Chapter Two

The Reshaping of Australian Public Service Employment Law

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There is a bundle of components constituting the legal regulation of public sector employment. To a large extent, these are the same components that regulate private sector employment: contract (both express and implied terms), awards and agreements made under industrial/workplace relations legislation, other specialist and general statutes (for example, occupational health and safety, and anti-discrimination laws), and general law (such as tort and criminal law). There have always been, however, some distinctive components and weightings in respect of public sector employment, such as the dismissal at pleasure principle, the application of administrative law, and a more prominent role for specialist, detailed legislation. At any time or place, the precise mix of employment law components in both the public and private sectors varies. Different mixes of these components affect the complexion and character of the employment relationship, and produce different patterns of power, protection and accountability.

The civilian public sector in Australia is complex and diverse. Across the three levels of government there are nine separate public services; eight police services; state and territory based public education and health systems; thousands of statutory authorities and government business enterprises conducting activities ranging from insurance to broadcasting, postal services to research, electricity generation and distribution to the running of cultural and arts institutions. The organisational diversity is matched by variations in the legal framework for employment. This chapter focuses on the Australian Public Service ('APS') as a core segment of the public sector. Occasionally examples are drawn from other areas to illustrate principles that have broad application and to provide comparisons.

The chapter depicts the legal framework of contemporary APS employment by charting changes that have occurred in the past 40-odd years. The APS of the 1970s was in the traditional mould of Australian public service employment but was on the brink of substantial reform. It had been subjected to a comprehensive review by the Coombs Royal Commission in 1974–76;¹ the Commonwealth's 'new administrative law' implemented between 1975 and 1977 was to affect not

only the interaction between government and citizens but also employment within the Service; and pressures were building for fundamental restructuring of the economy, including the public sector. The first part of this chapter gives an overview of the shape of Australian public sector employment law at that time, highlighting some contentious issues and showing how the legal framework worked to serve the 'constitutional' function of public services in a Westminster-derived system — a function of providing policy advice to the government of the day and implementing the government's policies and programs. The second part analyses the changes that followed, in particular changes in the nature and content of specialist public service legislation and the decentralisation of employment responsibilities, and explores the potentially adverse impact on the APS's constitutional function.

Awards and agreements made under the industrial/workplace relations legislation have for most of the past century set rates of remuneration and conditions such as hours and various forms of leave. These mechanisms are covered in Chapters 4 and 5, and there is only limited discussion in this chapter.

The Traditional Model of Australian Public Service Employment

Contract

In contrast to the traditional position in England, where the relationship between public servants and the Crown was generally regarded as non-contractual until the late twentieth century,² in the Australian colonies from the nineteenth century there was no doubt that a public servant's contract is 'his chief right, the very corner-stone of all his rights and privileges'.³

There were two principal concerns that influenced the English position:⁴ while ordinary contract involves mutually binding obligations, not until 1970 was it settled that civil servants had an enforceable right to pay,⁵ and secondly, the dismissal at pleasure principle (to be discussed below) gave the Crown a unilateral power not possessed by private contracting employers. Thus the civil service has been regulated under Crown prerogative by way of Orders-in-Council, which authorise the making of regulations and instructions about employment in the civil service by the relevant Minister.⁶ This 'internal' regulation⁷ is not legally enforceable, though the practical implications have been limited, given the conventions of the model 'good' employer, and especially as in the latter part of the twentieth century, general employment legislation on matters such as unfair dismissal has been made applicable to public sector as well as private sector employment.⁸

After Federation, there was a series of High Court decisions affirming that the relationship between public servants and the Crown in Australia was

contractual.⁹ In the leading case, *Lucy v Commonwealth* ('Lucy'), a public servant's appointment had been invalidly terminated according to the terms of the *Commonwealth Public Service Act 1902* and the *Commonwealth Constitution*, and he succeeded in obtaining damages for wrongful dismissal, that is, for repudiation of the contract of employment.¹⁰ Knox CJ explained the relationship between statute (in this case the *Constitution* as well as the public service legislation) and contract:

[I]t is admitted, that the plaintiff was wrongfully dismissed or removed from the Public Service of the Commonwealth. In so dismissing him, the Commonwealth committed a breach of the contract of employment into which it had entered with the plaintiff, it being a term of that contract, by virtue of sec. 84 of the *Constitution* and sec. 60 of the *Commonwealth Public Service Act*, that the plaintiff should preserve all his existing and accruing rights, including the right to remain in the Public Service during his life or until dismissal or removal for some cause specified in the South Australian Acts...¹¹

The analysis of Knox CJ in *Lucy* reveals that while public and private sector employees share a contractual basis for their employment, the public sector version is shaped by legislation. The role of special legislation has been a distinguishing feature of Australian public service regulation since the colonies gained self-government in the mid-nineteenth century,¹² and in the Commonwealth one of the Parliament's first priorities was a public service Act, which resulted in the *Public Service Act 1902* (Cth). So entrenched did the legislative model become that it might have appeared to be a legal necessity. But it was policy rather than law that generated the dependence on legislation for employment regulation in the public service. That is, there is no legal requirement — constitutional or otherwise — for a statutory framework.¹³

The legislation in the Commonwealth and the states followed a more or less standard pattern of substantial prescription. For example, the *Public Service Act 1922* (Cth) (the 'PSA 1922'), which operated until 1999, detailed substantive rules and processes for the structure of the service, job classifications, appointment of the majority of staff to 'offices', which amounted in practice to permanent employment subject to probation, promotion, transfer, discipline and termination, whether by retirement, redundancy or dismissal. Discipline and dismissal were subject to due process and a right of appeal, and there was also an appeal system for promotions. The bulk of the employment powers were exercised by a central body — the Public Service Board (a 'central personnel agency').¹⁴

The classic public service statutes also authorised the making of subordinate legislation in the form of regulations, and determinations, notices, instructions, directions and guidelines issued by the central body. By the early 1990s, in the

Australian Public Service, this tailor-made statutory regulation filled nine binders called the Personnel Management Manual.

Inevitably, this legislation impinged on the common law contract of employment. In a much-cited judgment in 1985, Brennan J in the High Court observed that

[t]he relationship between a civil servant of the Crown and the Crown has often been described as contractual, though the civil servant has been appointed pursuant to statute ... If the relationship is contractual, the contract must be consistent with any statutory provision which affects the relationship. No agent of the Crown has authority to engage a servant on terms at variance with the statute. To the extent that the statute governs the relationship, it is idle to inquire whether there is a contract which embodies its provisions. The statute itself controls the terms of service.¹⁵

Thus, failure to comply with provisions in a statute about the appropriate appointing authority and procedure for appointment cannot be overcome by resort to an argument that a contract of employment has been formed in fact by offer and acceptance,¹⁶ and conditions of employment prescribed in a statute cannot be changed simply on the basis of contract variation or implied contract, unless the variation or implication falls within the statutory scheme.¹⁷

An extreme view of the dominance of the legislation over the contract was that the legislation constituted a code, displacing the common law, including contract terms and principles altogether. There was a set of cases which tested this view in the 1980s.¹⁸

Rogers J in the New South Wales Supreme Court held in the first of the cases that the detailed provisions in the PSA 1922 on suspension of employees — which required ‘cumbersome’ procedures, conferred appeal rights, and limited the circumstances in which salary could be withheld — constituted a code. The context was an industrial campaign in which employees had imposed selective work bans, and the effect of the decision was to deprive the Crown of the option of invoking the contractual right of an employer to withhold pay from an employee who declines to carry out duties in full as instructed (the ‘no work as directed-no pay’ principle).¹⁹ Six years later,²⁰ Rogers J modified his position. He recognised the distinction between validity of a suspension — a matter governed by the public service legislation — and the employee’s right to pay, which at common law is dependent on having provided the services required under the contract. Rogers J found nothing in the legislation that displaced the operation of the common law principle.²¹

In *Australian Telecommunications Commission v Hart* (‘Hart’),²² the Federal Court was asked to find that the public service employer was not empowered to take statute-based disciplinary action against an employee for disobeying an

instruction about dress standards because the instruction itself was not statutorily authorised. The argument was as follows: the employer had a statutory power to make by-laws determining the terms and conditions of employment in the agency; the employer had exercised the power, but its by-laws made no provision about standards of dress; there was no room for the term implied by common law in the contract of employment that the employee must obey lawful and reasonable instructions, in this case about dress. A majority in the Court rejected the code argument with minimal comment.

Dismissal at Pleasure

The dismissal at pleasure power emerged in the context of the fundamental reforms of the English civil service that began in 1780 and continued into the second half of the nineteenth century, when public administration was transformed from decentralised, and often corrupt, office-holding, allocated by patronage, to a unified, professionalised career service. The courts looked for guidance to the law governing military servants of the Crown and adopted the principle that, like military service, Crown service was at the pleasure of the Crown.²³ Thus the Crown could dismiss without notice, without giving a reason, and for any reason, and the dismissed public servant had no redress, that is, no right to a hearing, no right of appeal and no entitlement to compensation on any ground including early termination of an appointment for a fixed term.

There has been some uncertainty about the juridical nature of the Crown power. In England, it was usually characterised as a Crown prerogative, so that the exercise of the power was unchallengeable.²⁴ Australian courts have tended to explain the power as an implied term of the contract.²⁵

In *Dunn v R*, a leading case at the end of the nineteenth century, Lord Herschell set out the rationale for the principle:

It seems to be that it is the public interest which has led to the term which I have mentioned being imported into contracts for employment in the service of the Crown ... [S]uch employment being for the good of the public, it is essential for the public good that it should be capable of being determined at the pleasure of the Crown.²⁶

Initially the principle was adopted in the Australian colonies, where the colonial administrations were being established in the latter half of the nineteenth century, but then an important departure occurred when, as discussed above in the section 'Contract', the colonies opted for comprehensive legislative regulation of public service employment. It was common for these statutes to deal with dismissal, and often in detail. The legal issue thrown up was how the legislation interacted with the dismissal at pleasure principle. The general answer was straightforward: the dismissal power, being a common law power, was subject to modification or displacement by statute. The answer in a specific case

was a matter of statutory interpretation: did the statute preserve, or abolish, or abrogate in part, the power to dismiss at pleasure?

Ideally, the statute would deal with the matter expressly. For example, the *Public Service Act 1979* (NSW) s 118 provided:

Nothing in this Act shall be construed or held to abrogate or restrict the right or power of the Crown, as it existed immediately before the commencement of this section, to dispense with the services of any person employed in the Public Service.²⁷

More commonly the courts were faced with non-express provisions. A statute would deal with some aspect of dismissal, such as grounds or procedure, leaving to implication the effect, if any, on the power to dismiss at pleasure. In the leading case of *Gould v Stuart* (1896) ('*Gould*'), the Privy Council held that the *Civil Service Act 1884* (NSW) had supplanted the power altogether.²⁸ The New South Wales *Civil Service Act* contained detailed provisions on removal, including removal for misconduct. It specified procedures, including initial suspension, a report to the Minister, and an opportunity for the suspended officer to show cause or make explanation, and a scale of penalties for different degrees of misconduct. The court construed the legislation generously:

These provisions, which are manifestly intended for the protection and benefit of the officer, are inconsistent with importing into the contract of service the term that the Crown may put an end to it at its pleasure. In that case they would be superfluous, useless, and delusive. This is, in their Lordships' opinion, an exceptional case, in which it has been deemed for the public good that a civil service should be established under certain regulations with some qualification of the members of it, and that some restriction should be imposed on the power of the Crown to dismiss them.²⁹

Gould stands out as a high-water mark for judicial willingness to find a legislative override of the dismissal at pleasure principle. Subsequently, courts — including the High Court which considered the matter on several occasions³⁰ — insisted on clear statutory expression of the intention to abolish or modify the power. It happened that later litigation tended to be concerned with legislation that made less detailed provision on dismissal than the *Civil Service Act 1884* (NSW) — the three High Court cases were concerned with state legislation for their police services — so that the case for override was more difficult to establish. For example, it was not sufficient for a statute simply to confer employment powers including dismissal on some person or body, such as the Governor,³¹ or to provide an appeal process for employees aggrieved by their dismissal,³² or to specify a procedure for dismissal.³³ In 2003, in *Commissioner of Police for New South Wales v Jarratt* ('*Jarratt*'), the New South Wales Court of Appeal

pointed out that these authorities imposed the onus of proof on the party contending that the dismissal at pleasure principle had been displaced by the statutory scheme.³⁴

The decision in *Jarratt* epitomised the traditional view of the relationship between the dismissal at pleasure principle and legislation. The statutory provision to be construed specified that certain senior police officers 'may be removed from office at any time' by the Governor on the recommendation of the Commissioner, with the approval of the Minister.³⁵ An officer who had been dismissed without notice and without notification of the reason, but in compliance with the stipulated formal procedures, sued for wrongful dismissal on the basis that the termination decision was invalid for failure to provide natural justice to which he was entitled because the legislation had displaced the dismissal at pleasure principle. He argued that the legislation, and in particular the words 'at any time', transformed the common law power into a statutory power that attracted the duty to provide natural justice. The Court of Appeal was unpersuaded, however, and accepted the Crown argument that the phrase was 'far too slender a raft upon which to find a statutory incorporation of the principle'.³⁶ The Court of Appeal decision was reversed by the High Court in 2005, as discussed under the heading 'Review of Employment Decisions' below.

As for the APS, because the federal Public Service Acts (1902 and 1922) were cast in the mould of the *Civil Service Act 1884* (NSW) that prevailed in *Gould*, it has long been assumed that the Crown in right of the Commonwealth had lost the power to dismiss at pleasure. This was confirmed by the Full Court of the Federal Court in *Dixon v Commonwealth* (1981) ('*Dixon*').³⁷

Another dimension to the traditional principle of dismissal at pleasure that was established in England by the end of the nineteenth century was that the Crown's freedom could not be fettered by contract. Thus a public servant could be removed from office notwithstanding express agreement that the employment was for a definite term.³⁸ The issue did not arise directly for consideration in Australia until the 1980s.³⁹ In *Scott v Commonwealth*, Kennedy J in the Federal Court, acknowledging long-standing criticisms of the rule, concluded that it 'is now too well established to be questioned in this court', and thus he rejected a claim of wrongful dismissal by a public servant whose five-year contract had been prematurely terminated.⁴⁰ The New South Wales Court of Appeal took a more robust approach to the ability of the Director General of Education to fetter by contract its right to dismiss at pleasure in proceedings brought by Suttling.

Suttling was a teacher employed under the *Education Commission Act 1980* (NSW). He successfully applied for a position advertised as a two-year secondment, and his letter of appointment specified a two-year period. During the first year, an administrative reorganisation made Suttling's position redundant

and he was redeployed to another post at a lower salary. Suttling sued the Director-General of Education for a declaration that he was validly appointed for two years and that he was entitled to be paid the salary of that position. The trial judge dismissed Suttling's action, holding that by virtue of the Crown's prerogative to dismiss at pleasure, the Director-General's power to terminate a fixed term contract at any time included the power to change terms of employment short of dismissal.

Suttling successfully appealed to the Court of Appeal, which held that 'the Crown may contractually abridge its right to dismiss at pleasure'.⁴¹ The Court found that there was no binding Australian authority, and that several factors weighed in favour of overturning the traditional view: there were suggestions in two Privy Council decisions that the prerogative could be restricted by means other than statute; there had been extensive academic criticisms of the principle; the rule often caused great injustice; 'in an age where a large section of the workforce [was] employed by the Government, there [was] no reason in principle or justice why the contractual rights of Crown (who are in reality government) employees should differ from those of private sector employees'; and the Crown was not bound to enter into fixed term contracts, and if it chose to do so, it should accept the ordinary rules of contract.⁴² Consequently, the Crown retained the power to terminate the employment but would be liable in damages if it acted in breach of contract, 'just as other employers pay damages when they cannot justify the termination of employment'.⁴³

Unfortunately, the High Court appeal did not engage with the issue of contractual overriding of the dismissal power.⁴⁴ The Court resolved the dispute by reference to the provisions of the *Education Commission Act 1980*.⁴⁵ The Court of Appeal decision has subsequently been followed in *National Gallery of Australia v Douglas*⁴⁶ and *Bryant v Defence Housing Authority*,⁴⁷ both cases involving the federal Public Service Acts.

Administrative Law

One of the striking features of federal government employment law which gained prominence in the late 1970s was the role of administrative law — both the traditional exercise of judicial review, and novel mechanisms for overseeing the exercise of government power, including its power as an employer.

Judicial Review

Judicial review refers to a body of law in which courts determine 'the legality of the act or omission of an official or other body or institution within the *public* domain'.⁴⁸ That is, the courts supervise the lawfulness of government decisions at the behest of aggrieved citizens: '[t]he overall ground of judicial review is

that the repository of public power has breached the limits placed upon the grant of that power'.⁴⁹

The specific grounds for review embrace both express and implied substantive and procedural restraints on decision-making: that the decision-maker breached the rules of natural justice, failed to comply with mandatory procedure, lacked jurisdiction to make the decision, made a decision not authorised by the enactment, failed to take account of a relevant consideration, took account of an irrelevant consideration, exercised the power for an extraneous purpose, exercised a discretion on direction, exercised a discretionary power in accordance with a rule or policy without considering the merits, made an error of law, made the decision induced or affected by fraud, or made the decision in the absence of justifying evidence or material; bad faith, unreasonableness, and uncertainty.⁵⁰

The heartland of judicial review is the exercise by government officials and bodies of powers that are conferred on them by statute.⁵¹ As has been noted, since the second half of the nineteenth century, public service employment in Australia has been subject to regulation by statute. These traditional public service statutes were couched in terms of specifying the powers of the government employer, from initial appointment of public servants to termination of appointment, and prescribing detailed procedures for the various employment decisions such as classification of positions, promotions, transfers, and dismissal, and other forms of termination. In theory, then, judicial review was available to public servants seeking to enforce their statutory rights.

A number of factors, however, militated against public servants resorting to judicial review: the rules of Crown immunity,⁵² particular technical rules associated with the specialised remedies (called prerogative writs), the lack of a financial compensatory remedy for the complainant,⁵³ and the high cost of the specialised jurisdiction. Litigation was rare.⁵⁴ And there was an alternative avenue of redress. As noted in the section above under 'Contract', the colonial courts characterised the relationship between the Crown and public servants as contractual, and treated the provisions of the public service legislation as terms of the contract. Thus, public servants alleging breach of their statutory rights — in relation to such matters as pay, superannuation, and their procedural rights in relation to promotion and so on — could mount a claim for damages for breach of contract, so long as economic loss was suffered. In a case where the public servant claimed that a termination of employment was invalid for breach of statutory entitlements, the action was for wrongful dismissal.⁵⁵ Theoretically, the remedy of specific performance, that is reinstatement, was also available but until recent times the courts have been loath to grant that remedy for employment contracts, and there is the practical obstacle that it is available only if the contract has been kept on foot.

Judicial review became much more accessible to federal public servants, along with other citizens affected by federal government decisions, from 1977, with the enactment of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the 'ADJR Act'). The Act conferred power on the Federal Court⁵⁶ to review decisions of an 'administrative character made ... under an enactment', including subordinate legislation,⁵⁷ and thus did not extend to exercises of prerogative or other non-statutory executive power, such as contractual decisions.⁵⁸ The ADJR Act's improvement of the arcane common law jurisdiction was substantial: it simplified and therefore reduced the cost of procedure, codified the grounds of review, and provided simpler, more flexible remedies.

One of the most facilitative features of the ADJR Act was the requirement that a decision-maker provide written reasons for a decision on request, but there were exemptions on grounds of practicality and third-party privacy for certain APS personnel decisions: decisions of a policy nature which did not relate to a particular person, appointment decisions, and promotion and transfer decisions.⁵⁹

The ADJR Act, then, provided federal public servants with a new, accessible avenue for challenging employment decisions made under the PSA 1922, the regulations and determinations made by the Public Service Board. And there was a flurry of litigation. Williams notes that whereas there were 23 reported cases of judicial review of personnel decisions between 1901 and 1979, there were 39 in the five-year period 1980–84 and almost 20 in the period 1985–91.⁶⁰ Public servants successfully challenged decisions about promotion,⁶¹ discipline,⁶² re-appointment,⁶³ suspension,⁶⁴ and dismissal,⁶⁵ and across the range of the grounds of review.

Other Review Mechanisms

While judicial review is concerned with lawfulness and power, other review mechanisms are concerned with the merits of decisions. There were both internal and external mechanisms available to members of the APS by the late 1970s.

Internal Review

The earliest public service Acts in the colonies provided rights of appeal for certain grievances.⁶⁶ By the late 1970s, under the PSA 1922, there were Disciplinary Appeals Committees, Promotion Appeals Committees and Re-appointments Review Committees, comprising an independent chair appointed by the Public Service Board, a nominee of the government department or body, and a nominee of employees, and these bodies and their procedures were of course subject to judicial review. There had also been a Grievance and Appeals Bureau established within the Public Service Board in 1979.⁶⁷ Another statute had created the Commonwealth Redeployment and Retirement Appeals Tribunals.⁶⁸

External Review

The administrative law innovations of the late 1970s introduced new channels of review of employment decisions in the APS. The new Administrative Appeals Tribunal, a general merits review tribunal which commenced operation in 1976,⁶⁹ was granted jurisdiction over the public service superannuation scheme (1976),⁷⁰ the public sector workers' compensation scheme (1981),⁷¹ and freedom of information (1982) (discussed further below).⁷² The Office of the Commonwealth Ombudsman, created to investigate and make reports and (unenforceable) recommendations about 'matter[s] of administration',⁷³ and thus to investigate both the merits and legality of decisions, was expressly precluded from dealing with

action taken by any body or person with respect to persons employed in the Australian Public Service ... including action taken with respect to the promotion, termination of appointment or discipline of a person so employed or the payment of remuneration to such a person.⁷⁴

This exclusion did not, however, prevent the Ombudsman from investigating complaints about matters arising before employment or after termination of employment.

Public servants could also take advantage of the *Freedom of Information Act 1982* (Cth) to gain access to their personnel records from their government employer, subject to some exemptions, including material provided in confidence, and material the disclosure of which could reasonably be expected to have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency and disclosure was not in the public interest. The Act also conferred a right of correction of personal records.

The role of administrative law provided a stark contrast between public and private employment. Public employers, by virtue of their governmental status, were subject to obligations that were far more onerous than those applying to their private sector counterparts. Through judicial review and merits review, public sector employees could seek enforcement of their rights and entitlements by means unavailable to their private sector counterparts.

Conclusion on the Australian Traditional Model

It had long been established that the substantive legal relationship between Australian public servants and the Crown was contractual, as in the private sector. It had also long been recognised that the contract was special because of its unilateral character: the terms of the contract were almost wholly supplied by legislation that was effectively under the control of the employer party to the contract,⁷⁵ and the contract could be terminated by legislation.⁷⁶ However, the PSA 1922 appeared by the late 1970s so comprehensively to prescribe the

powers of the government employer and the rights and duties of the employees that courts could even contemplate the view that the legislation constituted a code to the exclusion of common law.⁷⁷

Contract, then, provided the underlying legal framework of the relationship, but the content of the relationship derived largely from legislation and from awards and agreements made under industrial relations legislation. (The latter aspect is covered in Mark Molloy's Chapter 4 in this volume.) An additional effect of the traditional form of public service legislation was to facilitate the application of administrative law to the government's employment decisions, giving public servants distinctive rights and remedies. Legislation was thus the dominant component in the architecture of Australian public employment law, with contract operating in the background. Indeed the practice of designating a public servant as an 'officer' in the traditional public service statutes tended to obscure the role of contract.⁷⁸

Contract did have a role to play, however, even if generally low-profile. As discussed, it provided more accessible remedies than administrative law for public servants pursuing their statutory rights, at least until the late 1970s, and from the mid-1980s it provided a significant constraint on the Crown's common law power to dismiss at pleasure (though this had not been a significant issue for the APS). And, as reflected in the cases of *Hart* and *Csomore*,⁷⁹ it was working in the gaps left by the public service legislation, which could never be truly comprehensive in regulating the employment relationship. The interaction of contract and statute in particular situations was, of course, a matter of statutory interpretation.

The dominance of the statutory regulation of the traditional type forged a certain character of public service employment.⁸⁰ In the first place it created 'the structure of the APS as an entity, as distinct from an aggregation of separate employing bodies which would be the case if the common law was the only basis of employment'.⁸¹ In the second place, it imposed certain characteristics of employment uniformly across that service. These characteristics were encapsulated in the notion of a 'career service' that was independent of government control, impartial, and merit-based, and infused with the values of probity and equity.⁸² There were three key elements.

First, the service was insulated from political influence, patronage and corruption by the allocation of employment powers to a central Board/Commissioner and to a lesser extent to Department Secretaries, and by the detailed prescription of the criteria and the processes for merit-based decision-making about employment matters.

Secondly, the legislation imposed constraints on management prerogative and provided for fair and equitable treatment of public servants through uniform

rules and standardised formalities, including merits review for many employment decisions. Government was thereby a 'good' or 'model' employer.

Thirdly, the legislation conferred security of tenure on public servants by requiring that termination be only for cause and by due process, and subject to appeal.⁸³

The rationale for the 'career service' was to facilitate the carrying out of the public service's 'constitutional' function of providing policy advice to the government of the day and implementing the government's policies and programs. In the Westminster tradition, ministers were individually responsible to the parliament for the actions of their departments, but while both ministers and governments came and went, the function of the public service was to provide continuous, non-partisan, public administration. In Richard Mulgan's words, '[t]he public service always wears the colours of the government of the day'.⁸⁴ The employment conditions provided by the public service legislation — a combination of constraints on management and guaranteed entitlements and protection for employees — conferred on public servants conditions that were superior to those of their private sector counterparts, in particular security of tenure. The objective was to protect public servants against the risk of political pressure and to engender a commitment to service in the public interest, that is, service that was professional, expert, apolitical, and stable.⁸⁵

Of course, the theory of this model was not always achieved: occasionally there appeared to be political factors influencing appointment of heads of department,⁸⁶ and there were times when senior public servants did not give frank and fearless advice to the government, such as the VIP Affair, when the Prime Minister's Department helped Prime Minister Harold Holt keep a secret from Parliament and were active participants in a damaging cover-up.⁸⁷ Overall, however, there appeared to be consensus that it was appropriate and efficacious for employment arrangements to serve the constitutional function of the public service.

The Contemporary Model of Australian Public Service Employment

Reform Context

The APS underwent fundamental organisational, structural and cultural change in the late twentieth century. Initial reforms were prompted by recognition that the traditional bureaucratic model of public administration could be 'cumbersome, inefficient, impersonal, wasteful, negligent and unresponsive'⁸⁸ — recognition that prompted the establishment of the Coombs Royal Commission 1974–1976.⁸⁹ Then through the 1980s and 1990s came changing philosophies about the role of government and management as part of the all-embracing program of microeconomic reform and deregulation pursued by governments,

both Labor and Coalition. Like private enterprise, government became committed to enhancing productivity, competition and efficiency in its own sector. The story of this multi-faceted reform has been told in detail elsewhere,⁹⁰ and the following summary simply highlights the depth and breadth of formal change in the employment arena in the period to the early 1990s:

- creation of the Senior Executive Service in 1984, with management and policy responsibilities;
- conferral on the Public Service Board (1980) and then the Department of Industrial Relations (1987) of power to make determinations about terms and conditions of employment, so that changes could be made more expeditiously than the previous method of making regulations;
- creation of the Merit Protection and Review Agency ('MPRA') in 1984 to carry out independent appeals and grievance resolution independently of the government, the Public Service Board, and departmental management;
- express statement in the PSA 1922 that the merit principle applied in appointment, transfer and promotion, and incorporation of anti-discrimination provisions (1984);
- a changing role for the Public Service Board, with the shift of responsibility to Secretaries of Departments for creation, abolition and reclassification of most positions (1984) and for other powers relating to appointment, discipline and promotion (1987), and eventually replacement of the Board in 1987 by the Public Service Commission, led by a Commissioner;
- simplification and streamlining of provisions relating to discipline, redeployment and retirement procedures, promotion and higher duties, including withdrawal of appeal rights from executive employees (1987);
- introduction of performance pay for the Senior Executive Service (1990);
- tinkering with the tenure of departmental heads (1984).

In the early 1990s, there was a wave of further reviews both internal to the APS and external, culminating in the internal McLeod Report (1994), commissioned by the Labor government to recommend changes to the present legislative framework under which the APS operates, so that it will be able to operate in a flexible and responsive fashion, 'unhindered by excessive and unnecessary legislative provisions which are out of touch with modern public sector management philosophy'.⁹¹ The report made substantial recommendations for transformation and simplification of the PSA. It envisaged an Act that emphasised values and principles, leaving the details to regulations, awards, agreements and central agency instructions and directions.⁹² The Report was generally endorsed by the Government, but was overtaken by the change of government in March 1996. The Coalition embarked on its own reform path, which was not all that different from McLeod's.

The then Minister, Peter Reith, issued a Discussion Paper which contended that the existing employment framework was a major barrier to the necessary improvement of performance in the APS. He identified several problems.

The first was the complexity of the employment framework: there were statutes, associated delegated legislation, APS-wide awards plus agency-specific awards, APS-wide certified agreements and agency-specific certified agreements. In its totality, this regulation was outdated, rigid, and cumbersome: it tied management of the APS 'in red-tape', produced 'a process-driven culture' and 'an entitlement mentality', and inhibited innovation and best practice.

The second was 'unrealistic presumptions' that the APS was a uniform labour market, and that equity necessitated identical treatment of individuals. As a consequence, there had developed a preoccupation with prescribing universal and detailed employee rights, which generated 'a grievance mentality', and 'conservative and cautious management'.⁹³

The Minister's vision was the replacement of a single Commonwealth-wide public service and its strong centralised control, uniform employment conditions and permanent appointment to a lifetime career, with industrial and staffing arrangements that were 'essentially the same as those of the private sector'. The effect would be to give management greater freedom and flexibility, and to give public servants more autonomy and the benefit of a more direct relationship with their employers, rather than being managed through rules, regulations and third party relationships.⁹⁴

There was a two-fold strategy for achieving the transformation. The first was the application of the 'Workplace Relations' agenda of simplifying awards and promoting agency-specific enterprise bargaining, which is discussed in detail in this volume in Mark Molloy's Chapter 4.⁹⁵ The effect was a speedy break-up of the uniform APS labour market, with pay and conditions diversified both at agency level, through collective Certified agreements, and at individual level through Australian Workplace Agreements ('AWAs'). Some aspects of AWAs are discussed under the heading 'Implications of Reform' below. The second part of the strategy was radical revision of the APS legislation, which, as outlined in the first section of this chapter, had been the central and dominating feature of APS employment law. This development will now be examined.

Changes in the Specialist Public Service Legislation

The Public Service Bill was first presented to Parliament in June 1997, when the government lacked control of the Senate, which pressed for unacceptable amendments.⁹⁶ The government proceeded to implement a number of aspects of the Bill by administrative means — amendment of the Public Service Regulations to incorporate components of the Bill, delegation by the Public Service Commissioner of many employment powers to Agency Heads, and the

review and streamlining of voluminous instructions and determinations. Ultimately the government accepted many of the Opposition amendments to secure passage of the Bill, which became the *Public Service Act 1999* (the 'PSA 1999').

The PSA 1999 is vastly different from its predecessor. It comprises fewer than 50 pages and is written in lucid language and a simplified style. Key features, which will be elaborated below, are:

- a statement of 'the APS Values' and creation of a 'Code of Conduct';
- conferral on agency heads of all the rights, duties and powers of an employer;⁹⁷
- the imposition of some constraints on agency heads, specifically that the usual basis for engagement would be as an ongoing employee, and that the only grounds for termination of ongoing employment contracts would be those specified in the Act;
- retention of the position of Public Service Commissioner, in the role of guide, mentor and monitor;
- limitation of review rights for staff aggrieved by personnel decisions to internal agency review and a recommendatory review by the Merit Protection Commissioner, which is an independent office in the Public Service Commission;
- supplementation of the slim Act with a considerable amount of subordinate legislation:
 - specific matters such as the process of review of personnel decisions are to be dealt with by regulation and there is a standard general regulation-making power for the Executive;
 - the Public Service Commissioner is charged with issuing Directions on the APS Values, procedures to be established by agency heads for possible breaches of the Code of Conduct, and SES employment;⁹⁸
 - the Public Service Minister is charged with issuing service-wide Classification Rules, designed to facilitate the application of the merit principle and the operation of inter-agency mobility arrangements but not requiring parity of remuneration;
 - the Prime Minister is authorised to issue Directions on leadership and management.

Values and Code of Conduct

The APS Values⁹⁹ articulate much that was taken for granted over the preceding century about, not only employment and management of the workplace, but also the role that the APS plays in the service of government and the public. The Values that address the latter, 'constitutional' role,¹⁰⁰ are that the APS is apolitical, impartial and professional; is accountable for its actions to the

Government, the Parliament and the public; is responsive to government in providing frank, honest, comprehensive, accurate and timely advice and in implementing government policy and programs; has the highest ethical standards; and delivers services fairly, effectively, impartially and courteously to the public.

Other Values clearly relate to employment in the service: that employment decisions are based on merit;¹⁰¹ that equity in employment is promoted; that the workplace is discrimination-free and diversity among employees is recognised; that workplace relations value cooperation, consultation and communication; that the workplace is fair, flexible, safe and rewarding;¹⁰² that the APS focuses on achieving results and managing performance; that there is a fair system of review of employment decisions; and that the APS is a career based service to enhance the effectiveness and cohesion of Australia's democratic system of government.¹⁰³

Enforcement of the Values occurs by way of a Code of Conduct, another innovation in the PSA 1999. The Code is framed in terms of the obligations of 'an APS employee',¹⁰⁴ and breach renders an employee liable to discipline, including dismissal.

The obligations include honesty and integrity, care and diligence, compliance with laws and with lawful and reasonable directions by a superior, confidentiality of dealings with Ministers, avoidance of conflict of interest, and upholding the APS Values and the integrity and good reputation of the APS.

Heads of agencies are required to establish procedures for dealing with employee breaches of the Code, with due regard to procedural fairness and subject to the basic procedural requirements set out in the Commissioner's Directions. Sanctions for breach range from a reprimand to reduction in salary or classification to termination of employment.¹⁰⁵ Breaches by management of the Values concerning employment may also be checked by way of the reviewability of individual employment decisions, which is discussed further below.

The Values constitute a complex package, and there is potential for conflict:

While the Values complement each other, there may be tensions between them ... For example, being apolitical does not remove an employee's obligation to be responsive to the Government and to implement its policies and programs, nor does responsiveness permit partisan decisions or decisions that are not impartial. Compliance with the law always takes precedence over a public servant's obligations to achieve results and be responsive. On occasions, dilemmas may arise and public servants need to make difficult decisions.¹⁰⁶

Employer Powers of Agency Heads

Section 20(1) of the PSA 1999 confers on agency heads 'all the rights, duties and powers of an employer', with the objective of 'ensur[ing] that at law an Agency Head will have all the powers of an ordinary employer recognising that the employment laws for the APS are to be aligned as far as possible with the private sector'.¹⁰⁷ Some powers are in fact specified: to engage employees and determine the category of employment,¹⁰⁸ to assign duties,¹⁰⁹ to determine remuneration and other terms and conditions of employment subject to awards and agreements made under the WR Act 1996,¹¹⁰ to suspend employment¹¹¹ and to terminate employment.¹¹²

The government explained its purpose in specifying some of the agency head's powers: it wanted to emphasise the change of the employment framework, where such matters had previously been controlled or overseen centrally or had been subject to statutory restriction.¹¹³ In addition, the government had to accept the imposition of some restrictions on some of the powers, particularly engagement and termination, as part of the price of securing passage of the Act.

The general power conferred on Agency Heads by s 20 enables them to deal with unspecified matters such as underperformance, training, resignations, creation of new positions and grievance mechanisms, without separate statutory authority.¹¹⁴

Engagement and Termination

The government's policy was to give the agency heads unfettered powers of hiring and firing. The Bill originally put no constraints on engagement,¹¹⁵ and would have given the heads the right to terminate any contract by giving notice, whatever the duration and terms of the contract, subject only to the right of employees other than SES appointees to seek redress for unlawful or unfair dismissal under the WR Act 1996.¹¹⁶ The WR Act also prescribes minimum periods of notice. The proposed right to terminate a fixed-term contract by notice is not available at common law to 'ordinary' employers, and has echoes of the dismissal at pleasure principle.

This policy of freedom to hire and fire would undermine the expectation that employment was 'permanent' and sought to emulate the private sector's flexibility, especially increased use of fixed term contracts. It generated controversy around the question of whether the traditional 'career service' and tenure of employment were essential characteristics of the impartial, apolitical public service giving frank and fearless advice to government, as required by the APS Values.¹¹⁷ Competing views were expressed to parliamentary committees that reviewed the 1997 Bill, in the press, and in seminars and meetings about the proposed legislation. Former senior public servants voiced concerns that the loss of tenure and the consequent insecurity would tempt public servants to tell

Ministers what they wanted to hear, and would deter young staff from staying in the public sector.¹¹⁸ They highlighted the effects of perception and fear in the workplace. On the other side, the then Secretary of the Department of Prime Minister and Cabinet, Max Moore-Wilton, observed:

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.¹¹⁹

The critics, including the Opposition, prevailed. The government accepted amendments that:

- set out the categories of employment as 'ongoing', fixed term and casual, and specified ongoing employment as the usual basis for engagement;¹²⁰
- added to the APS Values the proposition that 'the APS is a career-based service';¹²¹
- specified — and thereby restricted — the grounds on which an ongoing contract could be terminated;¹²²
- required that a notice terminating an ongoing contract specify the ground or grounds for the termination;¹²³
- allowed SES employees to pursue relief under the WR Act against unfair or unlawful termination;
- allowed for regulations to limit the circumstances in which contracts may be made for a fixed term or on a casual basis, and to prescribe grounds or procedure applicable to the termination of non-ongoing contracts.¹²⁴

These amendments, while retaining essential aspects of the traditional tenure, nonetheless streamlined the termination process. The concept of tenure is further discussed in the context of tenure of agency heads (see section 'Agency Heads' below).

Review of Employment Decisions

The government's policy of radical pruning of staff appeal and review rights had two aspects.¹²⁵ First, all rights under the PSA 1922 were to be repealed and the independent Merit Protection and Review Agency was to be abolished. Agencies were to be required to resolve grievances at the workplace level, and external merits review (except for contract termination decisions, which would remain within the exclusive jurisdiction of the Australian Industrial Relations Commission and the Federal Court under the WR Act 1996) would be conducted by or through the Public Service Commissioner and would be limited to recommendatory rather than binding decisions.

The government accepted the suggestion of the Joint Committee of Public Accounts in 1997¹²⁶ that it should retain an independent body to exercise external merits review, and it substituted a Merit Protection Commissioner

(within the Public Service Commission) for the Public Service Commissioner in the scheme. Under the PSA 1999 and the *Public Service Regulations 1999* (Cth), the Merit Protection Commissioner has primary jurisdiction over review of decisions about breaches of the Code of Conduct and secondary jurisdiction (that is, second tier review, after primary review by the Agency Head) over other employment decisions other than termination of employment. The jurisdiction is recommendatory only, except in the case of promotions, where the decisions of Promotions Review Committees that are established by the Commissioner are binding on Agency Heads.

The second part of the government's policy was to reduce, if not eliminate, judicial review of APS employment decisions by ensuring that the decisions did not have the necessary 'public' character. It was envisaged that the removal from the PSA of substantive and procedural prescription for decisions such as engagement, probation, promotion, transfer, redeployment, retirement, suspension, termination, leave of absence, mobility and re-integration, together with the conferral on Agency Heads of employer powers in the broadest terms, would render the staffing decisions contractual rather than statutory in character, and therefore immune from judicial review.

There was support for this strategy in a decision of the Federal Court in 1982, *Australian National University v Burns* ('Burns').¹²⁷ Burns had sought a statement of reasons under s 13 of the ADJR Act for the University's decision to terminate his employment on the ground of permanent incapacity. The question for the Court, then, was whether the termination decision was made 'under an enactment' for the purposes of the ADJR Act. The *Australian National University Act 1946* (Cth), which established the University, expressly conferred on the Council of the University the power to appoint staff, to make statutes on a range of matters including dismissal of staff (but no such statute had been made), and to 'have the entire control and management of the affairs and concerns of the University'. At the time of Burns' appointment, the University had provided him with a document called 'Conditions of Appointment', which included a provision dealing with termination of the contract by the Council on the ground of permanent incapacity. The majority found that the contract rather than the enactment was the basis of the termination decision.¹²⁸

More recently, the High Court has given guidance on the principles to be applied. In a joint judgment in *Griffith University v Tang* ('Tang'), Gummow, Callinan and Heydon JJ held that

a statutory grant of a bare capacity to contract does not suffice to endow subsequent contracts with the character of having been made under that enactment. A legislative grant of capacity to contract to a statutory body will not, without more, be sufficient to empower that body unilaterally to affect the rights or liabilities of any other party. The power to affect

the other party's rights and obligations will be derived not from the enactment but from such agreement as has been made between the parties. A decision to enter into a contract would have no legal effect without the consent of the other party; the agreement between the parties is the origin of the rights and liabilities as between the parties ... The determination of whether a decision is 'made ... under an enactment' involves two criteria: first, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment. A decision will only be 'made ... under an enactment' if both these criteria are met.¹²⁹

Thus, if the government had secured the bare-bones version of the PSA that it desired, so that employment decisions could be attributed to the contract of employment, it is conceivable that staffing decisions would not have been reviewable under the ADJR Act, and also would lack the 'public' quality necessary for review at common law. But the government did not secure the bare-bones version, and there remains extensive legislative prescription in the PSA 1999 and subordinate legislation that constrains management substantively and procedurally in making staffing decisions. The restrictions on engagement and termination have been outlined above, and the government has conceded that public servants may still resort to 'administrative law' in respect of termination decisions.¹³⁰

There is a hard question, however, as to whether all APS employment decisions are made under an enactment for ADJR purposes, or raise issues of public law so as to attract the common law prerogative procedures. It could be argued that decisions that are regulated in some detail by the PSA 1999 and the Regulations and Directions — for example promotion, suspension and a determination that an employee has breached the APS Code of Conduct¹³¹ — do meet these tests and are therefore amenable to judicial review. Other decisions, however, are unspecified and fall within the general remit of employer powers to agency heads (s 20 PSA 1999), and could be construed as non-statutory and not 'public' in character, as in the cases of *Burns* and *Tang*. On the other hand, all employment decisions are explicitly subject to the APS Values in s 10 of the PSA 1999,¹³² including the merit principle, equity and fairness, and s 33 of the Act entitles APS employees to review of any action that relates to his or her APS employment.¹³³ In this light, all staffing decisions could be said to be sufficiently infused with a statutory flavour to be amenable to judicial review under either the ADJR Act or the common law.

As yet, there is no clear guidance from the courts. In only a handful of cases have APS employees sought judicial review of decisions made under the PSA

1999, and while all have been concerned with interlocutory matters, there has not been any dispute about the availability of judicial review. Three of the cases concerned decisions about termination of employment, a category of decision which is clearly amenable to judicial review.¹³⁴ The others dealt with suspension¹³⁵ and determination of a breach of the APS Code of Conduct,¹³⁶ matters that are regulated in some detail in the PSA (Code of Conduct breaches) or the Regulations (suspension) and are therefore analogous to termination.

The decision of the High Court in 2005 in *Jarratt v Commissioner of Police for New South Wales*,¹³⁷ while not concerned with the ADJR Act, nor the APS, is another straw in the wind. The Court showed an inclination to take an expansive view of jurisdiction to review employment decisions in the public sector. The overturned decision of the NSW Court of Appeal is briefly outlined in the section 'Dismissal at Pleasure' above.

The *Police Service Act 1990* (NSW) ('*Police Service Act*') provided that senior police officers could be removed from office 'at any time' by the Governor on the recommendation of the Police Commissioner as approved by the Minister. Deputy Commissioner Jarratt's five-year appointment had been prematurely terminated in accordance with these statutory procedures, without a reason and without an opportunity to be heard. Jarratt's case was that in the exercise of the statutory power the Crown was required to accord him natural justice on the principle formulated by the High Court in *Annetts v McCann* ('*Annetts*'), that is, 'when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment'.¹³⁸ It followed that the denial of natural justice made the termination decision invalid, thus constituting a repudiation of the contract and entitling Jarratt to substantial damages for wrongful dismissal. The Crown's case was that it had exercised the power of dismissal at pleasure, which had not been displaced by the *Police Service Act*, and therefore natural justice was not applicable.

The six members of the High Court delivered four separate judgments in favour of Jarratt's right to natural justice and damages for breach of contract. Callinan J took the most traditional approach, similar to that in the NSW Court of Appeal, focussing on the question of whether the *Police Service Act* manifested an intention to displace the common law power of dismissal at pleasure. He reached a different conclusion from the Court of Appeal, however, influenced strongly by the *Annetts* principle. The other members of the Court — Gleeson CJ, McHugh, Gummow and Hayne JJ in a joint judgment, and Heydon J — gave short shrift to the dismissal at pleasure principle, emphasising that the power exercised by the Crown in Jarratt's case was statutory¹³⁹ and that there was no basis in the legislation for excluding the *Annetts* principle. Whereas the

traditional approach was to require clear statutory language showing parliamentary intention to override the common law power to dismiss at pleasure, these judgments took the contrary approach of requiring clear statutory language to show parliamentary intention to preserve the common law power.¹⁴⁰ They were critical of the dismissal at pleasure rule, established in the nineteenth century in Britain, observing that it did not fit with ‘modern conceptions of government employment and accountability’,¹⁴¹ with ‘modern developments in the law relating to natural justice, and the approach to statutory interpretation dictated by those developments’,¹⁴² with modern authority on the reviewability of the exercise of prerogative and other non-statutory executive powers,¹⁴³ and with the different regulatory framework — that is, statute-based — for the public services in Australia.¹⁴⁴

It is likely, then, that despite the government’s commitment to removing its operation from the field of employment, judicial review remains a robust mechanism for enforcement of public servants’ employment rights and for accountability of the government employer.

Implications of Reform

The reform of the APS by the Howard government was designed to reshape the architecture of public service employment by reducing and changing the role of legislation and enhancing the role of agreements. The traditional public service legislation — and awards and collective agreements made under the industrial relations legislation — had provided universal and uniform pay and core terms and conditions of employment; decentralised agreement-making would provide flexibility and diversity. Thus the government aspired to changing the purpose and style of the public service legislation so that it would express general principle and leave detailed implementation to agencies, which would adapt the terms and conditions of employment to suit their needs. As outlined in the previous section, the government did not achieve its objective fully, as it was obliged to retain more detail in the PSA 1999 than it wanted. Despite this, agreements came to assume a dominant role in determining pay and conditions of employment from 1997. The primary vehicle for this change was not the common law contract of employment but agreements made under the WR Act 1996, both collective (certified agreements) and individual (Australian Workplace Agreements). In this volume, Mark Molloy’s Chapter 4 examines these Agreements in detail and in Chapter 5, John O’Brien and Michael O’Donnell explore some case studies.

The shift towards agreements and a principles-based PSA with decentralised agency-based implementation was a departure from the traditional methodology for serving the constitutional function of the public service. Whereas in the past the objective of maintaining a professional, expert, apolitical, continuing and

stable service was pursued *indirectly* by providing beneficial conditions of employment, notably tenure, the new approach *directly* articulated these attributes in the form of Values, which are enforceable by way of a Code of Conduct. Largely as a result of the political compromises needed to secure passage of the legislation in 1999, statutory employment conditions continued to play a role, but at a diminished level.

An important question is whether the new methodology matches the traditional approach in serving the constitutional function. By and large, judgments on the state of the APS have been positive. The combination of the new-style PSA 1999 and WR Act agreements has provided the flexibility needed for the modern economy and generated the higher degree of responsiveness sought by both Labor and non-Labor governments. There are however doubts persistently voiced about the cost paid for these gains, that is, the undermining of the non-partisan professionalism and stability that have been regarded as central to the constitutional function of the APS. Two problematic areas are the role and impact of Australian Workplace Agreements and the position of Agency Heads.

Australian Workplace Agreements

Since late 1996, when the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) came into operation, the federal government has been able to make AWAs with its employees. The nature of, and legal requirements for, AWAs are outlined in Mark Molloy's Chapter 4. AWAs are entered into by agency heads (on behalf of the Commonwealth as employer)¹⁴⁵ and individual public servants. They are potent instruments providing for pay and conditions that override awards, certified/collective agreements, and determinations made by agency heads under s 24 of the PSA 1999, as well as any inconsistent contract terms.¹⁴⁶ They do not, however, override provisions of the PSA 1999, nor other federal statutes.

The government's policy has been that agencies should provide access to AWAs for all staff and in particular for the SES.¹⁴⁷ At 30 September 2005 there were 11,481 AWAs operating in the APS and the Parliamentary Service together, covering 1,966 SES and equivalent employees and 9,515 non-SES employees.¹⁴⁸ The total APS workforce at 30 June 2005, including 2,117 SES employees, was 133,596,¹⁴⁹ and the Parliamentary Service had 1,280 employees, of which 20 were in the SES.¹⁵⁰ Thus, almost all SES employees — 92 per cent — were parties to an AWA, and 7 per cent of non-SES employees. A factor leading to an increase in the number and proportion of AWAs is the trend of departments requiring new starters to sign an AWA as a condition of engagement. Indeed, as of 30 June 2007 there were 20,195 AWAs operating in the APS and Parliamentary Service covering approximately 2,445 SES and equivalent employees and 17,750 non-SES employees.

AWAs have been a distinctive tool for breaking down the traditional standardisation of pay and conditions in the APS.¹⁵¹ Whereas certified agreements (collective agreements from 27 March 2006) operate on an agency-basis, that is, applying standardised pay and conditions across the agency, and until March 2006 have been published as a matter of course after approval in public proceedings by the Australian Industrial Relations Commission, AWAs have operated at the level of individual employees in the nature of a statutory but private contract, and have usually been kept confidential. The WR Act 1996 prohibits the official bodies (the Workplace Authority, and formerly the Employment Advocate; and, prior to March 2006, the Australian Industrial Relations Commission) from publishing the names of parties to an AWA. The legislation however prohibits the inclusion in an AWA of a provision that restricts disclosure by a party, so that either party has been free to disclose the fact and content of an AWA to whomever they choose.¹⁵²

Generally, federal government agencies have not publicised their AWAs.¹⁵³ Aggregated information about the number of Agreements and remuneration patterns is made available by the Department of Employment and Workplace Relations,¹⁵⁴ and by the Public Service Commissioner in the annual State of the Service Reports.

The law and the practice of confidentiality of AWAs are problematic in the context of the APS Values of accountability, merit-based employment, and a fair workplace.¹⁵⁵ In 2000, a cross-party report of the Senate Finance and Public Administration References Committee criticised the lack of transparency of AWAs:

AWAs are made between secretaries and public servants in their departments. The framework for establishing and approving these individual agreements involves no external scrutiny to ensure consistency with the APS Values or other ethical standards, or that the rewards to individuals are fair or within acceptable limits.¹⁵⁶

The Committee was concerned equally with equity and fairness as between APS staff, and efficient and effective use of public resources.¹⁵⁷ A particular cause for disquiet was performance pay, which is a common feature of AWAs for SES employees:

A system in which public servants are permitted to make payments of public money to each other based on subjective assessments of performance and without disclosure of the amounts paid, except in aggregate, is very difficult to reconcile with ... public accountability.¹⁵⁸

Similar considerations underlie the long-standing concern of the Public Service Commissioner that the majority of APS agencies do not have policies that set out the criteria for determining remuneration for employees:

[I]t remains apparent that there are a substantial number of agencies that should undertake the development of robust remuneration policies that make clear the links between skills, performance and pay. Moreover, these policies should be transparent and available to all employees. This is important from an accountability perspective as well as for building and maintaining employee confidence in, and support for, individually based approaches to remuneration that are consistent with merit-based employment and a fair workplace (as required by the Values).¹⁵⁹

By individualising pay and conditions, AWAs have taken the public service employment relationship out of the public into the private sphere. The development of differential pay and conditions and the secrecy of the Agreements pose risks of patronage, discrimination, and of undermining the cohesiveness of the APS. Without transparent policies and processes and comprehensive reporting, AWAs potentially compromise the core employment values of the APS and ultimately its constitutional function.

Agency Heads

The issue of tenure of employment, already raised in the discussion of engagement and termination under the PSA 1999 (section 'Engagement and Termination' above), has been of particular significance for the heads of public service departments and other bodies, who must take responsibility for managing the tension between the traditional values of the APS being apolitical, impartial and professional on the one hand and being responsive to government on the other. Over the past 20 years, the tenure of departmental heads has been whittled away, so that today they have fixed term contracts that can be terminated at any time.

Prior to 1977, heads of department were appointed to permanent positions, and were called Permanent Heads. Apart from dismissal for misconduct, the only way to remove a head was to abolish the department, and then it was necessary to deploy the person's services.¹⁶⁰ In 1977, under the Fraser government, the PSA 1922 was amended to make the first inroad into tenure,¹⁶¹ distinguishing between 'established candidates' — Permanent Heads who had previously been Permanent Heads, or were appointed by a procedure in which a committee comprising the Chairman of the Public Service Board and two other permanent heads nominated suitable names to the Prime Minister who recommended one to the Governor-General for appointment — and other appointees. A 'non-established' appointee was to be appointed for a fixed term of up to five years, and the appointment could be terminated early by the Governor-General on the recommendation of the Prime Minister, so long as the Prime Minister did not belong to the same political party as the Prime Minister who recommended the appointment.¹⁶²

This scheme was recast under the Hawke Labor government in 1984.¹⁶³ Permanent Heads were renamed Secretaries of Departments and if not already 'officers' appointed under the PSA, they were appointed under fixed term contracts for a maximum term of five years. New provisions allowed for the Governor-General to terminate the appointment of a Secretary, whether fixed term or not, on a recommendation made by the Prime Minister after receiving a report from the Chairman of the Public Service Board (from 1987, when the Board was abolished, the report was to come from the Secretary to the Department of the Prime Minister and Cabinet¹⁶⁴), and also for rotation of Secretaries between Departments. The presumption was that rotation would occur on a five-year cycle. Other new provisions addressed the relationship between Secretary and Minister. First, to emphasise 'the constitutional superiority of the Minister',¹⁶⁵ the words 'under the Minister' were added to the statement in the Act of a Secretary's responsibility for the general working and business of the Department and for advising the Minister. Secondly, the portfolio Minister was to be consulted on the appointment of a Secretary.¹⁶⁶

The final step to abandoning tenure came in 1994.¹⁶⁷ The PSA 1922 was amended to allow for all Secretaries to be appointed on a fixed term. Thus, when a fixed term expired, there would be a vacancy to fill and no obligation to find another position for the former head who, in the absence of another appointment, was retired from the service. There was, however, no bar to reappointment or appointment to another position and in the majority of cases Secretaries have been retained. One notable exception was in 1996 when, immediately after the election that brought the Howard government to power, the contracts of six Secretaries were terminated.¹⁶⁸ To encourage existing Secretaries to convert their continuing appointments to a fixed term, the government offered a pay loading via a determination of the Remuneration Tribunal, which adopted the government's recommendation of 20 per cent.¹⁶⁹ The Remuneration Tribunal also determined that compensation payable for early termination would be one third of a month's salary for the balance of the term up to a cap of 12 months' salary.¹⁷⁰

Under the PSA 1999, the appointment and termination powers were transferred from the Governor-General to the Prime Minister. The change simply reflected reality, as the Governor-General acted in accordance with advice based on the recommendation of the Prime Minister, but it was nonetheless symbolically important for articulating the very clear connection between Secretaries and the government of the day.¹⁷¹ As before, the maximum period for the fixed term appointment was five years, and a report from the Secretary of the Department of the Prime Minister and Cabinet was a prerequisite for the exercise of the powers.¹⁷²

The precarious tenure of Secretaries was revealed in 1999 when Paul Barratt contested the premature termination of his appointment as Secretary of the Department of Defence. The case was governed by the PSA 1922, but it is likely that the PSA 1999 would have yielded the same result.

Barratt first sought an injunction to restrain the imminent termination, contending that natural justice was required in the making of two decisions that were part of the process — the making of a report to the Prime Minister by the Secretary of the Department of Prime Minister and Cabinet (the ‘Cabinet Secretary’), and the Prime Minister’s making of a termination recommendation to the Governor-General. Barratt also contended that the power of termination could be exercised only for cause shown, that is for fault or incapacity of a fundamental nature that went to his fitness to continue for the remainder of the fixed term.¹⁷³

On the first issue, Hely J found for Barratt on two bases: the *Annetts* principles of natural justice (discussed above in section ‘Review of Employment Decisions’),¹⁷⁴ and the interpretive principles established by s 6 of the PSA 1922.

Section 6 of the PSA 1922 provided:

The chief object of this Act is to constitute a public service for the efficient, *equitable* and proper conduct, in accordance with sound management practices (including personnel management practices), of the public administration of the Australian Government *and this Act shall be construed accordingly*. [emphasis added by Hely J]

Construing the provisions concerning termination of a Secretary’s appointment, Hely J concluded:

That factors such as fairness and justice are relevant, as well as those of efficiency, suggests a legislative intention that the Cabinet Secretary should afford the Secretary whose position may be affected with an opportunity to be heard if his report is to be adverse to the Secretary’s position.¹⁷⁵

On the content of the required procedural fairness, Hely J held that Barratt was entitled to be told by the Cabinet Secretary the grounds or reasons proposed for the report to the Prime Minister, to be given the opportunity to respond, and to have his response form part of the report. There was no right to an oral hearing, and no entitlement to make submissions to the Prime Minister as well as the Cabinet Secretary unless the Prime Minister proposed to formulate his recommendation to the Governor-General for reasons different from those comprised in the Cabinet Secretary’s report.¹⁷⁶

On the second issue of grounds of termination, Hely J found against Barratt. There was no basis in the legislation for an interpretation that the termination power could be exercised only for cause shown.

On the day after Hely J made his decision, the Cabinet Secretary informed Barratt that he was considering making a report to the Prime Minister proposing that Barratt's appointment be terminated on the grounds that the Minister for Defence had lost trust and confidence in his ability to perform the duties of Secretary, and that this lack of trust and confidence was detrimental to the effective and efficient operation of the Department. The Cabinet Secretary cited documentary and oral evidence from the court proceedings, and a recent statement by the Minister to the Cabinet Secretary about his loss of confidence in Barratt. Barratt requested details and when no further reasons were forthcoming, he returned to the Federal Court seeking a declaration that he was entitled to a statement of the grounds on which the Minister asserted that he had no trust and confidence in Barratt.

Hely J held against Barratt on this application.¹⁷⁷ Since the ground for the decisions was that the Defence Minister, 'rightly or wrongly and for whatever reason' had lost confidence in Barratt's ability to perform his duties as Secretary,

considerations of procedural fairness do not require that [Barratt] be told why the Defence Minister has lost confidence in him, because this is not a matter which informs, or plays a part in, the decision making process of either the Cabinet Secretary or the Prime Minister.¹⁷⁸

According to Hely J, neither the Cabinet Secretary nor the Prime Minister would be required to inquire into the reasons for the Minister's loss of confidence.

Barratt appealed unsuccessfully to the Full Court of the Federal Court against both decisions.¹⁷⁹ In a joint judgment, the three members of the Court substantively upheld the various conclusions Hely J had reached, although there were different emphases. Their key findings were:

- Barratt's fixed term appointment was not terminable at pleasure;¹⁸⁰
- the PSA required that termination of a fixed term appointment be based on some ground or grounds;
- the range of grounds that could be relied on for the exercise of the power was governed by s 6 of the PSA (set out above), so that '[t]he discretion to terminate must be exercised to protect, maintain or advance the efficient, equitable and proper conduct, in accordance with sound management practices, of the public administration of the Australian government';¹⁸¹
- the range of permissible purposes of termination was not limited to considerations of management or administration, and 'political and policy considerations may be legitimate aspects of the basis upon which the power may be exercised';¹⁸²

- there was nothing in the language of the PSA to suggest that termination could occur only when there had been serious fault on the part of the Secretary;
- the court's function did not extend to determining whether the ground of a proposed termination would or was likely to achieve the object set out in s 6, and it was sufficient that the court was satisfied that the ground relied upon was capable of being related to the object, and was not extraneous to it; and
- loss of the minister's trust and confidence was plainly capable of being related to the object in s 6.

The Court conceded that a recommendation for termination made purely on subjective grounds without any factual basis being ascribed to it would be inherently capable of being capricious and arbitrary and therefore extraneous to the object in s 6. Turning to the present case, the Court found that the ground relied on was not based purely upon subjective considerations and the material provided by the Cabinet Secretary to Barratt was sufficient to demonstrate the basis for the Minister's loss of trust and confidence. The Court made clear that the Cabinet Secretary and the Prime Minister would have to consider why there was a lack of trust and confidence and whether it was appropriate to take the formal steps of a report in the case of the Cabinet Secretary and a recommendation in the case of the Prime Minister. But neither was required to consider whether the reason for loss of trust and confidence was objectively well founded.

Despite Barratt's success in the first case in winning recognition of a Secretary's right to natural justice in the face of early termination of appointment, the government's response, sanctioned by the Federal Court, revealed that 'all that was legally needed for the [Secretary's] contract to be ended was for a minister, with or without a justifiable reason, to declare a lack of trust in their departmental secretary'.¹⁸³ Perhaps Weller overstates the case, as the Federal Court made clear that both the Cabinet Secretary and the Prime Minister must turn their minds to the reasons for the lack of confidence. Despite this, it is clear that the government can easily establish circumstances in which the natural justice to which a Secretary is entitled has very limited content and impact.

The Barratt episode crystallised questions about the relationship between tenure and the traditional public service qualities, in particular non-partisanship, responsiveness, frankness and fearlessness in giving advice, and the expertise and stability engendered by the operation of 'a career service'. Given the fixed term contracts, sometimes shorter than five years, with no guarantee of reappointment, and the ease of early termination at small cost and negligible accountability, would the Secretaries' attitude to advising Ministers be affected? In order to satisfy Ministers of their responsiveness, would Secretaries give precedence to short-term aspects over longer-term considerations? Would they

pay more attention to political implications than other perspectives? Would public servants be willing to serve as Secretaries? Would able staff seek out the higher rewards of private sector employment with the consequence that their special skills would be lost to the public sector?

There are inherent difficulties in addressing these questions: Secretaries are unlikely to admit to experiencing problems, and staff are unlikely to comment on their interest in, or prospects of, appointment as Secretary. Patrick Weller and John Wanna have, however, endeavoured to gather empirical evidence by interviewing former and serving Secretaries.¹⁸⁴

Secretaries interviewed in 1997 denied that loss of tenure had deterred them from giving frank and fearless advice to ministers, which they regarded as a matter of professional duty and integrity. They did, however, acknowledge some changes in the relationship: some ministers were more distrustful of anyone they inherited, particularly from a previous government, and wanted 'their' person for the job; while the substance of advice might not change, the style of presentation may, possibly emphasising the benefits for the minister; there was evidence of the erosion of a long-term view among Secretaries, with a new emphasis on short-term objectives, described as the 'parking meter view'; they feared that the greater vulnerability at the top meant that was different advice coming from within the department, based on the ethos that 'this is what they want to hear'.¹⁸⁵ Secretaries also reported that the lack of tenure at Secretary level was discouraging potential future appointees. While not the only factor involved in the loss of talented officers to the private sector, it was a symbol of the difficulties in keeping good people in the APS.¹⁸⁶ After more interviews, Weller wrote in 2001 that this range of concerns about the effect of insecurity of tenure persisted.¹⁸⁷ As Weller and Wanna observed, while the Secretaries' views were difficult to test, the frequency of such comments indicated that there were issues that needed to be taken seriously.

The legal framework for, and experience of, appointment and removal of agency heads has prompted some concerns about politicisation and the risk of compromising fundamental values of impartiality and non-partisanship. The concept of politicisation is not straightforward. The narrowest definition is that it involves appointment/removal on the basis of party political affiliation or association.¹⁸⁸ The few known examples are scattered over the last 30-odd years. Of more impact has been the replacement of Secretaries upon a change of government, as happened under the Whitlam administration and at the beginning of the Howard government, as an exercise in signalling a change and exerting control. Mulgan describes such appointments as politicised in the sense that the underlying assumption is that the government has the right to appoint their own people, undermining the concept of a politically neutral public service that is 'capable of professionally serving alternative governments' (and ministers).¹⁸⁹

The principal risk, according to Mulgan, is not that advice will become less frank and fearless, but that professional experience and continuity, and thus efficiency and effectiveness, will be lost. Also there may be a demoralising effect on the ranks below secretary, and disincentives for able people to pursue careers in the public service. Mulgan also draws under the politicisation umbrella the appointment of Secretaries on the basis of their commitment to a particular policy or managerial direction favoured by the government.¹⁹⁰

It is difficult to test the degree of politicisation of the public service, given these multiple layers of meaning. Clearly the APS has not moved very far along the spectrum towards the US model, where large numbers of senior civil servants are replaced when there is a new presidential administration. Despite this, by a series of changes and innovations over the past few decades, government has increased its capacity for, and its actual, control over the bureaucracy. The arrangements for appointment and termination of Secretaries are the most overt manifestation. Other practices include recruitment from outside the public service at all levels; the growth in numbers and influence of ministerial advisers as an alternative source of advice to ministers and as a filter for departmental advice; the creation of the SES as a more flexible and responsive managerial echelon in which positions are advertised within and outside the service, staff are expected to be mobile between departments, and promotion decisions are not reviewable; the utilisation of fixed term contracts and consultancies; the spread of confidential AWAs; the recognition of the Secretary of the Department of the Prime Minister and Cabinet rather than the independent Public Service Commissioner as Head of the Public Service.

Another recent development is the growth in the amount of interaction between Ministers and their staff and APS staff. Notably this contact extends well beyond senior staff levels. For example, in 2004–5 one in five APS employees had direct contact with Ministers or their advisers — 73 per cent of SES employees, 35 per cent of executive level employees and 15 per cent of APS 1–6 employees. One third of these employees believed they had faced a challenge in balancing the Values of being apolitical, impartial and professional, responsive to government and openly accountable, for example, being asked to change advice to reflect the political position of the Minister. Ten per cent had low levels of confidence that they could balance the values.¹⁹¹

The combined effect of these developments is to generate unease from time to time about how the balance is struck between the traditional ‘constitutional’ values of impartiality and non-partisanship on one side, and the greater emphasis on responsiveness to government on the other side. There are concerns outside and inside the APS that the Service is politicised and compliant in the sense that:

public servants provide to government only the information and advice that it wishes to hear, either because political advisers let through only

that which they believe their Ministers want or because it is instructed to do so or because it is implicitly understood — if not explicitly stated — that certain facts or views will not be welcomed.¹⁹²

In depicting this image of the Service in 2004, the Secretary of the Department of the Prime Minister and Cabinet was concerned to correct it, but there is no doubt that such views are tenacious. In 2003, a Senate Committee documented evidence from witnesses, including former senior public servants, and published commentaries about the ‘erosion of public service advice’.¹⁹³ In a number of speeches in 2005, the Public Service Commissioner flagged politicisation as an issue to be addressed in the APS,¹⁹⁴ and describing the scope of a review of the PSA 1999, said:

The areas that we will look at in particular ... are around whether or not the legislation needs an overriding statement about what binds the Australian Public Service together. Do we see ourselves as working in the public interest or the national interest; how do we fold in our responsibilities to the Government of the day — are the sorts of questions we’re asking.¹⁹⁵

Conclusion

This chapter has canvassed the changing shape of APS employment law over the past 40-odd years, identifying the components and their interaction, and exploring their impact on the constitutional function of the Service.

For all the reform activity, there are marked continuities over the period: the substantive legal relationship between APS employees and the Crown is contractual; the content of the contract is largely supplied by the PSA and processes under the industrial/workplace relations legislation; the PSA remains a significant instrument for regulating APS employment, including engagement and termination; and administrative law continues to apply to employment decisions.

Yet significant changes have occurred. Whereas 30 years ago industrial awards and agreements operated Service-wide, agreements have almost completely displaced awards in the APS, and certified/collective agreements operate at agency level and AWAs operate at individual employee level. The specialist public service legislation has changed in substance and style, promulgating general principles rather than comprehensive prescription, and agencies fashion the detail to suit their needs. Substantive changes include loss of tenure for agency heads, who are appointed to fixed term contracts for up to five years and whose appointment may be terminated at any time; the contraction of employees’ rights of review and appeal, with the withdrawal of promotion appeal rights from middle and senior management, the abolition of the independent review body and substitution of a body with recommendatory powers only;

and the removal of specialised procedures for discipline and dismissal matters. Thus, management prerogatives have been expanded and employee entitlements and protections have been reduced or modified.

A conspicuous aspect of the changes is the trend of devolution, that is, the abandonment of central structures, processes and control and transfer of responsibility to agency-level. Thus not only has the scope of industrial awards and agreements contracted over time to agency level, but the Public Service Board/Commission has lost its role as a central personnel administration, and agency heads exercise the powers of employer. This development parallels the displacement in general industrial/workplace relations law of national and industry regulation in favour of enterprise regulation. The transformation in the *modus operandi* of the APS has given agencies flexibility and choice, which are key virtues according to contemporary management theory and practice. The APS has not, however, been broken up. There is still a commitment to maintaining the Service as an entity, primarily through the shared Values that are articulated in the PSA 1999. As discussed in the section 'Values and Code of Conduct', these values encapsulate the characteristics considered necessary for fulfilling the Service's constitutional function as well as expressing in general terms the 'good' employer role of the Crown. One of the primary functions of the Australian Public Service Commission is to promote and 'embed' the Values by education and auditing.¹⁹⁶

A major theme in this chapter has been the examination of the fit between the employment framework and the constitutional function of the Service. It has been argued that early in the twenty-first century, the fit does not appear as good as it was 30 years ago. Most of the contemporary concerns relate to the so-called phenomenon of politicisation, that is, an imbalance between being responsive to government and giving 'frank and fearless', impartial and professional advice. The problem can be manifest in various ways: telling the government what it wants to hear, withholding advice or information that the government does not want to hear, giving cautious or risk-averse advice, 'bend[ing] the rules around ... perceptions of what the Government wants',¹⁹⁷ complying with instructions given by ministerial staff about the content of advice.¹⁹⁸ The incidence of these practices may be unmeasurable, and to the extent that they exist, they cannot be simplistically attributed to particular aspects of the employment framework. Rather, over-zealous responsiveness is likely to be a matter of culture that has evolved over time.

Nonetheless, there may be improvements to the employment framework that could signal the reassertion of the independence and impartiality of the public service without compromising the responsiveness that governments of all political hues want. In relation to appointment and termination of Secretaries, a Senate Committee recommended in 2003 that greater tenure be conferred on

Secretaries.¹⁹⁹ It is unlikely that the proposal would win political favour. There is more hope for an arrangement in which a panel or committee, or at least the Public Service Commissioner, is involved in making recommendations about appointment and termination.²⁰⁰ In relation to the interaction of APS staff and the Minister and staff, formal guidelines have recently been published by the Australian Public Service Commission with a view to setting uniform standards and clarifying expectations.²⁰¹ This could well be complemented by a Code of Conduct for Ministerial advisers.²⁰² In relation to agency employment decisions, the merit principle would be served by the restoration of an independent review body with determinative powers. In relation to AWAs, much greater transparency and more extensive reporting would allay concerns about favouritism and discrimination. In relation to performance pay, clear policies on criteria and process would enhance fairness and equity as well as accountability. In relation to leadership, recognition of the Public Service Commissioner as the head of the APS, rather than the Secretary of the Department of the Prime Minister and Cabinet, would signify the independence of the Service.²⁰³

Prime Minister Howard set an admirable goal in 1998:

No government 'owns' the public service. It must remain a national asset that services the national interest, adding value to the directions set by the government of the day. The responsibility of any government must be to pass on to its successors a public service which is better able to meet the challenges of its time than the one it inherited.²⁰⁴

ENDNOTES

¹ Commonwealth of Australia, Royal Commission on Australian Government Administration, *Report* (1976).

² See ch 10, this volume [Ewing]. See also Graham Smith, *Public Employment Law* (1987) ch 3; Greg McCarry, *Aspects of Public Sector Employment Law* (1988) ch 2; Sandra Fredman and Gillian Morris, *The State as Employer* (1989) ch 3. The alternative analyses treated the relationship as one of status or office holding. In contrast to civil servants, other public sector employees, such as teachers and health workers, have been regarded as having contracts.

³ *Browne v R* (1886) 12 VLR 397, 412 (Williams and Holroyd JJ). Paul Finn, *Law and Government in Colonial Australia* (1987) 107 explains that in Victoria public servants could not enforce their statutory rights (see below) against the Crown on account of Crown immunity, but could make claims in contract, and that the colonial courts yielded to 'this necessity' of treating the public service legislation 'as providing the foundation for a contract of service with the Crown — a contract which embodied the statutory rights'. For other colonial cases affirming the contractual relationship, see Finn 66.

⁴ Ann Pickering, *Contract or Statutory Code? Private and Public Law Principles in Australian Public Service Employment* (LLB Honours Thesis, The Australian National University, 1984) 85.

⁵ *Kodeeswaran v Attorney-General of Ceylon* (170) AC 1111.

⁶ See ch 10 this volume [Ewing].

⁷ Trevor C Hartley and John Griffith, *Government and Law: An Introduction to the Working of the Constitution in Britain* (2nd ed, 1981) 86.

⁸ Chapter 10 this volume [Ewing]. See also Fredman and Morris, above n 2, 1.

⁹ Other cases were *Williamson v Commonwealth* (1907) 5 CLR 174 (Higgins J) and *Carey v Commonwealth* (1921) 30 CLR 132 (Higgins J).

¹⁰ *Lucy v Commonwealth* (1923) 33 CLR 229. Lucy was transferred from the South Australian public service, where his employment was subject to the state public service Act, to the Commonwealth service after Federation. Thereafter his employment was governed by the *Commonwealth Public Service Act 1902*. A provision of that Act, as well as s 84 of the *Commonwealth Constitution*, preserved all his existing and accruing rights, which would include the right to remain in the service during his life or until dismissal or removal for some cause specified in the South Australian Act. Lucy's service was terminated under a provision of the Commonwealth Act on the ground of age, which was not a basis for removal under the South Australian legislation. The case was argued on the basis that the removal was invalid, and the issues revolved around remedy, specifically, whether Lucy was entitled to damages for wrongful dismissal, ie wrongful termination of the contract of employment.

¹¹ (1923) 33 CLR 229, 237.

¹² Finn, above n 3, 15, 65.

¹³ 'As a matter of law, each department could employ its own staff on its own terms and conditions, relying for its authority to do so on the executive power of the Commonwealth in the Constitution': Public Service Act Review Group, *Report* (December 1994) (known as the McLeod Report), para 2.4. The same reasoning applies for the states.

¹⁴ Australian Public Service Commission, *The Australian Experience of Public Sector Reform* (2003) 35. See ch 3, this volume, section on 'The Central Public Service Management Agency' [Nethercote].

¹⁵ *Director-General of Education v Suttlng* (1987) 162 CLR 427, 437–8.

¹⁶ *Chapman v Commissioner of Australian Federal Police* (1984) 50 ACTR 23. The person who purported to appoint Chapman was not authorised by the statute to do so. See also the later case of *Re Australian Industrial Relations Commission and Arends; ex parte Commonwealth of Australia* (2005) 145 FCR 277. The issue was whether a worker employed by the Department of Defence was 'a person in employment ... by authority of a law of the Commonwealth', which was the jurisdictional basis on which he could pursue relief against unfair dismissal under the *Workplace Relations Act 1996* ('WR Act 1996'). The Department conceded that the contract with the worker was an employment contract at common law, ie a contract of service, notwithstanding an express term describing him as an independent contractor, ie a contract for services. The relevant 'law of the Commonwealth' under which the worker was engaged was an instrument made pursuant to the *Defence Act 1903* (Cth) that provided only for contracts for services, and the Federal Court held that there was therefore no law of the Commonwealth that authorised the employment of the worker and he had no basis for an action under the WR Act 1996.

¹⁷ *Keely v State of Victoria* [1964] VR 244. The employee was properly appointed under the statute, and subsequently carried out higher duties at the direction of a superior who had no authority under the

legislation to reclassify her position or approve payment of a higher salary. Her claim based in *quantum meruit* for services provided also failed because the superior officer did not have authority to request that the services be provided.

¹⁸ Other cases: *Fowell v Iannou* (1982) 45 ALR 491; *Bayley v Osborne* (1984) 10 IR 5. Another case, often quoted in this context, *Australian Broadcasting Commission v Industrial Court of South Australia* (1977) 138 CLR 399, was about inconsistency between a Commonwealth statute and a state statute.

¹⁹ *Bennett v Commonwealth* [1980] 1 NSWLR 581 ('*Bennett*'). One of the authorities on which Rogers J relied was *Gould v Stuart* [1896] AC 575, discussed below in section 'Dismissal at Pleasure'.

²⁰ *Csomore v Public Service Board (NSW)* (1986) 17 IR 275 ('*Csomore*').

²¹ His Honour also held that on the facts there was no suspension.

²² (1982) 43 ALR 165.

²³ B Beinart, 'The Legal Relationship between Government and its Employees' [1955] *Acta Juridica, Butterworths South African Law Review* 21, 24–5. Another principle applied from the military to the civil context was that Crown servants had no legally enforceable rights against the Crown — see section 'Contract' above.

²⁴ The traditional position was that the courts had jurisdiction to determine the existence of a prerogative power, ie whether or not the Crown was given the power by the common law, and its scope and extent, but the courts had no power to review or control the actual exercise of the power: *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508. Recent developments are noted in section 'Review of Employment Decisions' below.

²⁵ In *Ryder v Foley* (1906) 4 CLR 422 ('*Ryder*'), 435–6, Griffith CJ said 'it is an implied term in the engagement of every person in the Public Service, that he holds office during pleasure, unless the contrary appears by Statute'. In *Fletcher v Nott* (1938) 60 CLR 55 ('*Fletcher*'), 68, Latham CJ said 'the contract between the Crown and a servant of the Crown is unilateral. The servant is bound to serve, and to continue to serve for the term for which he has undertaken to serve, but the Crown is not bound to continue to employ him and may determine the employment at any moment without cause, that is, simply at will. While the employment continues, the relations are contractual in character ... But there can be a contract which is determinable at will ...'.

²⁶ *Dunn v R* (1896) 1 QB 116, 120–1.

²⁷ Such provisions are not uncommon in state legislation.

²⁸ *Gould v Stuart* [1896] AC 575. The court described the dismissal power as 'a condition' that was 'imported into the contract' — [1896] AC 575, 577.

²⁹ [1896] AC 575, 578–9.

³⁰ *Ryder v Foley* (1906) 4 CLR 422; *Fletcher v Nott* (1938) 60 CLR 55; *Kaye v Attorney-General for Tasmania* (1956) 94 CLR 193 ('*Kaye*').

³¹ *Ryder v Foley* (1906) 4 CLR 422; *Kaye v Attorney-General for Tasmania* (1956) 94 CLR 193.

³² *Kaye v Attorney-General for Tasmania* (1956) 94 CLR 193.

³³ *Fletcher v Nott* (1938) 60 CLR 55. Other important factors were that the procedural provisions were in subordinate legislation rather than in the primary statute, and were in the nature of administrative machinery that was not mandatory.

³⁴ (2003) 59 NSWLR 87, 109–10.

³⁵ Section 51 of the *Police Service Act 1990* (NSW).

³⁶ (2003) 59 NSWLR 87, 112.

³⁷ (1981) 55 FLR 34, 39. Also by *obiter dicta* in *Bennett v Commonwealth* [1980] 1 NSWLR 581, 585 (Rogers J).

³⁸ *Dunn v R* [1896] 1 QB 116.

³⁹ The issue was conceded in *Carey v Commonwealth* (1921) 30 CLR 132.

⁴⁰ (1982) 64 FLR 89, 96.

⁴¹ *Suttlng v Director-General of Education* (1985) 3 NSWLR 427, 448 (McHugh JA with whom Glass JA concurred, Kirby P dissenting).

⁴² *Ibid* 447.

⁴³ *Ibid* 446.

⁴⁴ *Director-General of Education v Suttlng* (1987) 162 CLR 427.

⁴⁵ One other finding of note by the High Court was that this case did not involve an exercise of the power to dismiss at pleasure as the power does not extend to reducing the position and salary of a person whose services are retained: (1987) 162 CLR 427, 442 (Brennan J).

⁴⁶ [1999] ACTSC 79 (Unreported, Higgins J, 22 July 1999).

⁴⁷ [2002] ACTSC 43 (Unreported, Miles CJ, 24 May 2002).

⁴⁸ Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) 14 (emphasis added).

⁴⁹ Ibid 85.

⁵⁰ This list is taken from the *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5, which codifies the common law grounds.

⁵¹ Other areas of operation are non-statutory government powers (such as the prerogatives, discussed above at section 'Dismissal at Pleasure' and later in section 'Review of Employment Decisions') and some decisions of some private bodies. See Aronson, Dyer and Groves, above n 48, ch 3.

⁵² Finn, above n 3, 107 and ch 6.

⁵³ Broadly, the remedy is to treat the defective decision as a nullity or to compel the making of a decision. The equitable remedies of injunction and declaration are also available. Damages are not available.

⁵⁴ Finn, above n 3, 107 cites three 19th-century cases in Victoria, and Pickering, above n 4, 86 cites another 19th century case and one 20th century case. The High Court case of *Kaye*, discussed above in section 'Dismissal at Pleasure', was an administrative law action in which a dismissed police officer claimed a declaration that the dismissal was ineffective. On the inaccessibility of judicial review generally, see Harry Whitmore, 'Law and the Administration: Justice or Expediency?' in Richard Spann and Geoffrey Curnow (eds), *Public Policy and Administration: A Reader* (1975) 275, 275–7.

⁵⁵ Finn, above n 3, 66 (nn 46, 52) and 103 (n 87) cites numerous pre-Federation contract-based claims for wrongful dismissal, and two superannuation cases. The High Court cases of *Lucy*, *Ryder* and *Fletcher* — above section 'Dismissal at Pleasure' — were also framed as contract actions. Pickering, above n 4, 86 adds some Victorian and other High Court cases. See, generally, M Pittard and R Naughton, *Australian Labour Law: Cases and Materials*, (4th ed, 2003), ch 5; B Creighton and A Stewart, *Labour Law*, (4th ed 2005), 443–450; R Owens and J Riley, *The Law of Work*, (2007) 262–268.

⁵⁶ Also on the Federal Magistrates Court since 2000.

⁵⁷ Section 5 and definitions in s 3(1). There were also express exemptions in the Act: decisions taken by the Governor-General, and decisions listed in sch 1 of the Act, which include defence force disciplinary decisions and decisions made under the WR Act 1996.

⁵⁸ Review of prerogative powers and contractual decisions is further discussed below in section 'Review of Employment Decisions'.

⁵⁹ The to-ing and fro-ing on these exemptions is set out by Neil Williams, 'The ADJR Act and Personnel Management' (1991) 20 *Federal Law Review* 158, 159. There is no common law right to reasons for an administrative decision: *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 657. See, generally, Marilyn Pittard, 'Reasons for Administrative Decisions: Legal Framework and Reform' in Matthew Groves and HP Lee (eds), *Administrative Law - Fundamentals, Principle and Doctrines*, (Cambridge University Press, 2007), ch 11.

⁶⁰ Williams, above n 59, 159. Included in the number were some common law cases, eg *Dixon v Commonwealth* (1981) 55 FLR 34 and *Ansell v Wells* (1982) 63 FLR 127. Some had been commenced before the enactment of the ADJR Act, or were taking advantage of provisions in the *Judiciary Act 1903* (Cth) which avoided the jurisdictional limitations of the ADJR Act, such as the requirement that the decision be made under an enactment and exemptions for decisions under the WR Act 1996 and the *Defence Force Discipline Act 1982* (Cth). Pickering, above n 4, Appendix A, 6, cites a report of the Administrative Review Council that in 1982 there were 19 applications made under the ADJR Act against the Public Service Board alone, and that there would have been more applications made against individual departments.

⁶¹ Eg *Hamblin v Duffy* (No 2) (1981) 55 FLR 18 (breach of natural justice, and decision taken by an incompletely constituted body); *Bewley v Cruickshanks* (1984) 1 FCR 534 (taking into account an irrelevant consideration).

⁶² Eg *Perkins v Cuthill* (No 2) (1981) 3 ALN N88 (an irrelevant consideration taken into account, unreasonableness, breach of natural justice, absence of evidence, excess of jurisdiction).

⁶³ Eg *Cole v Cunningham* (1983) 81 FLR 158 (breach of natural justice).

⁶⁴ Eg *Dixon v Commonwealth* (1981) 55 FLR 34 (breach of natural justice); *Schmohl v Commonwealth of Australia* (1983) 74 FLR 474 (breach of natural justice).

⁶⁵ Eg *Dixon v Commonwealth* (1981) 55 FLR 34 (breach of natural justice).

⁶⁶ Eg the *Civil Service Act 1862* (Vic) provided for a right of appeal in regard to classification and dismissal.

⁶⁷ Previous arrangements for dealing with grievances were ad hoc, and were criticised by the Coombs Royal Commission in 1976: above n 1, ch 8.

⁶⁸ *Commonwealth Employees (Redeployment and Retirement) Act 1979*.

⁶⁹ *Administrative Appeals Tribunal Act 1975* (Cth).

⁷⁰ *Superannuation Act 1976* (Cth). Under the *Superannuation Act 1922*, the appellate body was the High Court constituted by a single justice.

⁷¹ *Commonwealth Functions (Statutes Review) Act 1981* (Cth). The AAT took over from the Commonwealth Employees Compensation Tribunals, which were created in 1971.

⁷² *Freedom of Information Act 1982* (Cth). See, generally, Moira Paterson, *Freedom of Information and Privacy: Government and Information Access in the Modern State* (2005).

⁷³ *Ombudsman Act 1976* (Cth) ss 5(1), 15, 16.

⁷⁴ *Ombudsman Act 1976* (Cth) s 5(2)(d). In contrast, s 19C(3) of the Act gives the Defence Force Ombudsman power to investigate any matter 'that is related to the service of a member of the Defence Force'.

⁷⁵ Another reason for the distinctiveness of the public service contract was the Crown's common law power of dismissal at pleasure, which had more limited practical impact than the role of legislation.

⁷⁶ For example *Scott v Commonwealth* (1982) 64 FLR 89, discussed above in section 'Dismissal at Pleasure'.

⁷⁷ Commentators of the time highlighted this issue: Smith, above n 2, 189–90; McCarry, above n 2, 41; Finn, above n 3, 65; Pickering, above n 4, ch 8.

⁷⁸ The concepts of 'office' and 'officer' derive from the British background. For elaboration, see Finn, above n 3, ch 2; McCarry, above n 2, 11–22.

⁷⁹ See above section 'Contract'.

⁸⁰ This analysis was made in Phillipa Weeks, 'Reconstituting the Employment Relationship in the Australian Public Service' in Stephen Deery and Richard Mitchell (eds), *Employment Relations — Individualisation and Union Exclusion: An International Study* (1999) 69–87.

⁸¹ See above n 13, para 2.10.

⁸² For elaboration of the concept of 'career service', see Coombs Royal Commission, above n 1, para 8.1.12; McLeod Report, above n 13, para 1.20; Joint Committee of Public Accounts, Parliament of Australia, Report 323. *Managing People in the Australian Public Service — Dilemmas for Devolution and Diversity* (1993) paras 3.2–3.6; Gerald Caiden, *Career Service* (1965) 2–4. Patrick Weller, a political scientist, in *Australia's Mandarins: The Frank and the Fearless?* (2001) 50, identifies the core ideas of a career service as 'a single career, a commitment to public service, and the belief that officials would rise to the top and retire, or perhaps take another government position'.

⁸³ Greg McCarry, 'The Demise of Tenure in Public Sector Employment' in Ron McCallum, Greg McCarry and Paul Ronfeldt (eds), *Employment Security* (1994) 138 shows that, notwithstanding all the safeguards, termination was still possible but that there was an 'implicit contract' that the government employer would use the powers only in extreme circumstances (eg redundancy and abolition of agencies), or when there was demonstrated cause for dismissal on account of misconduct or incompetence. See Marilyn Pittard, 'The Age of Reason: Principles of Unfair Dismissal in Australia', chapter 2 in the same volume (McCallum, McCarry & Ronfeldt (eds), *Employment Security*, 1994, p.16) for common law and later unfair dismissal protection of private sector employees.

⁸⁴ Richard Mulgan, 'Public Servants and the Public Interest' (Australian Senate Occasional Public Lecture, Canberra, 11 August 2000) <http://www.apf.gov.au/Senate/pubs/occa_lect/transcripts/mulgan.htm> at 4 May 2006.

⁸⁵ An extreme version of this reasoning sees public servants being independent guardians of the public interest, ie independent of government. See Mulgan, above n 84; Michael Keating, 'The Public Service: Independence, Responsibility and Responsiveness' (1999) 58(1) *Australian Journal of Public Administration* 39; Peter Shergold, Secretary of the Department of the Prime Minister and Cabinet, 'Pride in Public Service' (Speech delivered to the National Press Club, Canberra, 15 February 2006) <<http://www.pmc.gov.au/speeches>> at 4 May 2006. This debate cannot be pursued here.

⁸⁶ Weller, above n 82, 23, 26.

⁸⁷ Ian Hancock, 'The VIP Affair 1966–67: The Causes, Course and Consequences of a Ministerial and Public Service Cover-Up' (2003) 18(2) *Australasian Parliamentary Review* (whole issue).

⁸⁸ Linda Colley, 'The Changing Face of Public Sector Employment' (2001) 60(1) *Australian Journal of Public Administration* 9, 10.

⁸⁹ See above n 1.

⁹⁰ Australian Public Service Commission, *The Australian Experience*, above n 14; Australian Public Service Commission, *A History in Three Acts* (2004) <<http://www.apsc.gov.au/publications/index.html>> at 4 May 2006.

⁹¹ See above n 13, vii.

⁹² Proposals of this kind had first surfaced in 1990 within the Public Service Commission: Australian Public Service Commission, *A History in Three Acts*, above n 90, 119.

⁹³ Hon Peter Reith, *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, November 1996* (1996) v–vi, 5–6, 15 <<http://www.apsc.gov.au/publications96/apsreformdiscussionpaper.htm>> at 4 May 2006.

⁹⁴ *Ibid* vii, viii, 5, 14.

⁹⁵ See also Weeks, above n 80.

⁹⁶ The Bill was again debated to an impasse in March–April 1998.

⁹⁷ As the Explanatory Memorandum, Public Service Bill 1999 (Cth) para 4.1 points out, the agency heads are not named as employers because constitutionally the ultimate employer is the Crown in right of the Commonwealth.

⁹⁸ The Directions are intended to specify minimum standards rather than to prescribe detailed requirements: Australian Public Service Commission, *A History in Three Acts*, above n 90, 152–3.

⁹⁹ Section 10(1).

¹⁰⁰ Described by the government in the Explanatory Memorandum, Public Service Bill 1999 (Cth) para 3.4 as 'the philosophical underpinning for the APS'.

¹⁰¹ There is an extended definition of 'merit' in s 10(2); patronage and favouritism in employment decisions are expressly prohibited in s 17; and s 19 precludes Ministers from involvement in individual employment decisions.

¹⁰² The Supplementary Explanatory Memorandum, Public Service Bill 1999 (Cth) paras 3.3.1–3.3.2 added a gloss of 'principles' including that the remuneration and conditions of employment will be fair and flexible, and that APS provides its employees with fair and flexible treatment, free of arbitrary or capricious administrative acts or decisions.

¹⁰³ The Values relating to equity, review of decisions, and career service were added to the 1999 Bill in order to secure Opposition support in the Senate. The Public Service Commissioner's Directions elaborate the minimum content of all the Values in terms of the separate obligations of agency heads and employees in relation to each Value, though in very general terms.

¹⁰⁴ Section 13, and s 14(1), extends the Code to heads of agencies.

¹⁰⁵ Section 15.

¹⁰⁶ Australian Public Service Commission, *APS Values and Code of Conduct in Practice: A Guide to Official Conduct for APS Employees and Agency Heads* (revised ed, 2005) ch 1 <<http://www.apsc.gov.au/values/conductguidelines.htm>> at 4 May 2006.

¹⁰⁷ Explanatory Memorandum, Public Service Bill 1999 (Cth) para 4.2.

¹⁰⁸ Section 22.

¹⁰⁹ Section 25.

¹¹⁰ Section 24. This power is therefore designed to cover matters not dealt with in awards and agreements: Explanatory Memorandum, Public Service Bill 1999 (Cth) para 4.11.4. The Department of Employment and Workplace Relations advised agencies that the power should be treated as a 'reserve power' and used 'sparingly', in the main as an interim arrangement where a new agency is set up or where genuinely unforeseen circumstances arise during the life of an agreement: *APS Advice 09 of 2000* <<http://www.workplace.gov.au/workplace/Organisation/Government/Federal/WRAdvices>> at 4 May 2006; Department of Employment and Workplace Relations, *Supporting Guidance for the Workplace Relations Policy Parameters for Agreement Making in the Australian Public Service* (April 2006) 31–2

<<http://www.workplace.gov.au/workplace/Organisation/Government/Federal/AgreementMaking>> at 4 May 2006.

¹¹¹ Section 28 and reg 3.10.

¹¹² Section 29.

¹¹³ Explanatory Memorandum, Public Service Bill 1999 (Cth) paras 4.11.3, 4.12.

¹¹⁴ Explanatory Memorandum, Public Service Bill 1999 (Cth) para 4.3 and Attachment A.

¹¹⁵ Clause 22, Public Service Bills 1997 and 1999.

¹¹⁶ Clause 29(1), Public Service Bills 1997 and 1999. The PSA 1922 allowed for dismissal of officers only for cause and it specified exclusive grounds and mandatory procedure, and there was a right of appeal to the MPRA. These protections were abandoned by agreement between the government and the public sector unions in 1995. Although the provisions remained in the statute, they were superseded by a certified agreement made under the then *Industrial Relations Act 1988* (Cth) that limited review of termination to the grounds and procedures under that Act. The appeal of the IRA scheme to the unions at the time was that the remedy of compensation was available as an alternative to reinstatement, whereas the MPRA could not order payment of compensation.

¹¹⁷ The phrase ‘frank and fearless’ is a popular usage. The APS Values in s 10 of the PSA 1999 refer to advice that is ‘frank, honest, comprehensive, accurate and timely’.

¹¹⁸ Submissions and evidence by Sir Lennox Hewitt (former head of the Department of Prime Minister), Denis Ives (former Public Service Commissioner), and Derek Volker (former head of several Commonwealth departments) to the Joint Committee of Public Accounts, Parliament of Australia, *Report 353: An Advisory Report on the Public Service Bill 1997 and the Public Employment (Consequential and Transitional) Amendment Bill 1997* (1997).

¹¹⁹ Evidence to Joint Committee of Public Accounts, Commonwealth of Australia, Canberra, 28 August 1997, 220 (Max Moore-Wilton).

¹²⁰ Section 22(2)–(3).

¹²¹ Section 10(1)(n).

¹²² Section 29(3).

¹²³ Section 29(2).

¹²⁴ Sections 22(4)–(5), 29(4). Regulations have been made on the circumstances and time limits and extension of fixed term contracts, and on procedure for termination of non-ongoing contracts: *Public Service Regulations 1999* (Cth).

¹²⁵ The policy was most fully articulated in a joint publication of the Public Service and Merit Protection Commission and the Department of Relations: *The Public Service Act 1997: Accountability in a Devolved Management Framework* (1997), which was published after consultations about the Minister’s Discussion Paper, above n 93.

¹²⁶ See above n 118, 112.

¹²⁷ (1982) 64 FLR 166.

¹²⁸ (1982) 64 FLR 166, 174 (Bowen CJ and Lockhart J).

¹²⁹ (2005) 221 CLR 99, 129, 130-1. The other member of the majority, Gleeson CJ, applied the test of whether the statute gave legal force or effect to the decision. Gleeson CJ also made approving comments about *Burns*. These four members of the Court found that a decision of Griffith University to terminate Tang’s PhD program was not made under an enactment.

¹³⁰ Australian Public Service Commission, *Termination of Employment* (May 2004) section 1.4 <<http://www.apsc.gov.au/publications02/terminations.htm>> at 4 May 2006.

¹³¹ Section 15.

¹³² The Code of Conduct (s 13(11)) states ‘[a]n APS employee must at all times behave in a way that upholds the APS Values’. Section 14(1) provides that Agency Heads are bound by the Code of Conduct ‘in the same way as APS employees’.

¹³³ There are some exemptions: termination of employment (s 33(1)), and a number set out in sch 1 of the *Public Service Regulations 1999* (Cth) such as engagement of an APS employee, action of a Promotions Review Committee, promotion of an ongoing APS employee as an SES employee, and movement of an APS employee to another agency to give effect to an administrative rearrangement (ie machinery of government changes).

¹³⁴ *O’Halloran v Wood* [2004] FCA 544 (Unreported, Selway J, 5 May 2004). See also *Anderson v Secretary of the Department of Veterans Affairs* [2004] FCA 1594 (Unreported, Hely J, 8 December 2004) paras 8-9

where the possibility of proceedings under the ADJR Act was noted, and *Twining v Australian Public Service Commission* [2005] FMCA 1738 (Unreported, Mowbray FM, 10 November 2005).

¹³⁵ *Sullivan v Secretary, Department of Defence* [2005] FCA 786 (Unreported, Stone J, 20 June 2005).

¹³⁶ *Mongan v Woodward* [2003] FCA 66 (Unreported, Finn J, 12 February 2003); *Sullivan v Secretary, Department of Defence* [2005] FCA 786 (Unreported, Stone J, 20 June 2005).

¹³⁷ (2005) 221 ALR 95.

¹³⁸ (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ).

¹³⁹ (2005) 221 ALR 95, 102 (Gleeson CJ), 105, 113 (McHugh, Gummow and Hayne JJ), 134–5 (Heydon J).

¹⁴⁰ (2005) 221 ALR 95, 98–9 (Gleeson CJ), 114 (McHugh, Gummow and Hayne JJ), 134–5 (Heydon J). McHugh, Gummow and Hayne JJ noted the views expressed in earlier High Court decisions that dismissal at pleasure was an implied term of the contract of employment (*Ryder, Fletcher and Kaye*, discussed above in section ‘Dismissal at Pleasure’), but doubted that the modern test for implying terms at law (*Byrne v Australian Airlines Ltd* (1995) 185 CLR 410) would be satisfied.

¹⁴¹ (2005) 221 ALR 95, 97 (Gleeson CJ).

¹⁴² *Ibid* 98 (Gleeson CJ).

¹⁴³ *Ibid* 110 (McHugh, Gummow and Hayne JJ), citing the UK cases of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 and *M v Home Office* [1994] 1 AC 377. Although the High Court has not had to consider these authorities, in obiter dicta in *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, 219–21, Mason J expressed his view that the exercise of prerogative power was reviewable (although the exercise of some prerogative powers may not be justiciable), and Wilson J expressed agreement (282–3). In *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 the Full Court of the Federal Court adopted the *Council of Civil Service Unions* decision that judicial review was applicable to the exercise of a prerogative power. In *Macrae v Attorney-General for New South Wales* (1987) 9 NSWLR 268, the New South Wales Court of Appeal held that the prerogative power to make judicial appointments was reviewable in a situation where members of a court that had been superseded were invited to apply for membership of the new court. The ground of review was that they had a legitimate expectation of procedural fairness.

¹⁴⁴ (2005) 221 ALR 95, 111 (McHugh, Gummow and Hayne JJ).

¹⁴⁵ WR Act 1996 s 415 (s 170WK prior to 27 March 2006).

¹⁴⁶ WR Act 1996 ss 348–349 and *Workplace Relations Regulations 2006* (Cth) regs 8.2 and 8.3 (prior to 27 March 2006, ss 170VQ and 170VR and *Workplace Relations Regulations 1996* (Cth) reg 30ZJ(1)(a)(i)).

¹⁴⁷ A more definitive stand has been taken since the passage of the Work Choices legislation (the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth)): SES employees should be covered by AWAs and excluded from collective agreements (Department of Employment and Workplace Relations (2006), above n 110, 19).

¹⁴⁸ The Department of Employment and Workplace Relations publishes statistics on agreement making in federal government employment at <<http://www.workplace.gov.au/workplace/Organisation/Government/Federal/Reports/ProgressinAgreementMaking.htm>> at 4 May 2006; and for 30 June 2007 data accessed July 2007.

¹⁴⁹ Australian Public Service Commission, *The Australian Public Service Statistical Bulletin 2004–05* (2005) <<http://www.apsc.gov.au/stateoftheservice/0405/statistics/index.html>> at 4 May 2006.

¹⁵⁰ Australian Parliamentary Service Commissioner, *Annual Report 2004–05* (2005), 7.

¹⁵¹ And to exclude unions.

¹⁵² WR Act 1996 s 165 and *Workplace Relations Regulations 2006* (Cth) reg 5.3 (previously ss 83BS, 83BT, 170VG(2), 170WHB, 170WHC, 170WHD). It is government policy that collective agreements (formerly Certified agreements) — now lodged with the Workplace Authority, formerly the Employment Advocates — will continue to be published.

¹⁵³ Two examples of disclosure are given in a report by the Senate Finance and Public Administration References Committee, Parliament of Australia, *Australian Public Service Employment Matters, First Report, Australian Workplace Agreements* (2000) paras 2.42–2.43.

¹⁵⁴ See above n 148.

¹⁵⁵ PSA 1999 s 10(1); see section ‘Values and Code of Conduct’ above.

¹⁵⁶ See above n 153, para 2.73.

¹⁵⁷ *Ibid* para 6.1.

¹⁵⁸ Ibid para 1.13 (citing an earlier report by the Committee on performance pay). The government response was to disagree with the Committee, stressing the importance of performance pay for attracting and rewarding high-quality staff (Australian Public Service Commission, *A History in Three Acts*, above n 90, 191).

¹⁵⁹ Public Service Commissioner, *State of the Service Report 2004–05* (2005) 104. The Commissioner had previously raised the issue in the reports for 2002–03 and 2003–04.

¹⁶⁰ According to Weller, above n 82, 25, the power was rarely used before 1972. Then the Whitlam government, which came to power after 23 years of non-Labor administration, abolished several departments. Keating, above n 85, 42 notes that heads of departments ceased to be permanent from the Whitlam-era when more than half the heads were displaced in less than three years.

¹⁶¹ *Public Service Amendment (First Division Officers) Act 1976* (Cth).

¹⁶² Weller, above n 82, 27 reports that no ‘non-established’ candidate was selected

¹⁶³ *Public Service Reform Act 1984* (Cth).

¹⁶⁴ *Administrative Arrangements Act 1987* (Cth).

¹⁶⁵ Weller, above n 82, 80.

¹⁶⁶ Ibid 29, 65 points out that ministerial involvement varies with circumstances, including the timing of the change (distinguishing a one-off change of Secretary from the multiple changes flowing from changes to machinery of government), the influence of the minister, and their relationship with the Prime Minister.

¹⁶⁷ *Prime Minister and Cabinet (Miscellaneous Provisions) Act 1994* (Cth).

¹⁶⁸ Weller, above n 82, 33. Also, in 1998, a meeting of Secretaries was told that the Prime Minister was not satisfied with the performance of a number of them, and there would be a review. In the event, no changes were made.

¹⁶⁹ Weller, above n 82, 31 reports that the initiative for this reform came largely from within the APS and that the figure of 20 per cent for the pay loading was recommended by a committee of secretaries. Keating, above n 85, 42 reports that before the 1994 legislation, the majority of displaced secretaries were taking the offer of a financial package.

¹⁷⁰ In 1999, the Remuneration Tribunal’s function changed from determining Secretaries’ remuneration and allowances to providing advice on those matters: *Public Employment (Consequential and Transitional) Amendment Act 1999* (Cth) sch 1, clauses 778, 780.

¹⁷¹ Submissions to the Joint Committee of Public Accounts, *Report 353*, above n 118, 117–9.

¹⁷² In the case of the appointment or termination of the appointment of the Secretary of the Department of the Prime Minister and Cabinet, the report is to be provided by the Public Service Commissioner.

¹⁷³ *Barratt v Howard* (1999) 165 ALR 605. Factual background on the relationship between the Minister and Barratt is set out in the appeal case, *Barratt v Howard* (2000) 96 FCR 428, and more detail is provided by Weller, above n 82, ch 9.

¹⁷⁴ (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ).

¹⁷⁵ (1999) 165 ALR 605, 619.

¹⁷⁶ Ibid.

¹⁷⁷ *Barratt v Howard* [1999] FCA 1183 (Unreported, Hely J, 26 August 1999).

¹⁷⁸ Ibid para 7.

¹⁷⁹ *Barratt v Howard* (2000) 96 FCR 428.

¹⁸⁰ The Full Court did not cite any authority for the finding that the Act overrode the common law — (2000) 96 FCR 428, 448; Hely J (1999) 165 ALR 605, 609 cited *Dixon and Bennett* (discussed above in ‘Judicial Review’ and ‘Contract’).

¹⁸¹ (2000) 96 FCR 428, 449.

¹⁸² Ibid.

¹⁸³ Weller, above n 82, 35.

¹⁸⁴ In ‘Departmental Secretaries: Appointment, Termination and their Impact’ (1997) 56(4) *Australian Journal of Public Administration* 13, they report the results of a research project commissioned by the Institute of Public Administration (ACT Division) to evaluate the appointment, termination, and terms of engagement of federal departmental secretaries in the context of the move to fixed term appointments from 1994. Their research includes interviews with 20 past and serving secretaries. In the book *Australia’s*

Mandarins, above n 82, Weller draws on a more extensive range of interviews of former and current Secretaries.

¹⁸⁵ Weller and Wanna, above n 184, 22.

¹⁸⁶ Ibid 23.

¹⁸⁷ Weller, above n 82, ch 5.

¹⁸⁸ Ibid 12.

¹⁸⁹ Richard Mulgan, 'Politicisation of Senior Appointments in the Australian Public Service' (1998) 57(3) *Australian Journal of Public Administration* 3, 5-6.

¹⁹⁰ Ibid 5-7. Weller, above n 82, 13 prefers to characterise these latter practices as 'personalisation' rather than 'politicisation'.

¹⁹¹ Public Service Commissioner, above n 159, 35-43. There were similar figures reported in the 2003-4 Report. In the State of the Service Report 2005 -6 it was stated: 'There continues to be slightly lower levels of confidence that most senior managers act in accordance with the Values (73 per cent) although this has continued to increase from 63 per cent in 2003. The majority of employees in each large agency agreed that most senior managers act in accordance with the Values, with results ranging from 61 per cent to 86 per cent.' <<http://www.apsc.gov.au/stateoftheservice/0506/foureembedding.htm>> 30 July 2007.

¹⁹² Peter Shergold, Secretary of the Department of the Prime Minister and Cabinet, 'Once was Camelot in Canberra? Reflections on Public Service Leadership' (Sir Roland Wilson Lecture 2004, Canberra, 23 June 2004) <<http://www.pmc.gov.au/speeches>> at 4 May 2006.

¹⁹³ Senate Finance and Public Administration References Committee, Parliament of Australia, *Staff Employed under the Members of Parliament (Staff) Act 1984* (2003) paras 7.9-7.16.

¹⁹⁴ Lynelle Briggs, Public Service Commissioner, 'Public service reform' (Speech delivered to SES Breakfast, 12 May 2005); Lynelle Briggs, Public Service Commissioner, 'Changes in the Australian Public Service' (Speech delivered to the Australian National Audit Office, 29 November 2005); Lynelle Briggs, Public Service Commissioner, 'State of the Service Report 2004-05, Launch Speech' (Speech delivered, 1 December 2005). All can be found at <<http://www.apsc.gov.au/about/pscommissioner.htm#media>> at 4 May 2006.

¹⁹⁵ Quoted in Karlene Sargent, 'Employer of Choice? Today's Australian Public Service', *Defence Magazine* (The Official Magazine, Department of Defence, Canberra) August 2005 <<http://www.defence.gov.au/defencemagazine/editions/20050801/sections/bigpicture.htm>> at 4 May 2006. Other issues flagged by the Commissioner were streamlining the APS Values, the inflexibility of the conditions for non-ongoing employment, management by agencies of review of actions and code of conduct issues, and whistleblowing.

¹⁹⁶ Australian Public Service Commission, *Embedding the APS Values* (2003) <<http://www.apsc.gov.au/values/values.htm>> at 4 May 2006.

¹⁹⁷ Briggs 'State of the Service Report 2004-05', launch speech, above n 194.

¹⁹⁸ Lynelle Briggs, Public Service Commissioner, 'Supporting Ministers, Upholding the Values: A Good Practice Guide, Launch Speech' (Speech delivered 9 March 2006) <<http://www.apsc.gov.au/media/briggs090306.htm>> at 4 May 2006.

¹⁹⁹ Senate Finance and Public Administration References Committee, *Staff Employed Under the Members of Parliament (Staff) Act 1984*, above n 193, recommendation 18.

²⁰⁰ Supported by Weller, above n 82, ch 10; Australian Public Service Commission, *A History in Three Acts*, above n 90, 214-5; Mulgan, 'Politicisation of Senior Appointments in the Australian Public Service', above n 189, 11; Keating, above n 85, 42.

²⁰¹ Australian Public Service Commission, *Supporting Ministers, Upholding the Values: A Good Practice Guide* (2006) <<http://www.apsc.gov.au/publications06/supportingministers.htm>> at 4 May 2006.

²⁰² Recommended by two Senate committees: the Senate Select Committee, Parliament of Australia, *A Certain Maritime Incident* (2002) recommendation 11, and Senate Finance and Public Administration References Committee, *Staff Employed Under the Members of Parliament (Staff) Act 1984*, above n 193, ch 6.

²⁰³ John Nethercote, 'Values in Contention: Some Key Administrative Issues in 2002' (2003) 62(1) *Australian Journal of Public Administration* 88, 91; Australian Public Service Commission, *A History in Three Acts*, above n 90, 225-6.

²⁰⁴ Quoted in 'A Healthy Public Service is a Vital Part of Australia's Democratic System of Government' (1998) 57(1) *Australian Journal of Public Administration* 3, 11.