Chapter Four

A Revised Legislative Framework for Australian Public Service Employment: The Successive Impacts of the *Workplace Relations Act 1996* (Cth) and *The Public Service Act 1999* (Cth)

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This chapter considers the successive changes to the legislative framework governing employment in the Australian Public Service ('APS')² that have occurred since the election of the Coalition Government in 1996 to the present. In particular, it discusses the successive effects of:

- a. the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) (which introduced the *Workplace Relations Act 1996* (Cth));
- b. the *Public Service Act 1999* (Cth); and
- c. the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (which significantly rewrote the *Workplace Relations Act 1996* (Cth)).

A major focus of the chapter is the legislative framework that provides for the determination of the terms and conditions of APS employment.

The chapter concludes that, significant as they have been, the above changes largely represent a continuation of the direction of change in APS employment culture that has been taking place since the early 1980s. However, some important new aspects have been introduced by the Work Choices legislation, including:

- a. the legislation has become more prescriptive in terms of the content required to be, or that may be deemed to be, included in industrial agreements and what is 'prohibited content' which cannot be included in agreements; and
- b. the introduction of the Australian Fair Pay and Conditions Standard that applies as a 'safety-net' for all employees under the *Workplace Relations Act 1996* (Cth) (including Commonwealth employees).

The Position to 1996

In order to properly appreciate the nature and extent of the changes to the APS employment framework since 1996, one needs to commence with an analysis of

the legal framework that had come to exist prior to 1996. The following provides a brief overview.

Sources of Public Sector Employment Law

By 1996, the laws governing APS employment were sourced from an interaction of:

- a. laws enacted pursuant to the Commonwealth constitutional powers in relation to the public service,³ (including by the application of general industrial relations legislation to its own employees); and
- b. the common law of employment.

It is important to note that the working relationship between the Commonwealth and its public servants may be characterised as an employer/employee relationship. This was the case even when, under the *Public Service Act 1922* (Cth), there was a distinction between ‘officers’ permanently appointed to the service and ‘employees’ (who were usually engaged for short or fixed terms).⁴

At common law, there were historical distinctions between a person who held an office and a person who was an employee. For example, salary may be payable to a person on the basis of holding an office for a particular period of time, whereas wages are payable to an employee on the basis of work performed (and may be withheld if work is not performed).

McCarry has discussed the difficulties of distinguishing between an ‘officer’ and an ‘employee’ in the public sector context. Given that the manner of the performance of work by officers was subject to control by the APS hierarchy, this meant the major indicium of the common law employment relationship was present.⁵ McCarry notes the possibility of a ‘pure’ officer who has a lawfully imposed independent function which is not the subject of control by an employer.⁶ In the public sector context however, there were very few ‘pure’ officers, so described, who had such an independence of function. Therefore, McCarry concludes that the common law criteria for the existence of an employment relationship would exist regardless of whether a statute referred to public servants as ‘officers’ or ‘employees’,⁷ and early High Court observations seem to confirm the contractual nature of the relationship.⁸

Hence, public servants are engaged under a contract of employment. This contract of employment will therefore be a source of conditions of service, including terms implied by the common law. However, in the context of the APS, the overwhelming source of employment obligations has been legislation of the following types:

- general public service legislation such as the *Public Service Act 1922* (Cth) (‘PSA 1922’) and the *Public Service Act 1999* (Cth) (‘PSA 1999’) (together the ‘Public Service Acts’);

- general industrial relations legislation such as the *Conciliation and Arbitration Act 1904* (Cth), the *Industrial Relations Act 1988* (Cth) and the *Workplace Relations Act 1996* (Cth); and
- legislation directed at specific conditions of employment (see later list).

General Public Service Legislation

Although it has been noted that the Commonwealth could establish a public service without a general legislative framework,⁹ the Public Service Acts have in fact provided one since 1902.¹⁰ These Acts provide a common framework for public service employment and allow for the Parliament to express the values and culture it wishes to see in the public service. Moreover, legislation means that the Parliament can entrench principles and bestow rights and obligations which would be unavailable at common law (eg impartiality, appointment and promotion on merit, disciplinary and appeals processes).¹¹

The General Industrial Relations Framework

The general industrial relations framework has become an increasingly important source of employment rights and obligations in the public sector. For some time, industrial relations matters were dealt with by a public service arbitrator.¹² With the repeal of the relevant legislation,¹³ Commonwealth public servants were brought under the then *Conciliation and Arbitration Act 1904* (Cth). With some express exceptions, awards made under general industrial relations legislation could prevail over conditions otherwise deriving from the general public service legislation.¹⁴

Awards historically applied across industries, and the APS was regarded as an industry for this purpose. However, since the early 1980s the APS has undergone a series of reforms, both in terms of its internal structure and because of other changes within the industrial relations system (see below from 1.2).

Specific Legislation

The final and important source of APS employment rights and obligations has been the various statutes directed to specific aspects of the employment relationship and which includes:

- *Long Service Leave (Commonwealth Employees) Act 1976* (Cth);
- *Maternity Leave (Commonwealth Employees) Act 1973* (Cth);
- *Merit Protection (Australian Government Employees) Act 1984* (Cth);
- *Occupational Health and Safety (Commonwealth Employment) Act 1991* (Cth);
- *Safety, Rehabilitation and Compensation Act 1988* (Cth); and
- the various Superannuation Acts.

The focus of the following discussion, however, will be on changes to the employment conditions which have resulted from changes to the general APS

and industrial relations legislative frameworks since 1996. The above specific legislation has undergone relatively little change and is in fact 'quarantined' from the effect of workplace agreements made under the *Workplace Relations Act 1996* (Cth) ('WRA').¹⁵

An Environment of Reform

The legal framework governing APS employment had been undergoing significant changes since the early 1980s. The reform agenda involved both the revision of public service legislation as well as the application of industrial relations reform to the APS.

In 1983, the then Government produced a White Paper entitled *Reforming the Australian Public Service*.¹⁶ The White Paper proposed a number of changes to management arrangements, including:

- the transfer of staff allocation and financial responsibilities from the Public Service Board ('the Board') to the Department of Finance;
- devolution of responsibility for personnel matters from the Board to agency heads (although the Board retained responsibility for overall APS staffing policy);
- establishment of the Senior Executive Service ('the SES'); and
- entrenchment of merit and equity principles in employment.¹⁷

Key elements of the White Paper were implemented by the *Public Service Reform Act 1984* (Cth).

In 1986, there was further devolution of personnel functions to departmental heads and streamlining of appeals processes.¹⁸ This was followed in 1987 by the replacement of the Board by the Public Service Commission and machinery of government changes that provided for so called 'mega-Departments'.¹⁹

In the late 1980s and early 1990s, enterprise bargaining came to be adopted in the Australian industrial relations system. International economic pressures were forcing the private and public sectors to examine their international competitiveness. Fundamental changes in the community wage-fixing and the industrial relations environment were a response to these pressures, linking future pay rises to improvements in productivity at the enterprise level.

Enterprise bargaining was embraced as a micro-economic reform, aimed at achieving increases in productivity and efficiency in individual workplaces.²⁰ Wages outcomes were increasingly based upon structural adjustments and efficiency gains.²¹ In the APS context, the Second Tier Agreement of 1987 provides an early example of a wages/productivity bargain which provided for workplace restructuring.²²

Enterprise bargaining was adopted as a general wage-fixing principle in the 1991 'National Wage Case'. In 1992, the *Industrial Relations Act 1988* (Cth) was amended to provide for certified agreements, with compulsory union involvement, at the workplace (rather than industry) level.²³ These certified agreements prevailed over inconsistent provisions in industrial awards. In March 1994, the *Industrial Relations Reform Act 1993* (Cth) moved the emphasis further in favour of enterprise bargaining by including provisions for enterprise flexibility agreements which could be negotiated without union involvement. The policy approach was that a major certified agreement would cover the APS as a single workplace, but with provision for further agreements of some matters to be negotiated at agency level.²⁴

In 1994, the McLeod Report recommended a new and simplified Public Service Act which emphasised the role, standards and values of the APS and with agency heads being primarily responsible for employment matters within their agencies.

Aside from the legal changes, there were also changes being implemented in APS management policy. In particular, there were changes being implemented to financial management practices. Managers were being expected to manage for results or 'outcomes'. There was devolution of management and financial accountability to line management, which was also accompanied by a concomitant accountability for the outcomes actually achieved.

Therefore, by 1996, the APS had undergone a number of cultural changes, both of a legal and policy character. This chapter however has its focus on the changes to the legal framework affecting APS employment, and so it would be appropriate to have a more detailed regard to the legislative framework as it had come to exist in 1996.

The Legislative Framework of the PSA 1922 and the *Industrial Relations Act 1988* (Cth)

Prior to the advent of the *Workplace Relations Act 1996* (Cth), employment rights and obligations in the APS were generally determined within the framework provided by the PSA 1922 and the *Industrial Relations Act 1988* (Cth), although this framework had itself undergone recent reforms.

***Public Service Act 1922* (Cth)**

By 1996 the PSA 1922, with a large number of amendments over the years, had come to represent a patchwork of provisions rather than a structured framework for regulating APS employment arrangements. Indeed, as will be seen, a significant amount of the rights and obligations in APS employment derived from the industrial relations legislative framework. Nevertheless, the PSA 1922 contained important provisions in the areas set out below.

Appointment and Promotion

The PSA 1922 provided for the creation and abolition of offices, for appointment to and transfer and promotion within the APS, and for the application of the merit principle in relation to appointments, transfers and promotions.²⁵

The PSA 1922 also provided for appeals against promotion decisions on the grounds of superior efficiency. However, by 1996, such appeals were limited to promotions below the senior officer grades. Persons who unsuccessfully applied for promotions at or above the senior officer grades could apply to the Merit Protection and Review Agency ('MPRA') on the grounds that there had been a breach of the merit principle (including by some form of discrimination).²⁶

Joint Selection Committees that included a union representative were also provided for and the decisions of such committees were not subject to appeal or review by the MPRA.²⁷ The PSA 1922 also provided for employment equity issues through a requirement for agency equal employment opportunity plans and industrial democracy plans.²⁸ It allowed for permanent part-time work²⁹ and for the engagement of temporary and fixed term employees.³⁰

Discipline

The PSA 1922 provided the framework for making inquiries into misconduct and for taking disciplinary action, including fines, reductions in salary, demotions and dismissals. Recent reforms had meant that these powers were generally exercisable by the Secretary of a department.³¹

Redeployment, Retirement and Redundancy

The PSA 1922 contained relatively complex provisions dealing with retirement and redeployment of officers who had been declared excess to requirements.³² For officers below the Senior Executive Service ('SES') level, the Australian Public Service General Employment Conditions Award 1995 (see below) operated to require certain procedures to be followed before a Secretary could take action to retire or redeploy excess staff.³³

The terms of the PSA 1922 allowed for appeals against redundancy decisions to be taken to the MPRA, however this avenue of review was blocked from 1995 because of the operation of the APS Enterprise Agreement (discussed below). By 1996, the sole avenue of review had come to be the unfair dismissal provisions of the *Industrial Relations Act 1988* (Cth).

Mobility

Complex mobility provisions dealt with the situation of former officers whose functions had recently been transferred outside the service. These provisions were the product of structural reforms in the public sector whereby some functions had been transferred (or outsourced) to either a public authority or

private concern. The mobility provisions gave former officers certain rights to return to the service or to apply for jobs back in the service, and preserved long service leave rights.³⁴

Determinations under the PSA 1922

One of the most important provisions of the PSA 1922, in terms of the employment framework, was s 82D. It provided for the Public Service Commissioner to issue written determinations in relation to terms and conditions of employment for officers and employees. These determinations dealt in detail with a large variety of terms and conditions of employment including allowances, leave and other benefits. Such conditions were often settled as a result of the industrial process, either in settlement of disputes or as an outcome of consultative processes.

Public Service Regulations

Discussion of the PSA 1922 should not ignore the regulations made under that Act. These regulations also contained important provisions for officers and employees. For example they:

- specified the duties of officers, a breach of which might have been the subject of disciplinary action; and
- contained secrecy provisions,³⁵ the grievance procedures and higher duties arrangements for non-SES officers.

There seems to have been little reason, except historical preferences and the relative ease of passage into law, as to why some provisions were included in the regulations and why some were included in the PSA 1922 itself. Like the 1922 Act, the regulations had come to resemble a patchwork of provisions which had evolved over the previous decades.

Industrial Relations Act 1988 (Cth)

At the beginning of 1996, the *Industrial Relations Act 1988* (Cth) (the 'IRA') provided the framework for many of the terms and conditions applying to employment in the APS. It did this through two main instruments:

- the Australian Public Service General Employment Conditions Award (the 'GECA');³⁶ and
- the Continuous Improvement in the Australian Public Service Enterprise Agreement: 1995-96 (the 'APS Enterprise Agreement').

The arrangements between the operation of the GECA, the APS Enterprise Agreement and the PSA 1922 (and regulations) were complex and there was overlap in subject matter in a large number of areas.

The GECA was an award relating to Commonwealth public sector employment and prevailed over inconsistent provisions of the PSA 1922 (including s 82D determinations and regulations). This is because the then s 121 of the IRA permitted the Australian Industrial Relations Commission ('AIRC') to make awards that were inconsistent with certain laws affecting public sector employment.³⁷

The APS Enterprise Agreement was a certified agreement under Part IVB of the IRA. As such it was regarded as an 'award' for the purposes of that Act and so would also prevail over terms and conditions of employment deriving from the PSA 1922.³⁸ Taken together, in relation to non-SES personnel, GECA and the APS Enterprise Agreement dealt with (and prevailed over) many of the conditions of employment set out in the PSA 1922, the s 82D determinations and in the regulations.

The relationship between GECA and the APS Enterprise Agreement was that the latter prevailed over the former to the extent of inconsistency.³⁹

Outline of GECA

GECA was a relatively recently made award which resulted from award restructuring and rationalisation efforts in the early 1990s. It represented the consolidation of a number of awards covering APS employment and dealt with matters such as:

- payment of wages and related matters such as incremental advancement (although it did not specify the base rates of pay);
- hours of work and overtime rules;
- leave (such as annual leave, public holidays, sick leave, and other miscellaneous leave types);
- redeployment, retirement and redundancy; and
- various allowances.

GECA included award flexibility provisions to allow for variation of the award by an agency agreement (ie an agreement at department level rather than at service wide level). However, GECA provided that agency agreements could not affect base rates of pay and essential standards of employment conditions, namely hours of work, public holidays, recreation leave, sick and long service leave, maternity leave, parental leave, redeployment and redundancy arrangements.⁴⁰

In terms of its interaction with the PSA 1922, perhaps the key provisions of GECA were the redeployment, retirement and redundancy provisions which effectively controlled the manner in which the relevant provisions of the PSA 1922 actually operated.⁴¹ It provided for union involvement, processes for voluntary retrenchment, income maintenance, and retention periods for those being considered for involuntary retrenchment.⁴²

APS Enterprise Agreement

The APS Enterprise Agreement was the latest in a series of service-wide certified agreements under the IRA framework. It was a certified agreement under the then s 170MC of the IRA. As such, its provisions prevailed over both GECA and the PSA 1922.⁴³

Among other things, it provided for:

- base rates of pay for the various classifications;
- certain non-salary allowances;
- removal of certain MPRA appeals rights;
- the IRA to be sole right of review of termination of employment decisions; and
- performance appraisal arrangement for senior officers and the Senior Executive Service.⁴⁴

The APS Enterprise Agreement also provided for a continuing commitment to workplace reform and improved productivity and flexibility in the public service.⁴⁵ It provided that agencies 'may agree to reflect improved productivity outcomes from workplace reforms in benefits to staff and clients, but excluding pay increases and alterations to service-wide classification structures and the formal framework of the Public Service Act and Regulations.'⁴⁶ This was an important departure (and reversal) from the immediately preceding certified agreements covering the APS, which had allowed for base rates of pay to be supplemented by agency agreements.⁴⁷

Agency Agreements

Since 1992, certified agreements under the IRA had also provided a limited opportunity for agency bargaining. A typical example was the then Department of Human Services and Health Agency Bargaining Agreement 1994, which provided for such things as flexible leave arrangements, selection procedures and supplementary pay.⁴⁸

Developments since 1996 Leading into the Twenty-First Century

In 1996, the Coalition Government came to office with a policy that continued the approach of taking APS management and employment practices closer to those of the private sector. The strategy basically centred on an expanded approach to bargaining at the agency level (and the rejection of APS-wide agreements), the use of AWAs, and greater regulation of the role to be played by unions in negotiating agreements. There have been three major legislative developments since 1996:

- a. the introduction of the *Workplace Relations Act 1996* (Cth);

- b. the passage of the *Public Service Act 1999* (Cth); and
- c. the significant rewriting (and constitutional rebasing) of the *Workplace Relations Act 1996* by the Work Choices legislation.⁴⁹

These legislative developments in (a) and (b) will be considered in the following sections; and the development in (c) will then be examined.

The Introduction of the *Workplace Relations Act 1996*

The *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) ('WROLA') was passed by the Commonwealth Parliament in November 1996 and commenced at the end of that year.

WROLA changed the name of the *Industrial Relations Act 1988* (Cth) to the *Workplace Relations Act 1996* (the WRA).⁵⁰ It pushed further down the road of enterprise bargaining by continuing to shift the emphasis from industry-based awards to bargaining at the workplace level. For the APS, this meant a shift from APS-wide agreements to agreements concluded at an agency level.

The new arrangements were to have a significant effect on the manner in which APS terms and conditions of employment were negotiated and settled.

Awards

A new s 89A of the WRA provided that, after an interim period, awards would only be allowed to deal with certain 'allowable matters'.⁵¹ Other terms and conditions of employment could be included in certified agreements or Australian Workplace Agreements ('AWAs'). This is what was known as the award 'simplification' process.

The 20 award matters allowed by s 89A included classifications of employees, hours of work, rates of pay, public holidays, certain types of leave (including annual leave, sick leave, but not including union leave), penalty rates, redundancy and termination, stand-downs, dispute settlement and superannuation. Significantly, and in keeping with the safety net approach to awards, the Australian Industrial Relations Commission ('AIRC') could specify only minimum rates of pay, ie paid rates awards, could no longer be made.⁵²

Certified Agreements

WROLA repealed the former Part VIB of the IRA and substituted a new Part VIB of the WRA.

The former Part VIB, which had been inserted by the *Industrial Relations Reform Act 1993* (Cth), had provided for two types of enterprise bargains or agreements: a 'certified agreement' and an 'enterprise flexibility agreement'. The former Part VIB had relied upon the existence and settlement of an industrial dispute for the ability to make certified agreements (ie s 51(xxxv) of the Constitution). The

making of enterprise flexibility agreements did not require the existence of an industrial dispute and instead relied upon the corporations power (ie s 51(xx) of the Constitution) in that the corporation could reach an agreement with employees whether or not a dispute or a union was involved.⁵³ This was the first significant step down the path of reliance on the corporations power, which ultimately led to the Work Choices legislation (discussed later).

The new Part VIB substituted two new categories of certified agreements:

- a. Division 2 provided for certified agreements to be made between an employer and employees where the employer was a 'constitutional corporation',⁵⁴ or was the Commonwealth;⁵⁵ and
- b. Division 3 provided for certified agreements in settlement of industrial disputes.

As to Division 2, the constitutional underpinning was the corporations power (s 51(xx)) and the executive power combined with the express incidental power (ss 61 and 51 (xxxix)). Although WROLA represented an expanded reliance by the WRA on the corporations power, that aspect is not directly relevant to the APS employment aspects which fall under the executive and express incidental heads of constitutional power.⁵⁶

As to Division 3, the constitutional support was the industrial relations power (s 51(xxxv)). This power had been, of course, the traditional constitutional basis for Commonwealth non-APS industrial relations legislation.

Division 2 provided for two types of agreement. Section 170LJ provided for agreements to be made between an employee and a union that represented employees in the workplace, while s 170LK provided for an employer to make an agreement directly with employees.⁵⁷

Both ss 170LJ and 170LK required the agreement to be approved by a majority of the employees proposed to be covered. They must have had at least 14 days to consider the agreement before voting and the employer was required to explain the terms of the agreement.⁵⁸

An agreement with employees had to be made in such a way that there was no discrimination between union members and other employees.⁵⁹ If an agreement was being made under s 170LK, a union member had the right to ask for union representation in meetings and confer with the employer on the proposed agreement.⁶⁰

Before commencing operation, an agreement was required to be certified by the AIRC.⁶¹ A certified agreement also had to satisfy the 'no-disadvantage test' (see below). Certified agreements commenced when they were certified by the AIRC and continued until terminated, or replaced by another certified agreement after their nominal expiry date.⁶²

Australian Workplace Agreements

A new Part VID was inserted into the WRA that provided for the making of AWAs. The AWA provisions provided a specific statutory framework for an individual form of employment contract. Unlike a common law employment contract, the statutory framework within which AWAs were made, allowed the employer and employee to reach an agreement that prevailed over awards and certain State and Commonwealth laws.⁶³ In effect, they were able to contract out of certain obligations which would otherwise apply. Breach of an AWA also carried with it certain statutory penalties that would not apply at common law.⁶⁴

AWAs were also subject to the same 'no disadvantage test' that applied to certified agreements (see below).

Generally speaking, an AWA was required to be approved by the (then) Employment Advocate⁶⁵ before it could come into operation. An AWA could not be approved unless there had been genuine agreement to the making of the AWA, and a person could not be subject to duress in the making of an AWA.⁶⁶ One of the other important approval requirements was that an employer was generally required to offer an AWA on similar terms to all comparable employees, unless it was reasonable not to do so.⁶⁷

Although the essence of an AWA was that it was an individual agreement with an individual employee, the employee was able to appoint a bargaining agent⁶⁸ and a number of individual agreements could be negotiated collectively and included in the one document.⁶⁹

No Disadvantage Test

The new Part VIE of the WRA provided for a 'no disadvantage test'. In effect, the test generally required that a certified agreement or AWA could not be certified or approved (as the case may be) if it would result, on balance, in a reduction in the overall terms and conditions of employment applying to employees under relevant awards, and any relevant laws (ie legislation).⁷⁰

Protected Industrial Action

The WRA provided for limited immunity for employers and employees in relation to the taking of industrial action connected with the negotiation of a certified agreement or an AWA.⁷¹ In certain circumstances, an employer or employees were able to take 'protected industrial action' (eg lock out or strike action) during a formal 'bargaining period'.⁷² In certain circumstances, an employer or an employee would be able take 'AWA industrial action' during negotiations for an AWA.⁷³

Award Simplification

An award simplification process was undertaken as a result of joint working party arrangements between the Commonwealth and the APS unions agreed on 22 May 1997.⁷⁴ While some matters were agreed through a process of conciliation, other matters required arbitration.⁷⁵ The Australian Public Service Award 1998 (the 'APS Award 1998') was finally made on 29 September 1998. It replaced ten APS awards then in existence (in effect replacing the GECA, referred to above, and merging the provisions of the SES Award).⁷⁶ Through the progressive adoption of comprehensive certified agreements and AWAs across the APS, the contents of the award would largely become redundant: to the extent that it operated as a safety net in the APS, there would be few people to catch.

Applying the New Arrangements in the APS: Initial Policy Approaches

The Federal Government announced its approach to agreement making in the APS, under the new WRA framework by stating that:

- certified agreements would be made subject to finalisation of Government policy parameters; and
- a framework for APS agency bargaining principles was to be negotiated with the public sector unions to assist in the progress of bargaining across the APS, but comprehensive agreements would be able to be made in advance of those principles being settled.⁷⁷

The Government's initial policy parameters for agreement making were issued to APS agencies on 23 May 1997. The twelve parameters included requirements for agreements to:

- be consistent with the Government's workplace relations and wages policy;
- be funded from agency appropriations;
- retain portability within the APS of annual leave and sick leave entitlements;
- move to a rationalised classification structure; and
- provide for flexible remuneration on a salary sacrifice basis, as appropriate.⁷⁸

The policy parameters on agreement making were published without formal union agreement.⁷⁹

The policy parameters were supplemented by the Supporting Guidance for the Policy Parameters for Agreement Making in the APS, which, in fact, provided the detailed instructions for agreement making by agencies.

Draft certified agreements had to be cleared with the then Department of Industrial Relations.

The initial Government policy in relation to AWAs was that there was an expectation that members of the SES would enter into these agreements as a matter of priority.⁸⁰

It was also government policy that certified agreements and AWAs were to be as comprehensive as possible in order to minimise the number of different instruments governing pay and conditions; ie they were to provide for terms and conditions of employment as far as possible to the exclusion of awards, determinations and, in particular, the APS Enterprise Agreement.⁸¹

Certified Agreements in the APS Context

The experience of the WRA was that the Commonwealth, as employer, was most likely to make an agreement under the then Division 2 of Part VIB of the WRA, rather than under the then Division 3, which dealt with agreements in settlement of industrial disputes. Therefore certified agreements would usually be made with organisations of employees under the old s 170LJ or directly with employees under the old s 170LK.

Part VIB provided that certified agreements might be made at the level of a single business or part of a single business. Although the Commonwealth was defined as a single business,⁸² Government policy was to make certified agreements only at the agency level (ie as part of a single business).

The framing of certified agreements under the old Part VIB of the WRA was initially complicated by the relationship between a certified agreement and other existing sources of APS terms and conditions of employment. In this regard, ss 170LY and 170LZ of the WRA relevantly provided that while a certified agreement was in operation:

- it prevailed over an award or order of the AIRC to the extent of any inconsistency between the two;⁸³ and
- it could displace conditions of employment in Commonwealth laws prescribed in the Workplace Relations Regulations 1996 (Cth).

Certified Agreements and APS Awards

When the WRA commenced, the major awards in APS employment were the GECA and the SES Award (later replaced by the APS Award 1998). Certified agreements could therefore limit or exclude the operation of these awards.

Certified Agreements and the APS Enterprise Agreement

The definition of 'certified agreement' in the WRA only applied to certified agreements made under the substituted Part VIB. WROLA did not include specific transitional provisions to cover the operation of certified agreements made under the IRA. However, the preferable view was that agreements such as the APS Enterprise Agreement continued to operate but that a new certified agreement,

being made under a later law, prevailed over it to the extent of any inconsistency.⁸⁴

Certified Agreements and the PSA 1922

Section 170LZ(4) of the WRA provided that a (new) certified agreement prevailed over conditions of employment in a Commonwealth law prescribed by the regulations. The regulations initially prescribed:

- all determinations under s 82D of the *Public Service Act 1922* (Cth);
- directions and notices about retirement and dismissal under that Act and regulations; and
- classification of offices.⁸⁵

Other specific legislation applying to APS employment (such as long service leave, maternity leave, superannuation, and safety, rehabilitation and compensation) was not prescribed and so could not be affected by a certified agreement.

The Experience of Making Certified Agreements in the APS

Agencies began to make certified agreements under the WRA from May 1997 following the release of the Government's initial Policy Parameters for Agreement Making in the APS that have been referred to above.⁸⁶ By the advent of the Work Choices legislation, the original set of 12 parameters had been reduced by successive revisions to six parameters which required that:

1. agreements were to be consistent with the workplace relations policies of the Government;
2. improvements in pay and conditions were to be linked to improvements in organisational productivity and performance;
3. improvements in pay and conditions were to be funded from within agency budgets;
4. agreements were to include compulsory retrenchment, reduction and retrenchment provisions, with any changes not to enhance existing redundancy arrangements;
5. agreements were to facilitate mobility across the APS; and
6. agreements were to include leave policies and employment practices that support the release of Defence Reservists for peacetime training and deployment.⁸⁷

A so-called 'first round' of certified agreements was negotiated between 1997 and 1999. Agreements typically ran for a two or three year period; hence successive 'rounds' of agreement making tended to occur at approximately two yearly intervals. By the time of the Work Choices legislation, many agencies had completed four or five rounds of agreement making.

Certified agreements have tended to include the following initiatives:

- a variety of pay outcomes and performance-linked salary progression;
- flexible use of the APS classifications structure and broadbanding of classifications;
- higher duties allowance only being payable after a minimum period of acting above level;
- more flexible working hours;
- streamlined leave provisions with generally three basic leave types:
 - annual leave
 - personal leave (which combines previous leave types such as sick, special, carers and bereavement leave); and
 - miscellaneous leave (which would cover leave such as for performance of jury duty, for approved study and other leave without pay); and
- streamlined allowances provisions.⁸⁸

As noted above, it was Government policy that agreements were to be comprehensive in the sense that they stood alone and did not operate in conjunction with other instruments (such as awards or previous certified agreements). In the author's experience, this was achieved to varying degrees in the 'first round' of certified agreements negotiated between 1997 and 1999. However, many of the agreements either incorporated by reference, or continued in effect, the provisions of the PSA 1922, awards, and the APS Enterprise Agreement.⁸⁹ This was often for reasons of convenience in that such mechanisms avoided the sheer amount of detail of terms and conditions which would have to be repeated (if they were not to be renegotiated).⁹⁰ Concern over the possibility of breaching the 'no-disadvantage test' was also a motivation for not excluding the operation of certain of the then current employment conditions.

Of the 98 'first round' certified agreements at 30 June 1999, 54 were stand-alone agreements in that they did not operate in conjunction with other awards or certified agreements.⁹¹ The subsequent rounds saw virtually all agreements move on to a standalone basis.⁹² While this trend had been noted to reflect a growing 'maturity' in agreement making by agencies,⁹³ the author suggests that removal of the complexities in the legal framework referred to above, together with the passage of the PSA 1999, discussed below, also had a significant facilitating influence in that regard.

In time, there has also been a change in approach in terms of the amount of detail that might be expected in a certified agreement. It is now expected that certified (or collective) agreements will be 'simple principles based' agreements that are free from administrative and procedural matters; those matters being dealt with in policy or guidelines material to which the certified (or collective) agreement would make reference.⁹⁴ It remains to be seen how far this approach can be

taken in terms of acceptance by employees. Many administrative and procedural matters actually involve important terms and conditions of employment which employees may wish to retain as the subject of a binding agreement.

Another interesting factor has been the trend in the number of agreements made with unions under the old s 170LJ, compared with those made directly with employees under the old s 170LK. As at 1 May 2006, there were 100 certified agreements covering APS and parliamentary service staff that were in operation under the old provisions of the WRA (ie as the WRA stood before the commencement of the Work Choices legislation on 27 March 2006). Of these, only 31 agreements (or 31 per cent) had been made directly with employees under s 170LK of the WRA.⁹⁵ In fact, the percentage of agreements made under s 170LK had dropped significantly since earlier rounds. As at 30 June 1999, of the 98 certified agreements then covering all APS and parliamentary agencies, 44 per cent of these had been s 170LK agreements.⁹⁶

Although certified agreements no longer needed to be cleared with DEWR, agencies were still required to provide a draft of their proposed agreement to that Department before seeking their Minister's approval of the agreement. A requirement was imposed that any policy issues raised by DEWR should be brought to the attention of their Minister before he or she provided approval.⁹⁷

Australian Workplace Agreements in the APS Context

In relation to making AWAs with Commonwealth employees, the Secretary to a Department will represent the Commonwealth.⁹⁸

In the APS, AWAs have represented a significant new policy direction consistent with a desire to have workplace bargaining arrangements reduced to the employer/employee level of direct negotiation. Although agency heads, and some SES staff, may have previously had individual contracts, introducing AWAs across the broader SES, and to lower levels, was a major step.

In the experience of the author, and in particular prior to the passage of the PSA 1999, the technical operation of an AWA depended a great deal on how it related to other instruments that set out terms and conditions of employment. The relationship between an AWA and these instruments in the APS context was complex, as will be seen in the following discussion.

As with certified agreements, it was Government policy that AWAs should be comprehensive agreements in that they would clearly provide for all the terms and conditions of employment and stand alone from other instruments such as awards and certified agreements. However, mainly for reasons of convenience, AWAs have often been framed on the basis of 'calling up' or incorporating by reference the content of more comprehensive instruments such as awards or certified agreements; ie they would incorporate or adopt the text of such

instruments as terms of the AWA itself. There is now an expressed policy position to have AWAs as 'textually' comprehensive agreements, in that they should expressly contain all the employee's terms and conditions of employment (although, as is the case with certified agreements, they should now be 'simple principles based' agreements).⁹⁹

AWAs and Awards

The old s 170VQ(1) of the WRA provided that, during its period of operation, an AWA operated to the exclusion of any award that would otherwise apply to the employee. It is important to note that this effect was broader than for a certified agreement. A certified agreement merely prevailed over an award to the extent of any inconsistency; an AWA excluded the award entirely. If it was desired to continue the effect of certain provisions of an award, then the terms of the award needed to be incorporated by reference as part of the AWA rather than being referred to as continuing to have effect as part of the award.

AWAs and Certified Agreements

The old s 170VQ(6) of the WRA provided for a complex relationship between an AWA and a certified agreement.

Generally speaking, a certified agreement which had not passed its nominal expiry date would prevail over an AWA unless the certified agreement allowed a subsequent AWA to operate to the exclusion of the certified agreement.¹⁰⁰ A certified agreement which came into operation after the nominal expiry date of an AWA would also prevail over the AWA to the extent of any inconsistency.¹⁰¹ In all other cases, the AWA operated to the exclusion of a certified agreement.

As was the case with awards, AWAs did not prevail over a certified agreement to the extent of any inconsistency. Hence, if the terms of the certified agreement were to effectively apply, the drafting technique was to incorporate the relevant terms of the certified agreement as terms of the AWA.

AWAs and the APS Enterprise Agreement

A further complexity was that the APS Enterprise Agreement was not a 'certified agreement' for the purposes of s 170VQ(6) of the WRA. Therefore, there were no express rules governing the relationship of an AWA and the APS Enterprise Agreement. However, as discussed above, for certified agreements made under the new Part VIB, the AWA, being made under a later law, would be taken to prevail over the APS Enterprise Agreement to the extent of an inconsistency. Hence, an AWA could expressly limit or exclude the operation of the APS Enterprise Agreement.

AWAs and the PSA 1922

To the extent that it was relevant in the APS context, AWAs (like certified agreements) prevailed over conditions of employment in a Commonwealth law prescribed by the regulations.¹⁰² Initially the regulations included:

- all determinations under s 82D;
- directions and notices about retirement and dismissal under the Act and regulations; and
- classification of offices.¹⁰³

Other specific legislation applying to APS employment (such as long service leave, maternity leave, superannuation, safety rehabilitation and compensation) was not prescribed and so could not be affected by an AWA.

The Experience of Making AWAs in the APS

The nature of AWAs is that, as individual agreements, they are not open for scrutiny in the manner of certified agreements. Although the WRA prevented AWAs including secrecy provisions,¹⁰⁴ the documents are usually covered by an agency's policy of protecting the confidentiality of its personnel records. Unless the parties agreed to the release of details of the AWA there would be implications under the *Privacy Act 1988* (Cth).

The following observations on AWAs are provided from the author's experience of drafting AWAs for many Commonwealth agencies. The observations are necessarily general in nature. Since 1996, there have also been other reports and publications dealing with the making of AWAs in the APS and these are also a source of confirmation of the nature of the matters that have been dealt with by these agreements.¹⁰⁵ As some of these publications have also acknowledged, the development of AWAs involved significant agency resources;¹⁰⁶ and, as may be gathered from the foregoing discussion, they have involved some complexity in their drafting.

Government policy after the commencement of the WRA was to offer AWAs to SES officers as a priority and to look to extend them to senior non-SES levels and specialist positions. By the time of the passage of the Work Choices legislation, it had got to the position where Agency Heads were required to put in place arrangements that enabled any employee in their agency to seek to negotiate an AWA.¹⁰⁷

AWAs within the APS may be dealt with in two categories. Those involving:

- SES personnel; and
- non-SES personnel.¹⁰⁸

These are considered in detail below.

SES Personnel

The first phase of AWAs commenced operation in advance of the 'first round' agency certified agreements that were negotiated between 1997 and 1999. The policy was that AWAs should be comprehensive in their scope, in the same manner as was envisaged for certified agreements (ie they did not operate in conjunction with other instruments). However, especially in this first phase, it was not practical that each AWA expressly detail all the terms and conditions of employment, and in many cases it was legally necessary to continue the effect of other instruments.

At the time that the first AWAs were being negotiated, the terms and conditions of SES personnel derived from:

- the Australian Public Service, Senior Executive Service (Salaries and Specific Conditions) Award 1995;
- various s 82D determinations or provisions of the APS Enterprise Agreement (of general or specific application); and
- other provisions of the PSA 1922 that specifically applied to them.

The failure to maintain certain of these conditions could have raised issues about whether there would be a breach of the 'no-disadvantage test'.

AWAs for SES personnel tended to be relatively short agreements providing for:

- a. general conditions of employment (such as hours of duty, leave and travel entitlements); and
- b. the remuneration package (including base salary, bonus payments, salary reviews, private plated vehicles and flexible remuneration packaging).

AWAs were also required to include mandated content in relation to dispute resolution and anti-discrimination.¹⁰⁹ They also might typically include provisions dealing with termination of employment, resignation and termination or variation of the AWA (but these were often included as 'comfort' provisions that merely restated the legal situation in any event).

Generally speaking, agencies offered AWAs in similar terms to all SES employees, although there were cases where remuneration rates differed or where different terms were offered to specialist positions.¹¹⁰

SES AWAs were often drafted on the basis that the s 82D determinations and the APS Enterprise Agreement would continue to apply except to the extent that they were inconsistent with the particular terms of the AWA. Even where more comprehensive AWAs did generally exclude the operation of s 82D determinations and the APS Enterprise Agreement, it was a common requirement for them to, at least, continue the operation of the APS Enterprise Agreement

provisions relating to salary regression for SES personnel and the prevention of appeal rights to the MPRA.¹¹¹

As agencies negotiated certified agreements, the issue for SES AWAs was what, if any, should the relationship be with those agreements. As has been seen above, the technical legal relationship between an AWA and a certified agreement was complex, and depended upon the time the respective agreements were made, their nominal expiry dates and whether a certified agreement allowed a later AWA to operate to its exclusion. Along with this, the policy was that SES personnel should be covered by comprehensive AWAs rather than come under an agency's certified agreement. Therefore, it was generally the case that AWAs operated to exclude the formal application of a certified agreement to SES employment or the relevant certified agreement was expressed not to cover SES employees. This resulted in two basic approaches to AWA formulation:

1. the AWA did not refer to matters included in a certified agreement but it may (or may not) have continued the operation of relevant s 82D determinations or the APS Enterprise Agreement; or
2. the AWA recited, or incorporated by reference, terms of the relevant certified agreement (either on a general or selective basis) that were to operate as terms of the AWA.

With the passage of the PSA 1999, there was no longer the legal technical need to continue the operation of provisions of awards, s 82D determinations and the APS Enterprise Agreement which have been discussed earlier. This removed a great deal of the drafting complexity. Nevertheless, many AWAs still continued to 'call up' provisions of agency certified agreements, as terms of the AWA, rather than be 'textually' comprehensive documents in themselves.

Non-SES Employees

In relation to non-SES personnel, the first phase of AWAs (ie those negotiated before an agency's certified agreement) involved different considerations. At that time, the relevant employment conditions were basically drawn from GECA and the APS Enterprise Agreement.

AWAs were generally offered to this group as a way of providing performance pay or retention bonuses (for example in relation to staff who might be tempted to go with an outsourced IT function). A typical early form of AWA for this class merely dealt with those special conditions but otherwise effectively continued the operation of the terms of the GECA or the APS Enterprise Agreement. As AWAs actually operated to the exclusion of GECA¹¹² the terms of that award had to be adopted as part of the AWA but without the technical overriding effect on the PSA 1922 that awards and the APS Enterprise Agreement could otherwise have.¹¹³

As agencies began to put in place their certified agreements, it became more common to offer AWAs to senior non-SES staff. Nevertheless, these AWAs almost invariably sat atop the certified agreement. Again, because the AWA generally operated to the exclusion of the certified agreement, the drafting technique was to incorporate the terms of the certified agreement as if they were terms of the AWA. Apart from the formal requirements in relation to anti-discrimination and dispute resolution, the balance of the substantive provisions of the AWA dealt with the special conditions to apply to the non-SES employee (e.g. retention and performance or skills bonuses).¹¹⁴

The Extent of Use of AWAs

As at 1 May 2006 there were 13,390 AWAs in operation in the APS (and Parliamentary Service) out of a total workforce of around 134,000.¹¹⁵ Of these, 2,131 related to SES employees and 11,259 to non-SES employees.¹¹⁶

The figures confirm the widespread practice of offering AWAs beyond the SES. While, non SES staff on AWAs are very much in the minority, even at the Executive Levels (ie those levels immediately below the SES), the numbers continue to grow, up from approximately 6,400 in November 2003. This would be primarily driven by the offer of performance bonuses and the like. It will be interesting to see how the trend continues under the Work Choices legislation.

The Introduction of the PSA 1999

For a considerable period of time, there had been a general consensus that the PSA 1922 was in need of replacement. The McLeod Report of December 1994 had recommended a new Public Service Act that emphasised the role, standards and values of the APS and with agency heads being primarily responsible for employment matters within their agencies.

Until the passing of the new PSA 1999 in November 1999, the WRA operated in conjunction with the PSA 1922. Therefore the new agreement making arrangements under the WRA had to take account of the legislative provisions of the PSA 1922 which affected employment entitlements and obligations. As outlined above, certified agreements and AWAs could override determinations made under s 82D of the PSA 1922. This was necessary, from one policy perspective, given that those s 82D determinations provided for service-wide conditions of employment whereas the goal of the new WRA (as it was applied to the APS) was to move bargaining down to the agency level.

The PSA 1922 had an outward structure that did not fit with the new agreement making arrangements. However delegations of authority to Agency Heads had meant, in a practical sense, there were no great impediments to agency bargaining. Any minor difficulties with agreements not being able to override certain provisions of the PSA 1922 could have been resolved by amendment of

the Workplace Relations Regulations 1996 (Cth). Nevertheless, change was desirable in order to make for a more coherent legislative framework.

Parliament failed to agree on a form of Public Service Bill that was presented in 1997. As an interim measure, the Public Service Regulations (Amendment-Interim Reforms) 1998 (Cth) were made. Those regulations provided for the APS Values and APS Code of Conduct that were to be included in a new Act.¹¹⁷

A revised Public Service Bill was passed by the Parliament in 1999 which is discussed below¹¹⁸

Structure of the PSA 1999

The PSA 1999 presents a more simply drafted and up to date piece of legislation governing APS employment.

The Australian Public Service

The APS is defined in s 9 as being comprised of Agency Heads and APS employees.

The culture of the APS is based upon the 'APS Values', which are set out in s 10. They are fifteen in number, with some notable ones being that the APS:

- is apolitical in the performance of its functions;
- makes employment decisions based upon merit;
- provides a workplace that is free from discrimination;
- provides frank, honest, comprehensive, accurate and timely advice to the government;
- establishes workplaces that value communication, consultation, cooperation and input from employees;
- provides a fair, flexible, safe and rewarding workplace;
- promotes equity in employment;
- is a career based service; and
- provides a fair system of review of decisions that affect employees.¹¹⁹

Section 10(2) provides a definition of 'merit' for the purposes of the PSA 1999.

The APS Code of Conduct is provided in s 13. This is essentially the same as that which operated under the Interim Reform Regulations from March 1998, and some of the more notable aspects are that an APS employee must:

- act with honesty and integrity, and care and diligence;
- treat others with respect and without harassment;
- obey lawful and reasonable directions;
- maintain appropriate confidentiality;
- disclose and avoid conflicts of interest;
- not make improper use of inside information or their position; and

- comply with other matter prescribed by the regulations (including the duty of non-disclosure).¹²⁰

Failing to uphold the APS Values is a breach of the Code of Conduct. Agency Heads are required to establish procedures for deciding whether an APS employee has breached the Code of Conduct. These procedures must comply with the Public Service Commissioner Directions 1999 (Cth) (discussed below). The PSA 1999 sets out the sanctions which may be applied for a breach, ranging from a reprimand to termination of employment.¹²¹

APS Employees

In terms of APS conditions of employment, the regulatory heart of the PSA 1999 is in Part 4.

Section 20 provides that the Agency Head, on behalf of the Commonwealth, has all the rights, duties and powers of an employer in relation to the APS employees in the relevant agency.¹²² This formalised the trend which had practically occurred by way of the delegations to Agency Heads made under the PSA 1922.

Section 22 provides that Agency Heads have the power to engage persons on the following bases:

1. as an ongoing APS employee;
2. for a specified term or for a specified task; or
3. for duties that are irregular or intermittent.

The usual basis for engagement, however, is ongoing employment.¹²³

Section 23 provides that the Public Service Minister may make rules about the classification of employees which have to be followed by Agency Heads. Moreover, an Agency Head may only reduce the classification of an employee, without consent, in specified circumstances.

Perhaps the most important formal devolution of powers achieved under the PSA 1999 is the power given to Agency Heads to determine terms and conditions for agency employees under s 24. This power corresponds to that which was previously formally held by the Public Service Commissioner under s 82D of the PSA 1922, although a s 24 determination cannot reduce the benefit of any condition of employment applying under the Australian Pay and Conditions Standard, an award, a workplace agreement, a pre-reform certified agreement or a pre-reform AWA.¹²⁴ Nevertheless, Agency Heads have been instructed that, as terms and conditions of employment should be established through agreements under the WRA, this determination power should be used sparingly, eg to deal with unforeseen or overlooked issues.¹²⁵

Section 29 deals with termination of employment. Ongoing APS employees may only be terminated on grounds listed in s 29(3) including:

- being excess to requirements;
- loss of essential qualification; or
- breach of the Code of Conduct.

The unfair dismissal provisions of the WRA apply to the termination of employment of APS employees.

Section 33 provides for the review of APS actions other than termination of employment. Review procedures, including the role of the Merit Protection Commissioner, are set out in the regulations.

Senior Executive Service

There are specific provisions which apply to SES employment, including that termination of employment must be certified by the Public Service Commissioner.

Public Service Commissioner and Merit Protection Commissioner

Parts 5 and 6 respectively provide for the appointment and functions of the Public Service Commissioner and the Merit Protection Commissioner. The Public Service Commissioner has an important role to play in relation to APS terms and conditions of employment through the issuing of Commissioner's Directions (discussed below) and the Merit Protection Commissioner plays an important role in relation to the review of employment decisions (also discussed below).

Secretaries of Departments

Part 7 provides for the appointment of Secretaries of Departments of State. A Secretary may be appointed by the Prime Minister for a period of up to five years, although the appointment may be terminated in writing at any time.¹²⁶

Management Advisory Committee

Section 64 continues the role of the APS Management Advisory Committee, although there is no longer any provision for formal union membership of that Committee.

Mobility

In relation to machinery of government changes, s 72 of the PSA 1999 enables the Public Service Commissioner to move APS employees from one agency to another agency, or to move them outside the APS and into the employment of a Commonwealth authority, or to move them into the APS from other Commonwealth employment. As discussed below, the regulations provide for what happens to employee terms and conditions as a result of machinery of government changes.

Subordinate Instruments under the PSA 1999

The PSA 1999 certainly does not contain the outdated detail and ‘dead letters’ of the PSA 1922. While the new Act provides a simplified statutory framework at the primary level, there are important matters of detail contained in a number of subordinate instruments made under the Act. These details fill out the framework provided by the Act and, in many respects, provide for service wide standards governing the activity of individual agencies.

Commissioner’s Directions

Various provisions in the PSA 1999 provide for the Public Service Commissioner to issue ‘Commissioner’s Directions’, including for the purpose of:

- ensuring that the APS incorporates and upholds the APS Values;
- determining where necessary, the scope and application of the APS Values (in particular the merit principle as applied to engagement and promotion);
- procedures in an agency for dealing with breaches of the Code of Conduct; and
- the engagement, promotion, redeployment, mobility and termination for SES employees.¹²⁷

Prime Minister’s Directions to Agency Heads

Section 21 provides for the Prime Minister to issue directions to Agency Heads relating to management and leadership of APS employees. At present, these directions deal with leave to undertake a statutory appointment or to work under the *Members of Parliament (Staff) Act 1984* (Cth) and with engagement of persons to take part in APS-wide training schemes.¹²⁸

Classification Rules

Section 23 provides that the Public Service Minister (presently the Prime Minister) may make rules about classifications of employees. The purpose of the Classification Rules is to provide a systematic mechanism for categorising employees for the purposes of facilitating the application of the merit principle and mobility arrangements.¹²⁹ The common service-wide prescription of the classification system is needed to distinguish clearly between promotions (subject to a merit test), assignment of duties at the same classification, and reductions in classifications (which are subject to restrictions).

Regulations

The Public Service Regulations 1999 (Cth) contain much of the important detail of the subordinate instruments.

The Regulations contain rules in relation to the following matters:

- the Code of Conduct including the duty of non-disclosure (reg 2.1);¹³⁰
- limitations on the employment powers of agency heads including the engagement and termination of non-ongoing employees and mobility (Part 3);
- Independent Selection Advisory Committees (Part 4);¹³¹ and
- details of other functions of the Public Service Commissioner and the Merit Protection Commissioner (Parts 6 and 7).

Perhaps the most significant area in the regulations is Part 5, which deals with the review of APS actions. Division 5.2 provides for the review of promotion decisions up to APS Level 6. Application for a review on the ground of merit may be made to the Merit Protection Commissioner. The Merit Protection Commissioner is responsible for appointing a Promotion Review Committee ('PRC') to review the decision. The decision of the PRC is binding on the Agency Head.

Part 5 also provides for a two-tier level of review of APS actions other than promotion decisions. At the primary level are reviews conducted by the Agency Head, unless the APS action involves a determination relating to a breach of the Code of Conduct. The Agency Head may refer a primary level matter to the Merit Protection Commissioner.

The Merit Protection Commissioner considers primary level matters involving breaches of the Code of Conduct or those which have been referred by an Agency Head. The Merit Protection Commissioner may also conduct a secondary level review if a person is dissatisfied with the decision of the Agency Head at the primary level.

Part 8 of the Regulations also provides for employment conditions to apply when APS employees change agencies as a result of machinery of government or administrative rearrangements.

Comparison with the PSA 1922

The major achievement of the PSA 1999 was to provide for a simpler and up to date piece of primary legislation which sets the framework for the detail in the subordinate instruments that have been discussed earlier. However, in reality, practically all of the employment reforms over the period discussed in this chapter had effectively been achieved within the old framework of the PSA 1922.¹³²

In general terms it is accurate to summarise the PSA 1999 as having the following effects:¹³³

- the primary legislation was simplified and updated (the old Act was some 245 pages, whereas the new Act is only 47 pages);

- it removed outdated detail and prescription, although there is much detail included in the subordinate instruments made under the new Act;
- the concept of 'merit' now has a specific definition;
- there was a change in employment categories, with the abolition of the notion of 'office';
- the maximum retirement age of 65 was removed;
- some review procedures have been changed although independent review of promotion decisions up to APS level 6 has been retained; other employment decisions may be subject to internal agency review prior to review by the Merit Protection Commissioner;
- complex Part IV mobility provisions were removed; and
- an Independent Selection Advisory Committee mechanism has replaced the old Joint Selection Committee Process, which is another instance of removal of a formal union function.

The PSA 1999 and its subordinate instruments do represent a significant rewrite of many of the pre-existing conditions of APS employment. In that regard, a new jurisprudence and practice has developed around the new framework. For example, agencies no longer need to consider concepts such as 'office' that employees no longer occupy particular positions, and references to 'temporary employees' are now altered to 'non-ongoing employees'. Nevertheless, the basic employment relationships operating under the PSA 1922 continue to operate under the PSA 1999.

Relationship with the WRA

Section 8 of the PSA 1999 provides that the Act has effect subject to the WRA, and thus contemplates the agreement making and unfair dismissal provisions provided for by that Act. Shortly after its passage, a former Public Service Commissioner commented that the PSA 1999 is concerned primarily with the ethos, standards, accountability and key structure aspects of the APS while the WRA defines the employment relations framework.¹³⁴

Certified Agreements and AWAs

The Workplace Relations Regulations 1996 (Cth) were amended with effect from the commencement of the PSA 1999 to provide that a certified agreement or AWA could prevail over conditions of employment specified in a determination made under s 24 of the PSA 1999 (other than a determination made under s 72 in relation to machinery of government or other administrative changes).¹³⁵ This position can be equated with the previous position in which certified agreements and AWAs could prevail over determinations made under s 82D of the PSA 1922.

Twenty-First Century Developments: The Work Choices Legislation

Since 1996, the third major change to the legislative framework governing APS employment has come with the passage of the Commonwealth *Workplace Relations Amendment (Work Choices) Act 2005* (the 'Work Choices legislation'). All of the relevant provisions had commenced by 27 March 2006.

The Work Choices legislation repealed and replaced a great deal of the WRA. Moreover, it effected a substantial constitutional 're-basing' of the WRA by expanding the Commonwealth's reliance on the corporations power in s 51(xx) of the Constitution. The reforms were stated to include:

- simplification of the inherent complexity in the existence of six separate workplace relations jurisdictions in Australia by creating a national workplace relations system based on the corporations power;
- establishment of the Australian Fair Pay Commission to set minimum wages;
- greater emphasis on direct bargaining and simplified lodgement processes for industrial agreements;
- direct legislation for certain minimum conditions of employment such as annual leave, personal/carers leave, parental (including maternity) leave and the maximum ordinary hours of work;¹³⁶
- improved regulation of industrial action, including by requiring a secret ballot before the taking of 'protected industrial action';
- further simplification of awards that would provide a safety net; and
- the protection and preservation of certain award conditions.¹³⁷

The Work Choices legislation has been the subject of much controversy. There was a challenge to its constitutional validity on a number of grounds in the High Court. In particular, the question was whether the legislation (dealing as it does with employment and industrial matters) went beyond a valid exercise of the Commonwealth Parliament's power to make laws with respect to trading and financial corporations. The principal arguments centre around:

- whether an employment relationship operating within a corporation is a matter with respect to its trading activities; and
- whether the Commonwealth's power with respect to corporations should be read down by reference to the conciliation and arbitration power in relation to interstate industrial disputes in s 51(xxxv) of the Constitution (ie that a valid law with respect to the industrial relations matters of corporations is also confined by the terms of that constitutional provision).

Whilst the High Court upheld the validity of the Work Choices legislation,¹³⁸ many of the controversial and constitutionally contentious matters are outside the scope of this chapter, dealing as it does with APS employment.¹³⁹

Nevertheless, the Work Choices legislation, now declared valid and fully operative, together with the further changes brought about by the *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* (Cth), have made significant changes to the arrangements for the APS introduced by WROLA at the end of 1996, particularly the arrangements for agreement making.

While it may still be too early to provide meaningful commentary on the practical effects of the changes for public sector employment, the Work Choices legislation does represent a further increment in the attempt to encourage agreements directly between employers and employees, and as well as further regulation of the role of unions in relation to that process.

Workplace Agreements

Part 8 of the amended WRA now deals with what are known as ‘workplace agreements’. It is sufficient to consider two basic forms of workplace agreements described in that Part, collective agreements; and AWAs.¹⁴⁰

Collective Agreements

Collective agreements now replace certified agreements.¹⁴¹ For present purposes, we can consider two types of collective agreement:

- ‘employee collective agreement’;¹⁴² and
- ‘union collective agreement’.¹⁴³

While both forms of collective agreement still require approval by a majority of the affected employees, there are some important changes:

- these agreements are no longer required to be certified by the AIRC in order to commence operation; rather they are merely required to be lodged with the Workplace Authority Director (formerly the Employment Advocate) within 14 days after approval;¹⁴⁴
- except for checking some agreements as to whether they meet the fairness test, Workplace Ombudsman is generally not required to make a determination as to whether the agreement complies with the WRA;¹⁴⁵ and
- arrangements for the appointment of bargaining agents have been extended to individual employees, even in the context of the negotiation of collective agreements.¹⁴⁶

Australian Workplace Agreements

Part 8 of the WRA continues provision for the making of AWAs but with a number of changes:

- there is no longer a requirement to offer AWAs on similar terms to comparable employees; and

- there is no longer provision for multiple individual AWAs to be included in a single document.¹⁴⁷
- Agency Heads continue to act on behalf of the Commonwealth in relation to the negotiation of AWAs.¹⁴⁸

Changes Common to Both Collective Agreements and AWAs

There are important new provisions that are common to the making of collective agreements and AWAs (as 'workplace agreements') which include:

- the period during which a proposed agreement must be available for an employee's consideration has been reduced from 14 days to seven days;¹⁴⁹
- there is no longer an express requirement to explain the terms of a proposed workplace agreement to an employee;¹⁵⁰
- the 'no-disadvantage' test in old part VIE of the WRA was repealed, effectively leaving the Australian Fair Pay and Conditions Standard and any 'protected award conditions' of the APS Award 1998 (see below) to operate as the 'safety net' for APS employees who ceased to be covered by a workplace agreement.¹⁵¹ However the 'fairness test' later added by the *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* now provides for compensation to be paid for any modification or exclusion of 'protected award conditions' in all collective agreements, and in AWAs involving an annual salary of under \$75,000, made from 1 May 2007.¹⁵²
- the nominal expiry date for workplace agreements may now be up to five years after the agreement has been lodged with the Workplace Authority Director;¹⁵³
- a collective agreement or AWA is deemed to include 'protected award conditions' unless these have been specifically excluded by the agreement;¹⁵⁴
- a collective agreement and an AWA are now expressly allowed to 'call-up' (ie incorporate by reference) the terms of another workplace agreement or industrial instrument (such as an award) that would otherwise apply to the employment of the employee(s);¹⁵⁵
- 'protected industrial action' in relation to the negotiation of a collective agreement will now only be able to be taken following a secret ballot of the relevant employees.¹⁵⁶

Prohibited Content

A collective agreement or AWA will not be able to include 'prohibited content' which has been defined by the regulations to include terms relating to the deduction of union fees; leave to attend trade union training course or meetings; the renegotiation of the workplace agreement; restrictions on the engagement of independent contractors or labour hire workers; the encouragement or discouragement of union membership; the allowing of industrial action or dealing with unfair dismissal (except in relation to the management of underperformance);

restrictions on offering AWAs; excessive foregoing of annual leave and provision of employee information to trade unions.¹⁵⁷

A workplace agreement cannot contain a term which would restrict or prohibit the disclosure of the content of a workplace agreement.¹⁵⁸ It is also 'prohibited content' to discriminate in an agreement on the basis of sex, sexual preference, age, disability, religion, marital status, etc unless inherent to the requirements of the position, or to include matters that do not pertain to the employment relationship.¹⁵⁹

Unilateral Termination

A party to a workplace agreement will now be able to unilaterally terminate that agreement after the nominal expiry date:

- if such termination is provided for by the agreement; or
- on the giving of 90 days notice.

On termination, an employee will not be covered by any other workplace agreement or award that might otherwise apply to the employee, except for any 'protected award conditions'.¹⁶⁰ Unless an employer gives undertakings about post-termination conditions under s 397 of the WRA, an APS employee who has, say, an AWA terminated, will fall back on the AFPC Standard and any 'protected award conditions' that apply.¹⁶¹

The effect of the above provisions is that the Commonwealth Parliament has now significantly expanded its direct legislation in relation to the content of APS workplace agreements, for example:

- it may have the effect of deeming that the terms of the 'protected award conditions' as set out in s354 of the WRA are taken to be part of the content of an agreement; and
- (conversely) it proscribes a range of matters as being 'prohibited content' in a workplace agreement.¹⁶²

The Relationship between AWAs, Collective Agreements, Awards and the PSA 1999

Many of the previously complex arrangements between the various sources of APS terms and conditions of employment have been addressed by more simplified arrangements to operate under the Work Choices legislation.

AWAs and Collective Agreements

Section 348 of the WRA now makes it clear that only one workplace agreement can operate in relation to an employee at any one time. Further, a collective agreement has no effect in relation to an employee while an AWA is in operation.¹⁶³

Awards

Section 349 of the WRA makes it clear that an award has no effect in relation to an employee while a workplace agreement operates in relation to that employee.¹⁶⁴

PSA 1999

Section 350 of the WRA continues the arrangements whereby a workplace agreement may displace certain prescribed conditions of employment in prescribed Commonwealth laws. Consistent with the arrangements that applied prior to the Work Choices legislation, the new regulations made under the WRA specify that a workplace agreement may displace conditions specified in a determination made under s 24(1) of the PSA 1999 (other than certain determinations made in relation to ‘machinery of government’ changes pursuant to s 72 of the PSA 1999).¹⁶⁵

Transitional Arrangements

Certified Agreements and AWAs

A certified agreement or AWA made before the commencement of the Work Choices legislation will be known respectively as:

- a ‘pre-reform certified agreement’; and
- a ‘pre-reform AWA’.

Generally speaking, pre-reform certified agreements and pre-reform AWAs continue to operate, in the same manner as under the old WRA, until they are replaced by a workplace agreement.

Once replaced by a collective agreement, a pre-reform certified agreement ceases to apply (and can never operate again). A collective agreement replaces a pre-reform certified agreement even if the nominal expiry date of the pre-reform certified agreement has not passed. Further, if an employee covered by a pre-reform certified agreement enters into an AWA, then the pre-reform certified agreement ceases to apply to that employee (and can never operate again in relation to that employee).¹⁶⁶

A new AWA replaces a pre-reform AWA, even if it is made prior to the nominal expiry date of the pre-reform AWA.¹⁶⁷ The terms of a pre-reform certified agreement or a pre-reform AWA may be incorporated by reference into a new workplace agreement.¹⁶⁸

Awards

Awards made prior to the Work Choices legislation will continue to operate except that the number of allowable award matters has been reduced from 20

to 15. Any matter that is not one of the 15 matters listed in s 513 of the WRA ceased to have effect from commencement of the Work Choices legislation (ie from 27 March 2006) unless it is a 'preserved award term'.¹⁶⁹ Preserved award terms are those relating to:

- annual leave;
- personal/carers leave;
- parental, maternity or adoption leave;
- long service leave;
- notice of termination;
- jury service; and
- superannuation (until 20 June 2008).¹⁷⁰

A preserved award term takes effect as part of the award. However, as noted, the award does not apply to any employee subject to a workplace agreement.¹⁷¹

In relation to the APS, the Australian Public Service Award 1998 continues in effect to the extent that it deals with the 15 allowable award matters and preserved award terms and does not include prohibited terms. However, apart from 'protected award conditions', its operation is entirely excluded by a new workplace agreement, and the 'protected award conditions' may themselves be entirely excluded.¹⁷² Moreover, subject to the provisions of the previous WRA, the APS Award may also be excluded by the terms of a pre-reform certified agreement or a pre-reform AWA. As has been noted, the recent introduction of the 'fairness test' will mean that fair compensation may be required for modification of or exclusion of protected award conditions that occurs in collective agreements or AWAs involving an annual salary of less than \$75,000 that are made from 1 May 2007.

Rates of pay are no longer to be matters dealt with as allowable award matters, nor are they to be 'preserved award matters'.¹⁷³

Early Experiences with Agreement Making in the APS under the Work Choices Legislation

In many ways, the Work Choices legislation has simplified arrangements for agreement making and clarified the position in relation to the operation of workplace agreements in relation to other industrial instruments. However, as agencies come to consider new AWAs and collective agreements the provisions of existing AWAs and certified agreements are being examined with regard to the following two subject matters:

- *prohibited content*: in order to ensure that new agreements do not restate or incorporate by reference provisions that would now be void if included and in order not to breach the legislation and be subject to civil penalties; and

- *the AFPC Standard*: in order to ensure that agreements do not carry forward terms that would now be less favourable than the standard. As noted, APS terms and conditions generally exceed the AFPC Standard but there are some aspects where adjustments are being required, for example, in relation to the accrual and crediting rules for leave.

As with WROLA, in 1996, it might be expected that there will be a period of adjustment for APS agencies in terms of aligning their agreement making arrangements with the latest changes to the legislative framework.

Conclusion: A Comparison of the Present and Pre-1996 Frameworks

In the pre-1996 framework, APS terms and conditions of employment were sourced from: general public service legislation in the form of the PSA 1922; general industrial relations framework legislation that provided for awards; certified agreements (including some made at APS agency level); and public service legislation on particular matters.

In the present framework, APS terms and conditions of employment are sourced from: general public service legislation in the form of the PSA 1999; general industrial relations framework legislation that provides for awards, certified or collective agreements (routinely made at APS agency level); and AWAs; and public service legislation on particular matters.

The changes, since 1996, to the legislative framework for APS employment can be seen as forming part of a continuing process of reform to the manner and circumstances in which employment terms and conditions are determined. In devolving agreement making responsibilities to the agency level (subject to fairly comprehensive policy guidance) those changes parallel the approach that has been taken in relation to APS financial management reform since the 1980s. However, the Work Choices legislation, with the introduction of the AFPC Standard and 'prohibited content' adopts a position that has become more prescriptive about the matters which can and cannot be included in workplace agreements.

WROLA and the Introduction of the *Workplace Relations Act 1996*

As discussed, the first major reform in terms of general industrial relations law was the introduction of the WRA.¹⁷⁴ That Act continued the then recent trend to emphasise workplace bargaining arrangements over industry awards, and the approach taken under the WRA has been to introduce comprehensive bargaining at APS agency level in place of service-wide agreements. It is true that comprehensive bargaining at the agency level was a significant step but, put in an historical context, the 1996 workplace relations reforms were carrying

on a recent trend of change in the APS, rather than striking out in a new direction.

Agency level bargaining under the WRA has produced some variations in outcomes on pay and other conditions across the APS, although the Government maintains a significant degree of centralised control through its agreement making policy parameters and guidelines.

A significant new area of reform however was the introduction of individual bargaining to the APS in the form of AWAs. This form of agreement has provided some flexibility in terms and conditions and specific remuneration arrangements to apply in particular cases. AWAs have become standard for employees at SES level but, a decade or so later, it still remains to be seen how pervasive they will become at levels below the SES. For this latter group, AWAs are primarily used as a vehicle for performance pay and other specific benefits; otherwise there has been no real incentive for these employees to move out from cover under a certified agreement.¹⁷⁵

The other significant change under WROLA was the winding back of a formal (or guaranteed) union role in negotiating agreements on a service wide or agency basis. Nevertheless, it is clear that unions have played a significant role in the negotiation of many certified agreements. The substantial majority of those agreements were made with unions under old s 170LJ of the WRA, and, it is probably the case that unions have also played a significant role in the conclusion of many of the agreements expressed to have been made directly with employees.¹⁷⁶

The 1996 WRA regime, as applied in the APS, initially made the arrangements for determining terms and conditions of employment more complex. Certified agreements and AWAs were difficult to frame for the following reasons:

- the lack of clarity in transitional provisions concerning the status of old certified agreements;
- the continuing relationship of old awards and old certified agreements with the PSA 1922 and the determinations and regulations made under that Act;
- the different nature of the relationship between new certified agreements and AWAs on the one hand and the PSA 1922, its determinations and regulations on the other hand;
- the complex relationship between the new certified agreements, AWAs and existing awards;
- the effect of the 'no-disadvantage' test; and
- the different instruments which applied to SES and non-SES officers.

Nevertheless, it is fair to say that the 1996 WRA arrangements presented the opportunity for more simplified arrangements. As time progressed, certified agreements became more comprehensive in nature, meaning less reliance on the

need to refer to awards and other instruments (and the 'no disadvantage test' became less significant as successive agreements were negotiated). Moreover, when AWAs were able to sit above (or call up) certified agreements, their operation also became clearer. Nevertheless, difficulties (both real but mainly in terms of presentation) remained with the continued operation of the PSA 1922. These were largely addressed with the passage of the PSA 1999.

PSA 1999

The second major initiative affecting APS employment since 1996 has been the passage of the PSA 1999. This Act ultimately had bipartisan support and completed the work to modernise the legislation that had commenced with the McLeod Report in 1994.¹⁷⁷

As has been noted, the PSA 1999 represented a welcome rewrite and modernisation of the old legislative framework. In particular, it works better with the WRA.¹⁷⁸ While the PSA 1999 is shorter and simpler, the detail has been moved to an increased number of subordinate instruments which keep in place a measure of control of employment policy and practice, especially with the continuing roles of the Public Service Commissioner and Merit Protection Commissioner.

A key design aspect of the PSA 1999 is that it embodied the relatively recent reforms in relation to the APS Values and the APS Code of Conduct. The APS Values provide an express statement of the principles of the APS which previously had to be derived from the prescriptive duties of officers formerly contained in the old Public Service Regulations.

Nevertheless, the APS did not undergo revolutionary change as a result of the PSA 1999. As a practical matter for APS employees, the passage of the PSA 1999 presented no great change to the way they were engaged and rewarded or how they went about their business.¹⁷⁹ The substance of the matters dealt with by the new framework had already been substantially put in place under the framework of the PSA 1922 (albeit in a more convoluted way). As such, the new Act really represented a step closer to the end of a journey of reform, rather than the beginning of another.

There was, however, a deal of activity required to adapt management systems to take account of the new legislative framework and terminology.¹⁸⁰ This seems to be confirmed by the State of the Service Report 1999/2000 tabled by the Public Service Commissioner. An entire section of that report is, not surprisingly, devoted to the experience of working with the PSA 1999 and it identified the major implementation issues for agencies as:

- dealing with the cultural effects of the removal of the concept of 'office' and updating delegations instruments;

- reviewing and revising recruitment and promotion arrangements to take account of legislative changes, including the new stricter requirements for engaging non-ongoing employees and application of the defined merit principle;
- creating agency procedures for dealing with breaches of the Code of Conduct and for review of employment decisions; and
- ensuring that changes to the legislative framework were properly factored into negotiations for 'second round' certified agreements.¹⁸¹

These issues were largely ones for organisations to deal with rather than being of practical day to day effect on employees. For example, for an employee, undergoing a promotion review process under the Public Service Regulations 1999 (Cth) is not unlike undergoing an appeals process under the provisions of the PSA 1922.

To reiterate, the above discussion is not to suggest the enactment of the PSA 1999 was not a significant and welcome step, for it was. It should however be seen for what it was: merely one of a series of steps in reform and not the entire reform agenda.

Work Choices

Since 1996, the third significant change to the legislative framework for APS employment has, of course, been the Work Choices legislation. It is too early to discern the practical significance of the legislation in relation to the APS but the following aspects might be noted.

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

It is not so much a change to the general framework of agreement making but rather a number of changes to the rules within that framework that have potential impact, including the following changes:

- a. the proscription of 'prohibited content' from workplace agreements removes the ability of agencies and, in particular unions, to come to their own agreement on that range of matters;
- b. the potential operation the AFPC Standard, and any 'protected award conditions' as terms of a workplace agreement, are key examples of the Commonwealth Parliament directly legislating for terms and conditions of employment;
- c. the requirements for 'protected industrial action' in relation to collective agreements now include a secret ballot;

- d. there are more express requirements placed upon the AIRC in relation to the termination of bargaining periods (and hence discontinuation of any protected industrial action); and
- e. the ability to unilaterally terminate a workplace agreement (especially an AWA) has the consequences that an affected APS employee will, unless undertakings are made, fall back upon the AFPC Standard and 'protected award conditions'.

Furthermore, the legislation now puts it beyond doubt that AWAs can be made a condition of engagement for new APS employees, with the potential to erode, over time, the numbers on collective agreements.

Obviously the issue of the ability of workplace agreements to modify or exclude the operation of award conditions has received some commentary and has prompted the recent introduction of the 'fairness test'. Nevertheless, this aspect of the potential operation of workplace agreements does not appear to have been an issue in the APS employment context.

The Work Choices legislation should generally make the framing of collective agreements and AWAs easier because it will be clear that only one instrument will apply to an employee at any one time. Nevertheless, there are initial complexities because of the need for new workplace agreements to pay appropriate regard to the AFPC Standard and to avoid the inclusion of any 'prohibited content'.

It remains to be seen how the other matters mentioned above will affect the way workplace agreements are made in the APS. The experience of the next couple of years will tell in that regard.

ENDNOTES

- ¹ Mark Molloy is a Senior Executive Lawyer at the Australian Government Solicitor (AGS). The views expressed in this paper are Mark's personal views, and not necessarily the views of AGS.
- ² References to the Australian Public Service or APS throughout this chapter are references to the public service of the Commonwealth of Australia.
- ³ The Commonwealth Constitution s 51(xxxix) combined with s 61 (the federal executive power) and s 52(ii) (the power in relation to departments transferred by the states).
- ⁴ See Breen Creighton and Andrew Stewart, *Labour Law: An Introduction* (1990) 109.
- ⁵ See *Stevens v Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16.
- ⁶ G J McCarry, *Aspects of Public Sector Employment Law* (1988) 18.
- ⁷ *Ibid.*
- ⁸ *Williamson v Commonwealth* (1907) 5 CLR 174; *Lucy v Commonwealth* (1923) 33 CLR 229; *Fletcher v Nott* (1938) 60 CLR 55.
- ⁹ This it could do by variously exercising powers under Constitution s 61 (executive power), s 64 (establishment of Departments of State) and s 67 (appointment of civil servants).
- ¹⁰ Prior to the PSA 1922, there had been the *Commonwealth Public Service Act 1902*.
- ¹¹ See Public Service Act Review Group, *Report of the Public Service Act Review Group: December 1994* (1994) 13-15 (the 'the McLeod Report').
- ¹² *Arbitration (Public Service) Act 1920* (Cth).
- ¹³ *Conciliation and Arbitration Amendment Act (No 2) 1983* (Cth).
- ¹⁴ See, eg, *Industrial Relations Act 1988* (Cth) s 121 (and of the renamed *Workplace Relations Act 1996* (Cth)).
- ¹⁵ See *Workplace Relations Act 1996* (Cth) s 350 and Workplace Relations Regulations 2006 (Cth) regs 8.2 and 8.3. The *Merit Protection (Australian Government Employees) Act 1984* (Cth) was repealed at the time of the passage of the PSA 1999; merit protection provisions are now contained in pt 5 of the Public Service Regulations 1999 (Cth).
- ¹⁶ Commonwealth, *Reforming the Australian Public Service: A Statement of the Government's Intentions*, Parl Paper No 194 (1983).
- ¹⁷ See also McInnes, 'Public Sector Reform under the Hawke Government: Reconstruction or Deconstruction?' (1990) 62(2) *Australian Quarterly* 108.
- ¹⁸ *Public Service Legislation (Streamlining) Act 1986* (Cth).
- ¹⁹ *Administrative Arrangements Act 1987* (Cth).
- ²⁰ Peter Punch, *Australian Industrial Law* (1995) 704.
- ²¹ See, eg, *National Wage Case — March 1987* (1987) 17 IR 65 (Australian Conciliation and Arbitration Commission) ('The National Wage Case of 1987').
- ²² This agreement provided for changes to office structures and classifications in exchange for a wage rise.
- ²³ *Industrial Relations Legislation Amendment Act 1992* (Cth); Punch, above n 20, 705.
- ²⁴ As will be seen, the WRA has continued the trend to enterprise bargaining, which is now completely conducted at the agency level in the APS.
- ²⁵ See PSA 1922 div 4 of pt III.
- ²⁶ See PSA 1922 subdiv D, div 4, pt III.
- ²⁷ See *Ibid.*
- ²⁸ See PSA 1922 pt IIA
- ²⁹ See PSA 1922 div 2B, pt III.
- ³⁰ See PSA 1922 div 10, pt III.
- ³¹ See PSA 1922 div 6, pt III.
- ³² See PSA 1922 divs 8A, 8B and 8C.
- ³³ See PSA 1922 s 76W(4) and *Industrial Relations Act 1988* (Cth) s 121
- ³⁴ See generally PSA 1922 pt IV.

- ³⁵ It is interesting to note that the general secrecy provision was recently held to be unconstitutional in the case of *Bennett v President, Human Rights and Equal Opportunity Commission* [2003] FCA 1433, but substantially the same provision is still retained as reg 2.1 of Public Service Regulations 1999 (Cth).
- ³⁶ In addition, the Australian Public Service, Senior Executive Service (Salaries and Specific Conditions) Award 1995 (the 'SES Award') dealt with rates of pay and some other issues for SES personnel. Clause 6.1 of that award also provided that SES officers were not covered by GECA and so most SES terms and conditions were actually those determined under s 82D of the PSA 1922 or those that applied by under the APS Enterprise Agreement.
- ³⁷ IRA s 121 continued as *Workplace Relations Act 1996* (Cth) s 116.
- ³⁸ See definition of 'award' in the then s 4(1) of the IRA.
- ³⁹ The then s 170MK of the IRA.
- ⁴⁰ GECA clause 17.
- ⁴¹ PSA 1922 div 8C, pt III, which applies to non-SES officers.
- ⁴² GECA clause 11.
- ⁴³ IRA ss 171 and 170MK.
- ⁴⁴ Unlike GECA, the APS Enterprise Agreement also covered SES officers.
- ⁴⁵ Clause 8 of the APS Enterprise Agreement.
- ⁴⁶ Clause 10(c) of the APS Enterprise Agreement.
- ⁴⁷ See *Improving Productivity, Jobs & Pay in the Australian Public Service: 1992-1994* (also known as the 'Framework Agreement'); see also Interim Framework Australian Public Service Agreement 1995 (the 'Interim Framework Agreement').
- ⁴⁸ Although the ability to negotiate for supplementary pay at the agency level was curtailed by the APS Enterprise Agreement.
- ⁴⁹ *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).
- ⁵⁰ References to sections of the *Workplace Relations Act 1996* (Cth) are to section numbers prior to the amendments brought about by Work Choices legislation in 2005.
- ⁵¹ See generally M Pittard, 'Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements' (1997) 10 *Australian Journal of Labour Law* 62.
- ⁵² WRA s 89A(3). APS awards had traditionally been paid rates awards.
- ⁵³ See generally M Pittard and R Naughton, *Australian Labour Law: Cases and Materials*, 4th ed, 2003, ch 12.
- ⁵⁴ Defined by s 4 of the WRA to include foreign, trading and financial corporations within the meaning of s 51(xx) of the Constitution, a body corporate incorporated in a Territory or a Commonwealth authority.
- ⁵⁵ Division 2 also operated where the employer was an employer conducting business in a Territory; or an employer of certain employees such as waterside workers, maritime workers and flight crew officers engaged in interstate or overseas trade or commerce (see s 5AA of the WRA).
- ⁵⁶ Underpinning for additional operation of Div 2 was also provided by the Territories power (Constitution s 122) and the trade and commerce power (Constitution s 51(ii)).
- ⁵⁷ It should be noted that employers could also make enterprise flexibility agreements directly with employees under the previous Part VIB of the IRA.
- ⁵⁸ WRA ss 170LJ(2), (3), 170LK(1), (2), (5).
- ⁵⁹ WRA s 170NB.
- ⁶⁰ WRA ss 170LK(4), (5).
- ⁶¹ WRA div 4, pt VIB.
- ⁶² WRA s 170LX.
- ⁶³ WRA div 6, pt VID.
- ⁶⁴ J Riley, G McCarry and M Smith, *Workplace Relations: A Guide to the 1996 Changes* (1997).
- ⁶⁵ An office established with the function of providing assistance to employers and employees about rights and obligations under the WRA, particularly in relation to AWAs: WRA s 83BB.
- ⁶⁶ WRA ss 170VPA, WG.
- ⁶⁷ WRA s 170VPA(1)(e).
- ⁶⁸ WRA s 170VK.

⁶⁹ WRA s 170VE.

⁷⁰ WRA s 170XA.

⁷¹ This limited immunity replaced the limited 'right to strike' in relation to the negotiation of certified agreements that had previously been included in IRA s 170VPA.

⁷² WRA div 8, pt VIB.

⁷³ WRA div 8, pt VID.

⁷⁴ DIR Workplace Relations Advice 1997/27, APS Agreement Making — Update, of 23 May 1997.

⁷⁵ Department of Workplace Relations and Small Business ('DWRSB'), *Annual Report 1998* (1998) 55.

⁷⁶ See clause 6.1.1 of the APS Award 1998 and Department of Employment, Workplace Relations and Small Business, *Annual Report 1999* (1999), 99.

⁷⁷ DIR Workplace Relations Advice 1997/4, Agreement Making in the APS, 12 March 1997 (This and other DIR/DEWRSB/DEWR Advices are available at <<http://www.workplace.gov.au>> (Commonwealth Public Sector)).

⁷⁸ DIR Workplace Relations Advice 1997/29, Policy Parameters for Agreement Making in the APS, 23 May 1997.

⁷⁹ Throughout 1997, the Government and the ACTU (on behalf of public sector unions) conducted negotiations on an Agency Bargaining Framework. However, no framework agreement was concluded.

⁸⁰ See, eg, 'Workplace Relations and Agreement Making in APS Agencies' a paper attached to DEWRSB Workplace Relations Advice 1997/33, Workplace Relations and Agreement Making in APS Agencies, 3 June 1997.

⁸¹ Policy parameter number 7 of the May 1997 Policy Parameters, however, for a number of reasons, this was difficult to achieve (see below).

⁸² WRA old s 170LB(1)(b) and now s 322(1)(b).

⁸³ Except awards made under WRA s 170MX(3), which deals with arbitration in matters at the end of a bargaining period and 'exceptional matter' orders made after the commencement of a certified agreement.

⁸⁴ So much would seem to follow from the effect of s *Acts Interpretation Act 1901* (Cth) s 8, which operates to preserve rights and obligations which have arisen under repealed legislation.

⁸⁵ Then reg 30ZE of the Workplace Relations Regulations 1996 (Cth) and Sch 5 to those regulations. However, since the passage of the *Public Service Act 1999* (Cth), new regulations only refer to determinations made under ss 24 and 72 of that Act (which is discussed later).

⁸⁶ At 16.

⁸⁷ DEWR Workplace Relations Advice 2002/5, Policy Parameters for Agreement Making in the APS 2002, 7 June 2002; DEWR APS Advice 06 of 2003, Government Support for Defence Reservists, 3 December 2003. In April 2006, DEWR released revised policy parameters for the Work Choices legislation and these are discussed later.

⁸⁸ See generally DEWRSB Agreement Making in the APS — The First Round (May 1997-June 1999), and the follow up Survey of Agreement Making in the APS (2001).

⁸⁹ Although AWAs were to be as comprehensive as possible they also, at least initially, largely incorporated the terms of other instruments.

⁹⁰ For example, a certified agreement could be drafted to exclude the legal operation of an award but to incorporate, by reference, the terms of that award as terms of the certified agreement. In a sense therefore, the agreement might legally have been a stand-alone agreement but it may not have been 'textually comprehensive'.

⁹¹ DEWRSB, *Annual Report 1998-99* (1999) 29.

⁹² DEWR Website figures as at 1 May 2006 record that 98 of the then 100 certified agreements were standalone agreements.

⁹³ See DEWRSB, *Survey of Agreement Making in the APS* (2001) 9.

⁹⁴ DEWR APS Advice 04 of 2005 (3 August 2005) and Supporting Guidance - Workplace Relations Policy Parameters for Agreement Making in the Australian Public Service (April 2006) 24.

⁹⁵ DEWR figures at <<http://www.workplace.gov.au>>.

⁹⁶ DEWRSB, *Annual Report 1998-99* (1999) 29.

⁹⁷ DEWRSB Workplace Relations Advice 1999/8, Policy Parameters for Agreement Making in the APS, 17 May 1999; and this will continue under the Work Choices arrangements: DEWR APS Advice 05 of 2006.

⁹⁸ WRA old s 170WK and now s 415.

⁹⁹ DEWR APS Advice 04 of 2005 (3 August 2005).

¹⁰⁰ And most certified agreements were drafted to so allow.

¹⁰¹ These provisions are intended to reflect the primacy of operative certified agreements which are likely to contain more detailed provisions of benefit to the employee.

¹⁰² WRA s 170VR(4).

¹⁰³ Then reg 30ZJ of the Workplace Relations Regulations 1996 (Cth) and Schedule 5 to those regulations. However, since the passage of the *Public Service Act 1999* (Cth), new regulations only refer to determinations made under ss 24 and 72 of that Act (discussed in a later section of this paper).

¹⁰⁴ WRA s 170VG(2).

¹⁰⁵ Reports and publications include: Department of Employment and Workplace Relations and Small Business, and the Office of the Employment Advocate, *Australian Workplace Agreements in the Public Sector: Early Experiences: Tips and Case Studies* (August 2000); The Senate Finance and Public Accounts Committee, Parliament of Australia, *Australian Public Service Employment Matters, First Report, Australian Workplace Agreements* (2000); and the Department of Employment, Workplace Relations and Small Business, *Survey of Agreement Making in the APS* (2001).

¹⁰⁶ Department of Employment, Workplace Relations and Small Business, *Survey of Agreement Making in the APS* (2001), 15.

¹⁰⁷ DEWR circular 13 April 2006.

¹⁰⁸ Prior to the passage of the PSA 1999, APS permanent APS personnel held an 'office', whereas they are now termed as (ongoing) 'employees'.

¹⁰⁹ WRA old s 170VG.

¹¹⁰ On the basis that they were not 'comparable employees'; see WRA ss 170VA and 170VPA.

¹¹¹ To ensure that conflicting and outdated provisions of the PSA 1922 remained inoperative.

¹¹² WRA s 170VQ(1).

¹¹³ See generally section 'Australian Workplace Agreements in the APS Context' above.

¹¹⁴ See Department of Employment, Workplace Relations and Small Business/ Office of the Employment Advocate Booklet, 28; and Senate Committee: *Report on the Consideration of the Workplace Relations and Other Legislation Amendment Bill 1996*, commentary at 30-31.

¹¹⁵ Total figure as at 30 June 2005 as per Australian Public Service, Statistical Bulletin 2002-05 (2005).

¹¹⁶ <<http://workplace.gov.au/workplace/Organisation/Government/Federal/Reports/ProgressinAgreementMaking.htm>>

¹¹⁷ No. 23 — Reg 3: new regulations 5 to 11.

¹¹⁸ As Act no 147 of 1999.

¹¹⁹ PSA 1999 ss 10(1)(a), (b), (c), (f), (i), (j), (l), (n) and (o).

¹²⁰ PSA 1999 ss 13 (1) (2) (3) (5) (6) (7) (10) and (13); PS Regulations (Amendment-Interim Reforms) 1998 ss 7 (1) (2) (3) (5) (6) (7) (10) and (13).

¹²¹ PSA 1999 s 15.

¹²² PSA 1999 s 20.

¹²³ PSA 1999 s 22(3).

¹²⁴ This update list of instruments reflects amendments recently made by the Work Choices legislation (discussed below).

¹²⁵ DEWR, *Supporting Guidance: Workplace Relations Policy Parameters for Agreement Making in the Australian Public Service* (April 2006) 31.

¹²⁶ Subject of course to meeting the procedural fairness requirements described in *Barratt v Howard* (2000) 170 ALR 529, 543-46, and the reporting requirements of s 59.

¹²⁷ PSA 1999 ss 11, 15 and 36; Public Service Commissioner's Directions 1999 chs 2, 5 and 6.

¹²⁸ Prime Minister's Public Service Directions 1999 chs 2 and 3.

¹²⁹ Department of Employment, Workplace Relations and Small Business, APS Advice 1999/19, Classification Management Under the New Public Service Act, 18 November 1999.

¹³⁰ It would seem that the present form of the duty of non-disclosure provision is constitutionally invalid as a result of the decision in *Bennett v President, Human Rights and Equal Opportunity Commission* 10 December 2003 [2003] FCA 1433.

¹³¹ An Independent Selection Advisory Committee ('ISAC') may be established to advise an Agency Head on selection decisions for up to APS Level 6. An ISAC will consist of a convener nominated by the Merit Protection Review Agency ('MPRA'), an agency representative and another APS employee nominated by the MPRA. An Agency Head is not bound to follow the recommendations of an ISAC but, if he or she does, then there is no right of review of that employment decision under pt 5 of the Regulations.

¹³² In this regard, PSMPC Advice No 1 of 19 November 1999 included a comparison chart, which traces where particular subject matters were dealt with under the old and the new regimes. It reveals that the major impact of the PSA 1999 has been to change the location of the subject matters dealt with under the previous regime rather than remove those matters.

¹³³ Workplace Partners Update (2004) DEWRSB <http://www.dewrsb.gov.au> (at 29 August 2006).

¹³⁴ Denis Ives, 'Benchmarking the Issues', (2000) 95 *Canberra Bulletin of Public Administration* 31, 32.

¹³⁵ Now regs 8.2. and 8.3 of ch 2 of the Workplace Relations Regulations 2006 (Cth).

¹³⁶ Together with the minimum wages to be set by the Australian Fair Pay Commission, these entitlements are to be known as the Australian Fair Pay and Conditions Standard ('AFPC Standard').

¹³⁷ *Explanatory Memorandum*, Workplace Relations Amendment (Work Choices) Bill 2005 1-2.

¹³⁸ *New South Wales v The Commonwealth* [2006] HCA 52.

¹³⁹ As has been noted, the Commonwealth's constitutional power to legislate on APS employment matters is based on the executive power (s 61) and the express incidental power (s 51 (xxxix)).

¹⁴⁰ The types of 'workplace agreements' are set out in WRA div 2, pt 8, and also extend to 'greenfields' agreements, which might apply in relation to new businesses and 'multiple-business' agreements, which might apply across a number of single businesses.

¹⁴¹ There are transitional provisions to continue the operation of certified agreements until so replaced and these are discussed later.

¹⁴² Provided for by WRA s 327, and which can be compared with old s 170LK certified agreements.

¹⁴³ Provided for by WRA s 328, and which can be compared with old s 170LJ certified agreements.

¹⁴⁴ WRA s 342.

¹⁴⁵ WRA ss 344(5) although s 363 provides for a power to make a variation where an agreement is considered to contain prohibited content.

¹⁴⁶ WRA s 355.

¹⁴⁷ A provision which was never availed of in the author's experience.

¹⁴⁸ WRA s 415.

¹⁴⁹ WRA s 337.

¹⁵⁰ Employers are required to provide 'information statements' about bargaining agents and how approval of the agreement is to be sought: WRA s 337(4).

¹⁵¹ This is because a workplace agreement can 'switch off' the future operation of all but 'protected award conditions'. Although, as a practical matter, APS employees will continue to be covered by workplace agreements that provide for terms and conditions that are above the AFPC Standard, it has been noted that there is a lot of detail for agencies to examine to ensure that is the case — Richard Harding, Australian Government Solicitor Legal Briefing, *The Work Choices Act — How Will it Affect Commonwealth Employment?* (2006) 5.

¹⁵² See WRA Part 5A.

¹⁵³ Increased from three years: WRA s 352.

¹⁵⁴ 'Protected award conditions' include those dealing with rest breaks, incentive-based payments or bonuses, annual leave loadings, public holidays, skills and expenses allowances, overtime and shift loadings, penalty rates and outworker conditions.

¹⁵⁵ WRA s 355.

¹⁵⁶ WRA div 4, pt 9: The ballot process is to be administered by the AIRC under detailed provisions provided for in the WRA.

¹⁵⁷ Workplace Relations Regulations 2006 (Cth) reg 8,5, ch 2.

¹⁵⁸ Workplace Relations Regulations 2006 (Cth) reg 8,5(4), ch 2.

¹⁵⁹ Workplace Relations Regulations 2006 (Cth) regs 8.6 and 8.7, ch 2.

¹⁶⁰ WRA s 399.

¹⁶¹ See Harding, above n 151, 15.

¹⁶² Previously, in relation to AWAs, there had been deemed inclusion of dispute resolution and anti-discrimination provisions under the old s 170VG.

¹⁶³ Nevertheless, the 'call up' provisions may be called in aid of the drafting exercise to effectively leave the AWA sitting on top of a collective agreement, however that would be contrary to DEWR policy discussed earlier in this chapter.

¹⁶⁴ However, 'protected award conditions' may be deemed to form part of the workplace agreement if they are not expressly excluded by the agreement.

¹⁶⁵ Workplace Relations Regulations 2006 (Cth) regs 8.2 and 8.3, ch 2. PSA 1999 s 24(1) has also been consequentially amended to provide that a determination cannot provide for terms and conditions less than those provided for under a relevant workplace agreement, award, pre-reform certified agreement or pre-reform AWA. As to the latter instruments see the following discussion on transitional arrangement.

¹⁶⁶ WRA clauses 3 and 7, sch 7.

¹⁶⁷ WRA clause 18, sch 7.

¹⁶⁸ WRA clauses 9 and 21, sch 7.

¹⁶⁹ WRA s 525.

¹⁷⁰ WRA s 527.

¹⁷¹ Except that 'protected award conditions' are taken to be terms of a workplace agreement unless they have been expressly excluded: WRA s 354. See also above n 154.

¹⁷² WRA s354.

¹⁷³ See Harding, above n 151, 9.

¹⁷⁴ By the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth).

¹⁷⁵ The Work Choices changes, discussed below, may also have some impact upon the numbers of non-SES personnel signing up to AWAs.

¹⁷⁶ Again, the Work Choices legislation may also have further effects in this area.

¹⁷⁷ Although it is fair to say that a push for a modernised Public Service Act had been underway for some time before McLeod, see, eg, Ives, above n 134, 31.

¹⁷⁸ It removed the need to have regard to s 82D determinations and other outdated provisions of the PSA 1922.

¹⁷⁹ Also see comments to this effect in Podger, 'The New Public Service Act and the Commitment to Values' (2000) 97 *Canberra Bulletin of Public Administration* 22, 23.

¹⁸⁰ DEWRSB issued four advices and the then PSMPC issued 36 advices in the period immediately following the passage of the new Act.

¹⁸¹ Public Service Commissioner, *State of the Service Report 1999-2000* pt 2, 'Implementation Issues'.