

Government Lawyer

Newsletter of The Law Society of NSW's Government Solicitors Committee



The Law Society
of New South Wales

Chair's Message

By Mary Macken
Chair, Government Solicitors
Committee



The Government Solicitors Committee has had a busy first quarter expanding the work of the Committee and planning the years events. Firstly I would like to welcome the new members of the Committee and wish them all the best for the year ahead.

The Annual Government Solicitors Conference and Dinner is currently in the preparation phase and has been scheduled for Tuesday 16 September 2008. This years Conference will be back in the Theatre of NSW Parliament House with dinner being held in the Strangers Dining Room.

Over the past year the Committee has been developing *A Government Lawyers Guide to Rules on Ethical Issues* which is in the final stages of editing and soon to be launched and published. The Guide is a simple, easy to read manual that advises lawyers from Federal, State or Local levels of Government what Rules, Acts, Regulations and guidelines are applicable to their situation.

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A 2008 project involves the significant task of updating the online publication *Guidance on Ethical Issues for Government Solicitors*. This document was originally published in 2003 and was designed specifically for government solicitors. It discusses a variety of ethical issues unique to government solicitors and has proved to be a very useful resource for both experienced and new government lawyers.

2008 is set to be a busy and action-packed year for the Committee and I look forward to reporting on events further as the year progresses.

2008 Government Solicitors Committee

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Ms Margaret Bateman Crown Solicitor's Office, NSW
Councillor, Law Society of NSW

Ms Mary Macken State Transit Authority of NSW
Councilor, Law Society of NSW

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Susai Benjamin Office of State Revenue
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Wayne Cooper Work cover Authority of NSW
Michael Donohoe Australian Government Solicitor
Elizabeth Espinosa Sutherland Shire Council
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Release of the Guide to Better Regulation

The Guide to Better Regulation was released by the Minister for Regulatory Reform on 2 April 2008. The requirements of the Guide came into effect on 1 June 2008.

The Guide applies to all new and amending Acts and Regulations, and sets out requirements for agencies to prevent the creation of red tape in new regulatory proposals and to reduce existing red tape as legislation is reviewed.

The requirements of the Guide do not apply to regulation concerning: police powers, criminal laws, administration of justice, electoral rules and management of the public sector. Instruments exempt under Schedule 4 of the *Subordinate Legislation Act 1989* and proposals that have been assessed through national processes are also exempt.

Many existing aspects of regulatory development are reinforced in the Guide. However, there are some new requirements including:

- all new and amended regulation must demonstrate compliance with the seven better regulation principles;
- a Better Regulation Statement will be required for significant proposals and will be made publicly available;
- there is a greater focus on understanding the impacts of a proposal, including compliance costs for business and costs of implementation and monitoring;

The Government Lawyer – Refocused

Earlier this year the Committee agreed to widen the scope of the *Government Lawyer* to enable it to be a more informative and useful resource.

As well as including updates on changes in legislation, practising guidelines and Committee activities the Committee invites solicitors to use this communication as an open forum for discussion on issues affecting solicitors working in the public sector.

If you have a matter to be included please email Sarah Sherborne-Higgins, Executive Officer, Government Solicitors Committee on: ssh@lawsocnsw.asn.au.

- early consultation with stakeholders should inform regulatory development;
- regular review should occur to ensure regulation remains relevant.

It is recommended that agencies contact the Better Regulation Office early in the regulatory development process if there is any uncertainty about what is required.

The Guide to Better Regulation and Premier's Memorandum 2008-05, which implements the requirements of the Guide, can be found on the Better Regulation Office's website: www.betterregulation.nsw.gov.au.

2008 Government Solicitors Conference and Dinner

The Government Solicitors CLE Conference and Dinner will be held at NSW Parliament House on Tuesday 16 September 2008.

To register your interest in receiving a copy of the programme and registration form when finalised, please send an email with your contact details (including agency/department) to ssh@lawsocnsw.asn.au.

Joint Ventures and the Public Authorities (Financial Arrangements) Act 1987 (PAFA)

The "Joint Venture" provisions of PAFA were introduced in 2000.

Their operation has been, in my opinion, somewhat problematic due to the wording of the original legislative provisions. The provisions are so widely worded (see text extracted below) that the wording could potentially catch (and so require the Treasurer's approval to) transactions of wide-ranging nature, many of which, due to their relatively minor size or their being ones involving other government agencies, involved little or no real risk.

This has been recognised in the way regulations were used over a number of years to clarify operation of the provisions.

However, with the ever increasing interface of Government and the private sector across a myriad of situations involving shared and or joint activity, the frequency of relevance of the "joint venture" provisions should not be overlooked.

Agency Specific Tailoring of Joint Venture provisions

Various regulations have been made over the years to tailor the operation of the Joint Venture provisions to range of agencies and situations.

These included some which excluded specific activity from the operation of the Joint Venture provisions e.g. *Public Authorities (Financial Arrangements) Amendment (Education and Training) Regulation 2002 and 2003 and the Public Authorities (Financial Arrangements) Amendment (Department of Agriculture Joint Ventures) Regulation 2003 and the Public Authorities (Financial Arrangements) Amendment (Excluded Entity) Regulation 2000.*

Operation of the Provisions

Relevant provisions of PAFA are:

Section 3 Definitions

joint venture is defined in section 22K.

joint venture arrangements means arrangements (as defined in section 22J) for or with respect to the carrying on of a joint venture.

Part 2D Joint ventures

22J Definition

In this Part:

arrangement includes a contract or understanding, and includes the constitution of a body corporate referred to in section 22K (1) (b).

22K Meaning of joint venture

(1) In this Act, a reference to a joint venture is a reference to an activity:

(a) carried on jointly by two or more persons, whether or not in partnership, or

(b) carried on by a body corporate formed by two or more persons for the purpose of enabling those persons to carry on that activity jointly by means of their joint control, or by means of their ownership of shares in the capital, of that body corporate,

and includes a reference to an activity or activity of a class prescribed by the regulations as being within this section, but does not include a reference to an activity or activity of a class prescribed by the regulations as not being within this section.

(2) An activity may be regarded as carried on jointly even though some or all of the persons involved carry on different aspects of the activity.

22L Restriction on joint ventures

(1) An authority must not:

(a) enter into an arrangement with another person for the purpose of carrying on a joint venture, or

(b) carry on a joint venture under such an arrangement, unless the Treasurer has approved of the arrangement.

(2) The Treasurer's approval:

(a) may be given for a specified arrangement or class of arrangements, and

(b) may be given in respect of one or more specified authorities or in respect of a specified class of authorities, and

(c) may be otherwise specific or may be general, and

(d) may be given on such terms and subject to such conditions as the Treasurer thinks fit.

(3) The Treasurer's approval must be in writing.

(4) The Treasurer's approval is required under this section even though the arrangement is, or is entered into in connection with, financial accommodation authorised under Part 2, a joint financing arrangement authorised under Part 2B or some other financial arrangement authorised under this Act.

Joint Ventures and the Public Authorities (Financial Arrangements) Act 1987 (PAFA)

Generalised Definitional Specification

Following the series of specific exclusions and tailoring over a number of years, the *Public Authorities (Financial Arrangements) Regulation 2005* (the PAFA Regulation) was amended in July 2006 by the *Public Authorities (Financial Arrangements) Amendment (Joint Ventures) Regulation 2006*. GG No 90 of 7.7.2006, better to specify the activities that are to be considered "joint ventures" for the purposes of PAFA (which will accordingly require Treasurer Approval under Part 2 D PAFA) and to exclude some activity from the operation of the Joint Venture provisions of PAFA.

The new provisions apply generally across the board to all NSW "authorities" as defined for PAFA purposes.

Following those changes the **Public Authorities (Financial Arrangements) Regulation 2005** now contains the following clause 55A (bolding is my emphasis)

55A Joint ventures

(1) Activities that are joint ventures

For the purposes of section 22K of the Act (but subject to subclause (2)), an activity of a commercial nature that:

- (a) is entered into for the purposes of **profit or gain**, and*
- (b) is carried on jointly by an **authority and another person**, and*
- (c) involves a range of technical, managerial and financial **resources or other assets in the form of jointly controlled operations**, assets and entities (either within or outside of Australia, or both),*

is prescribed as an activity that is within that section.

(2) Excluded activities

*For the purposes of section 22K of the Act, the following activities are prescribed as not being within that section (but only if the activity is carried on in **New South Wales** or is related to an activity carried on in **New South Wales**):*

- (a) an activity carried on by 2 or more authorities but with no other person involved,*
- (b) an activity carried on by an authority and an agency of the Commonwealth or of another State or Territory but with no other person involved.*

Treasury Circular

Consistently with the new clause 55A, NSW Treasury Circular (NSW TC 06/18) states that the aim of the amendments was to narrow the operation of the

provisions to include "...State significant and high risk arrangements...".

The primary thrust of the amendments seems to be to limit the operation of the provisions to transactions of a **commercial** nature involving an intent by an authority to carry on or conduct the activity **jointly with** "another person" to make **profit or gain by jointly conducted operations** involving technical, managerial or financial resource or asset contributions of the participating parties.

The provisions are such that the "Joint Venture" provisions will not normally relate to activities carried on by two or more NSW PAFA authorities together, provided the activity is carried on in New South Wales or is related to an activity carried on in New South Wales.

What exactly is meant by "*related to an activity carried on in New South Wales*" in context of any activity outside New South Wales, remains to be seen.

Activities carried out with the Commonwealth or another State or Territory entity, if carried on in NSW or if related to an activity carried on there, would be exempt from report and the need for Treasurer approval.

NSW Treasury Circular (NSW TC06/18) outlines of format register of relevant joint ventures involving contributions over \$100,000. "Contribution" is defined in the Treasury Circular in a way which is capable of including the value of agency / authority staff time involved in providing resources or services to the joint operation.

These are to be maintained so as to enable NSW Treasury to keep an eye on estimated contingent liability of State authorities in respect of relevant joint ventures.

It is interesting that the PAFA provisions do not talk in terms of anticipated risk or potential exposure which might flow from the proposed activity but only in terms of "contribution", though the format register attached to NSW Treasury Circular TC 06/18 plus havoc on noting contingent liability issues, to the extent that they involve a contingent liability on the Consolidated Fund.

An Authority's actual power to enter into a "joint venture" must flow from some power it has apart from PAFA, such as its own enabling Act.

Commercial + "Jointly" and "Jointly"

Clause 55A (1) not only requires that something of a "commercial" intent but twice uses the word "jointly", in both subparagraphs (b) and (c).

The double use of the word will be important in determining whether a particular arrangement falls within the provisions.

It will involve detailed examination of fact situations to determine whether particular existing or proposed activity of an authority and another person is commercial activity carried on "jointly" involving "joint" contributions.

It is not uncommon for state agencies to be involved in transactions involving development and licensing of intellectual property.

If the arrangements concerning the development and licensed use of intellectual property (or even jointly owned intellectual property being used commercially) involve royalties being paid those arrangements could that not amount to an arrangement falling within the provisions?

Indeed, the format register attached to NSW Treasury Circular TC 06/18 envisages or gives an example of a joint-venture as one involving "Research".

Result

With so much outsourcing, 'partnering', collaboration and the like between State Agencies and the private sector, both within NSW and beyond, in the provision of "services", collaborative development of Intellectual property and the like, there would seem to be a real need for careful consideration of any proposed transactions before implementation to avoid inadvertent classification as "joint ventures" which, in light of section 22L(4) PAFA, may, at the same time, also be subject to PAFA's "financial accommodation" and "joint financing arrangement" requirements.

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Nothing in the above is to be considered or taken as advice as to any particular situation but is merely a general overview of the operation of relevant PAFA provisions.

Excellence Award in Government Legal Service 2008

Since 1992 the Law Society of New South Wales' Government Solicitors Committee has been administering the Excellence Award in Government Legal Service which recognises the outstanding achievements of public sector solicitors.

The award is given to a solicitor or legal team who has performed 'above and beyond the call of duty'.

Lawyers employed in New South Wales by Commonwealth, New South Wales or Local Governments are eligible for nomination for the 2008 Excellence in Government Legal Service Award if their legal work:

- makes a contribution to the community that is worthy of notice
- enhances the standing of the government legal service
- contributes to good government

The Award is presented at the Annual Government Solicitors' Dinner which will be held this year on Tuesday, 16 September 2008.

Nominations are now open for the 2008 Excellence Award. You can nominate your own work or that of a colleague or staff member.

Please contact Sarah Sherborne-Higgins at the Law Society of New South Wales on telephone 02-9926 0354 or email ssh@lawsocnsw.asn.au for an Excellence Award package containing a nomination form, as well as the rules and conditions for the 2008 selection criteria.

The closing date for nominations is Friday 29 August 2008.

Toongabbie Legal Centre

Toongabbie Legal Centre Inc. (TLC) is a not-for-profit community-based initiative resourcing those in need in the Toongabbie area, established 17th March 2007.

Over recent years, a small group of solicitors and other professionals based in Western Sydney had become more aware of the need for increased access to legal services in their area. Responding to this need, they have joined together to launch a community Legal Centre in Toongabbie. The initiative started with a small meeting in Toongabbie during November 2005. A series of meetings followed.

On 25th November 2006, the Management Committee of the Centre conducted a Consultation within the community regarding the need for such a centre and the nature of the potential issues faced by those who might use such a centre. As a result of this Consultation, it is anticipated that the services will be accessed typically by the following groups of community members:

- those with financial constraints
- non-English speaking
- recently-arrived migrants
- especially migrant women and children
- refugees and those on humanitarian visas

- needy youth
- unemployed
- those affected by issues related to employment, compensation
- Aboriginal and Torres Strait Islander people

The Mission of TLC is to provide legal assistance and advice to those in the Toongabbie and surrounding areas who are unable to seek the help of commercial lawyers, or who have difficulty in accessing legal services.

TLC exercises its mission through Service in:

- legal advice
- information
- arranging referrals to other relevant bodies or to individual legal practices or other services
- advocacy work in respect of policies and legislation relevant to the client group
- contributing to law reform processes
- community legal education and on-going consultation with local communities.

Priority is given to clients from the target groups within the Toongabbie and surrounding suburbs.

TLC is a community initiative providing free legal advice, referral service and information to those who cannot afford to pay commercialised and for those who do not know where to go when they encounter a legal problem.

After a day long induction for all volunteers held on 6 October 2007, TLC commenced services on 13 October 2007.

Susai Benjamin, Hon. Coordinator
Michael Vassili, Principal Solicitor



Toongabbie Legal Centre Open Saturdays only. Drop-in service operates between 10am – 12.30pm.

The Centre operates with the help of volunteers who are solicitors, migration agents, law students, social workers, financial planners and experts in finance, as well as IT specialists.

**For information, please email: platform_access@yahoo.com.au; or anandjantony@yahoo.com
Anne Tel 0417 482 682**

New Personal Property Securities Law Proposed

The Australian Government, in cooperation with the States and Territories, is pursuing reforms to Australia's personal property securities law and practice.

Personal property securities are interests in property (other than land) that are created or evidenced by an agreement that secures payment or performance of an obligation.

A single national Act to replace the myriad of provisions in State and Commonwealth legislation dealing with personal property securities, supported by a single national online register, is proposed. The Draft Personal Property Securities Bill 2008 and a commentary have been released for public consultation and are available at www.ag.gov.au/pps.

The Bill deals with all forms of property other than land or buildings, including tangible property, crops, livestock, fixtures and intangible property such as contract rights and intellectual property. The Bill establishes rules for creating valid security interests and determining which security interests have priority. Other provisions establish when a person (such as a purchaser) acquiring personal property takes it free of a pre-existing security interest. The Bill also sets out an enforcement regime for when a debtor defaults.

The new register would replace various existing registers including the NSW Register of Encumbered Vehicles, the General Register of Deeds under the Security Interests in Goods Act 2005 (NSW), and the register of company charges.

The Bill is modelled on the laws of New Zealand, Canada and the USA.

The Australian Government is seeking comments on the Bill by 15 August 2008.

*You are invited to support a most worthwhile cause –
a community-based initiative resourcing those in need*

'Showing The Way.'



T OONGABBIE
LEGAL CENTRE

Inaugural Fund-raising Dinner

Chief Guest: Justice Margaret Beazley AO

Court of Appeal, NSW Supreme Court

Saturday, 28th June, 2008

7.15 pm for 7.30 pm

Church Hall, Aurelia Street, Toongabbie

Hall is adjacent St Anthony's Church, near Toongabbie station. Free street parking available.

Cost: \$50 (Dinner & Entertainment) All drinks available for purchase.


RSVP Monday 23rd June

Name: _____

Phone (day): _____ Mobile: _____

Address: _____

No. of tickets at \$50 each No. of vegetarian meals required

 I am unable to attend the dinner but would like to make a donation of \$ _____

Credit card payment: Please debit my credit card Bankcard MasterCard Visa

Expiry date Authorised payment \$ _____

Name on card _____

Signature _____

Payment by cheque: Enclose cheque for \$ _____

Payable to: Toongabbie Legal Centre (TLC)

Mail to: Toongabbie Legal Centre, P.O. Box 232, Toongabbie, NSW 2146

 *thank you*

Human Rights Law & Policy 2008 Conference

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16 - 17 June, Marriott Hotel, Melbourne

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- **Michael Jackson QC**, Director, Lawyers Rights Watch Canada and Professor of Law, University of British Columbia, Canada
- **Susan Ryan AO**, Former Senator, Hawke Government Cabinet
- **Fiona Smith**, Chairperson, Victorian Equal Opportunity and Human Rights Commission

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- Navigate equal employment opportunity and industrial relations
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- Examine the absence of human rights: children in detention
- Identify the role of community in achieving human rights outcomes
- Unravel the complexities of criminal process and human rights
- Learn about racial profiling in law enforcement decision making

For more information or to register please visit

www.thomson.com.au/humanrights

call **1300 304 195**

or email professional.development@thomson.com