Chapter Eleven

Challenges Ahead: Workplace Relations Legislation and the Future

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In Chapter One of this book it was stated that:

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

These themes embrace developments over time and up to the early part of the twenty-first century. What of the period beyond? What influences are emerging? What is likely to occur in public sector employment? What challenges are ahead?

In these concluding pages, some issues are explored and questions raised. They include the new influence ahead of the regulatory framework for industrial relations and the APS; state responses to the new regulatory framework in relation to state public servants; the challenges of employment diversity in terms of women, Indigenous Australians and people with disability; challenges associated with an ageing workforce; the influence of the private sector; the potential for clashes of market forces and APS codes and values; and the role of policy and guidelines. Finally, the work of Dr Peter Shergold, in forecasting the future in Australia to the year 2035, is examined.

Workplace Relations Framework at Federal Level

One of the significant changes in recent times has been the enactment of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ('Work Choices') and the *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* (Cth) ('Stronger Safety Net Act'). These Acts, which amended the *Workplace Relations Act 1996* (Cth), have radically changed the regulation of workplace relations in Australia. Utilising mainly the corporations power in the Constitution, section 51(xx), as the legislative authority for enactment, the Work Choices legislation of 2005 and the further legislative amendments in 2007 have overhauled the legal framework for collective and individual workplace relations in Australia,

and hence the context in which Australian public sector employment operates. The new framework has:

- abolished compulsory arbitration;
- reduced the role of the Australian Industrial Relations Commission ('the Commission') in conciliation;
- generally removed that Commission's award-making role (except in limited circumstances);
- abolished the role of awards as a safety net (except as a standard for comparison in a limited way where the new fairness test brought in by the Stronger Safety Net legislation applies to agreements);
- generally shifted the role of the safety net in respect of wages to the new minimum rates set by the Australian Fair Pay Commission and the minimum conditions standards in the legislation (known collectively as the Australian Fair Pay and Conditions Standard);
- encouraged individual bargaining and collective bargaining resulting in Australian Workplace Agreements or collective agreements respectively, with the removal of former mechanisms of scrutiny (either the Australian Industrial Relations Commission or the Employment Advocate); rather workplace agreements are now lodged with the Office of the Workplace Authority (formerly the Office of the Employment Advocate) to be operational upon lodgement (it being noted that, in the case of collective agreements and those AWAs which meet specified remuneration levels, to be valid, such agreements must satisfy a 'fairness test');
- removed the protection from unfair dismissal for employees engaged by employers with staff of 100 or less, and for all employees, regardless of employer size, where there is termination of employment for operational reasons;¹
- further controlled industrial action, through measures such as compulsory protected action ballots.

The impact of this legislation has been referred to in this book in the context of the framework for public sector employment, the making of collective and individual agreements and the impact of the transmission of business provisions, to name but some of the issues addressed in the chapters of the book. However one of the very significant aspects of the Work Choices legislation is the enactment of a single national system of workplace relations. The new system essentially applies to all corporate employers which are 'constitutional corporations' (that is trading, foreign and financial corporations), the Commonwealth and Commonwealth authority employers, and their employees.² It no longer rests on the employers and unions initiating an interstate industrial dispute and thereby obtaining award coverage through this mechanism or a collective agreement for settlement of such a dispute.

The implications for the Australian public sector are yet to emerge fully and to be analysed. However, many of the developments occurring in the Australian public sector previously had occurred against the backdrop of the compulsory arbitration system with award safety nets, the possibility of collective bargaining and the then new emphasis on individual agreements (AWAs). The new environment for workplace matters suggests that much of the impact will be felt in wage rates, wages differentials, gender (in)equality and less public disclosure of terms of agreements (particularly given the policy for use of AWAs at Commonwealth level) as well as in the content of agreements. It is far from clear how the changed legal framework, and the consequences for the private sector, will directly and indirectly affect workplace conditions for APS employees.

State Public Servants

The introduction of the national system based on the corporations power has implications for the role of state systems. Essentially they remain in operation and of influence for employers outside the corporate sphere, that is employers who are not 'constitutional corporations'. It means that corporate employers which perform government functions (or perform functions under contract to state governments) at state level are embraced by the new unitary national system. Employers which are incorporated statutory authorities under state law will usually meet requirements of being trading, financial or foreign corporations and so be caught by the federal legislation.

The impact on state public servants is also very significant. As a general rule, too, employees of local government will be covered by the new Work Choices legislation as will employees of corporate employers which perform government functions. But what about employees who are members of a state public service and work in state government departments? Apart from Victorian government employees who are generally covered by the federal legislation as a consequence of Victoria's referral of powers to the Commonwealth, employees who are engaged in the state public services will not be employed by an entity which satisfies the definition of 'constitutional corporation' and will not be covered by the federal legislation. Likewise, a body which is established by the state law to perform some government functions may or may not constitute a 'constitutional corporation' and, if not, will not therefore be covered by the federal system.

State governments have been concerned at the possible ramifications of the new federal law on their own employees. A variety of responses has been undertaken by the states. In New South Wales, legislation was enacted to transfer employment of employees of corporate authorities to employment by the state in order to avoid the possibility of these employees being covered by the new federal law.³ Similar legislation was introduced in South Australia and Western Australia.⁴ Victoria has enacted legislation to enshrine public sector conditions

by requiring agreements to meet a 'no disadvantage' test approved by the Victorian Workplace Rights Advocate before those agreements can be lodged federally and to enshrine, and provide for, additional rights, for example, in relation to unfair dismissal.⁵

Use of procurement contracts has been another vehicle whereby state governments attempt to maintain fair labour conditions for employees within the state. The mechanism used for example in New South Wales and South Australia is the imposition of contractual requirements on successful tenderers.⁶

Diversity Issues

In addition several issues are emerging as important in the employment sphere. The ageing workforce is of concern not only to the private sector but also to the public sector. The need to maintain diversity of ages as well as diversity in race and sex and a full range of under-represented employees is vital to the goals and aims of the workforce. In the case of the APS, the *State of the Service Report 2005-6* indicated that women's representation in the APS increased over the previous five years from 46.6 per cent to 55.8 per cent of ongoing categories in employment, but women still tended to be engaged in lower classifications than men. By way of contrast, women made up a higher proportion of non-ongoing categories (62.8 per cent) but they were likely to be younger women and employed at lower levels.⁷ The problems of representation in the APS of Indigenous Australians and people with disability are also acknowledged challenges⁸ to fulfilment of the APS values of providing 'a workplace that is free from discrimination and recognises and utilises the diversity of the Australian community it serves'.⁹

The Commonwealth as Employer, Market and APS Values

The public sector employer as the 'model employer' was formerly a role which was the subject of some note. Now the state as employer is decreasing its role as direct employer, due to factors including privatisation of functions and outsourcing.¹⁰ Coupled with this is the revival of the market as the main determinant of wages and conditions of employment in the private sector — and leading the way in the revival is the Commonwealth itself. Its preparedness to put service delivery, efficiency and competitiveness ahead of model employment roles will no doubt force a further re-thinking of the role played by the Commonwealth as employer in the era of the Work Choices legislation. The new regulation of workplace relations will no doubt transcend the thinking in the public sector — vestiges of the Commonwealth as the model employer are likely to be eroded or at least challenged. However one of the challenges for the APS is acknowledged to be positioning the APS as the 'employer of choice', especially in tight labour market.¹¹

The values and code of conduct applicable to APS employees may also be at odds with the new market-type regulation of employees of corporate employers. For example, the *APS Values and Code of Conduct in Practice: Guide to Official Conduct of APS Employees and Agency Heads* sets out in chapter 5, 'Working with the public', the relevant values and elements of the code of conduct. These have an overlay of administrative law requirements in administrative decision-making. To what extent do remuneration and reward systems for employees sit comfortably with the obligations of employees under legislation? Greater flexibility in remuneration is encouraged by the *Workplace Relations Act 1996* (Cth), such as remuneration related to work performance. How far can this be achieved in systems where there are express duties to third parties? More tightly governed schemes may be necessary to avoid a potential conflict between incentive to the employee and the employee's obligations to the public.

In this context, some differences between private sector employment and the public sector emerge. Whilst the private sector may have employment largely governed by industrial instruments and the contract of employment, the role of employment policy is increasing. Most large employers will have a bank of policies to control, explain and limit employees' exercise of discretion and conduct. Whilst the source of these policies is not legislative, the force and effect of them may be binding when they are incorporated expressly as a term of the contract or where they are implied as a term or otherwise constitute a source of legitimate instructions from the employer to the employee. More attention is devoted to the applicability and binding nature of such policies at common law, as we see for example in the case of *Goldman Sachs J B Were Services v Nickolich*¹² where the Federal Court upheld a decision of Wilcox J that the policy of the employer to provide a safe workplace and so on was regarded as having been incorporated into the contract of employment. It is more usual for cases to focus on the *employee* being bound by such policies.

These policies have their parallels in the public sector — the APS code of conduct and values, with individual policies fleshing these out as guidelines. Arguably the policy constraints are greater in the public sector and may always be so. The problem of differential conditions as between career public servants and short term contractors providing services to the Commonwealth may also be a challenge.

The public sector and private sectors have been closer together, when there was a high degree of tenure in the public sector and when the unfair dismissal laws provided a tight control on fair dismissal for private sector employees covered by the provisions. Since the 'attack' on public sector tenure, particularly at agency head level (as discussed in Chapter 2 of this volume) and the demise of unfair dismissal protection at federal level under the Work Choices legislation, arguably the two sectors are not so far apart on this measure of unfair dismissal

protection. However, the statutory protection providing for fair processes for most public sector employees elevates that sector to one with fair safeguards for dismissal.

Fast Forward — 2035

What is the vision for the public sector and employment in the next two to three decades? Dr Peter Shergold, as Secretary, Department of Prime Minister and Cabinet, undertook a 'forecast' in a speech entitled 'The Australian Public Service in 2035: Back to The Future'¹³ in which he made a number of predictions about the Australian Public Service. These included:

- The decline in the size of the public services would continue. He predicted the APS would decline to a workforce of about 100,000 employees in 2035.
- Innovations in technology would enable more to be done with less.
- The development of 'a blended, multi-dimensional workforce' in which full-time and part-time employees would work with contract providers and consultants 'bound together by the work they do, not their working conditions'.¹⁴
- The problem of relativity of pay between the private and public sectors would remain. The Australian Public Service Commissioner, Lynelle Briggs, has also referred to 'the generally lower level of remuneration of APS staff compared with equivalent staff in the private sector'.¹⁵
- Women would represent approximately 75 per cent of the APS - and would be represented across all levels of the service.
- The career public service would remain.
- All APS employees would be graduates. In Shergold's words:

"Managing an all-graduate service will present new challenges. The process of dismantling hierarchy as the basis of authority will have continued, driven by similarities in the education level of the workforce, workplace aspirations, flat job structures and communications technology. Employees will all, in a real sense, be managers — managing knowledge, contracts and projects to develop and deliver policy for the government of the day. They will all be expected to behave as leaders."¹⁶

- The influence of technology will be uncertain and difficult to envisage. However, Shergold stated:

"I do not think it will all be for the better. Dealing with the wicked complexity of public policy will be as slow and difficult as ever but the flow of information and responses to it will be ever more immediate ... Governments and their public services will find it increasingly difficult to meet the expectations of citizens as to what government action can achieve and how quickly ... *The job of public servants to identify and*

promote a national interest may have become even more challenging.[Emphasis added]"¹⁷

Some things will remain largely unchanged, in his view. For example, the nature of the public service itself — he was of the view that the merit-based and apolitical public service envisaged by Stafford Northcote and Charles Trevelyan, as discussed in Chapter 3 of this volume, would remain of relevance well into the twenty-first century.¹⁸ Moreover, Dr Shergold said, 'The civil service that they sought, existing as an institution in its own right within the executive arm of government, will have survived'.¹⁹

The Australian Public Service Commissioner, however, noted that decisions would need to be made about the balance between in-house and external work. In her words:

As public servants, we need to identify where collaborations with external stakeholders will add the most value and where work should be done in house. We also need to think about how we can try to loosen some of our controls and guidelines to facilitate more flexibility, innovation and effectiveness on the ground, while retaining high standards of accountability. The more we reduce unnecessary red tape, the better our arrangements will be for everyone.²⁰

Perhaps it is fitting to conclude with the predictions of Dr Peter Shergold:

A professional administrative class, willing and able to serve successive governments in a non-partisan manner, accountable through ministers for ensuring that decisions are taken and implemented in a lawful manner and responsive to the directions set by elected government — these, I suggest, are values which will retain their virtue in the decades ahead.²¹

ENDNOTES

¹ See generally the issue of volume 19 of the *Australian Journal of Labour Law* devoted to analysing the Work Choices legislation published in 2006.

² Other employers are covered — eg maritime, waterside worker and flight crew officer employers; employers, corporate and non-corporate, in Victoria and the Territories.

³ The *Public Sector Employment Legislation Amendment Act 2006* (NSW) amended the *Public Sector Employment and Management Act 2002* (NSW) in March 2006.

⁴ See *Statutes Amendment (Public Sector Employment) Act 2006* (SA); and the Public Sector (State Employment) Statutes Amendment Bill 2007 (WA).

⁵ See *Public Sector Employment (Awards Entitlements) Act 2006* (Vic) and the *Public Sector Acts (Further Workplace Protection and Other Matters) Act 2006* (Vic). For analysis, see G Smith, 'Understanding and Implementing the New Workplace and Industrial Relations Guidelines-A Public Sector perspective' (2006) 12 *Employment Law Bulletin* 61.

⁶ See C Hartigan and A Kaviani Johnson, 'State Responses to Work Choices' (2007) 13 *Employment Law Bulletin* 13 and G Smith above, n 5.

⁷ *State of the Service Report 2005-6*, November 2006,

<www.apsc.gov.au/stateoftheservice/0506/index.html> [December 2006].

⁸ See *State of the Service Report 2005-6 at a Glance*, section in Challenges for the APS, <www.apsc.gov.au/stateoftheservice/0506/ataglance.pdf> [December 2006].

⁹ See APS Values, *Public Service Act 1999* (Cth), s 10.

¹⁰ In 2005, Commonwealth public servants accounted for 1.3 per cent of the entire workforce as compared to 2.7 per cent in 1976: 'The Incredible Shrinking Public Sector' Research Note, 24 March 2005, Parliamentary Library, <www.aph.gov.au/libary/pub/RN/2005-06/06rn29.pdf> [July 2007]. See also Geoff Winter, 'Whither Public Sector Employment?', Research Note 17, 1997-98, Parliamentary Library, <www.aph.gov.au/library/Pubs/rn/1997-98/98rn17.htm> [August 2006].

¹¹ See *State of the Service Report 2005-6 at a Glance*, section in 'Challenges for the APS' <www.apsc.gov.au/stateoftheservice/0506/ataglance.pdf> [December 2006].

¹² [2007] FCFA 120 [12 August 2007].

¹³ Dr Peter Shergold, Secretary, Department of Prime Minister and Cabinet, 18 May 2005, speech to the CPA Annual Conference, Melbourne.

<www.pmc.gov.au/speeches/shergold/aps_2035_back_to_the_future_2005-05-18.cfm> [July 2007].

¹⁴ See Dr Shergold speech above, n 13.

¹⁵ 'Looking to the Future — Directions in Public Sector Reform', speech, Crawford School Alumni. Address by Lynelle Briggs, Australian Public Service Commissioner, 8 November 2006 <www.apsc.gov.au/media/briggs081106.htm> [July 2007]

¹⁶ Above at n 13.

¹⁷ Above at n 13.

¹⁸ Above at n 13.

¹⁹ Above at n 13.

²⁰ Above n 15.

²¹ Above at n 13.