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PARLIAMENT OF TASMANIA

**AUDITOR-GENERAL
SPECIAL REPORT No. 82**

Head of Agency contract renewal

August 2009

*Presented to both Houses of Parliament in accordance with the provisions of Audit
Act 2008*

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18 August 2009

President
Legislative Council
HOBART

Speaker
House of Assembly
HOBART

Dear Madam President

Dear Mr Speaker

SPECIAL REPORT NO. 82
Head of Agency contract renewal

This report, that examines the processes followed in renewing an employment contract for a Head of Agency, has been prepared consequent to examinations conducted under section 23 of the *Audit Act 2008*.

Yours sincerely

H M Blake
AUDITOR-GENERAL

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Foreword

Tasmania's ten Heads of Agencies are responsible for managing in excess of 28 000 employees and for a significant number of government outputs and programs. They are expected to provide the government of the day with independent, frank and fearless advice. It is in the public interest that the government engage the best possible persons to fill these positions. It is also in the public interest that the government is, and is seen to be, an employer of the highest repute having good conscience.

In order to entice the best possible candidates to Heads of Agencies positions, it is essential that their employment arrangements be attractive and consistently applied. At the same time, any employment arrangement should recognise that circumstances can change, such as those arising from the global financial crisis. It is essential therefore that employment contracts be clear and consistently interpreted and applied.

What is less clear is whether or not contracts for the employment of Heads of Agencies should be for fixed terms or not. I am on the record as noting that fixed terms are a reasonable employment mechanism but I acknowledge alternative points of view. In the matter which was the subject of this Report, had the contract not been for a fixed term and the administrative restructure eventuated as it did, it is conceivable that there may have been a different outcome. This is a matter requiring further debate.

This audit examined the processes followed in renewing a contract for the employment of Mr Scott Gadd, the Secretary of the then Department of Environment, Parks, Heritage and the Arts. It resulted in four recommendations aimed at greater clarity in the employment arrangements for both the employer and the employee.

H M Blake

Auditor-General

18 August 2009

List of acronyms and abbreviations

DEPHA	Department of Environment, Parks, Heritage and the Arts
DPAC	Department of Premier and Cabinet
DPIW	Department of Primary Industries and Water
First instrument	Instrument of appointment dated 10 May 2004
Second instrument	Instrument of appointment dated 10 May 2009

Independent auditor's conclusion

Independent auditor's conclusion

This independent conclusion is addressed to the Speaker of the House of Assembly and the President of the Legislative Council. It relates to my compliance audit of the processes followed in renewing the contract of employment for a Head of Agency. My audit was based on the audit objective and audit scope detailed in the Introduction to this Report.

In developing the scope of this audit and completing my work, the parties interviewed provided me with all of the information that I requested. There was no effort by any party to the audit to limit the scope of my work. This Report is a public document and its use is not restricted in any way by me or by any other person or party.

Responsibility of the Premier and the Secretary of the Department of Premier and Cabinet

Under the State Service Act 2000, the Premier is the employer of Departmental Heads of Agencies. In fulfilling this responsibility in the contract renewal being the subject of this compliance audit, the Secretary, Department of Premier and Cabinet assisted in the contract negotiations.

Auditor-General's responsibility

In the context of this compliance audit, my responsibility was to express a conclusion on whether or not the processes followed in the renewal of Mr Gadd's contract complied with his existing contract, the renewal process was consistent with that used for similar contracts and the renewal was in the public interest.

I conducted my audit in accordance with Australian Auditing Standard ASAE 3100 *Compliance Engagements* which required me to comply with relevant ethical requirements relating to audit engagements. I planned and performed the audit to obtain reasonable assurance of whether the processes followed were reasonable.

My work involved obtaining evidence of the processes followed in renewing the contract based on the objectives and scope outlined in the Introduction to this Report which were established by me without influence. The procedures depended on my judgement, based on the objectives and scope and on my assessment of the risks of material misstatement of the information obtained by me as part of this audit.

I believe that the evidence I have obtained was sufficient and appropriate to provide a basis for my conclusion.

Auditor-General's overall conclusion

Based on the audit objectives and scope and for reasons outlined in the remainder of this Report, it is my conclusion that the processes followed in the renewal of Mr Gadd's contract complied with his existing contract, the renewal process was consistent with that used for similar contracts and the renewal was in the public interest.

However, my work did result in findings leading to four recommendations that the Premier should consider when drafting instruments of appointment and their renewal in future.

H M Blake
Auditor-General
Hobart
18 August 2009

Executive summary

Executive summary

Background

In May 2004, Mr Scott Gadd was appointed for five years as the Secretary of the then Department of Tourism, Parks, Heritage and the Arts (subsequently the Department of Environment, Parks, Heritage and the Arts (DEPHA)). In November 2008 Mr Gadd received a letter from the Premier, being the employer of all positions at the level of Secretary, dated 24 November 2008 which included an offer for the contract to be renewed.

A new instrument of appointment for Mr Gadd was signed by the Premier on 5 May 2009 and by Mr Gadd on 7 May 2009, however, shortly after, on 11 May 2009, the Government decided to abolish DEPHA.

On 27 May 2009 the Leaders of both Opposition Parties wrote to me seeking that I investigate the decision by the Premier to renew the employment contract. I decided to conduct a compliance audit examining the processes applied in renewing Mr Gadd's contract. The audit objective was to assess whether the renewal of Mr Gadd's contract complied with his existing contract, was consistent with other contracts of this nature and whether the renewal was in the public interest.

Conduct of the audit involved examination of documentation including Cabinet minutes, seeking of advice from the Solicitor-General and interviews with various parties including the Premier, the Premier's Chief of Staff, the Secretary of the Department of Premier and Cabinet (DPAC) as well as Mr Gadd.

Detailed audit conclusions

Other than a change to the contract term, the renewal of Mr Gadd's contract complied with his contract, was consistent with the process used for similar contracts and was in the public interest.

More specifically:

- The timing of the offer of renewal was reasonable
- Mr Gadd's performance was considered satisfactory at the time of the renewal offer being made
- Among budget options rejected by Government at the time of the offer of renewal were various Departmental restructure options including restructuring DEPHA
- Government again considered Departmental restructures and other cost savings options prior to 11 May 2009,

including some submitted previously. However, the decision to abolish DEPHA was only taken on 11 May 2009, based on a Cabinet minute dated 4 May

- The Solicitor-General was of the view that the Crown could not as a matter of law or of good conscience have revoked the offer
- In any event, the offer was effectively accepted by Mr Gadd by letter to the Premier on 28 April 2009, a week before a proposal to abolish DEPHA was submitted to Cabinet
- Any attempt to renegotiate the agreed contract had little or no prospect of success
- The process followed was in the public interest. The potential additional cost to Tasmania (\$120 000) would only arise if Mr Gadd's appointment were terminated at the end of the current six month reassignment
- The renewal of Mr Gadd's contract complied with his contract, was consistent with the process used for similar contracts and was in the public interest.

However, my audit identified areas where improvements could be made to initial contracts and to their subsequent renewal. As a result, four recommendations were made aimed at doing so.

The following table reproduces the recommendations contained in the body of this Report.

List of recommendations

Rec No.	Section	I recommend that ...
1	2.3	The standard HOA instrument of appointment should be amended to require that the officer receive at least six month's notice of any intention to not renew the contract.
2	2.4	Any decision to offer a contract renewal under Clause 12 should be based on a recent performance appraisal.

Rec No.	Section	I recommend that ...
3	2.7	<p>The standard HOA instrument of appointment should be amended to clarify:</p> <ul style="list-style-type: none">▪ whether an offer under Clause 12 can be withdrawn or modified by the Crown prior to acceptance and if so, what compensation is payable▪ whether an offer under Clause 12 is presumed to be on the same terms and conditions as the existing contract unless otherwise specified▪ if different terms (e.g. duration) are offered, what is the impact on the option provided by Clause 13?
4	2.8.1	<p>The standard HOA instrument of appointment should be amended to state that an offer of renewal of contract will lapse unless accepted in writing within a specified time.</p>

Audit Act 2008 section 30 — Submissions and comments received

Audit Act 2008 section 30 — Submissions and comments received

Introduction

In accordance with section 30(2) of the *Audit Act 2008* a copy of this report, or relevant extracts of this report, were provided to Mr Gadd and the Department of Premier and Cabinet with a request for comment or submissions. In addition, and as required by section 30(2), a summary of findings, as well as the full report, was provided to the Treasurer, and to the Premier, the Solicitor-General and to every Head of Agency other than to Mr Mark Addis, being persons who in my view have a special interest in this Report. The Treasurer, the Premier and all of these persons were invited to make a submission or comment on the summary of findings or on the full report.

The comments and submissions provided are not subject to the audit nor the evidentiary standards required to reach an audit conclusion. Responsibility for the accuracy, fairness and balance of those comments rests solely with those who provided a response or comment.

Submissions and comments received

Premier

I note your conclusions that the processes followed in the renewal of Mr Gadd's contract complied with his existing contract, the renewal process was consistent with that used for similar contracts and the renewal was in the public interest.

I also acknowledge your recommendations about the drafting of the clauses in instruments of appointment relevant to renewal.

I support the intent of those recommendations, and have asked the Department of Premier and Cabinet to seek the advice of the Solicitor-General about the wording of any appropriate amendments to the instruments of appointment used for Heads of Agency.

Scott Gadd

Mr Gadd is satisfied that this report is an accurate representation of the circumstances surrounding his contract renewal and is grateful for the Auditor-General's involvement.

Solicitor-General

Having considered the draft Report, I advise that I do not desire to make any submissions or comments in relation to it. I am nevertheless grateful for having been given the opportunity to do so.

Secretary — Department of Premier and Cabinet

I have discussed the draft report with the Premier, and to deal with the issues you raise I will be seeking the advice of the Solicitor-General about the wording of any required amendments to the instruments of appointment used for Heads of Agency.

Secretary — Department of Education

The recommendations, if adopted, would provide all parties with greater clarity and certainty on contract renewal. At its best, performance appraisal provides frequent feedback that is immediate to the circumstances of the time. Therefore, it should be the case that a contract renewal decision based on a 'recent' performance appraisal would have a broad focus on performance across the contract period, rather than on an 'event' immediately preceding its conclusion.

Secretary — Department of Infrastructure, Energy and Resources

I support the recommendations in the report. With regard to recommendation 3, I support the suggested changes, providing the intent should be to place the officer in a no detriment position, with regard to their reliance on the Clause 12.

Secretary — Department of Economic Development, Tourism and the Arts

I have noted the report and support its recommendations.

Secretary — Department of Police and Emergency Management

I have no comment to make or any issue with the draft report.

Secretary — Department of Health and Human Services

Thank you for the opportunity to provide comment on this audit. I have no objections to the recommendations arising from this audit being adopted.

Other Heads of Agencies

Other Heads of Agencies who responded advised me that they had no comment to make on the report or did not wish to make a submission.

1 Introduction

1 Introduction

Background

In May 2004, Mr Scott Gadd was appointed for five years as the Secretary of the then Department of Tourism, Parks, Heritage and the Arts (subsequently the Department of Environment, Parks, Heritage and the Arts (DEPHA)). Mr Gadd received a letter from the Premier, being the employer of all positions at the level of Secretary, dated 24 November 2008 which included an offer for the contract to be renewed.

A new instrument of appointment for Mr Gadd was signed by the Premier on 5 May 2009 and by Mr Gadd on 7 May 2009, however, shortly after, on 11 May 2009, the Government decided to abolish DEPHA.

On 27 May 2009 the Leaders of both Opposition Parties wrote to me seeking that I investigate the decision by the Premier to renew the employment contract. I decided to conduct a compliance audit examining the processes applied in renewing Mr Gadd's contract.

Audit objective

The objective of the audit was to assess whether:

- the renewal of Mr Gadd's contract complied with his existing contract
- the renewal process was consistent with that used for similar contracts
- the renewal was in the public interest.

Audit scope

The audit focussed on the single matter — an audit of the processes around the contract renewal.

Audit approach

To conduct the audit, I:

- examined documentation including relevant Cabinet minutes and advice provided by the Solicitor-General
- interviewed relevant persons including the Premier, the Premier's Chief of Staff, the Secretary of DPAC as well as Mr Gadd
- sought legal advice

- sought information concerning the Government's future intentions regarding Mr Gadd's employment including termination of his contract.

Timing

Planning for this compliance audit began in May 2009. Fieldwork was completed in June and the report was finalised in July 2009.

Resources

The total cost of the audit excluding production costs was \$8 000.

2 Findings

2 Findings

2.1 *Background*

Mr Gadd was appointed for five years as the Secretary of the then Department of Tourism, Parks, Heritage and the Arts with effect from 10 May 2004 under an instrument of appointment dated 7 May 2004.

On about 26 November 2008 Mr Gadd received a letter from the Premier, being the employer of all positions at the level of Secretary, dated 24 November 2008 which included the following paragraph:

I write to formally offer to renew your appointment as Secretary, Department of Environment, Parks, Heritage and the Arts from 10 May 2009.

A new instrument of appointment for Mr Gadd was signed by the Premier on 5 May 2009 and by Mr Gadd on 7 May 2009, shortly before the Government decided to abolish DEPHA.

In this Chapter, I discuss a range of issues related to the audit objective of determining whether the renewal of Mr Gadd's contract complied with his existing contract, was consistent with other contracts of this nature and was in the public interest.

2.2 *Key dates timeline*

With respect to the recent history of DEPHA and Mr Gadd, the following timeline applies:

- October–November 2008 — Global Financial Crisis started to impact Tasmania. Treasury put forward cost saving strategies to Government, some of which (including proposals for Departmental restructures) were rejected.
- 9 November 2008 — Six months to go for existing contract.
- 24 November 2008 — the final date upon which Mr Gadd could make the election to receive a termination payment under his first instrument of appointment. This was also the date of the offer letter.
- December 2008 — the Premier met with Mr Gadd and his Minister to discuss his performance as head of DEPHA.
- 31 March 2009 — Secretary, DPAC, acting as agent for the Premier, and Mr Gadd held discussions about his

contract renewal — at this meeting Mr Gadd indicated he was not seeking any changes to contract terms (for example an increase in remuneration).

- 22 April 2009 — draft instrument of appointment was forwarded to Mr Gadd by email and he was advised that the contract term had been revised down from five years to three. On the same day, he initiated discussions with his Minister and her senior advisor seeking a five-year term.
- 28 April 2009 — Mr Gadd wrote to the Premier ‘accepting’ a revised contract, but with reservations about the three-year term.
- 4 May 2009 — Cabinet considered a minute recommending a range of budget saving strategies including the abolishment of DEPHA.
- 5 May 2009 — The Premier signed the new instrument of appointment of Mr Gadd.
- 7 May 2009 — Mr Gadd signed the new instrument of appointment.
- 11 May 2009 — Cabinet decided to proceed with a range of budget saving strategies including the abolishment of DEPHA.
- 11 June 2009 — Abolishment of DEPHA announced.

2.3 *Was the offer made too early?*

In later sections I discuss the extent to which the offer of contract renewal bound the Crown. That raised the issue of whether the offer was made before necessary and whether, by doing so, the Crown deprived itself of the option to not renew the contract if the State’s financial circumstances changed.

As noted, the offer to renew the contract between the Crown and Mr Gadd was made on 24 November 2008, approximately six months prior to the lapse of Mr Gadd’s existing contract. Clause 12 of Mr Gadd’s first instrument of appointment reads:

If the officer is to be reappointed upon the expiry of the term of this instrument, the officer will be notified in writing of the intention to renew at least six months prior to the completion of the term.

Where an officer does not receive a written offer to renew his or her contract, Clause 13 — effectively a penalty clause — becomes relevant. It reads:

Should the officer not be notified of the intention to renew in accordance with Clause 12, the officer may, within 14 days of the date on which notification was due, elect to forthwith terminate the appointment and receive the entitlements set out in Schedule 4.

The Schedule 4 entitlements at 24 November 2008 were approximately \$120 000.

The two clauses provide assurance to Heads of Agency that either they will be informed of the Premier's intentions at least six months prior to the conclusion of their contracts or they will have the option of resigning immediately and receiving specified entitlements. Both clauses are standard in instruments of appointments for Heads of Agency and the offer to renew six months before the previous contract lapses is consistent practice for them. In my opinion, the inclusion of such clauses in instruments of appointment is reasonable given the reputational risk associated with working at the level of Head of Agency and of potential impacts on incumbents' future employments prospects.

The offer of 24 November 2008 provided legal satisfaction of Clause 12 and thus took away the option of Mr Gadd immediately terminating his appointment and receiving entitlements equal to six months of salary.

However, I note that, in order to comply with Clause 12, the offer to renew should have been made by 9 November 2008 (i.e. "at least six months prior to the completion of the term") after which date Mr Gadd would have been within his rights to immediately terminate his employment and receive Schedule 4 entitlements. I also note that the Crown's delayed communication left Mr Gadd in a state of uncertainty, that may have denied him the opportunity to take up the Clause 13 option, had the Government not chosen to renew. Accordingly, I conclude that the offer was actually made too late rather than too early.

Recommendation 1

The standard HOA instrument of appointment should be amended to require that the officer receive at least six month's notice of any intention to not renew the contract.

2.4 Was performance reviewed prior to the offer of a new contract?

I was advised that in December 2008, the Premier introduced the practice of meeting from time to time with each Head of Agency together with their respective Minister and that these meetings included discussions about departmental performance.

I noted that no formal assessment of Mr Gadd's performance was conducted prior to the November 2008 offer of a new contract. However, the Premier has advised me at interview that he was happy with Mr Gadd's performance at the time of the offer. At a subsequent meeting between the Premier, Mr Gadd and his Minister in December 2008, satisfaction was also expressed with Mr Gadd's performance.

My understanding is that the result of the assessment is not normally documented, although in one instance an outcome was a memorandum of understanding between a Minister and the Head of Agency, which included performance expectations.

Recommendation 2

Any decision to offer a contract renewal under Clause 12 should be based on a recent performance appraisal.

2.5 *Prior to the offer, was the Government seriously contemplating abolishment of DEPHA?*

In December 2008, the *Preliminary 2008-09 Mid-Year Financial Report* flagged a substantial decline in projected revenue for the state. I have established from interview that various options for dealing with the reduced revenues were provided to Government by Treasury, prior to 24 November 2008 (i.e. the date of the Premier's letter offering to renew Mr Gadd's contract). Among options rejected by Government at the time were various Departmental restructure options including restructuring DEPHA.

During the early part of 2009, financial information available to Treasury suggested further declines in revenues. Government again considered Departmental restructures and other cost savings options, including some submitted previously. However, the decision to abolish DEPHA was only taken on 11 May 2009, based on a Cabinet minute dated 4 May (see Section 2.8.2).

I concluded that, while there were indications of declining revenues, at the time of making the offer, no decision had been made to abolish DEPHA. Nor was there any indication that the idea was any more than one of a range of options that were put aside at the time.

2.6 *Was the offer binding on the Crown, if accepted?*

Regarding this matter, the Premier sought legal advice from the Solicitor-General who advised by letter dated 22 May 2009 that:

Had the offer been accepted, then there is almost no doubt that the acceptance would have resulted in a binding contract ... on the same terms and conditions.

I concur with that advice.

2.7 *Could the Crown have withdrawn the offer prior to acceptance?*

Commercial practice normally allows an offer to be revoked prior to acceptance and the instrument of appointment does not explicitly preclude that possibility.

However, in this regard, the Solicitor-General advised the Premier:

It is, I think, readily apparent that the Crown could not as a matter of law (and certainly not, as a matter of good conscience) having given notification of its intention to renew the appointment — thereby persuading the officer not to exercise his option under Clause 13 to terminate the appointment — later purport to withdraw that notification at a time when it was too late for the Officer to make that election.

Based on the Solicitor-General's advice to the Premier referred to in Section 2.6, Mr Gadd was entitled to assume that the offer of 24 November 2008, was on the same terms and conditions, including its five-year duration. It is therefore interesting that the Premier advised Mr Gadd on 22 April 2009 that he had decided to modify the offered term of renewal from five to three years. Given the Solicitor-General's advice in this Section, it could be similarly argued that the original offer should not have been subject to modification since, by 22 April 2009, Mr Gadd had clearly lost the opportunity to take advantage of the option provided by Clause 13 (namely, payment under the terms of Schedule 4).

In the absence of specific direction within the instrument of appointment, there appears to be at least some uncertainty as to whether the Crown had the legal right to withdraw or modify its offer, and if it had done so, what legal remedy would have existed for Mr Gadd.

Recommendation 3

The standard HOA instrument of appointment should be amended to clarify:

- **whether an offer under Clause 12 can be withdrawn or modified by the Crown prior to acceptance and if so, what compensation is payable**
- **whether an offer under Clause 12 is presumed to be on the same terms and conditions as the existing contract unless otherwise specified**
- **if different terms (e.g. duration) are offered, what is the impact on the option provided by Clause 13?**

2.8 *Prior to Mr Gadd's acceptance, was the Crown seriously contemplating abolishment of DEPHA?*

In Section 2.7, I noted that the Solicitor-General's advice was that the Crown could not as a matter of law (and certainly not, as a matter of good conscience) withdraw its offer at a time when it was too late for the Officer to exercise the Clause 13 option.

However, if we put that advice aside and assume it was possible for the offer to be revoked at any time prior to acceptance by Mr Gadd, two questions arise:

- When was the renewal offer accepted?
- Had the Crown decided or seriously contemplated abolishing DEPHA prior to the date of acceptance of the renewed contract by Mr Gadd?

2.8.1 *When was the renewal offer accepted?*

Firstly, I considered some general principles of contract law. Offer and acceptance analysis is used to determine whether a contract exists between two parties. An offer is an indication by one person to another of willingness to enter into a contract on certain terms without further negotiations. The contract is said to come into existence when a final and unqualified expression of assent to the terms of an offer has been communicated to the party who made the offer. One special case of acceptance is when the conduct of the party to whom the offer was made makes it clear that the offer has been accepted.

There were three possible times when Mr Gadd might be thought to have accepted the Crown's offer:

- shortly after the offer had been made, simply by not writing back (acceptance by conduct)

- on 28 April 2009, when Mr Gadd wrote to the Premier:
“Whilst I’m pleased to accept a new contract I’m concerned about the 3 year tenure.”
- on 5 May 2009, when the Premier signed the instrument of appointment.

Once a Head of Agency is advised of the intention to renew, I established that it is normal practice that no further discussions or negotiations are needed prior to signing. It is widely accepted that silence means assent and in some situations acceptance can be inferred from conduct. However, in this case I believe that the conduct of continuing employment under the existing contract did not necessarily signify acceptance. Accordingly, I consider that the contract has not been agreed until the Head of Agency has explicitly communicated his acceptance. In my view, that lack of certainty is undesirable for either party and a related recommendation follows.

The second possible date of acceptance was when Mr Gadd wrote to the Premier on 28 April 2009 that he was pleased to accept a new contract, but was concerned about the reduced term. The language used seems to me to clearly convey willingness to enter into a contract on the Premier’s offered terms without further negotiations, even though he expresses concern about the reduced term. Subsequently, Mr Gadd confirmed to me that, despite this comment, he accepted at this date the contract in its entirety. On the other hand, Mr Gadd e-mailed a senior official at DPAC on 4 May 2009 that:

I don’t want to be out of contract in the interim so will have to sign what is currently on offer.

The above comment suggests that, at that stage, he did not believe the renewal had been finalised. Despite that, I believe that on 28 April 2009 Mr Gadd had clearly accepted the offered renewal by letter to the Premier and that a valid contract existed between the parties. My view was verbally supported by the Solicitor-General.

It follows that the signing of the instrument of appointment by the Premier on 5 May 2009 and by Mr Gadd on 7 May 2009 was merely endorsing a contract which had previously come into existence on 28 April 2009, with Mr Gadd’s acceptance by letter.

Recommendation 4

The standard HOA instrument of appointment should be amended to state that an offer of renewal of contract will lapse unless accepted in writing within a specified time.

2.8.2 When did the Crown seriously contemplate the abolishment of DEPHA?

As noted in Section 2.5, I have established that various options for dealing with the reduced revenues were provided to Government by Treasury, prior to 24 November 2008. The options included various Departmental restructure options, however those options were rejected.

Approximately six months later, a Cabinet minute dated 4 May 2009 included a proposal that DEPHA be abolished. That led to the decision being taken to do so on 11 May 2009.

It is not clear what contemplations were entered into by the Government between November 2008 and 4 May 2009. The Premier has advised me that at that time Cabinet had no intention of abolishing DEPHA. I considered whether the decision to reduce Mr Gadd's term from five years to three — communicated to Mr Gadd in April 2009 — might be an indication that the Government had then been seriously contemplating abolishing DEPHA and had been looking to reduce the potential early termination expense by shortening the term of employment. However, that surmise was rejected since inspection of the early termination provisions in the three-year and five-year contracts found identical entitlements for termination in the first year of the contract.

I conclude that there were no indications that the abolishment of DEPHA had been seriously contemplated until 4 May 2009; approximately one week after Mr Gadd had accepted the offered renewal of contract.

2.9 Should the Premier have sought to renegotiate after the contract had been agreed?

Despite the agreed contract, the Premier could have sought to renegotiate Mr Gadd's contract renewal, once the formal proposal to abolish DEPHA was made on 4 May. I understand that this was not done.

However, from discussions held with Mr Gadd, it is clear to me that any proposals along these lines are unlikely to have been entertained by him. This was confirmed in an email by Mr Gadd to DPAC on 4 May 2009 referred to in Section 2.8.1. In fairness, the early termination provisions of employment contracts are inserted to deal with situations such as the abolishment of DEPHA.

2.10 What was the potential saving for Tasmania, if the contract had not been renewed?

As a result of the offer, and assuming that Mr Gadd's renewed contract were terminated on 31 December 2009, the additional cost to Government would be approximately \$120 000¹.

The impact of salary payments for the period 24 November 2008 to 30 June 2009 would be nil because he would have earned his salary.

Similarly, for the period 1 July to 31 December 2009 the impact is nil assuming that Government finds work for Mr Gadd commensurate with his responsibilities as a Head of Agency.

2.11 *Was the renewal of contract in the public interest?*

The public interest is a concept that is central to policy debates, politics, democracy and the nature of government itself. However, there is little consensus on what exactly constitutes the public interest since any action by government — particularly expenditure of public money — will involve different costs and benefits for the groups and individuals affected. For example, building a new bridge is likely to be seen in a positive light by construction workers and residents who will reduce their travelling time, whilst others might see the decision mainly in terms of its impact on taxation expense. Another difficulty is that some costs and benefits will be less obvious and immediate, for example, a cost-saving measure might cause lasting damage to the state's reputation.

In the case of the renewal of Mr Gadd's contract, I have defined the State's public interest responsibilities to include:

1. compliance with contract law, agreed contracts and moral obligations — since failure to do so could undermine confidence of employees and suppliers of goods and services to contract with the State
2. engaging competent employees to provide Government programs — since failure to do so could result in inefficient use of resources and greater expense to the public
3. not wasting public money.

In Sections 2.3 to 2.10, I have argued that the process from offer to acceptance of the contract was determined by the terms of the previous instrument of appointment, contract law and moral

¹ The additional cost to government is based on the following calculation:

Termination payment from the second contract following abolishment of DEPHA	\$240 000
Less potential Clause 13 payment from first contract if second offer had not been made	\$120 000
NET COST TO CROWN	<u>\$120 000</u>

obligations. My opinion in this is supported by advice from the Solicitor-General.

I would also argue that, in the context of fixed-term employee contracts, a contract clause to ensure employees will get reasonable notice of whether the Government plans to renew the contract is essential when attempting to recruit employees at a senior management level.

With respect to whether or not there has been a potential waste of public money, as outlined in Section 2.10, the cost to the Crown in excess of amounts paid for work performed, is estimated to be \$120 000, but this loss will only arise if Mr Gadd's appointment were terminated at the end of the current six-month reassignment.

In my view, that net cost is reasonable, given the clear public interest benefit of the Crown seeking to reengage competent public servants as considered necessary and the importance of the State complying with its contractual, legal and moral obligations.

2.12 *Mr Gadd's role from 1 July 2009*

On 1 July 2009, Mr Gadd was re-assigned to the newly restructured Department of Primary Industries, Parks, Water and Environment. His position there is Executive Director, Parks and Strategic Projects being an office created under section 29(4) of the *State Service Act 2000*.

This re-assignment was made in accordance with the provisions of Clause 2 of Mr Gadd's instrument of appointment, which states:

The officer will undertake the functions of the office to which he is hereby appointed and of any other office which may be assigned to him additionally to or in substitution for that office and will be subject to the direction of and accountable to the Minister responsible for the office to which the officer is for the time being assigned.

The assignment is for six months with the potential for extension by mutual agreement. Mr Gadd's remuneration and other conditions did not change.

In addition, without additional remuneration, Mr Gadd has the statutory role of Director of National Parks and Wildlife under the *National Parks and Reserve Management Act 2002*. In this capacity, a number of priorities have been established for Mr Gadd's attention whilst in this role.

Also, Mr Gadd has been charged with developing or progressing various strategic projects and he will continue existing board roles for the Royal Tasmania Botanical Gardens, Theatre Royal and Port Arthur Historic Site Management Authority.

2.13 *Advice from the Solicitor-General*

Based on the presumption that the offer to Mr Gadd of 24 November 2008 was binding on the Crown, I sought advice from the Solicitor-General as follows:

“What would be the likely quantum of an award of damages in favour of Mr Gadd given the following hypothetical circumstances:

- a legally enforceable contract to re-appoint Mr Gadd as Secretary of the Department of Environment, Parks, Heritage and the Arts had arisen as a result of the acceptance by Mr Gadd of the offer contained in the letter from the Premier dated 24 November 2008,
- The State of Tasmania had refused or failed to re-appoint Mr Gadd in accordance with that contract, and
- Mr Gadd had threatened/commenced legal proceedings in respect of an alleged breach of contract.

Following a reasoned argument, and having regard to documented “known unknowns” and making allowance for “unknown unknowns”, the Solicitor-General provided his best estimate of the compensation likely to be payable to Mr Gadd in the hypothetical circumstances that I provided. The best estimate provided was in a range not inconsistent with my conclusions in section 2.11.

2.14 *Conclusion*

The renewal of Mr Gadd’s contract complied with his contract, was consistent with the process used for similar contracts and was in the public interest.

3 Recent reports

3 Recent reports

	Tabled	Special Report No.	Title
Apr	2006	59	Delegations in government agencies Local government delegations Overseas Travel
May	2006	60	Building security Contracts appointing Global Value Management
Aug	2006	61	Elective surgery in public hospitals
Nov	2006	62	Training and development
Nov	2006	63	Environmental management and pollution control act by local government
Nov	2006	64	Implementation of aspects of the <i>Building Act 2000</i>
Apr	2007	65	Management of an award breach Selected allowances and nurses' overtime
Jun	2007	66	Follow-up audits
Jun	2007	67	Corporate credit cards
Jun	2007	68	Risdon Prison: Business case
Oct	2007	69	Public building security
Nov	2007	70	Procurement in government departments Payment of accounts by government departments
Nov	2007	71	Property in police possession Control of assets: Portable and attractive items
Apr	2008	72	Public sector performance information
Jun	2008	73	Timeliness in the Magistrates Court
Jun	2008	74	Follow up of performance audits April – October 2005
Sep	2008	75	Executive termination payments
Nov	2008	76	Complaint handling in local government
Nov	2008	77	Food safety: safe as eggs?
Mar	2009	78	Management of threatened species
May	2009	79	Follow up of performance audits April – August 2006
May	2009	80	Hydro hedges
Jun	2009	81	Contract management

4 Current projects

4 Current projects

Performance and compliance audits that the Auditor-General is currently conducting:

Profitability, and economic benefits to Tasmania, of Forestry Tasmania	Evaluates Forestry Tasmania's long-term financial and economic performance.
Speed detection devices	Evaluates Tasmania's speed detection devices enforcement program looking at the efficiency and effectiveness of the program.
Communications by the government	Tests whether advertising, public surveys and websites are used for the benefit of Tasmanians and not for political purposes.
Teaching of science in public high schools	Examines the quality of science teaching in Tasmanian high schools.
Public servants not working	Looks at the trends, prevention and management of stress leave, long term sick leave, suspension and poor performance. Also considers broad public sector efficiency measures.
Council Rating	Examines the legality of rates set by Local Government Councils during the financial year ended 30 June 2009.
Council Investments	Examines the legality and governance practices applied by Local Government Councils when investing cash.
Employment of family members by Members of Parliament	Examines process applied when recruiting staff in Electoral offices and in the offices of Ministers.