Chapter One

Public Sector Employment in the Twenty-First Century: Themes and Introduction

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Employment in the public sector has been caught up in the winds of change which have radically reshaped the legal environment for labour relations more generally in the last two decades. It has not been immune from the pressures for change in the private market sector.

In Australia, the United Kingdom and New Zealand — to name but three jurisdictions which have shared a common approach in the past to employment in the public service, and in the public sector more broadly — legislation and practice has reformed and revised the concepts and structures which govern the employment relationship in the public arena. These changes demonstrate a number of common influences and themes but with several variations in timing and content. There have even been some revisions to new concepts, as governments of various political persuasions come and go in the political cycle and as they adjust and ‘fine tune’ or modify earlier reforms.

The contributions in this book weave together the themes of, and influences on, public sector employment in contemporary Australia, whilst exploring parallels and differences between public sector employment in the United Kingdom and New Zealand, with some discussion of whistleblowers’ legislative protection, including developments in the United States.

Themes

This introductory chapter identifies the common threads of these themes and influences which are analysed and emerge in the other chapters. The themes include:

- the processes of changing industrial relations and legislative frameworks, both general industrial relations legislation and specific public sector legislation, and the influences exerted by those processes themselves;
- the move to individual contracts and more general individualisation in public sector employment, with impact on the rights and obligations of public sector employees and of their government employers;

- the trend to outsourcing of functions previously undertaken by government workers and the associated diminution of the size of the public sector;
- changes in the nature and approach of the role of government generally;
- the influence of general labour market reform on Australian public sector employment relations and changes in the nature of the employees engaged in the public sector in terms of gender and level of education;
- the move to decentralised and agency-based bargaining and the problem of the maintenance of centralised control over public servants;
- the impact of accountability mechanisms, such as whistleblowers on the public sector, and the role of unions in bargaining; and
- parallel influences in some other countries.

Each chapter, then, deals with a separate but linked aspect of employment relations in the contemporary public sector.

The Scope of the Chapters

One of the major effects of change has been upon the legal framework of the relationship of the government employee to the government employer, with consequential significant transformation in that relationship. In her chapter, Phillipa Weeks analyses the transformation from a relationship governed largely by statute to one in which the contract plays a far greater role. Both the legal and political implications are drawn out and explored.

The chapter identifies and examines the traditional model of public sector employment, with its historical origins providing for dismissal at pleasure and a limited role for the contract and the implications arising from administrative law principles. By way of contrast, as it reviews the contemporary model which provides a different structure for the employment relationship, the chapter considers the impact of the changes in engagement, in tenure and in termination of employment, as well as methods of review of employment decisions. A number of these changes have evolved through vehicles such as Australian Workplace Agreements, with their consequential impact on the individualisation of the public service. The courts have of course been required to review the operation of many of these changes. How have they done so in cases such as *Jarratt's case*,¹ and what attitudes have been evinced by them to the employment of public servants in the new legislative environment? How have the courts treated these changes to the notion of tenure of public servants and the move to employment more akin to that in the private sector? Phillipa Weeks concludes that one of the major changes is the diminution of the size of the public sector engaged directly by government, therefore bringing with it a reduced number of employees who are affected by, or subject to, the *Public Service Act 1999* (Cth). The legal consequences of these changes are identified and explored. The contractualisation of the public service has brought public sector employees

closer to their private sector counterparts in terms of rights and remedies for any breach of contract or detrimental treatment during the employment relationship.

Public administration does not stand still; the matrix of underlying administrative structures and arrangements has evolved and developed as part of the context for employment. John Nethercote² identifies, and traces historical changes in the broad administrative and governance arrangements underlying Australian government employment — in particular the matters of Ministerial control, statutory regulation, central management functions, the form and values of ‘career service’ and ‘merit’, and the management of workplace relations. He argues that the post war years have seen enormous changes in the institutions and structures and administrative arrangements of government. The role of government has expanded significantly in Australia, and Commonwealth administration has been consolidated, along with the transformation of the workforce from one with a clerical, less-educated emphasis to one substantially of a graduate character. At much the same time, the public sector has experienced other changes in workforce composition, such as increased employment of women and persons from non-English speaking backgrounds, whilst simultaneously adjusting to the centralisation and computerisation of the administration.

At the national level, some of the changes have been reflected in, or brought about by, the *Public Service Act 1999* (Cth) which John Nethercote examines in illustrating the statutory, doctrinal and institutional arrangements for government; the position before the enactment of the *Public Service Act 1999* (Cth) is contrasted and compared to highlight the changes arising from it.

Whilst much was done through non-legislative means, of course the legislative framework remained (and remains) critical to the implementation of particular public sector employment policies. The *Public Service Act 1999* (Cth) and the *Workplace Relations Act 1996* (Cth), and the contesting forces for continuity and change, are analysed in the chapter by Mark Molloy as he sets out the regulatory frameworks for the collective and individual environment in which public sector employees work and negotiate their terms and conditions of employment.

The context of new structures for dispute resolution and agreement-making for the workforce are generally set out in the *Workplace Relations Act 1996* (Cth). Nonetheless the *Public Service Act 1999* (Cth) as the major formal vehicle for the modernisation of the Australian Public Service (‘APS’), amongst other changes, called for the embodiment of the values and codes of the APS in the APS Values and the APS Code of Conduct. But did these formal changes do more than give a ‘seal of approval’ to developments which were already in train? Molloy’s thesis is that:

the APS did not undergo revolutionary change as a result of the PSA 1999. As a practical matter for APS employees, the passage of the [*Public*

Service Act 1999 Cth]] presented no great change to the way they were engaged and rewarded or how they went about their business. The substance of the matters dealt with by the new framework had already been substantially put in place under the framework of the [prior legislation, the *Public Service Act 1922*] PSA 1922 (albeit in a more convoluted way). As such, the new Act really represented a step closer to the end of a journey of reform, rather than the beginning of another.³

The author espouses the view that the *Public Service Act 1999* fitted better and worked better with the *Workplace Relations Act 1996*. More recently, however, the *Workplace Relations Amendment (Work Choices) Act 2005* ('the Work Choices Act') has drastically amended the *Workplace Relations Act*. The author argues the Work Choices Act should have the result that making collective or individual agreements will be easier because, when either form of agreement is made, only one of them will apply to a particular employment at a time. Mark Molloy concludes by saying that:

The Work Choices legislation further entrenches agreement-making arrangements at agency level across the APS. However, particular provisions have the potential to have significant effects on the environment in which those agreements are reached, including by further regulation of the formal role of unions in the process.⁴

Despite the increased emphasis on individual work arrangements and agreements, collective bargaining in the public sector remains alive, as is analysed fully by John O'Brien and Michael O'Donnell in this volume. Contemporary case studies (including Centrelink collective agreements from 1997 to 2009) demonstrate the implications for workplace relationships in the context of policy changes. Via the case studies, the authors explore and reveal the 'the contradictions faced by a government that wished to pursue its overall policy agenda while espousing an industrial relations policy that provides for a significant degree of managerial autonomy'.⁵ John O'Brien and Michael O'Donnell conclude that the implementation of a policy for 'a comprehensive performance-related pay system' and marginalisation of unions in the agreement-making process was of varied success in different departments.⁶ However, whilst the public sector unions were able to modify some of the impact of management's agendas where they were present, they 'could not impose a template across the APS'.⁷

Whilst governments create environments for the conduct of industrial relations, for example in which employers and employees negotiate suitable arrangements for their organisations, the authors argue that:

In the APS, however, the government is the ultimate employer: it cannot be indifferent to the outcomes achieved in particular agencies. Moreover, as the financial guardian of the nation it must be mindful of the costs of

its own employees. Government control of budgets places considerable constraint on the capacity of any agency to offer generous remuneration.⁸

In exploring the role of the government in negotiations, the authors note that there has been a movement away from the APS as ‘the monolith’ since the service-wide framework for employment no longer prevails. Nonetheless, whilst pay diversity has occurred, the authors note that many APS agreements use similar terminology, despite some variations and diversity in implementation within an agency. However the authors are careful to caution that:

it would be misleading to conclude that the APS employment arrangements have been radically altered in the direction of a series of quasi-independent agencies. In the end, public service departments and agencies are instruments of government.⁹

They conclude as follows:

In the existing bargaining environment management has been endowed with more ‘choices’ albeit within tighter parameters set by government, while the CPSU and other public unions face even more challenges to their capacity to organise their members and to preserve their employment conditions.¹⁰

Can employees keep their government employers honest and accountable by ‘blowing the whistle’ with impunity? Robert Vaughn analyses legal frameworks to protect and control whistleblowers. In drawing conclusions from a survey of such laws, and from undertaking a comparison with the United States, a legal revolution has arguably occurred in whistleblower protection. Further the chapter argues that

An examination of how the principles and precepts of whistleblower protection challenge public employment law also exposes the similarities between public and private employment law. In discounting the distinctions between the two, whistleblower protection ironically poses perhaps its greatest challenge, a challenge to the very notion of a distinct public employment law.¹¹

Traditional areas of public sector employment have been challenged by the trend to outsourcing — the delegation of functions which were previously performed by government to the private sector. This change in thinking about how some services for the public generally are to be provided has paralleled developments in the private sector in respect of services required by private businesses for them to function. In the public sector context, what are the implications for government employees? Can their negotiated or award terms and conditions carry over to the private sector when there is outsourcing? What effect does such outsourcing have on employment rights and duties? Can outsourcing be

seen purely as cost-cutting and avoiding public sector award or collective agreement obligations and therefore might it fall foul of the freedom of association provisions in the *Workplace Relations Act*? In considering another dimension of the privatisation of activities formerly directly carried out by the public sector, Marilyn Pittard's chapter examines the framework of the *Workplace Relations Act* and assesses the potential impact of revolutionary reforms made by the Work Choices Act in Australia's national labour relations law generally and in connection with transmission of business in particular.

Can we learn from other or innovative models for public sector employment? Some other models of public sector employment are explored in three other chapters:

- Peter Gahan examines the evolution of a partnership approach to industrial relations in the public sector which occurred in Victoria under the State Labor government.
- In New Zealand, dramatic deconstruction of traditional public sector structures took place in the late 1980s and early 1990s: the employment and management aspects of these reforms are analysed and evaluated in the chapter by Jane Bryson and Gordon Anderson.
- The modern transformation of the United Kingdom civil service is examined by reference to the theme of privatisation in Keith Ewing's chapter, which pursues the theme in relation to focus, structure, values, employment practices and employment regulation. Perhaps counter-intuitively, the influence of contract as opposed to traditional judicial review is identified as leading to diminution of individual employment rights. The proposal to enact a Civil Service Act and its purported and real potential impact are explored.

The chapter by Peter Gahan outlines the implementation of the reform of the Victorian industrial relations and workforce-planning framework covering public sector employees. Privatisation of government functions occurred against the background of the sweeping changes which had occurred in the 1990s when the Victorian Liberal government had introduced changes to the public sector which not only 'challenged traditional principles of public sector administration'¹² but also reflected the view that the private sector should be performing most of the functions previously performed by the public sector. During this era, management and organisational changes occurred with increased decentralisation of bargaining and delegation to agencies and individualisation of the agreements between public sector employees and government employers. There were positive implications but also negative aspects as outlined by the author which included:

unsustainable pressures on employment arrangements, the capacity of public organisations to recruit and retain capable employees, and wage

anomalies which did not reflect market conditions. This was particularly evident in relation to a number of key occupational groups where labour shortages had emerged due to demographic shifts in the workforce and world-wide shortages.¹³

The Bracks Labor government, which succeeded the Kennett Liberal government, introduced a 'partnership approach' between government and unions whereby some of the reforms of the 1990s were retained but with a change in the returned emphasis on collective labour relations. Essentially unions were recognised for collective bargaining in relation to employment conditions with the concomitant arrangement with unions that they were committed to understanding and taking account of the fiscal realities of government. The decentralised approach was retained so that ministerial responsibility was delegated to agency level. Peter Gahan's chapter outlines the challenges this partnership approach posed for the unions and for government and assesses and evaluates, to the extent possible, the successes and tensions in the system. It also gives the flavour of the further memorandums of understanding and new versions of the partnership agreement that have been entered into, in an attempt to continue the arrangement and make it workable for the future.

The reversal of the individualisation approach of the Liberal government and the return to the collective approach to industrial relations and public sector employment is a model which is novel.

In the chapter 'The Privatisation of the Civil Service', Keith Ewing analyses how corporate values have 'penetrated the public sphere' in the United Kingdom as seen by:

- first, 'the privatisation of the process of government' not via outsourcing or privatising government functions but rather through adoption of private sector values and methods and what the author calls 'private sector similes';¹⁴ and
- secondly, the adoption by government of what the author labels 'private sector legal forms' to provide the civil servants with some degree of protection which was previously lacking in the context of their employment under the royal prerogative.

The chapter points to the paradox that, despite the addition of some protections in this way, the use of private sector legal forms actually *removes* some of the protections which would otherwise be available through judicial review. How has this approach affected collective bargaining? It appears at least that 'collective bargaining was at its most effective' when the civil servants had little protection (as they were engaged under the royal prerogative and could be hired and fired at will).¹⁵

Although the evaluation of the draft Civil Service Act suggests that it is a potential source of more scrutiny by Parliament of the government's conduct in relation to civil servants, it is argued that this legislation is not likely to make any real practical difference to public sector employees in the United Kingdom.

In an antipodean experience influenced by the changes in the United Kingdom under the Thatcher government, in the chapter 'Restructuring State Employment in New Zealand', Jane Bryson and Gordon Anderson review and analyse the reforms in New Zealand in the late 1980s and early 1990s which:

introduced a comprehensive legislative base as a catalyst of change, and as a reflection of the strategic direction of government. In the employment setting the role of law as a protector of rights was down-played.¹⁶

The authors argue that, as New Zealand entered the first decade of the twenty-first century, the 'big' reforms have been achieved in such a way as to remain embedded for the long term as indeed are 'the legislative framework and the supporting culture'. However, are there undesirable 'costs' of these reforms? The authors suggest that one of those costs is that private sector values and methodologies may not be the most suitable values and methodologies for meeting the objectives of and carrying out a range of government functions. An adverse consequence is the resulting segmentation of the public sector — with an impact on public service culture. The changes are further analysed by reference to industrial relations and human resource management. In exploring further recent changes, the authors put the argument that the role of law is no longer to be the vehicle for major change but is rather directed to 'achieving normative and cultural evolution within the state sector'. Further they argue in their chapter that the:

push for change will come from the 'structural' mechanisms: the committees, boards and project teams established to implement aspects of the Review of the Centre and the teams, networks and organisational consolidation that emerge as new ways of working.

In addition there is a new lexicon — the authors label this 'the new state sector lexicon' — which is emerging in the words 'co-ordination'; 'capability'; 'sustainability'; 'leadership'; 'values', and 'outcomes'. They argue this new lexicon indicates cultural changes. They conclude by posing the question as follows:

as governments worldwide grapple with skill shortages, particularly in the health and education sectors, will a joined up/reconstructed state sector be enough to meet the potential labour market and employment relations challenges that face a small economy such as that of New Zealand?¹⁷

Industrial relations in Australia today is at the cross roads: the path is deregulation as exemplified by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) amending the *Workplace Relations Act 1996* (Cth), exposing employees to greater market forces in the negotiation of their terms and conditions of employment. In the concluding chapter, the radical reforms at federal level and the move to a 'freer' labour market are explored and their likely impact on public sector employment is debated. This final chapter by Marilyn Pittard examines the impact of changes to date and the likely impact of the new industrial relations policies contained in the Work Choices as well as overall future directions for public sector employment in Australia.

Overview

A dramatic contractualisation and individualisation of the public sector has occurred within the last decade and a half in Australia, New Zealand and the United Kingdom. Values relating to management prerogative, privatisation, and corporate values and corporatisation of the public sector, which are studied in this book, continue to be influential on contemporary public sector employment. These developments are against a backdrop of changes in the industrial relations regulatory framework, particularly in the mid-1990s and well into the twenty-first century. This book explores this transformation of public sector employment.

ENDNOTES

¹ *Jarratt v Commissioner of Police for New South Wales* (2005) 221 ALR 95; [2005] HCA 50 (8 September 2005). See Phillipa Weeks, this volume, Chapter 2.

² See John Nethercote, this volume, Chapter 3.

³ See Mark Molloy, this volume, Chapter 4.

⁴ Ibid.

⁵ See John O'Brien and Michael O'Donnell, this volume, Chapter 5.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ See Robert G Vaughn, this volume, Chapter 6.

¹² See Peter Gahan, this volume, Chapter 8.

¹³ Ibid.

¹⁴ See Keith D Ewing, this volume, Chapter 10.

¹⁵ Ibid.

¹⁶ See Jane Bryson and Gordon Anderson, this volume, Chapter 9.

¹⁷ Ibid.