



Judiciary Amendment Act 2015

No. 64, 2015

**An Act to consolidate the Australian Government
Solicitor into the Attorney-General's Department,
and for related purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

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No. 64, 2015

An Act to consolidate the Australian Government Solicitor into the Attorney-General's Department, and for related purposes

[Assented to 16 June 2015]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Judiciary Amendment Act 2015*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with
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column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	16 June 2015
2. Schedules 1 to 3	A single day to be fixed by Proclamation. However, if the provisions do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Main amendments

Judiciary Act 1903

1 Section 2 (definition of AGS)

Repeal the definition, substitute:

AGS has the meaning given by section 55J.

2 Section 55I (definition of AGS lawyer)

Repeal the definition, substitute:

AGS lawyer means:

- (a) the AGS; or
- (b) a person:
 - (i) whose name is on the roll of barristers and solicitors of the High Court kept under the Rules of Court, or the roll of barristers, solicitors, barristers and solicitors or legal practitioners of the Supreme Court of a State or Territory; and
 - (ii) who is a person in the Attorney-General's Department who is engaged under the *Public Service Act 1999*; and
 - (iii) who ordinarily performs work for clients of the AGS under the supervision or direction of the AGS.

3 Section 55I (definition of CEO)

Repeal the definition.

4 Section 55I (definition of Finance Minister)

Repeal the definition.

5 Division 2 of Part VIII B (heading)

Repeal the heading, substitute:

Division 2—Identity and activity of the Australian Government Solicitor

6 Sections 55J, 55K, 55L and 55M

Repeal the sections, substitute:

55J The Australian Government Solicitor

- (1) There is to be an Australian Government Solicitor (the *AGS*).
- (2) The AGS must be a person:
 - (a) whose name is on:
 - (i) the roll of barristers and solicitors of the High Court kept under the Rules of Court; or
 - (ii) the roll of barristers, solicitors, barristers and solicitors or legal practitioners of the Supreme Court of a State or Territory; and
 - (b) who is a person in the Attorney-General's Department who is engaged under the *Public Service Act 1999*.

7 Subsection 55N(1)

Omit "In performing its functions, the AGS may provide services to the following", substitute "The AGS may provide legal services and related services to or for the following".

8 Subsection 55N(2)

Omit "In performing its functions, the AGS may provide services to the following", substitute "The AGS may provide legal services and related services to or for the following".

9 Subsections 55N(3) and (4)

Repeal the subsections, substitute:

- (3) The AGS may provide legal services and related services to or for a person or body, or class of persons or bodies, not referred to in subsection (1) or (2) if the Attorney-General requests the AGS to do so.

(4) The AGS may provide legal services and related services to or for a person or body, or class of persons or bodies, not referred to in subsection (1) or (2) if the AGS so determines.

(4A) The AGS may provide services under subsection (3) or (4) only for a purpose for which the Commonwealth has power to make laws.

10 Subsection 55P(1)

After “The AGS may”, insert “, on behalf of the Commonwealth,”.

11 Paragraph 55P(1)(a)

Omit “provided by it in the course of performing its functions”, insert “provided by the AGS in accordance with section 55N”.

12 At the end of section 55P

Add:

(3) A fee charged under subsection (1):

(a) is a debt due to the Commonwealth; and

(b) is recoverable by the Commonwealth in a court of competent jurisdiction.

(4) Fees charged to the Commonwealth (or to a part of the Commonwealth) under subsection (1) are notionally payable by the Commonwealth (or by the part of the Commonwealth).

Subsection (3) does not apply to such fees.

13 Subsection 55Q(4)

Omit “the lawyer’s position as an employee of the AGS”, substitute “his or her position as an AGS lawyer”.

14 Divisions 4 and 5 of Part VIII B

Repeal the Divisions.

15 Subsection 55ZF(3) (paragraph (a) of the definition of *Commonwealth legal work*)

Repeal the paragraph, substitute:

(a) any work performed by or on behalf of the AGS in providing services in accordance with section 55N; or

16 Paragraph 55ZG(1)(d)

Omit “CEO”, substitute “AGS”.

Schedule 2—Consequential amendments

Director of Public Prosecutions Act 1983

1 Paragraph 11(1)(b)

Repeal the paragraph, substitute:

(b) the Australian Government Solicitor; or

2 Subsection 32(1)

Omit “Chief Executive Officer of the AGS”, substitute “Australian Government Solicitor (the *AGS*)”.

3 Subsection 32(4)

Repeal the subsection.

4 Paragraphs 32A(5)(a) and (b)

Repeal the paragraphs, substitute:

(a) the Australian Government Solicitor (the *AGS*); or

(b) another AGS lawyer (within the meaning of section 55I of the *Judiciary Act 1903*);

5 Subsection 32A(6)

Repeal the subsection.

6 Paragraph 33A(b)

Omit “Chief Executive Officer of the AGS (within the meaning of Part VIIIIB of that Act)”, substitute “Australian Government Solicitor”.

Freedom of Information Act 1982

7 Division 1 of Part I of Schedule 2

Omit:

Australian Government Solicitor

8 Division 1 of Part II of Schedule 2 (paragraph (b) of the item relating to Attorney-General’s Department)

Omit “commercial”.

Schedule 3—Transitional arrangements

Part 1—Preliminary

1 Definitions

In this Schedule:

AGS agreement means the enterprise agreement known as the Australian Government Solicitor Enterprise Agreement 2012 approved on 29 June 2012 in decision [2012] FWAA 5568.

asset means:

- (a) any legal or equitable estate or interest in real or personal property, whether actual, contingent or prospective; and
- (b) any right, power, privilege or immunity, whether actual, contingent or prospective.

assets official, in relation to an asset other than land, means the person or authority who, under a law of the Commonwealth, a State or a Territory, under a trust instrument or otherwise, has responsibility for keeping a register in relation to assets of the kind concerned.

commencement time means the time at which this Schedule commences.

exempt matter: see item 10.

former AGS means the Australian Government Solicitor established under the *Judiciary Act 1903* (as in force immediately before the commencement time).

instrument:

- (a) includes:
 - (i) an agreement or undertaking; and
 - (ii) a notice, authority, order or instruction; and
 - (iii) an instrument made under an Act or regulations; but
- (b) does not include:
 - (i) an Act; or
 - (ii) instruments made under this Act.

land means any legal or equitable estate or interest in real property, whether actual, contingent or prospective.

land registration official, in relation to land, means the Registrar of Titles or other proper officer of the State or Territory in which the land is situated.

liability means any liability, duty or obligation, whether actual, contingent or prospective.

new AGS means the Australian Government Solicitor mentioned in section 55J of the *Judiciary Act 1903* (as in force on and after the commencement time).

rules means the rules made under item 25.

Part 2—Activity of AGS

2 AGS continues to act in relation to matters

If:

- (a) the former AGS was acting in relation to a matter just before the commencement time; and
- (b) the matter continues after the commencement time;

the new AGS is taken to be substituted for the former AGS, for all purposes, in relation to the matter and all references to the former AGS in relation to the matter are taken to be references to the new AGS.

3 Persons and bodies for whom the AGS may provide services

(1) A request:

- (a) made by the Attorney-General under subsection 55N(3) of the *Judiciary Act 1903*; and
- (b) in force immediately before the commencement time; has effect, from the commencement time, as if it had been made under that subsection as amended by Schedule 1 to this Act.

(2) A determination:

- (a) made by the CEO of the former AGS under subsection 55N(4) of the *Judiciary Act 1903*; and
- (b) in force immediately before the commencement time; has effect, from the commencement time, as if it had been made under that subsection as amended by Schedule 1 to this Act.

4 Appointment to receive service

(1) This item applies to an appointment that:

- (a) was made under section 63 of the *Judiciary Act 1903* by the Attorney-General of the Commonwealth; and
- (b) was in force immediately before the commencement time; and
- (c) appointed a class of AGS lawyer for the purposes of that section.

- (2) To avoid doubt, the appointment continues to have effect, after the commencement time, in relation to that class of AGS lawyer.
- (3) To avoid doubt, this item does not affect the ability of the Attorney-General of the Commonwealth to amend or revoke the appointment.

Part 3—Transfer of assets and liabilities

Division 1—Transfer from AGS to the Commonwealth

5 AGS assets and liabilities

- (1) At the commencement time, the assets and liabilities of the former AGS cease to be assets and liabilities of the former AGS and become assets and liabilities of the Commonwealth, without any conveyance, transfer or assignment. The Commonwealth becomes the successor in law in relation to those assets and liabilities.
- (2) To avoid doubt, for the purposes of an income tax law (within the meaning of the *Income Tax Assessment Act 1997*), the operation of subitem (1) does not result in any of the following:
 - (a) an amount being included in the assessable income of the former AGS for the income year in which the commencement time occurs;
 - (b) an increase of an amount included in that assessable income.

Division 2—Instruments, legal proceedings and records

6 References in instruments to the former AGS

- (1) This item applies to an instrument that:
 - (a) is in force immediately before the commencement time; and
 - (b) contains a reference to the former AGS.
- (2) If the instrument relates to an asset or liability that, as a result of the operation of item 5, becomes an asset or liability of the Commonwealth, then the reference to the former AGS has effect, at and after the commencement time, as if it were a reference to the Commonwealth.
- (3) This item does not, by implication, prevent the instrument from being varied or terminated after the commencement time.

7 Legal proceedings of AGS

- (1) This item applies to any proceedings:
 - (a) that were pending in any court or tribunal immediately before the commencement time; and
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- (b) to which the former AGS was a party.
- (2) At and after the commencement time, the Commonwealth is substituted for the former AGS as a party to the proceedings.

Division 3—General provisions

8 Certificates for vesting of assets other than land

- (1) This item applies if:
- (a) an asset other than land vests in the Commonwealth under this Part; and
 - (b) there is lodged with an assets official a certificate that:
 - (i) is signed by the Minister; and
 - (ii) identifies the asset; and
 - (iii) states that the asset has become vested in the Commonwealth under this Part.
- (2) The assets official may:
- (a) deal with, and give effect to, the certificate as if it were a proper and appropriate instrument for transactions in relation to assets of that kind; and
 - (b) make such entries in the register in relation to assets of that kind as are necessary, having regard to the effect of this Part.
- (3) A certificate made under subitem (1) is not a legislative instrument.

9 Contracts etc.

If a contract, agreement, arrangement or understanding, entered into by the former AGS, was in force immediately before the commencement time, it has effect, on and after that time, as if the Commonwealth had entered into it.

10 Exemption from stamp duty and other State or Territory taxes

- (1) No stamp duty or other tax is payable under a law of a State or a Territory in respect of an exempt matter, or anything connected with an exempt matter.
- (2) An *exempt matter* is:
- (a) the vesting of an asset or liability under this Part; or
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- (b) the operation of this Schedule (including the rules) in any other respect.
- (3) The Minister may certify in writing:
 - (a) that a specified matter is an exempt matter; or
 - (b) that a specified thing was connected with a specified exempt matter.
- (4) A certificate made under subitem (3) is not a legislative instrument.

11 Certificates taken to be authentic

A document that appears to be a certificate made or issued under item 8 or 10:

- (a) is taken to be such a certificate; and
 - (b) is taken to have been properly given;
- unless the contrary is established.

Part 4—Books, reports, returns etc.

12 Transfer of custody of records or documents of former AGS

- (1) This item applies to a record or document that, immediately before the commencement time, was in the custody of the former AGS.
- (2) After the commencement time, the record or document is to be transferred into the custody of the Commonwealth.

13 Financial statements and other reporting requirements for the former AGS

Reporting requirements

- (1) If:
 - (a) immediately before the commencement time, a law required the CEO of the former AGS to provide a report (whether financial statements or otherwise) for a period; and
 - (b) the period ends after the commencement time;the Secretary of the Department must provide the report, as required, for so much of the period as occurs before the commencement time.
- (2) If:
 - (a) under subitem (1), the Secretary of the Department is required to provide a report for a part of a period; and
 - (b) the Secretary of the Department is also required to provide a similar report for the remainder of the period;the Secretary of the Department may meet the requirements in a single report for the period.

Outstanding reporting requirements

- (3) If:
 - (a) a law required the CEO of the former AGS to provide a report (whether financial statements or otherwise) for a period that ended before the commencement time; and
 - (b) the report has not been provided by the commencement time;the Secretary of the Department must provide the report as required.

Part 5—Staff

14 Transfer of business

- (1) This item applies if:
 - (a) immediately before the commencement time, a person was an employee of the former AGS; and
 - (b) at the commencement time, the person becomes engaged as an APS employee in the Attorney-General's Department under section 72 of the *Public Service Act 1999*.
- (2) In determining, for the purposes of the *Fair Work Act 2009*, whether there is a transfer of business from the former AGS to the Commonwealth in those circumstances, treat the requirement in paragraph 311(1)(d) as being satisfied.
- (3) Despite section 312 of the *Fair Work Act 2009*, the only transferable instrument in relation to such a transfer of business is the AGS agreement.

15 AGS agreement—AGD employees who work under the AGS

- (1) The AGS agreement covers and applies to the Commonwealth and the Community and Public Sector Union, and covers and applies to a person if, after the commencement time:
 - (a) the AGS agreement (disregarding this item) does not apply to the person; and
 - (b) the person:
 - (i) is a person in the Attorney-General's Department who is engaged under the *Public Service Act 1999*; and
 - (ii) ordinarily performs work under the supervision or direction of the new AGS.
 - (2) The AGS agreement has effect under subitem (1) as if:
 - (a) references in the agreement to the CEO were references to the Secretary of the Attorney-General's Department; and
 - (b) references in the agreement to the AGS were references to the Department.
 - (3) This item is subject to item 17.
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16 AGS agreement—guidelines and policies

- (1) Guidelines and policies relating to employment conditions, administrative process and other employment-related matters that had effect for the purposes of the AGS agreement immediately before the commencement time also have effect for the purposes of that agreement as it has effect:
 - (a) because of a transfer of business mentioned in item 14; or
 - (b) under item 15.
- (2) Guidelines and policies have effect under subitem (1) as if:
 - (a) references in the agreement to the CEO were references to the Secretary of the Attorney-General's Department; and
 - (b) references in the agreement to the former AGS were references to the Department.
- (3) Subitem (2) does not prevent the variation, withdrawal or replacement of the guidelines and policies, as they have effect under that subitem, by the Secretary of the Department.
- (4) This item is subject to item 17.

17 AGS agreement—ceases when new AGD agreement commences

- (1) This item applies if, after the commencement time, an enterprise agreement commences operation that covers:
 - (a) all employees in the Attorney-General's Department; or
 - (b) all employees in the Department (other than SES employees).
- (2) At the time that the enterprise agreement commences operation, the AGS agreement ceases to have operation.

18 Accrued entitlements etc. of former AGS employees who become APS employees

Persons to whom this item applies

- (1) This item applies to a person if:
 - (a) immediately before the commencement time, the person was an employee of the former AGS; and

- (b) at the commencement time, the person becomes engaged as an APS employee under section 72 of the *Public Service Act 1999*.

Preservation of accrued entitlements

- (2) The person is taken to have accrued an entitlement to benefits, in connection with becoming an APS employee, that is equivalent to the entitlement that the person had as an employee of the former AGS immediately before the commencement time.

Continuity of service

- (3) The service of the person as an APS employee is taken, for all purposes, to be continuous with his or her service as an employee of the former AGS.

Long service leave

- (4) For the purposes of the *Long Service Leave (Commonwealth Employees) Act 1976*, the person's service before the commencement time as an employee of the former AGS is to be treated, at and after that time, as if it had been service by the person as an APS employee.

Maternity leave

- (5) For the purposes of the *Maternity Leave (Commonwealth Employees) Act 1973*, the person's service before the commencement time as an employee of the former AGS is to be treated, at and after that time, as if it had been service by the person as an APS employee.

19 Safety, Rehabilitation and Compensation Act 1988

- (1) This item applies in relation to a person if:
- (a) the person was an employee of the former AGS before the commencement time (whether or not the person was still an employee of the former AGS immediately before the commencement time); and
 - (b) the person was an employee (within the meaning of the *Safety, Rehabilitation and Compensation Act 1988* (the **SRC Act**)) of the former AGS; and
 - (c) the person suffered an injury (within the meaning of that Act) before the commencement time.
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- (2) The SRC Act applies, after the commencement time, as if the person had been engaged as an APS employee in the Attorney-General's Department during the period that the person was an employee of the former AGS as mentioned in paragraph (1)(a).
- (3) This item does not limit items 6 and 22 of this Schedule.

20 Rules—staffing procedures

- (1) The rules may provide for:
 - (a) staffing procedures of the former AGS to apply, or to continue to apply, in relation to:
 - (i) processes begun before, but not completed by, the commencement time; or
 - (ii) things done by, for or in relation to the former AGS or an employee of the former AGS before that time; or
 - (b) staffing procedures of the Attorney-General's Department to apply in relation to:
 - (i) processes begun before, but not completed by, that time; or
 - (ii) things done by, for or in relation to the former AGS before that time.
- (2) Rules made for the purposes of this item have effect despite the *Public Service Act 1999*.
- (3) In this item:

staffing procedures includes procedures and policies related to:

 - (a) recruitment, promotion or performance management; or
 - (b) inefficiency, misconduct, forfeiture of position, fitness for duty or loss of essential qualifications; or
 - (c) disciplinary action, grievance processes or reviews of, or appeals against, staffing decisions; or
 - (d) transfers, resignations or termination of employment; or
 - (e) leave.

21 No transfer of appointment, engagement or employment of former AGS staff

- (1) Nothing in this Schedule produces the result that the appointment, engagement or employment of an employee of the former AGS has
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Schedule 3 Transitional arrangements

Part 5 Staff

effect as if it were an appointment, engagement or employment of the person in relation to the Commonwealth.

(2) To avoid doubt, if a person:

(a) ceases to be an employee of the former AGS; and

(b) becomes engaged as an APS employee under section 72 of the *Public Service Act 1999*;

the person is not entitled to receive any payment or other benefit merely because he or she ceased to be an employee of the former AGS.

Part 6—Other transitional matters

22 References in existing Commonwealth laws to AGS

To avoid doubt, a reference in a law of the Commonwealth (as in force immediately before the commencement time) to the Australian Government Solicitor (or to the AGS) is taken on and after the commencement time to be a reference to the new AGS.

23 Compensation for acquisition of property

- (1) If the operation of this Schedule would result in an acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person.
- (2) If the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in a court of competent jurisdiction for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.
- (3) In this item:
acquisition of property has the same meaning as in paragraph 51(xxxi) of the Constitution.
just terms has the same meaning as in paragraph 51(xxxi) of the Constitution.

24 Delegation by Minister

- (1) Subject to subitem (2), the Minister may, in writing, delegate all or any of his or her powers and functions under this Schedule (other than under item 25) to:
 - (a) the Secretary of the Department; or
 - (b) an SES employee, or acting SES employee, in the Department.
- (2) In exercising powers or functions under a delegation, the delegate must comply with any directions of the Minister.

25 Transitional rules

- (1) The Minister may, by legislative instrument, make rules prescribing matters:
 - (a) required or permitted by this Act to be prescribed by the rules; or
 - (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) In particular, for paragraph (1)(a), the Minister may make rules prescribing matters of a transitional nature (including prescribing any saving or application provisions) relating to:
 - (a) the amendments or repeals made by this Act; or
 - (b) the enactment of this Act.
- (3) The rules may provide that this Schedule (other than this item) has effect with any modifications the rules prescribe.
- (4) The Minister cannot make rules later than 12 months after the commencement time.
- (5) This Schedule (other than subitems (4) and (6)) does not limit the rules that the Minister may make under this item.
- (6) To avoid doubt, the rules may not do the following:
 - (a) create an offence or civil penalty;
 - (b) provide powers of:
 - (i) arrest or detention; or
 - (ii) entry, search or seizure;
 - (c) impose a tax;
 - (d) set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act;
 - (e) directly amend the text of this Act.

*[Minister's second reading speech made in—
Senate on 26 March 2015
House of Representatives on 28 May 2015]*

(53/15)
