THE PUBLIC SERVICE BILL 1997

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Paper presented to an Australian Institute of Law Seminar, held on 20 August 1997.

Before taking on my role of critic at this seminar (having been paired as a speaker with Peter Kennedy, Deputy Commissioner in the Public Service and Merit Protection Commission and proponent of the legislation), I should like to begin with praise for the Bill.

Not the least of its virtues is the admirably direct and succinct statement of the essential characteristics of public service. The so-called "APS Values" in clause 10 spell out what have been largely *implicit* assumptions about the constitutional principles and employment standards appropriate to the public service. Praise is due not only to the drafters, who have produced a Bill which is almost breathtaking in its lucidity and simplicity, and an Explanatory Memorandum which is uncommonly intelligible and informative, but also to the policy-makers who, in conceptualising this streamlined public service regulation, have perceived the importance, both in practical and symbolic terms, of crystallising fundamental principles, conventions, and standards.

As a labour lawyer, I am most interested in the framework for employment - the work relationship between the Crown and the public servant- and I shall address my commentary to the three issues nominated for discussion at the seminar:

- will the Public Service Bill mark the end of the apolitical bureaucracy?
- will it inject needed private sector values into the APS?
- what does it mean for accountability and the principles of responsible government?

An apolitical bureaucracy and security of tenure

At the head of the APS Values set out in clause 10 is the statement -"the APS is apolitical, performing its functions in an impartial and professional manner".

The natural tendency is to regard this value as concerned with insulating public servants from political pressure from the government of the day, although in a recent speech the Secretary of the Department of the Prime Minister and Cabinet drew attention to another dimension - that it should restrain public servants from leaking confidential information to hinder or embarrass that government.[1] In the more familiar arena, one which has been explored in the media and before the Joint Committee of Public Accounts in recent weeks, we have conventionally relied on security of tenure as the primary means of protecting impartiality and independence.

It must be acknowledged that tenure was never fully secure, and over time has been progressively diluted.[2] But now this Bill may well have removed *all* security.

First, Agency Heads are given power to determine the basis of engagement as employees - that is, whether on a continuing or temporary basis, for a fixed term or as casual, or subject to

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termination by notice. The novelty here is that fixed term contracts and contracts terminable by notice are to percolate down the ranks from Secretary to SES and even lower.

Secondly, clause 29 says: "An Agency Head may at any time, by notice in writing, terminate the employment of an APS employee in the Agency". That is, the Head may terminate in apparent breach of contract. Even where the employee is engaged on a continuing basis or for a fixed term, the Head has an unfettered power to terminate. The consolation is that employees other than Agency Heads,[3] SES employees,[4] and employees terminated for machinery of government reasons,[5] will all have recourse to remedies for unfair or unlawful termination under the *Workplace Relations Act 1996*, and so will have the same protection as private sector employees.

This proposal appears to reflect the status quo: public servants had recourse to review under the then *Industrial Relations Act 1988* from March 1994, as an alternative to review under the *Public Service Act* and *Merit Protection (Australian Government Employees) Act 1984*,[6] and in 1995 the unions and government agreed that the *Industrial Relations Act* (now the *Workplace Relations Act 1996*) should be the exclusive avenue of appeal.[7]

There are, however, at least 2 concerns to raise here. (At this early stage, before the development of Commissioner's Directions and Regulations, I put these comments no higher than concerns.)[8]

First, certain categories of employee are excluded from the *Workplace Relations Act* scheme, notably all fixed term employees. So, for example, a fixed term employee, who is dismissed before expiry of the agreed term on grounds, for example, of misconduct or redundancy, or incompatibility with a colleague, or for no explicit reason, cannot seek redress.[9]

The Public Service Bill envisages that public servants may be engaged for a fixed term. Will those employees be deprived of access to review of terminations under the *Workplace Relations Act*?

There is authority that a contract for a fixed term which provides for earlier termination by notice is not in truth a fixed term contract.[10] Thus, if an Agency Head contracted for a fixed term subject to the right of early termination by notice, a termination by notice before the expiry of the fixed term would be reviewable under the *Workplace Relations* Act.[11] What would be the position, however, where the fixed term contract did not expressly provide for termination by notice? Possibly, the provision in clause 29 of the Public Service Bill, allowing the Agency Head to terminate with notice at any time, would have the same effect as an express contractual term, and an employee prematurely dismissed would be entitled to seek remedies under the Act. But it is arguable that, according to the High Court's reasoning in *Byrne v Australian Airlines*,[12] the provisions of a statute (in this case clause 29) are not automatically imported into a contract, with the result that the Australian Industrial Relations Commission and the Federal Court, exercising jurisdiction under the *Workplace Relations Act 1996*, would be obliged to take the fixed term contract at face value, and deny a hearing to an aggrieved former employee.

In such cases, as well as for Agency Heads, SES employees and employees displaced by machinery of government changes, something akin to the dismissal at pleasure rule appears to apply. Whether there would be a common law remedy for wrongful termination - that is, for breach of a continuing or fixed term contract by the employer - would depend on the interplay of contract, statute and, possibly, prerogative.

I take an SES employee as an example. If the employee is engaged for a fixed term and there is an express contract term allowing the Agency Head to terminate the employment with notice, then early termination by notice will not constitute breach, and the employee will not be entitled to any remedy.[13] If the SES employee is engaged for a fixed term and the contract makes no reference to the power of termination by notice, and the Agency Head does terminate the contract early by notice, the availability of a remedy may well depend on the legal character of the power used by the Agency Head in terminating the contract. If clause 29 of the Bill is interpreted as conferring a statutory power, then the exercise of the power could not constitute breach of contract.[14] If, however, clause 29 is construed as describing the prerogative power to dismiss at pleasure which revives after repeal of the extensive statutory regulation in the *Public Service Act 1922*, it could be argued that the New South Wales Court of Appeal decision in *Suttling v Director-General of Education*[15] applies - that is, that the Commonwealth is bound by the contract and, while the contract will not be specifically enforced, damages for breach by early termination would be payable.[16]

The second concern I have about reliance on the *Workplace Relations Act* to promote or protect an apolitical bureaucracy, is that, in contrast to the provisions in place until the end of 1996, that Act offers little by way of enforceable legal rights to dismissed employees.

Under the *Industrial Relations Act*, terminations were rendered unlawful on several grounds, including unfairness in a substantive or procedural sense. If a termination *were* unlawful, the employee was entitled to a remedy of reinstatement or compensation *as of right* from a court exercising judicial power. Under the *Workplace Relations Act*, unfairness is now a matter for review through the processes of conciliation and arbitration. Not only is the issue of unfairness a matter for the balancing of various factors, including management's right to manage,[17] but the availability of a remedy is discretionary, even where unfairness is established.[18] There is still scope for challenging a termination as unlawful in the Federal Court, but the grounds have been narrowed - to the giving of an inadequate period of notice, or termination for a prohibited reason such as age, or union membership.

What is clear is that the current general law of termination provides materially less protection for public service employees than it did in 1995 when unions and government agreed to abandon the specialised scheme for review of terminations in the *Public Service Act* and *Merit Protection (Australian Government Employees) Act 1984*.

Now, does all this matter? The Secretary of the Department of the Prime Minister and Cabinet thinks not: "I do not believe that loss of tenure per se really should or needs to impact upon professional advice in the public sector. I think that tenure ... has very little to do with intelligence or honesty".[19]

Others - including insiders past and present - believe it does matter.[20] They believe that loss of tenure and the consequent insecurity will tempt public servants to tell Ministers what they want to hear, and induce younger staff to move into the private sector rather than seek advancement to senior ranks. They believe that perception and fear are potent forces in the workplace.

This is one of those debates where assertion is matched by pronouncement. Suffice for me to make a modest suggestion that it is imperative that there be clear guidance from the government on:

- parameters for the adoption of fixed term contracts and notice provisions in employment contracts, and

- parameters for the exercise of the power of termination, especially in relation to those employees who will not have access to the procedures and remedies under the *Workplace Relations Act.*

Accountability

This is one of the more intriguing themes of the Bill, and the surrounding documentation. It is certainly central, as signalled by the discussion paper circulated in May just ahead of the Bill, entitled *Accountability in a Devolved Management Framework.* Of course it is not a new component of public service regulation. Rather, what is proposed is a new model of accountability - new mechanisms, new paths, and a different mix.

Again I put forward two concerns: one is about accountability lost; the other about accountability gained.

First, the loss. The government's policy is to abolish the remaining avenues for merits review of employment decisions,[21] and to curb if not eliminate judicial review. Little of this scheme has been detailed in the Bill[22] and will materialise in regulations.[23] But an outline appeared in the paper *Accountability in a Devolved Management Framework.*

All existing appeal rights for merits review in the current *Public Service Act* are to disappear, and accordingly the *Merit Protection (Australian Government Employees) Act 1984* is to be repealed. So-called "external review" of decisions other than on termination is to be the responsibility of the Public Service Commissioner, who may conduct the reviews or approve independent reviewers. It will also be possible to streamline the process if the external reviewers are used by agencies to carry out initial consideration of grievances; then, one tier in the process will be eliminated in the interests of more timely resolution. The external review will be limited to making recommendations rather than re-making the decision,[24] but the Commissioner will have power to report on unsatisfactory cases to the Minister or Parliament.

The model, then, is an Ombudsman-type review scheme, *without* the Ombudsman's independence. With every respect for the integrity of the Public Service Commissioner, this arrangement is not "external review". It is not independent review.

So the accountability of merits review by the Merit Protection Review Agency has been jettisoned. With the one narrow exception for unlawful termination, there is to be no mechanism for guaranteed legal redress of substantive or procedural wrongs committed against APS employees, that is, for breach of the APS Values set out in clause 10 such as the merit principle, equity, consultation, fairness, flexibility and diversity in the workplace.

The position of judicial review of employment decisions is not so clear.

The government has expressed the view that the streamlining of the statutory employment framework will reduce if not eliminate judicial review under the *Administrative Decisions (Judicial Review) Act 1977.* The assumption is that a decision made by an Agency Head in relation to employment - a decision about appointment, promotion, transfer, assignment of duties and so on - will not be a "decision made under an enactment", which is the jurisdictional trigger for judicial review under the ADJR Act. Rather the decision can be characterised as made pursuant to contract.[25]

The Full Federal Court decision in *Australian National University v Lewins*[26] might give comfort to the government, but there are other, less encouraging decisions: such as *Chittick v Ackland* and *Mair v Bartholomew*.[27] Overall, I think it would not be difficult to convince the Federal Court or the High Court that decisions made by an Agency Head by reference to "Values" set out in a Public Service Act , or decisions made in accordance with Public Service Commissioner's "Directions", which are to be disallowable instruments, or decisions made by reference to Commissioner's "guidelines" *are* decisions made under an enactment and therefore subject to judicial review. Nonetheless, the fate of judicial review as an accountability measure for public service employment is unclear.

Secondly, accountability gained.

The Public Service Bill introduces a Code of Conduct which prescribes obligations of APS employees. For example an employee must in the course of employment

- behave honestly and with integrity,
- act with care and diligence,
- treat everyone with respect and courtesy and without coercion or harassment,
- comply with any lawful and reasonable direction given by someone in the employee's agency who has authority to give the direction,
- disclose and take reasonable steps to avoid any real or apparent conflict of interest,
- use Commonwealth resources in a proper manner, and so on.

The Code is legally enforceable on employees by way of personal liability to a range of sanctions for breach.[28]

Strictly speaking, this is not a new form of accountability. But there is a new focus or weighting of accountability, which becomes apparent when the enforceability of the APS Values on employees is juxtaposed with the repeal of mechanisms by which employees would enforce on management the distinctive employment standards of the public service which are included in the APS Values - that is, the merit principle, non-discrimination, consultation, fairness and flexibility.

The result is that Agency Heads are to be liberated from statutory constraints - from the enforceable procedures for selection and recruitment, promotion, discipline, termination and so on in the *Public Service Act 1922* - and from external appeal processes. They will be required to "uphold and promote"[29] the values, but there will be no direct sanction for default. Rather they will be subject only to the guidance, monitoring and reporting of the Public Service Commissioner, and to the toothless "external review" triggered by employee complaint.

The policy, then, is to render unenforceable and non-justiciable the employment principles which protect employees, while confirming the enforceability of those principles which impose duties on employees. So accountability is at once being personalised, and de-institutionalised.

Accountability and scrutiny are flexible concepts. Their value and effectiveness depend very much on the angle of the light shone and the focus of the lens.

Private sector values

One of the premises of the Bill is that "the industrial and staffing arrangements for the public service should be essentially the same as those of the private sector"[30]

and that the peculiar features of public service employment law (like service-wide terms and conditions and centralised control, detailed legislation and regulations. and the overarching role of administrative law) should all be stripped away.

The rationale seems to be largely one of efficiency: best practice people management, measured in economic terms, is found in the private sector, and so, to quote Commissioner Shergold, "we need to walk the same green fields and gaze the same blue skies that inspire innovation in the private sector".[31]

I have less enthusiasm for the transplantation of private sector values, and am sceptical about the capacity of the private sector employment paradigm to accommodate and satisfy the APS Values of merit, equity, participation, fairness, diversity and so on.[32]

The ordinary employment relationship is contractual. "Best practice" employers may well negotiate contracts with their employees which by express terms provide for merit-based, fair, equitable and consultative decisions about work issues. But they are not obliged to make such contracts. And terms which are implied by law in all contracts of employment tend to sanction managerial prerogative and employee subordination. These terms impose on employees onerous duties of obedience and of fidelity, and even perhaps a positive duty of cooperation, and the obligations often extend to controlling the employee's activities and self-expression beyond the workplace and working hours.

Of course, employers are not unregulated. They are bound by awards and agreements made under industrial legislation to pay certain wages and provide certain conditions. They are also bound by other statutes dealing with working conditions like superannuation, long service leave and occupational health and safety. But, subject to minor qualifications, these awards and statutes do *not* impose on employers a general obligation of fairness and do not institute merit as the basis for employment decisions.

The qualifications include anti-discrimination statutes, and unfair dismissal laws, which have been noted above. Another possible qualification is a recent common law development. English courts are prepared to contemplate a duty of reasonableness or respect on the employer's part as an implied term of all contracts of employment. The duty has most force in the situation of termination of employment, and has been narrowly confined in other contexts of the employment relationship.[33] Australian courts have only recently, and tentatively, recognised the duty.[34] There is no suggestion in the caselaw that a duty is owed to applicants for employment, nor that there is a duty to consult or negotiate with employees over terms and conditions, nor an obligation to provide natural justice in decisions to promote, or transfer, or allocate duties. The common law duty of reasonableness on the part of employers is at this stage not a solid shield, let alone a sword, for employees.

In summary, private sector employment law, barely recognises, still less protects, the standards and values which are regarded as essential to public sector employment. Those public sector standards and values are currently enforceable only because of the detailed legislative prescription and administrative law package of merits review and judicial review.

That's what makes public sector employment different.

I am not predicting an outbreak of arbitrary, tyrannical, unfair employment decisions by public service managers. Rather, my argument is that a shift to an employment regime of unenforceable

"values" inevitably jeopardises the values. Merit, equity, and fairness involve costs, and in an era when economic considerations dominate public policy and the public sector budget is shrinking, those values must be vulnerable to compromise, if not generally and uniformly, then in particular instances.

At the base of the comments I have made on an apolitical bureaucracy, on accountability, and on private sector values is the issue of whether, why, and how far public employment should be different from private employment. I close by citing the insights of an American scholar, YS Lee, who in 1992 in a book called *Public Personnel Administration and Constitutional Values*, said:

> To many, especially those who are familiar with private sector personnel administration, it is difficult to understand why public employees should be treated any differently from private sector employees .... The answer is simple. It is because their employers are governmental entities ....
>
> Some may contend that under the existing civil service regulations, it is difficult, if not impossible, to dismiss unproductive employees ... [and that] due process protection ... completely ties the hands of public personnel managers. There is an element of truth in this argument; the due process of law can slow down personnel administration, forcing public managers to compromise the principle of efficiency. This is not a trivial issue. Yet one should note that an equally - if not more - important value in public administration is that public employers "do it right", even if it is a little slow and costly. When government is allowed to deviate from what is right and fair, it creates a possibility of tyranny .... In this sense, one should not dwell upon a view that the due process protection ties the hands of public managers. but rather find ways to improve efficiency within the [legal] framework.[35]

Lee's argument is potent. There is inefficiency, complexity and duplication in APS employment, which should be addressed. But it is possible to modernise, consolidate and simplify the legislative and administrative framework for management in the APS[36] without dismantling the distinctive legal framework for public sector employment, in particular the "statutory underpinning" and the safety-net of administrative law.[37]

Indeed, the reforms already made to the general employment law framework through the *Workplace Relations* legislation provide the governmental employer with about as much flexibility and scope for deregulation as it could wish for.

Endnotes

1 PSMPC Lunchtime Seminar Series, 6 August 1997.

2 G McCarry, "The Demise of Tenure in Public Sector Employment" in R McCallum, G McCarry and P Ronfeldt (eds), *Employment Security* (1994) pp 138-162.

3 Public Service Bill clauses 52(4), 60(3).

4 Public Service Bill clause 38.

5 Public Service Bill clause 65(3).

6 *Maggs v Comptroller General of Customs* (1995) 128 ALR 586.

7 Continuous Improvement in the Australian Public Service Enterprise Agreement 1995-96, clause 11(f)-(h) and Schedule 1 of Attachment F. The Agreement was a certified agreement made under the *Industrial Relations Act 1988*, and as provided in section 121, overrides inconsistent federal statutes. Note that the Merit Protection Review Agency could not order compensation in lieu of reinstatement.

8 Draft regulations and directions were presented in several versions to the Joint Committee of Public Accounts, to which the Public Service Bill and the accompanying Public Employment (Consequential and Transitional) Amendment Bill 1997 were referred for consideration and an advisory report. The Committee's *Report 353* was presented on 29 September 1997.

9 Reg 30B(1)(a), (b); the regulation previously exempted only short-term fixed term employees.

10 *Andersen v Umbakumba Community Council* (1994) 126 ALR 121, [1995] 1 IRCR 457 (Von Doussa J); *Cooper v Darwin Rugby League Inc* [1995] 1 IRCR 130 (Northrop J).

11 Of course such a clause may well command a premium on remuneration.

12 (1995) 185 CLR 410.

13 As noted in the Explanatory Memorandum for the Public Service Bill at 4.26, an agreement between the Agency Head and the employee

"could deal with compensation for early termination of a fixed-term engagement."

14 *Director-General of Education v Suttling* (1987) 69 ALR 193 at 200 (Brennan J).

15 (1985) 3 NSWLR 427.

16 The measure of damages is however limited at common law by the principles in *Addis v Gramophone Co Ltd* [1909] AC 488. If there were a term implied at common law in all contracts that termination shall not be unfair, then a higher measure of damages may be available: *Gregory v Philip Morris Ltd* (1988) 80 ALR 455.

17 *Workplace Relations Act 1996* s 170CG(3) lists a number of factors to be taken into account, including "any other matter the Commission considers relevant". Section 170CA(2) refers to the test of "a fair go all round" formulated by Sheldon J in *in re Loty and Holloway v Australian Workers Union* [1971] AR (NSW) 95 at 99 and which Sheldon J said included consideration of the right to manage.

18 *Workplace Relations Act 1996* s 170CH(2).

19 PSMPC Lunchtime Seminar Series, 6 August 1997.

20 Sir Lenox Hewitt, Denis Ives, and Derek Volker, who made submissions to the Joint Committee of Public Accounts; Tony Ayres, quoted by Michelle Grattan, *Financial Review* 11 Aug 1997.

21 Note that review of selection was removed during the Fraser government, promotion appeals were removed for positions at or above the classification of Senior Officer Grade C in 1986, and as already noted the special provisions for review of termination were withdrawn by a Certified Agreement in 1995.

22 Clause 33(1) simply states that "An APS employee is entitled to review, in accordance with the regulations, of any APS action that relates to his or her APS employment".

23 Public Service Bill clause 33 makes provision for the regulations to prescribe exceptions to the entitlement to review, and to provide for "the powers available to the Commissioner, or any other person or body, when conducting a review of the regulations".

24 While not made clear, this restriction would presumably apply whether the review was one-tier or two-tier.

25 Public Service and Merit Protection Commission and Department of Industrial Relations, *The Public Service Act 1997: Accountability in a Devolved Management Framework* (1997) p 21.

26 (1996) 138 ALR 1.

27 (1984) 1 FCR 254 and (1991) 104 ALR 537.

28 Public Service Bill clause 15.

29 Public Service Bill clause 12.

30 *Towards a Best Practice Australian Public Service - Discussion Paper issued by the Minister for Industrial Relations and Minister Assisting the Prime Minister for the Public Service, the Hon Peter Reith MP, November 1996* (1996) p 5; see also the Explanatory Memorandum for the Public Service Bill p 3.

31 Speech, 8 July 1997, "A New Public Service Act: The End of the Westminster Tradition?"

32 The following section repeats views expressed by the author in a presentation to the National Administrative Law Forum (presented by the Australian Institute of Administrative Law and the Institute of Public Administration) on 2 May 1997 in Canberra. The proceedings are in press.

33 *Bliss v South East Thames Regional Health Authority* [1987] ICR 700; *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] IRLR 66; *Scally v Southern Health and Social Services Board* [1991] ICR 771; *Reid v Rush & Tompkins Group plc* [1989] 3 All ER 228. See discussion in W Creighton, W Ford and R Mitchell, *Labour Law Text and Materials* (2nd ed, Law Book Co, 1993) paras 9.17-9.25; B Creighton and A Stewart, *Labour Law - An Introduction* (2nd ed, Federation Press, 1994) paras 868-870. A recent decision of the House of Lords, *Malik v Bank of Credit and Commerce International SA* [1997] 3 WLR 95, does however suggest a broader operation of the duty. It was held that the conduct of a business in a corrupt or dishonest manner is a breach of the general obligation not to engage in conduct likely to destroy or seriously damage the degree of trust and confidence the employees were reasonably entitled to have in their employer.

34 *Byrne v Australian Airlines Ltd* (1994) 120 ALR 274 at 334-335 (Gray J); *Durazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144 (Full Court, Industrial Relations Court of Australia).

35 Quorum Books, pp 25-26.

36 As recommended by the Joint Committee of Public Accounts, *Report 323, Managing People in the Australian Public Service - Dilemmas of Devolution and Diversity* (1993) p 21. See also MAB/MIAC, *Achieving Cost Effective Personnel Services*, Report No 18 (1995).

37 The term "safety net" is deliberately chosen, but not for the sense in which it is currently being used in industrial relations and industrial law to refer to a floor of minimum pay and conditions above which bargaining will operate.