

The Constitutional Role of the
Solicitor-General:
An Historical, Legal and Lived Portrait

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I was, when younger, much given to films about wagon trains which braved the dangers of the unchartered plains lying westward of the settled and effete eastern seaboard of Northern America. Their dangerous journeys were imperilled by constant Indian attacks, bands of renegade whites, fires, arrows, hails of bullets and hordes of menacing bison. Vividly portrayed in bloody detail was the heart-rending destruction of other adventurers less fortunate or less skillfully guided.

Always a bearded, wise, alert, quick-thinking wagon master led the train. He rose to every challenge, surmounted every danger and dominated every crisis. He was assisted, if you could so describe his role, by a half-caste Indian scout who, when danger threatened, was summoned to locate, pacify, mislead or fight – of course, off camera – the hostile, cunning and noble Indians. They were led of course by a wise, brave, handsome and handsomely head-dressed chief who always raised his right hand in a vaguely Nazi salute and said “How!” whenever spoken to, speaking, or seemingly thinking.

Oh my prophetic soul! Little did I realize that these films were allegories of ten years of my life. The wagon train of course the Commonwealth Government, the Indians – the courts, the States and all the citizens of Australia – the bearded wagon master the Attorneys-General past, and may I say it, present, and the half-breed scout is of course the Solicitor-General. The destroyed wagon trains were, naturally, those cases other people lost. Those other half-breed scouts – other Solicitors-General.

*Sir Maurice Byers QC, speaking at a dinner given in his honour by Gareth Evans
8 February 1984*

National Library of Australia, 'Papers of Sir Maurice Byers' (1975-1999)

ABSTRACT

This thesis introduces the Solicitor-General as an important actor in the modern Australian constitutional order. The Solicitor-General's significance lies in the office's role as the final and authoritative legal adviser to government. This function is combined with that of government advocate, defending the legality of government action and protecting the institutional interests of the body politic. This research provides the first portrait of the office from an historical, legal, and lived perspective. I hope that it will be a valuable tool for officeholders and government officials seeking to understand the role.

The modern Australian Solicitor-General is a uniquely Australian institution. Its design is underpinned by the objective of creating an independent, exclusively legal officer to complement the Australian Attorney-General, who has become increasingly political. On the one hand, the office's framers sought to create an office that would be beyond criticism because of improper political or administrative influence. On the other, the officeholder's continuity of service to the Crown would mean they would be understanding of, and responsive to, government's interests. This thesis considers the extent to which this delicate balance has been achieved. It embarks upon an analysis of the legal position, complemented by a qualitative analysis of interviews with Solicitors-General, and others closely associated with the office.

I conclude that removal of the Solicitor-General from the political realm has not been wholly achieved. However, I argue that politics and the public interest remain legitimate, and not inappropriate, influences on the office in many circumstances. The Solicitor-General acts as counsel for *the Crown*. The Crown's legitimacy rests on a complex amalgam of democratic and liberal theory that emphasises empowerment and the necessity of restraint. Because of the Solicitor-General's close relationship with the Crown, it is inevitable that political and public interest considerations continue to influence and inform the office. These considerations dictate that the advisory and advocacy functions must be performed differently, they influence how the office ought to resolve legal ambiguity, and they import an obligation to advise the government, not only on the legal position, but on the impact of policies on the whole of government, the long-term interests of the polity, and those principles that underpin our constitutional order – which I have termed 'core government principles'.

Emphasis was placed on the structural independence of the statutory office when it was created. However, in practice the office's independence largely rests on the commitment of individual officeholders to this independence. This commitment can be compromised because the office operates in a wider bureaucratic and government setting where at times it may be competing for legal work. My findings reveal that these and other pressures have resulted in two different approaches. Both have the object of securing the place of the Solicitor-General in the government order, but each emphasises the importance of independence *or* involvement. I call these the 'team member' and 'autonomous expert' approaches.

DECLARATION

I, Gabrielle Appleby, certify that this work contains no material which has been accepted for the award of any other degree or diploma in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text.

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Signature: Gabrielle J Appleby

26 September 2012

Date

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GLOSSARY OF ACRONYMS

ABA	Australian Bar Association
AGD	Attorney-General's Department (Commonwealth)
AGS	Australian Government Solicitor
ACTGS	Australian Capital Territory Government Solicitor
APS	Australian Public Service
DFAT	Department of Foreign Affairs and Trade (Commonwealth)
DPP	Director of Public Prosecutions
GBE	Government Business Enterprise
ICAC	Independent Commission Against Corruption (New South Wales)
OIL	Office of International Law (Commonwealth, Attorney-General's Department)
OLC	Office of Legal Counsel (United States)
OLSC	Office of Legal Services Coordination (Commonwealth, Attorney-General's Department)
OPC	Office of Parliamentary Counsel
OSG	Office of Solicitor-General (United States)
SCAG	Standing Committee of Attorneys-General*
SCSG	Special Committee of Solicitors-General
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS III	United Nations Convention on the Law of the Sea III
VGSO	Victorian Government Solicitor's Office

* Now called Standing Council on Law and Justice.