Secretary, Ginna Webster.

I have enjoyed excellent support from a very hard working, professional and diligent staff, both present and past. I thank them for all of their efforts, both individual and collegiate, as well as their friendship and support.


I record my thanks to the Crown Solicitor, Alan Morgan and the Director of Public Prosecutions, Daryl Coates SC, and also to their staff for their comradery, support and guidance.

I particularly thank the Assistant Solicitor-General (Advisings), Sarah Kay, and the Assistant Solicitor-General (Litigation), Paul Turner SC, for their friendship, support and guidance since I commenced. In addition to the demands I make of them, they each have significant responsibilities of their own to allocate the work of the offices and to supervise and mentor staff.

Finally, I extend my heartfelt thanks to Melissa Xepapas, our Executive Officer, who has been a trusted assistant and colleague for the whole of my term. Melissa's dedication, as well as her unfailing good humour and positive disposition have been of immeasurable assistance to me, and are invaluable to our office.

I wish everyone at Crown Law all the very best for the future.

Dated: 30 September 2021



Michael O'Farrell SC
Solicitor-General of Tasmania

Schedule 1

SCHEDULE OF ADVICE GIVEN

	2019-20	2020-21
Department of State Growth	77	76
Department of Education	33	22
Department of Health	51	33
Department of Justice	201	184
Department of Police, Fire and Emergency Management	9	10
Department of Premier and Cabinet	127	103
Department of Primary Industries, Parks, Water and the Environment	75	83
Department of Communities Tasmania	18	23
Department of Treasury and Finance	37	25
Tasmanian Audit Office	4	8
The Public Trustee	1	3
Other bodies and offices	63	51
TOTAL ADVISINGS	696	621
Section 78B Notices	142	213

Schedule 2

CIVIL FILES OPENED AND CLOSED AS AT 30 JUNE 2021

Work type	Opened	Closed
Abuse in Care	34	8
Administrative appeals – Magistrates Court	21	17
Administrative appeals – Supreme Court	14	10
Anti-discrimination	11	10
Charity	1	-
Contract	12	3
Coronial	27	20
Debt recovery	15	27
Employment /Industrial	19	23
Employment – workers compensation	338	326
Environment	-	1
Judicial Review	8	3
Miscellaneous	42	34
Negligence – medical	30	11
Negligence – other	9	7
Negligence – school	8	7
Planning	8	4
Subpoena	3	2
Tenancy	6	8
Total	606	521

Schedule 3

BRIEF HISTORY OF THE OFFICE OF SOLICITOR-GENERAL

The Office of Solicitor-General has existed in Tasmania since 1825. At that time and consistent with the practice in the United Kingdom, the Office of Solicitor-General was a political office¹⁶ – both the Attorney-General and the Solicitor-General being members of most of the early Cabinets following the introduction of responsible government in Tasmania.¹⁷ However, in 1863, following the report of a Royal Commission to inquire into the accounts, and ‘...*the nature and amount of the business transacted in the several Departments of Our Government whose offices or places of business shall be and lie to the southward of the Town of Campbell Town...*’, the decision was made that the Office of Solicitor-General should henceforth be a non-political and non-ministerial office. Perhaps unsurprisingly, the decision appears to have been based more upon financial rather than prudential considerations.

From 1863 the Solicitor-General’s Office was the core of the legal administration of the government until, in 1934, the Attorney-General’s Department was created and assumed responsibility for the administration of legislation. Thereafter the Solicitor-General’s Department functioned as the Crown Law office advising and assisting the Executive Council, Ministers and agencies in legal matters affecting them. This position remained virtually unchanged until the enactment of the Act which, for the first time, established the Office of Solicitor-General as an independent office under statute.

Today, the office is accurately described in the following passage about Australian Solicitor’s-General.

The most familiar of their roles is the argument, on behalf of the executive government of their respective polities, of the most important cases affecting the interests of the government and the governed and between the governments of the federation in the highest courts in the land. No less important, however, are the duties performed by these officers in ensuring the observance of the rule of law by advice given to the governments they serve on issues of constitutional, administrative and even commercial law.¹⁸

The Supreme Court of Tasmania recently referred to the status of the office in the following terms:

...the legislative scheme of the *Solicitor-General Act 1983* results in the creation of an independent statutory office ultimately accountable to Parliament and that it is in the public interest that the office remains “steadfastly independent as part of the State’s constitutional fabric and its adherence to the rule of law.”¹⁹

¹⁶ i.e., an office filled by an elected member of the Parliament.

¹⁷ In the United Kingdom the Attorney-General has rarely, and the Solicitor-General has never, been a member of the Cabinet; the prevailing view being that membership of the Cabinet is inconsistent with the duty to act as truly independent legal advisors to the Cabinet and government departments [See generally, *The Law Officers of the Crown*, Edwards, Sweet & Maxwell, 1964, Chapter 9].

¹⁸ Hon Patrick Keane in the Foreword to *Public Sentinels: A comparative study of Australian Solicitors-General*, Gabrielle Appleby, Patrick Keyzer, and John Williams (Eds) Ashgate, 2014, page xi.

¹⁹ *The Hon Will Hodgman, as Minister Administering the State Service Act 2000 v Tasmanian Industrial Commission* [2019] TASSC 40, [36].

**SOLICITORS-GENERAL OF
VAN DIEMEN'S LAND and TASMANIA**

9 May 1825	5 May 1832	Alfred Stephen
1832	1833	Hugh Cokeley Ross (acting)
Jan 1833	Sep 1837	Edward McDowell
23 Mar 1838	1841	Herbert C Jones
15 Jan 1841	Dec 1843	Thomas William Horne
Jan 1844	1848	Valentine Fleming KC
1848	Dec 1853	Alban Charles Stonor
1854	1854	Francis Villeneuve Smith
1854	1855	Edward McDowell (acting)
19 Dec 1855	Feb 1857	John Warrington Rogers
25 Apr 1857	1 Nov 1860	Thomas James Knight
1 Nov 1860	Feb 1861	William Lambert Dobson
1 Jan 1864	1867	John Compton Gregson
Dec 1867	14 Mar 1887	Robert Patten Adams
Jun 1887	Apr 1901	Hon. Alfred Dobson KC
Apr 1902	1 Sep 1913	Edward David Dobbie KC
1914	1930	Lloyd Eld Chambers KC
Sep 1930	Aug 1938	Philip Lewis Griffiths KC
1939	17 Oct 1944	Rudyard Noel Kipling Beedham KC
18 Oct 1944	13 Mar 1946	Marcus George Gibson KC (acting)
14 Mar 1946	1 May 1951	Marcus George Gibson KC
14 Jun 1951	21 Mar 1952	Malcolm Peter Crisp KC
26 May 1952	1 Sep 1956	Stanley Charles Burbury QC
27 Sep 1956	27 Feb 1968	David Montagu Chambers QC
6 May 1968	1 Mar 1984	Roger Christie Jennings QC
2 Mar 1984	10 Apr 1986	Christopher Reginald Wright QC
11 Apr 1986	3 Aug 2007	William Christopher Robin Bale QC
18 Sep 2007	18 Jan 2008	Francis Counsel Neasey (acting)
3 Mar 2008	16 May 2014	Geoffrey Leigh Sealy SC
19 May 2014	31 Aug 2014	Francis Counsel Neasey (acting)
1 Sep 2014		Michael Ernest O'Farrell SC

Schedule 4

MODEL LITIGANT GUIDELINES

Introduction

1. These guidelines apply to civil proceedings brought by or against the State, its instrumentalities, including its agencies and authorities ('the State').

“civil proceedings” includes actions, applications, appeals, claims, proceedings or suits of any nature in the civil jurisdiction of any Federal Court or a Court of any State, or in the jurisdiction of any commission, tribunal, arbitrator or other body.²⁰
2. The obligation of the State to act as a model litigant arises from the Crown's status as a moral exemplar.²¹ The obligation extends beyond legal practitioners acting for the Crown. It is possessed by every State instrumentality, its officers and employees.
3. The administration of these guidelines is primarily the responsibility of the head of each instrumentality, in consultation with the Office of the Solicitor-General.
4. All legal practitioners²² acting on behalf of the State and State service officers or employees instructing them must be made aware of these guidelines and required to comply with them.
5. The guidelines reflect the existing common law and do not impose further obligations on the State.

Object

6. The object of these guidelines is to assist in maintaining consistent and high professional standards in legal proceedings brought by or against the State.

Primary obligation

7. The State, its agencies and authorities must act as a model litigant in the conduct of civil litigation.
8. The obligation does not prevent the State from acting in the public interest, or firmly pursuing a legitimate claim or defence to protect its interests.

Nature of the Obligation

9. Subject to clause 8, the obligation requires the State and its agencies to:
 - a. deal with matters efficiently and expeditiously;
 - b. make an early assessment of the prospects of any claim or defence;

²⁰ Proceedings under the *Crime (Confiscation of Profits) Act 1993* are not to be taken to be civil proceedings.

²¹ *Dyson v Attorney-General* [1911] 1 KB 410 at 421-22; See also *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342 per Griffith CJ; *Kenny v South Australia* (1987) 46 SASR 268, 273; *Yong Jun Quin v Minister for Immigration and Multicultural Affairs* (1997) 75 FCR 155 and *ASIC v Hellicar* (2012) 247 CLR 345.

²² Including legal practitioners engaged by the State in compliance with Treasurer's Instruction No 1118.

- c. settle legitimate claims promptly, without resort to litigation. This includes partial or interim settlements, where liability is clearly established for the part of the claim to which the settlement gives effect;
 - d. not contest liability where the only issue is quantum of damages, or the application of a remedy;
 - e. avoid resort to litigation and encourage and participate in alternative dispute resolution where possible;
 - f. keep the costs of litigation to a minimum;
 - g. not require a party to prove a matter that the State knows to be true;
 - h. not rely on technical issues where the State will not suffer prejudice, unless it is necessary to do so in the public interest, or to protect the State's interests;
 - i. not take advantage of a party who lacks resources to pursue a legitimate claim;
 - j. only undertake and pursue appeals where it is considered, on proper advice, that the State has reasonable prospects of success, or the appeal is otherwise justified in the State's interests;²³
 - k. provide reasonable assistance to claimants and their legal representatives to identify the proper defendant.
10. The State is not prevented from:
- a. seeking or enforcing orders for costs;
 - b. protecting any privileges or immunities that are available to it;
 - c. pleading limitation periods (other than in child abuse claims²⁴);
 - d. seeking security for costs;
 - e. opposing unreasonable, or oppressive claims or processes;
 - f. requiring opponents to comply with procedural obligations;
 - g. applying to strike out, or oppose claims or defences which are untenable or an abuse of process.

Michael O'Farrell SC
 SOLICITOR-GENERAL
 14 May 2019

²³ It may be in the State's interest to commence an appeal to avoid prejudice to its interests where it is awaiting, or needs to consider legal advice, provided it makes a decision about whether to continue the appeal as soon as practicable.

²⁴ Limitations of actions in child abuse proceedings are subject to the *Limitation Act 1974*, s 5B.

Schedule 5

Guidelines for the Conduct of Civil Claims

The State and its Agencies must:

1. Acknowledge the potential for litigation to re-traumatise claimants, and act in a way to minimise this potential.
2. Avoid unnecessarily adversarial conduct and communications.
3. Respond to, conduct and resolve similar claims consistently.
4. Develop trauma-sensitive letters that acknowledge claims and provide information about services and supports available to claimants.
5. Provide early acknowledgement of claims and information about particulars needed to progress the claim, and subject to receiving proper particulars of claim, the estimated time for any necessary historical investigations.
6. Facilitate access to records relating to the claimant and the alleged abuse, subject to other's privacy and legal restrictions.
7. Communicate regularly with claimants on the progress of their matters.
8. Subject to receiving proper particulars of claim, consider facilitating an early settlement and should generally be willing to enter into negotiations to achieve this.
9. Resolve all claims as quickly as possible.
10. Offer alternative forms of acknowledgement or redress, in addition to monetary claims (for example, a written apology, site visits and Direct Personal Responses).
11. Provide a claimant with a selection of suitably qualified counselling and psychological support providers - with experience in the effects of child sexual abuse.
12. Not rely on a claimant's delay or the effluxion of time as a reason why a proceeding should be stayed unless there is a real prospect of unfair prejudice.
13. Not to ordinarily require confidentiality clauses in the terms of settlement. In the event a confidentiality clause is used, it should not restrict a claimant from discussing the circumstances of their claim or their experience of the claims process.
14. Pursue a contribution to any settlement amount from alleged abusers, where possible.
15. In appropriate matters, suggest to claimants a range of potential experts, being both acceptable to the State and providing genuine choice to claimants, and, where appropriate, facilitate agreement on the use of a single expert.

