

REDUNDANCY IN THE AUSTRALIAN PUBLIC SERVICE – SOME CRITICAL REFLECTIONS

*Cameron Roles**

ABSTRACT

This article critically examines the law concerning dismissal on grounds of redundancy as it applies to the Australian Public Service ('APS'). Such an examination is timely, given the newly elected Coalition government's stated intention to reduce the APS by 12 000 employees through natural attrition.

The article argues that a reduction of 12 000 employees through natural attrition alone is unlikely, and that redundancies are almost inevitable. Against this backdrop, the article considers recent legislative developments concerning dismissal on grounds of redundancy. Its focus is the genuine redundancy exclusion contained in s 389 of the *Fair Work Act 2009* (Cth) ('*FW Act*') and its application to APS employment. The genuine redundancy exclusion precludes unfair dismissal claims if the redundancy is genuine, the employer complies with any consultation obligations in a modern award or enterprise agreement and it would not have been reasonable in all the circumstances to redeploy the affected employee within the employer's enterprise or that of an associated entity.

The article argues that, prior to the *FW Act*, redundancy obligations were predominantly dealt with in collective agreements, and did not require consultations or redeployment of redundant employees beyond the individual agency. However the *FW Act* fundamentally changed the law in this area. The article contends that a failure to comply with consultation obligations in an agency enterprise agreement will increase the prospects of a dismissal being found to be unfair. In the APS this is problematic, given the convoluted nature of many consultation clauses in enterprise agreements. The article also argues that the redeployment obligations in s 389(2) are extremely broad and, contrary to past practice under the *Public Service Act 1999* (Cth) ('*PS Act*'), encompass redeployment across the APS. The obligation to redeploy across the APS creates tensions in the law between the provisions of the *FW Act* and the devolution of managerial powers under the *PS Act*.

* Lecturer, ANU College of Law. I wish to thank my colleagues Ms Pauline Thai and Emeritus Professor Dennis Pearce AO for their helpful comments on earlier drafts of this article. I also wish to thank and acknowledge the helpful suggestions for improvement made by the anonymous referees. Thanks must also go to Alice Crawford for valuable research assistance in the preparation of this article.

The article concludes by calling for reform of the law which would address these tensions. It is submitted that any reforms should first clarify whether, as a matter of policy, the Commonwealth wishes to permit redeployment across the APS, or confine it to the level of each individual agency. Options for reform are suggested which would achieve either policy outcome.

I INTRODUCTION

The recent election of a Coalition (Liberal/National party) government in Australia is certain to lead to reductions in the workforce of the Australian Public Service ('APS'). It is also very likely to lead to redundancies, for two reasons. The first is a Coalition commitment, made during its last days in opposition, and at its campaign launch, in which the Coalition pledged to reduce the public service by 12 000 employees 'through natural attrition because we don't need 20 000 more public servants now than in 2007'.¹ The second is a major shake-up of the APS, announced by the Prime Minister within a few hours of the swearing in of his new government, which aimed to 'simplify the management of government business, create clear lines of accountability and ensure that departments deliver on the government's key priorities'.² Under the changes departments and agencies have been abolished, broken up or absorbed, increasing the likelihood of redundancies.³ Key changes include the abolition of the Department of Regional Australia, Local Government, Arts and Sport, along with the Department of Resources, Energy and Tourism, with the functions of each being allocated to other departments. AusAID has been merged with the Department of Foreign Affairs and Trade. Policy responsibility for matters concerning customs and border control has been transferred from the Attorney-General's portfolio to the newly created Department of Immigration and Border Protection, with the Australian Customs and Border Protection Service also reporting to the Minister for Immigration and Border Protection. A new Department of Social Services has been created which takes over some of the responsibilities previously carried out by the Department of Families, Housing, Community Services and Indigenous Affairs, but with additional responsibility for aged care, multicultural affairs and settlements, income support and programs for persons with a disability. The former Department of Education, Employment and Workplace Relations has been split into two departments: Education and Employment. A raft of smaller departmental changes completes the shake-up of the bureaucracy.

Reducing the APS by 12 000 through natural attrition was always going to be difficult, given previous rounds of efficiency dividends and consequential voluntary redundancies under Labor in 2011–12.⁴ Likewise the abolition of two departments and

¹ Tony Abbott, 'Address to the 2013 Federal Coalition Campaign Launch' (Speech delivered at the Federal Coalition Campaign Launch, Brisbane, 25 August 2013).

² Tony Abbott, 'The Coalition Will Restore Strong, Stable and Accountable Government' (Media Release, 18 September 2013).

³ Details of changes to the APS can be found in the Administrative Arrangements Order: Commonwealth, *Administrative Arrangements Order*, 18 September 2013.

⁴ See Cameron Roles, Michael O'Donnell and Peter Fairbrother, 'The Aftermath of the Global Financial Crisis and Union Strategies in the Australian Public Service' (2012) 67(4) *Relations Industrielles/Industrial Relations* 633, 640.

significant restructures to others will lead, at the very least, to a need to reduce staff to avoid duplication in many corporate services areas such as finance and accounting, information technology, human resources and payroll. The combination of these factors means that APS redundancies, either voluntary or involuntary, are almost inevitable.

These developments come hard on the heels of significant legislative changes concerning dismissal on grounds of redundancy. The *Fair Work Act 2009* (Cth) (*FW Act*) introduced the first Commonwealth statutory right to redundancy payments, which prescribed minimum entitlements for most private sector employees and all Commonwealth employees.⁵ The impact of these new standards has been marginal, because APS agencies generally have generous redundancy entitlements in enterprise agreements. Of more significance is the genuine redundancy exclusion from unfair dismissal laws for certain dismissals on grounds of redundancy.⁶ This exclusion, contained in s 389 of the *FW Act*, precludes an unfair dismissal claim if a redundancy is genuine, the employer complies with any obligation to consult in a modern award or applicable enterprise agreement, and if, in all the circumstances, it would not have been reasonable to redeploy the employee within the employer's enterprise or that of an associated entity. If the Fair Work Commission ('FWC')⁷ finds that a redundancy is not genuine, or that the employer has failed to consult in accordance with an applicable award or enterprise agreement, or that redeployment should have occurred, the exclusion does not apply and the FWC can consider the merits of any claim for unfair dismissal. As part of any such consideration, a failure to consult has been treated as a distinct matter which can go to the fairness of any dismissal. Likewise the obligation to redeploy effectively amounts to a new and broad statutory right for employees to be redeployed within the employer's enterprise or that of an associated entity.

This is a marked change from the situation which existed following the introduction of the *Public Service Act 1999* (Cth) (*PS Act*). Since the enactment of the *PS Act*, but prior to the commencement of the *FW Act*, redundancy entitlements, including obligations to consult or redeploy affected workers, were generally set out in certified agreements.⁸ These entitlements were shaped partly by *PS Act* requirements and of

⁵ *FW Act* s 119. The only other instance of a statutory entitlement to redundancy payments prior to the *FW Act* is the *Employment Protection Act 1982* (NSW), which provides redundancy entitlements to a tiny minority of New South Wales award covered employees.

⁶ *FW Act* s 389.

⁷ The *Fair Work Amendment Act 2012* (Cth), among other things, changed the name of Fair Work Australia ('FWA') to the Fair Work Commission from 1 January 2013: see sch 9. For ease of reference, the acronym FWC will be used, and should be taken as referring also to FWA in respect of matters prior to 1 January 2013.

⁸ In addition to any obligations contained in a certified agreement, various iterations of the Commonwealth industrial statute since 1993 have imposed obligations on employers with respect to redundancies, such as an obligation to notify Centrelink if more than 15 employees are to be made redundant and certain other notification and consultation obligations. For the current iteration of these provisions see *FW Act* pt 3–6 div 2. These various statutory obligations are beyond the scope of this article, as they are not central to the argument.

course unfair dismissal laws, but the unfair dismissal laws then operating did not impose any statutory requirements to consult or to redeploy affected employees.

It is in this context of increasing restructuring and downsizing in the APS, along with recent legislative changes, that the law concerning redundancy of permanent (or ongoing)⁹ APS employees is explored.¹⁰ In the APS, a decision that an employee is to be made redundant generally involves two distinct legal decisions: a declaration that the employee is 'excess'¹¹ (a process analogous to a position being redundant in a private sector context) and, if redeployment or other measures are not successful, a subsequent decision to terminate the excess employee's employment.¹² The 'termination' decision, and possibly the 'excess' decision, may be challenged on administrative law grounds.¹³ Such challenges are beyond the scope of this article. Instead this article focuses on the narrower, but perhaps more significant, question of the interaction between the termination provisions of the *PS Act*, agency enterprise agreements and the unfair dismissal provisions of the *FW Act*. It is argued that the genuine redundancy exclusion, as interpreted by the FWC, effectively makes non-compliance with consultation obligations in an applicable enterprise agreement a stand-alone ground of potential unfairness in an unfair dismissal proceeding. This has significant ramifications in the APS where agreements typically contain highly prescriptive consultation obligations. Likewise it is contended that the new redeployment obligations are extremely onerous, requiring an Agency Head, inter alia, to be proactive in seeking redeployment. A related issue is whether any *FW Act* redeployment must be across the APS, or is limited to the affected employee's agency. It is submitted that this question remains an open one, but that it is strongly arguable that any *FW Act* redeployment obligations require redeployment across the APS. It is contended that such an obligation to redeploy across the APS creates tensions with the thrust of the *PS Act* reforms, which devolved managerial responsibilities to the level of each individual agency.

The argument will be developed in four sections. The article will firstly examine the legal framework for redundancies following the introduction of the *PS Act*, but before

⁹ Employees can be engaged in the APS as either ongoing employees (*PS Act* s 22(2)(a)), or for a specified term or for the duration of a specified task (*PS Act* s 22(2)(b)), or for duties that are irregular or intermittent (*PS Act* s 22(2)(c)). These latter categories are known as non-ongoing employees. Most agency agreements do not provide for redundancy entitlements for such employees, and as such any entitlements they may enjoy are beyond the scope of this article. Likewise any discussion of the redundancy entitlements of Senior Executive Service ('SES') employees is also beyond the scope of this analysis.

¹⁰ The *PS Act* s 10A(1)(b) states that the usual basis for engagement should be as an ongoing APS employee.

¹¹ The definition of excess is usually contained in an agency's enterprise agreement. A declaration that an employee is excess to the requirements of an agency is usually preceded by obligations which are triggered after an employee is informed that they may be potentially excess to requirements. Often employees who are potentially excess are offered voluntary retrenchment prior to a formal excess declaration.

¹² *PS Act* s 29(3)(a).

¹³ See *Judiciary Act 1903* (Cth) s 39B. A declaration of excess cannot be challenged under the *Administrative Decisions (Judicial Review) Act 1977* (Cth); see *O'Halloran v Wood* [2003] FCA 854. A termination decision is however clearly challengeable under that Act: see, eg, *O'Halloran v Wood* [2004] FCA 544.

the *Work Choices*¹⁴ amendments to the *Workplace Relations Act 1996* (Cth) ('*WR Act*'). It will be argued that the requirements of the *PS Act*, together with the agency approach to bargaining under the *WR Act*, had the effect of confining redundancy processes, including redeployment, to the level of the agency or part thereof. It is further argued that the then Australian Industrial Relations Commission ('AIRC'),¹⁵ in hearing claims of unfair dismissal on grounds of redundancy, did not usually challenge an employer's judgment as to whether a position was redundant, or whether an employee could be redeployed. The most common ground on which a redundancy was challenged was that the employee had not been fairly selected for retrenchment.

The second section of the article will briefly examine the changes brought about by the *Work Choices* laws. It will be concluded that the *Work Choices* 'operational reasons' exemption meant that there was no role for the AIRC in dismissals involving redundancy in the APS. The agency-level approach to questions of excess, redeployment and the like was maintained.

In the next section, the *FW Act* genuine redundancy exclusion is analysed. Two matters in particular – the requirement to consult and the redeployment obligations – are examined. It is argued that consultation is all but mandatory in the APS, and that the often convoluted consultation provisions in agency enterprise agreements, combined with the increased weight given by the FWC to compliance with such obligations, could prove a fertile ground for challenging the fairness of dismissals of excess employees. It is further argued that the proactive nature and extent of *FW Act* redeployment obligations impose extremely high burdens on Agency Heads. In addition, and contrary to past practice under the *PS Act*, it is argued that the employer's *FW Act* obligation to redeploy may well encompass redeployment across the APS. It is submitted that this obligation creates tensions with the *PS Act* scheme, which devolved managerial power to the level of each individual agency.

The final section of the article considers options for resolving these tensions. It is argued that, as a matter of policy, the Commonwealth must decide whether it wants to permit redeployment across the APS, or confine it to the level of each individual agency. If the former, an option for reform is suggested which would remove any doubt concerning the Commonwealth's capacity to redeploy across the APS in order to comply with its redeployment obligations under the *FW Act*. If the latter, it is suggested that reforms are needed to the drafting of s 389(2). However it is argued that any such reforms would impact on the private sector, perhaps even more so than the public sector, and that as a result any such changes should be considered as part of the new government's commitment to ask the Productivity Commission to undertake a review of the operation of the Fair Work laws.¹⁶

¹⁴ *Work Choices* was the popular name given to the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) which substantially amended and renumbered the *Workplace Relations Act 1996* (Cth).

¹⁵ The AIRC was the predecessor to the industrial tribunal now known as the FWC.

¹⁶ Liberal/National Party Coalition, *Real Solutions for All Australians: The Direction, Values and Policy Priorities of the Next Coalition Government – The Coalition's Policy to Improve the Fair Work Laws* (May 2013) 3.

II THE PS ACT AND AGENCY LEVEL REDUNDANCIES

Following the introduction of the *PS Act*, redundancies in the APS were dealt with on an agency-by-agency basis. This was not always the case – under the *Public Service Act 1922* (Cth) ('*PS Act 1922*') it was not possible to make a permanent APS employee¹⁷ redundant (other than in instances of voluntary redundancy ('VR')) without first attempting to redeploy the affected employee both within the employee's agency and across the service. The *PS Act 1922* and relevant APS awards contained elaborate rules which, among other things, required attempts to be made to redeploy an excess APS employee across the service,¹⁸ and prohibited the termination of such an employee's employment unless the Public Service Commissioner's attempts to redeploy across the service had been unsuccessful.¹⁹ These statutory obligations to attempt redeployment across the service in relation to the involuntary termination of an excess APS employee were abolished when the *PS Act* took effect in December 1999. Accompanying these legislative changes was the shift toward enterprise bargaining in the APS. Agreements struck at the agency level, known as certified agreements, over time replaced awards as the source of terms and conditions of employment for many APS employees.²⁰ Certified agreements are discussed in more detail below, but for now it is sufficient to note that these agreements typically did not impose any obligations on an Agency Head to seek to redeploy beyond the individual agency. A power was however retained in the *PS Act* for the Australian Public Service Commissioner ('APS Commissioner') to compulsorily transfer an excess employee between agencies, but to the writer's knowledge it has never been used. This power is considered later.

The abolition of the Public Service Commissioner's oversight powers concerning the termination of excess APS employees was consistent with the legislative emphasis of the *PS Act*. The *PS Act* ushered in a new legal framework for managing APS employees – a framework which favoured principles based legislation and an agency-by-agency approach, at the expense of detailed prescriptive rules operating across the APS. Under the *PS Act*, Agency Heads are responsible for engaging and managing APS employees in their agency.²¹ But when Agency Heads engage APS employees, they do so on behalf of the Commonwealth, and not on behalf of their individual agencies.²² So whilst an Agency Head is not the employer of APS employees, they nevertheless may exercise 'all the rights, duties and powers of an employer in respect of APS employees

¹⁷ Under the *PS Act 1922* there was no category called 'permanent' employee. I am using this expression for reasons of clarity. It should be taken to refer to continuing employees with more than one year's service, or officers not on probation.

¹⁸ For details of the rules concerning APS redundancies, including redeployment obligations, as at February 1997, see Allan Anforth, 'Redundancies in the Australian Public Service' (1997) 35(1) *Law Society Journal* 67.

¹⁹ *PS Act 1922* s 76W.

²⁰ For a discussion of this shift towards enterprise bargaining in the APS, see John O'Brien and Michael O'Donnell, 'From Workplace Bargaining to Workplace Relations: Industrial Relations in the Australian Public Service under the Coalition Government' in Marilyn Pittard and Phillipa Weeks (eds), *Public Sector Employment in the Twenty First Century* (ANU E Press, 2007) 127.

²¹ *PS Act* ss 57 (Secretaries of Departments), 66 (Agency Heads of Executive Agencies).

²² *PS Act* s 22(1).

in the Agency'.²³ The idea was that 'the APS should operate, to the maximum extent consistent with its public responsibilities, under the same industrial relations and employment arrangements as apply to the rest of the Australian workforce.'²⁴

Other provisions of the *PS Act* supplement the broad s 20 power in relation to particular matters. These include powers concerning the engagement of employees,²⁵ assignment of duties,²⁶ discipline for misconduct²⁷ and termination of employment.²⁸ Importantly, the *PS Act* operated subject to the *WR Act*,²⁹ meaning that provisions of the *WR Act* dealing with matters such as certified agreements and unfair dismissal regulation applied as they would in the private sector.

The result of this legislative scheme is that Agency Heads were empowered to manage employees, subject to the limits set out in the *PS Act*, agency agreements and the like. In the context of redundancy, one such limit on an Agency Head's general powers is the limited power of termination of employment under the *PS Act*. This power is set out in s 29 of the *PS Act*, which permits an Agency Head, 'at any time, by notice in writing' to terminate the employment of an APS employee.³⁰ However any such termination of an ongoing APS employee must be on one of eight prescribed grounds.³¹ The only ground relevant to redundancies is contained in s 29(3)(a), that the employee 'is excess to the requirements of the Agency'.

The *PS Act* did not define what was meant by 'excess'. This was left to certified agreements, though it is submitted that any such definition could not encompass something wider than 'the agency'. A typical provision is contained in the *Centrelink Development Agreement 1999–2002* ('*Centrelink Agreement*') which defined excess in the following terms:

49.1 Management of redeployment, retrenchment and retirement is required where excess employee situations arise because:

- An employee is included in a group of employees, as defined by the CEO or delegate, where there is a greater number of employees at a particular level than is necessary for the efficient and economical working of Centrelink;
- The services of an employee cannot be effectively used because of technological or other changes in the work methods of Centrelink or changes in the nature, extent or organization of the functions of Centrelink; or

²³ *PS Act* s 20.

²⁴ Explanatory Memorandum, Public Service Bill 1999 (Cth) [3]. For a discussion of the nature of s 20 of the *Public Service Act 1999* (Cth), see Dennis Pearce, 'Exercise of Powers under Section 20 of the *Public Service Act 1999* (Cth)' (2007) 56 *AIAL Forum* 16–21.

²⁵ *PS Act* s 20.

²⁶ *PS Act* ss 25, 26.

²⁷ APS employees are bound by the APS Code of Conduct contained predominantly in s 13 of the *PS Act*, and can have a range of sanctions imposed for breaching the Code: *PS Act* s 15. A range of other provisions also play a role with respect to APS discipline: see, eg, the APS values in s 10, the employment principles in s 10A, the employer's power to suspend in s 28 and *Public Service Regulations 1999* (Cth) reg 3.10, and the *Australian Public Service Commissioner's Directions 2013* (Cth).

²⁸ *PS Act* s 29.

²⁹ *PS Act* s 8.

³⁰ *PS Act* s 29(1).

³¹ *PS Act* s 29(3).

- The duties usually performed by an employee are to be performed at a different locality within Centrelink, the employee is not willing to perform duties at that locality and the CEO or delegate has determined that these provisions will apply to that employee.³²

Just as the meaning of 'excess' was confined to either the agency or other agreed level, provisions dealing with redeployment would often give excess employees preference in relation to vacancies for which the employee applied within the agency.³³ Help would also be given to employees to apply for APS positions more broadly, but agencies did not actively attempt to redeploy employees into other agencies.³⁴ This approach was partly a matter of policy, but also a recognition that the voluntary movement of an APS employee from the employee's home agency to a receiving agency was at the discretion of the receiving Agency Head.³⁵ As discussed earlier, the *PS Act* did provide for the compulsory movement of APS employees between agencies at the discretion of the APS Commissioner,³⁶ but the writer is not aware of an instance when this power has been used.

The combined effect of the provisions of the *PS Act* and certified agreements evidenced an approach to redundancy in the APS which emphasised the primacy of individual agencies and downplayed the idea of a unified APS.

Operating alongside these laws were the unfair dismissal provisions of the *WR Act*.³⁷ The unfair dismissal provisions, as they applied to redundancy dismissals, broadly upheld managerial prerogative in relation to the existence of a redundancy, and the scope of redeployment obligations were generally left to certified agreements. Under the *WR Act*, an employee could challenge a redundancy by bringing a claim of unfair dismissal before the AIRC³⁸ on the grounds that the dismissal was 'harsh, unjust or unreasonable'.³⁹ In considering whether a termination of employment was 'harsh, unjust or unreasonable', the AIRC needed to decide 'whether there was a valid reason'⁴⁰ for the termination relating to the capacity or conduct of the employee or to

³² For other certified agreements with similar definitions of 'excess' see *Defence Employees Certified Agreement 2000–2001* sch 6 s 6B.1; *ATO (General Employees) Agreement 2000* s 108.1.

³³ See, eg, *ATO (General Employees) Agreement 2000* cls 108.3, 109.4; *Defence Employees Certified Agreement 2000–2001* sch 6 cls 6C.1–3, 6E.3, s J.

³⁴ The APS did set up schemes to assist public servants to find jobs in other agencies. An example of such a scheme was the Australian Public Service Labour Market Adjustment Program. Some agency certified agreements also offered preference to excess employees in other agencies: see, eg, *Defence Employees Certified Agreement 2000–2001* sch 6 cl 6M.1.

³⁵ *PS Act* s 26.

³⁶ *PS Act* s 27.

³⁷ See *WR Act* pt VIA div 3. For a discussion of these laws, see Anna Chapman, 'Termination of Employment under the *Workplace Relations Act 1996* (Cth)' (1997) 10 *Australian Journal of Labour Law* 89. Note that employees could also bring a claim that their employment had been unlawfully terminated: see *WR Act* ss 170CK–170CN.

³⁸ Note that there were many exclusions from the coverage of Commonwealth unfair dismissal laws. Most of these exclusions were not relevant to award/agreement covered ongoing APS employees, save for the exclusion on grounds of probation and/or employees serving a three month qualifying period: see *WR Act* s 170CC(1)(b) and s 170CE(5)(A).

³⁹ *WR Act* s 170CE(1)(a).

⁴⁰ A valid reason is one which is 'sound, defensible or well founded' and not 'capricious, fanciful, spiteful or prejudiced': *Selvaichandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

the operational requirements of the employer's undertaking, establishment or service',⁴¹ and whether procedural fairness requirements had been satisfied.⁴² To successfully make out the valid reason requirement, an employer needed to:

establish firstly that there was a genuine need for the redundancy related to the operational requirements of the business, and, secondly, that the selection of the particular employee concerned was sound, defensible, well-founded and objectively justifiable.⁴³

The AIRC has been reluctant to interfere with an employer's judgment as to the need for redundancies, provided such redundancies are not a sham.⁴⁴ As a result it was usually not difficult for an Agency Head, implementing a genuine redundancy, to show a connection between the operational requirements of the Agency and the need to reduce staff. Likewise issues of redeployment were very much regulated by agency certified agreements.

Where the AIRC was more willing to intervene and hold that a reason was not valid was in relation to the selection of particular employees for redundancy. Such selection processes needed to be objective.⁴⁵ If an employee could show that the process by which the employee was selected for redundancy was not objective, the AIRC could intervene and hold that the dismissal was unfair.⁴⁶ If the selection of an employee related in part to their capacity or conduct, an employee was entitled to respond to their selection, or any subsequent dismissal may be invalid.⁴⁷ Likewise employees could not be selected for redundancy on the basis of matters unconnected to the staff reduction process, such as participation in an industrial dispute,⁴⁸ or past work cover claims.⁴⁹

It is important to recognise that procedural fairness obligations, such as a lack of consultation, could be taken into account when deciding whether a redundancy dismissal was harsh, unjust or unreasonable,⁵⁰ but these were accorded less weight than had been the case under the previous Keating government's unfair dismissal

41 *WR Act* s 170CG(3)(a).

42 *WR Act* s 170CG(3)(b)-(db). Other relevant factors could also be taken into account: *WR Act* s 170CG(3)(e).

43 James Macken et al, *The Law of Employment* (Lawbook Co, 5th ed, 2002) 331-2.

44 See, eg, *Quality Bakers of Australia v Goulding* (1995) 60 IR 327; *Kenefick v Australian Submarine Corporation* (1995) 62 IR 107, 116; *Lang v Tenix Defence Systems Pty Ltd* (Unreported, AIRC, Williams SDP, 20 April 2000); *Powerlab Pty Ltd v Georgiadis* (2005) 147 IR 406.

45 See *Windsor-Smith v Liu* (1998) 140 IR 398.

46 For a selection of Full Bench decisions see *Lockwood Security Products Pty Ltd v Sulocki* (Unreported, AIRC, Giudice J, Lacy SDP and Blair C, 23 August 2001); *Smith v Moore Paragon Australia Ltd* (Unreported, AIRC, Ross VP, Lacy SDP and Simmonds C, 21 March 2002); *Rosedale Leather Pty Ltd v Metcalf* (2004) 144 IR 365; *Australian Nuclear Science And Technology Organisation v Rajaratnam* (2005) 145 IR 165.

47 See, eg, *Windsor Smith v Liu* (1998) 140 IR 398; *Lockwood Security Products Pty Ltd v Sulocki* (Unreported, AIRC, Giudice J, Lacy SDP and Blair C, 23 August 2001).

48 See *Dahlstrom v Wagstaff Cranbourne Pty Ltd* (Unreported, AIRC, Boulton J, Acton SDP and Simmonds C, 25 September 2000).

49 *Smith v Moore Paragon Australia Ltd* (Unreported, AIRC, Ross VP, Lacy SDP and Simmonds C, 21 March 2002).

50 *Powerlab Pty Ltd v Georgiadis* (2005) 147 IR 406.

laws.⁵¹ Non-compliance with rules of procedural fairness was no longer a stand-alone ground of invalidity.⁵² Instead the AIRC was required to ensure that 'a fair go all round' had been given to the employer and employee.⁵³

A combination of the *PS Act*, agency certified agreements and the unfair dismissal laws under the *WR Act* meant that APS redundancies were almost entirely dealt with during this time at the agency level. The new *Work Choices* laws did not reverse this trend – if anything they exacerbated it.

III REDUNDANCIES AND WORK CHOICES

The provisions of the *PS Act* remained virtually the same following the introduction of the *Work Choices* legislation.⁵⁴ Likewise redundancy entitlements in what were now known as collective agreements⁵⁵ remained in similar form, partly as a result of the Government's *Policy Parameters for Agreement-Making* which had, since 1999, prohibited any enhancement of redundancy entitlements.⁵⁶ This prohibition was interpreted narrowly by the Australian Public Service Commission ('APSC'), limiting any changes to the provisions.

The real action was through the *Work Choices* legislation itself. The fairly minimalist role played by the AIRC in APS redundancy dismissals was removed following the commencement of the majority of the *Work Choices* laws on 27 March 2006. An exemption for dismissals for 'genuine operational reasons'⁵⁷ was introduced.⁵⁸ Reference to 'the operational requirements of the employer's undertaking, establishment or service' was removed from the factors to be considered by the AIRC when determining whether a dismissal was 'harsh, unjust or unreasonable'.⁵⁹ In addition, s 643(8) of *Work Choices* prohibited the making of an unfair dismissal claim⁶⁰ if the employee's employment was terminated for genuine operational reasons or for reasons which included genuine operational reasons. Genuine operational reasons were defined as 'reasons of an economic, technological, structural or similar nature

⁵¹ Anthony Forsyth, 'Freedom to Fire: Economic Dismissals under Work Choices' (Research Report, Victorian Office of the Workplace Rights Advocate, 2007) 17-19.

⁵² Ibid.

⁵³ *WR Act* s 170CA(2).

⁵⁴ The *PS Act* was amended slightly to ensure consistency with the new *Work Choices* laws.

⁵⁵ Non-greenfields certified agreements, either negotiated with a union or directly with employees, were known as either employee or union collective agreements: see *Work Choices* ss 327, 328.

⁵⁶ See Department of Employment, Workplace Relations and Small Business, *Policy Parameters for Agreement Making in the Australian Public Service* (May 1999) cl 5.

⁵⁷ For an excellent account of the operational reasons exemption, see Forsyth, above n 51.

⁵⁸ A range of other exclusions were also introduced by *Work Choices*, notably an exclusion from unfair dismissal laws for employers who employed 100 or fewer employees: *Work Choices* ss 643(10)-(12). However these exclusions are not discussed in this article, as they are not relevant to the vast majority of APS employees.

⁵⁹ *Work Choices* s 652(3).

⁶⁰ The AIRC was required to hold a jurisdictional hearing if it was alleged that the genuine operational reasons exclusion applied, and if it found for the employer, the claim was invalid: see *Work Choices* s 649.

relating to the employer's undertaking, establishment, service or business, or to a part of the employer's undertaking, establishment, service or business.⁶¹

The Howard government seemed to indicate that the rationale for the genuine operational reasons exclusion was to prevent employees double dipping – that is, receiving a redundancy payment and then claiming unfair dismissal.⁶² Minister Andrews in his second reading speech described the rationale for the exclusion as follows: 'In addition, no claims can be brought where the employment has been terminated because the employer genuinely no longer requires the job to be done.'⁶³

Notwithstanding these statements, as drafted, the meaning of 'operational reasons' was much broader than suggested by then Minister Andrews, and broader than the former meaning of 'operational requirements'. This was made clear by a Full Bench of the AIRC in *Village Cinemas Australia Pty Ltd v Carter*.⁶⁴ Here the Full Bench confirmed that any inquiry into an employer's 'operational reasons' was limited to whether the reason was 'genuine' and whether it was an operational reason. It did not matter that the job remained to be done by another employee, or that termination of the particular employee's employment could have been averted.⁶⁵ Provided the operational reason was the reason, or part of the reason, for a termination of employment, the employee was excluded from bringing an unfair dismissal claim.

Given the breadth of the definition of genuine operational reasons, there is no doubt that the exclusion covered any redundancy situation in the APS. As a result, APS employees could no longer apply to the AIRC for review of a termination of employment on the ground that the employee was excess to the requirements of the agency. Arguments concerning the selection of particular employees to be made redundant and the like were no longer able to be ventilated before the industrial umpire.

The operational reasons exclusion was swept aside following the introduction of the *FW Act*, the bulk of which came into effect on 1 July 2009. In the following section, the changes to redundancy laws brought about by the *FW Act* are considered, and in particular the impact on the APS of the new genuine redundancy exclusion is analysed.

IV THE *FW ACT* AND REDUNDANCIES

The *FW Act* introduced significant changes to redundancy laws. Apart from the changes to unfair dismissal laws outlined later in this article, statutory redundancy entitlements were introduced,⁶⁶ in addition to minimum notice requirements⁶⁷ which have been a feature of Commonwealth workplace law since 1993.⁶⁸ The new

61 *Work Choices* s 643(9).

62 Forsyth, above n 51, 25–6.

63 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 2005, 21 (Kevin Andrews).

64 (2007) 158 IR 137.

65 *Ibid* 145.

66 *FW Act* s 119.

67 *FW Act* s 117.

68 See *Industrial Relations Act 1988 (Cth)* s 170DB; *WR Act* s 170CM; *Work Choices* s 661.

redundancy entitlements are based on the AIRC's 2004 redundancy test case,⁶⁹ and provide for a scale of severance benefits from four weeks base pay for employees with at least one years' service, to 16 weeks for employees with at least nine years but less than ten years' service. This redundancy scale improves on the VR provisions commonly found in pre-*FW Act* agency agreements in relation to employees with less than four years' service. The typical VR provision was for the payment of two weeks pay for each completed year of service, plus pro rata payments for completed months of service.⁷⁰ But since the introduction of the new redundancy provisions⁷¹ on 1 January 2010, these benefits have increased slightly for employees with less than four years' service.⁷²

There is also the potential for the new general protections provisions in Part 3-1 of the *FW Act* to play a role in redundancy processes. The general protections provisions are a set of protections which consolidated and expanded upon protections previously available in earlier iterations of Commonwealth workplace law.⁷³ The general protections provisions are complex, but in broad terms make it unlawful for an employer to take adverse action⁷⁴ against a person because the person has certain protections⁷⁵ concerning a workplace right⁷⁶ (broadly defined) or because of certain trade union activity,⁷⁷ or because of certain characteristics of the employee (such as race, sex etc.).⁷⁸ There is no case law dealing with these provisions in the context of APS redundancies, but they have the potential to be used to challenge redundancy processes. Most obviously this could occur after a declaration that an employee is potentially excess, but prior to an excess decision being made. In the absence of case law, however, the potential for these provisions to play a role in redundancy processes is difficult to assess.

V THE GENUINE REDUNDANCY EXCLUSION

More significant however is the new genuine redundancy provision contained in s 389 of the *FW Act*. Like its Coalition predecessor, the then ALP government maintained the policy position that employees dismissed as a result of a genuine redundancy should be precluded from arguing that their dismissal was unfair. Section 389 of the *FW Act* gave effect to this policy, and is in the following terms:

- (1) A person's dismissal was a case of genuine redundancy if:

⁶⁹ *Redundancy Case* (2004) 129 IR 155.

⁷⁰ *Centrelink Agreement* attachment 4 cl 39; *ATO (General Employees) Agreement 2000* cls 109.4, 109.12-15.

⁷¹ *FW Act* s 119.

⁷² See, eg, *Department of Agriculture, Fisheries and Forestry Enterprise Agreement 2011-2014* cl 92.1.

⁷³ Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, Sydney, 2010) [17.64].

⁷⁴ *FW Act* s 342.

⁷⁵ *FW Act* s 340. See also Creighton and Stewart, above n 73, [17.69] and following.

⁷⁶ *FW Act* s 341.

⁷⁷ *FW Act* ss 346-7.

⁷⁸ *FW Act* s 351. Part 3-1 also contains other provisions, such as prohibitions on coercion, undue influence and misrepresentation: see ss 343-5, ss 348-9.

- (a) the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
 - (b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.
- (2) A person's dismissal was not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within:
- (a) the employer's enterprise; or
 - (b) the enterprise of an associated entity of the employer.

The section differs in its operation in two significant respects from its *Work Choices* counterpart. To begin with, the statutory genuine redundancy exclusion is significantly narrower than the *Work Choices* operational reasons exemption, and is confined to redundancy situations. Provided ss 389(1) and (2) are complied with, no unfair dismissal claim can be brought.⁷⁹ However if ss 389(1) or (2) are not complied with, an employee can bring a claim of unfair dismissal before the FWC on the grounds that a termination is 'harsh, unjust or unreasonable'.⁸⁰ Provided certain jurisdictional matters are satisfied,⁸¹ the FWC must consider whether there is a 'valid reason' for the termination,⁸² whether various matters going to procedural fairness have been complied with⁸³ and 'any other matters that the FWC considers relevant'.⁸⁴ The definition of valid reason in s 387(a) does not include redundancy,⁸⁵ but this does not preclude allegations of unfair dismissal based on redundancy from being litigated. The FWC tends to treat the valid reason requirement as a neutral consideration, and instead considers the fairness of any such dismissal, including any failure to consult or to reasonably redeploy, under the catch-all s 387(h), being 'any other matters that the FWC considers relevant'.⁸⁶

This approach has the practical effect of requiring an Agency Head when implementing redundancies to consult in accordance with s 389(1)(b), and to redeploy an employee where reasonable in accordance with s 389(2). A failure to do either of these things will mean the exclusion is unavailable, and may lead to a finding that a dismissal is unfair⁸⁷ on the merits – a marked departure from the position under *Work Choices* and the *WR Act* before it.

⁷⁹ *FW Act* s 385(d).

⁸⁰ *FW Act* ss 385(b), 394.

⁸¹ *FW Act* s 396.

⁸² *FW Act* s 387.

⁸³ *FW Act* ss 387(b)-(g).

⁸⁴ *FW Act* s 387(h).

⁸⁵ A valid reason is a reason 'related to the person's capacity or conduct (including its effect on the safety and welfare of other employees)': *FW Act* s 387(a).

⁸⁶ See, eg, *UES International Pty Ltd v Harvey* [2012] FWAFB 5241 (14 August 2012) [42]. See also *Crema v Abigroup Contractors Pty Ltd* [2012] FWA 5322 (2 October 2012) [16]; *Ball v Metro Trains Melbourne* [2012] FWA 7729 (11 September 2012) [52]-[55].

⁸⁷ A failure to consult may lead to a finding that a dismissal was unfair, even if the dismissal would have occurred anyway had consultation obligations been complied with: see, eg, *UES International Pty Ltd v Harvey* [2012] FWAFB 5241 (14 August 2012). A failure to

The breadth of these new obligations will be considered. But before that it is important to consider whether s 389(1)(a) covers similar ground to the definition of excess commonly found in agency enterprise agreements.

A The existence of a redundancy

A Full Bench of the FWC has made it clear that the definition in s 389(1)(a) is broadly consistent with that used in the National Employment Standards,⁸⁸ and picks up the long standing jurisprudence on redundancy developed by courts and industrial tribunals over the past four decades.⁸⁹ The touchstone is that the employer no longer requires the employee's job to be performed by anyone. This can occur for a number of reasons, including that the employer wishes to reduce overall staff levels, because of the introduction of new technology or because the work previously performed by the employee has been distributed to other employees, or moved to a different locality.⁹⁰ The mere fact that some of the duties previously performed by the employee are still performed by the remaining workers does not mean that the employee cannot be redundant.⁹¹

The definition of excess commonly used in agency enterprise agreements incorporates many of the traditional features of a redundancy outlined above, and is broadly consistent with s 389(1)(a). A typical example⁹² is the definition of excess in the *Department of Agriculture, Fisheries and Forestry Enterprise Agreement 2011–2014* ('DAFF Agreement'), which is in the following terms:

88.3 An employee is an excess employee if:

- (a) the employee is included in a class of employees employed in the department, and that class comprises a greater number of employees than is necessary for the efficient and economical working of the department;
- (b) the services of the employee cannot be effectively used because of technological or other changes, or changes in the nature, extent or organisation of the functions of the department; or
- (c) where the duties usually performed by the employee are to be performed at a different locality, the employee is not willing to perform duties at the locality and the Secretary has determined that these provisions will apply to that employee.

Given the degree of conformity between this definition and that in s 389(1)(a), it is likely that a declaration that an employee is excess to requirements will continue to be made in much the same way as it was prior to the *FW Act*. This aspect of the s 389(1)(a) exclusion should be satisfied in most redundancy situations in the APS, and the new *FW Act* definition of redundancy should have no impact on how excess status is determined.

redeploy in circumstances where redeployment is available will often lead to a finding of unfairness: see below.

⁸⁸ *FW Act* s 119.

⁸⁹ *Ulan Coal Mines Ltd v Howarth* (2010) 196 IR 32, 35 [15] ('*Ulan Coal No 1*').

⁹⁰ The Explanatory Memorandum to the Fair Work Bill 2008 (Cth) gives several examples of redundancy which are similar to those highlighted here: see [1548]–[1549].

⁹¹ See *Dibb v Commissioner of Taxation* (2004) FCR 388, 404–5.

⁹² This definition of excess can be traced back to a similar definition in s 7(3) of the *PS Act* 1922.

B Obligation to consult

The second limb of the genuine redundancy exclusion requires an employer to comply with any obligation to consult about the redundancy contained in an applicable award or enterprise agreement.⁹³ The obligation to consult in s 389(1)(b) does not apply to workplaces not subject to an award or enterprise agreement. But given that it is government policy that all non-SES employees should have their terms and conditions of employment contained in a single enterprise agreement,⁹⁴ consultation is effectively mandatory in the APS if an Agency Head wishes to argue the genuine redundancy exclusion. If consultation has not occurred in accordance with the relevant enterprise agreement the genuine redundancy exclusion will not be available, and any unfair dismissal claim will be determined on its merits. A Full Bench of the FWC in *UES International Pty Ltd v Harvey*⁹⁵ confirmed that a failure to consult is a matter which can be taken into account when determining the merits of an unfair dismissal application. The majority expressed the view that a 'failure to consult does not necessarily mean a dismissal was harsh, unjust or unreasonable.'⁹⁶ However in the circumstances of *UES International*, the majority found that the dismissal was unfair, partly due to a failure to comply with consultation obligations in the relevant modern award.⁹⁷

This interpretation is stricter than the practice under the *WR Act*. Under that legislation, any failure to consult would have been taken into account in answering the overall question of whether 'a fair go all round' had been given to the employer and employee.⁹⁸ The 'fair go all round' epithet has been retained in the *FW Act*.⁹⁹ However as explained earlier, the FWC, when deciding claims of unfair dismissal on grounds of redundancy, must specifically consider whether consultation obligations have been complied with¹⁰⁰ to determine whether the genuine redundancy exclusion applies. If the exclusion does not apply because consultation obligations have not been complied with and the FWC goes on to decide the merits of a claim, it is almost inevitable that this failure will be treated by the tribunal as a stand-alone ground of potential unfairness.¹⁰¹ Whilst a failure to consult will not necessarily mean that a redundancy

⁹³ *FW Act* s 389(1)(b).

⁹⁴ *Australian Public Service Bargaining Framework* cl 1.2 ('*APS Bargaining Framework*'). The *APS Bargaining Framework* took effect from 31 January 2011: see Australian Public Service Commission, *Circular 2011/1: Introduction of the Australian Public Service Bargaining Framework* (3 February 2011).

⁹⁵ [2012] FWAFB 5241 (14 August 2012) ('*UES International*').

⁹⁶ *Ibid* [49].

⁹⁷ *Ibid*.

⁹⁸ *WR Act* s 170CA(2).

⁹⁹ *FW Act* s 381(2).

¹⁰⁰ *FW Act* s 389(1)(b).

¹⁰¹ For recent examples see *UES International* [2012] FWAFB 5241 (14 August 2012); *Ball v Metro Trains Melbourne* [2012] FWA 7729 (11 September 2012); *Murrihy v R Mechanical Services Pty Ltd* [2012] FWA 8416 (8 October 2012); *Vidaic v Market Street Holdings Pty Ltd* [2012] FWA 9311 (2 November 2012); *Thomas v InfoTrak Pty Ltd* [2013] FWA 1134 (21 February 2013); *Harbud v Australian Commercial Catering* [2013] FWA 2625 (3 July 2013); *Sajan v Amdel Pty Ltd* [2013] FWA 4784 (18 July 2013); *Siriwardhana v FDGH Pty Ltd* [2013] FWA 5609 (12 August 2013); *Papathanasiou v HBS Group Pty Ltd* [2013] FWA 6838 (11 September 2013).

dismissal is unfair,¹⁰² such a failure will inevitably figure prominently in the FWC's reasoning. On several occasions the FWC has held that a dismissal is unfair in whole or in part because of a failure to comply with consultation obligations.¹⁰³

Given the operation of s 389(1)(b), the wording of a consultation clause in an agency enterprise agreement will assume critical importance. The FWC has made it clear that '...the inquiry in the particular factual circumstances of [a particular] case and for the purpose of determining whether the requirement in s 389(1)(b) of the Act is satisfied, must be directed to the proper construction of the [consultation] obligation set out in [the relevant] Agreement.'¹⁰⁴

Determining 'the proper construction' of the consultation obligations in many APS redundancy clauses, not to mention complying with them, can be a particularly difficult task. Many of these clauses have not been updated for a long time, and are convoluted. An example is cl 89 of the *DAFF Agreement*. Under this clause, the Secretary of DAFF must first notify the employee in writing that the employee is likely to become excess to requirements.¹⁰⁵ Discussions must then be held, covering the reasons for the redundancy and the method used to determine excess employees, measures, including redeployment and job swaps at level, which could alleviate the situation, a referral to an employment agency and the appropriateness of a VR.¹⁰⁶ Whilst these discussions are taking place, the Secretary can, at the Secretary's discretion, offer to employees who are not excess the chance to accept a VR.¹⁰⁷ Limitations are also imposed on a Secretary with respect to involuntary retrenchment, and more consultation must take place once the employees are excess to determine which employees want to be redeployed and which employees want a VR.¹⁰⁸ Finally the Secretary 'will take all reasonable steps, consistent with the interests of efficient administration,' to transfer an excess employee at level within the agency.¹⁰⁹

The complexity of these provisions increases the likelihood that mistakes concerning consultation will be made. The result of the inclusion of s 389(1)(b) in the *FW Act* is that any such mistakes are now more likely to feature in the FWC's consideration as to whether or not a dismissal is unfair than was previously the case. It is of course true that an Agency Head could reduce these risks by seeking to negotiate simpler consultation arrangements. However if such negotiations are unsuccessful, an Agency Head may need to face the reality that convoluted consultation arrangements could lead to mistakes being made, and that under the *FW Act* there is a greater

¹⁰² See, eg, *Murrilhy v R Mechanical Services Pty Ltd* [2012] FWA 8416 (8 October 2012); *Vidaic v Market Street Holdings Pty Ltd* [2012] FWA 9311 (2 November 2012); *Harbud v Australian Commercial Catering* [2013] FWA 2625 (3 July 2013); *Sajan v Amdel Pty Ltd* [2013] FWA 4784 (18 July 2013); *Papathanasiou v HBS Group Pty Ltd* [2013] FWA 6838 (11 September 2013).

¹⁰³ See, eg, *UES International* [2012] FWAFB 5241 (14 August 2012); *Ball v Metro Trains Melbourne* [2012] FWA 7729 (11 September 2012); *Thomas v InfoTrak Pty Ltd* [2013] FWA 1134 (21 February 2013); *Siriwardhana v FDGH Pty Ltd* [2013] FWA 5609 (12 August 2013).

¹⁰⁴ *Ulan Coal No 1* (2010) 196 IR 32, 39 [27].

¹⁰⁵ *DAFF Agreement* cl 89.1.

¹⁰⁶ *Ibid* cl 89.2.

¹⁰⁷ *Ibid* cl 89.5.

¹⁰⁸ *Ibid* cl 89.8.

¹⁰⁹ *Ibid* cl 89.9.

likelihood such mistakes may ultimately thwart the dismissal of an employee whose position is in fact redundant.

C Reasonable redeployment

Section 389(2) states that a dismissal will not be a genuine redundancy 'if it would have been reasonable in all the circumstances for the person to be redeployed within:

- (a) the employer's enterprise; or
- (b) the enterprise of an associated entity of the employer.¹¹⁰

This requirement to redeploy raises a number of important issues, both in relation to employment generally and APS employment in particular. To what extent must an employer be proactive in placing an employee within its enterprise? How should an employer go about identifying suitable positions for redeployment? What is meant, in the APS context, by the term 'employer's enterprise'? These questions are important, not only for determining whether a claim for unfair dismissal can be excluded on the basis that it is a genuine redundancy, but also because the FWC is likely to hold that a dismissal is unfair if, in all the circumstances, an affected employee is not redeployed in circumstances where it would be reasonable to do so.

1 How proactive must an employer be?

A FWC Full Bench in *Ulan Coal Mines Ltd v Honeysett*¹¹¹ has unambiguously held that an employer must be proactive in redeploying redundant employees. The Full Bench said:

It is an essential part of the concept of redeployment under s 389(2)(a) that a redundant employee be placed in another job in the employer's enterprise as an alternative to termination of employment.¹¹²

This passage makes it clear that the onus is on the employer to be proactive in finding jobs for redundant employees. In *Ulan Coal No 2*, for instance, the Full Bench took a dim view of Ulan's policy of advertising positions and allowing redundant employees to apply and be assessed as part of a competitive selection process with other members of the community. The Full Bench opined:

Where an employer decides that, rather than fill a vacancy by redeploying an employee into a suitable job in its own enterprise, it will advertise the vacancy and require the employee to compete with other applicants, it might subsequently be found that the resulting dismissal is not a case of genuine redundancy. This is because it would have been reasonable to redeploy the employee into the vacancy.¹¹³

This idea that the employer must be proactive in identifying suitable positions has been applied in subsequent FWC decisions. In *Aldred v J Hutchinson Pty Ltd*¹¹⁴ for instance, Commissioner Lewin put the matter like this:

The clear implication I think is that whether or not redeployment will be possible is something primarily, but not exclusively, within the purview of the employer ... To

¹¹⁰ The issue of redeployment to an associated entity has no application in the APS context, and is beyond the scope of this article.

¹¹¹ (2010) 199 IR 363 (*Ulan Coal No 2*).

¹¹² *Ibid* 371 [34].

¹¹³ *Ibid*.

¹¹⁴ [2012] FWA 8289 (26 October 2012) (*Aldred*).

suppose a responsibility to identify any reasonable redeployment opportunities or to impose an onus upon an employee to initiate the identification and determination [sic] what the employee would accept as being a reasonable redeployment opportunity is not appropriate.¹¹⁵

The same view – that the employer must be proactive – was taken by Commissioner Smith in the course of dealing with a dispute arising under an enterprise agreement between the CPSU and ASIC.¹¹⁶ The dispute concerned the interpretation of cl 49.5 of the agreement, which said in part that 'where the staff member indicates they wish to examine options for redeployment, ASIC will assist the staff member to find alternate employment ...' ASIC submitted that the word 'assist' meant that it was strictly only required to react to requests for assistance made by the employee.¹¹⁷ Commissioner Smith rejected this argument and held that

[a]n examination of the history of debate, industrial regulation and decisions in relation to redundancy would lead to the conclusion that where an employer is faced with making employees redundant then every effort should be made to mitigate the effects of that redundancy. The employer's role is not a passive one of standing on the sidelines and responding only to specific requests by employees but one where it assumes an active role.¹¹⁸

These decisions make it abundantly clear that an employer must actively take steps to redeploy an affected employee. This places a heavy burden on APS agencies, particularly when this proactive obligation is considered in light of what is said below concerning the steps an employer must take to identify suitable positions, the geographic reach of the obligation to redeploy and the potential that the obligation extends across the APS.

2 *What are suitable positions?*

An employer does not have an absolute obligation to redeploy an employee into any vacant position. The Full Bench in *Ulan Coal No 2* held that whether it would have been reasonable to redeploy a redundant employee 'will depend on the circumstances.'¹¹⁹ Some of the factors to be considered 'include the nature of any available position, the qualifications required to perform the job, the employee's skills, qualifications and experience, the location of the job in relation to the employee's residence and the remuneration which is offered.'¹²⁰

The FWC has tended to interpret these requirements beneficially. For instance in *Crema v Abigroup Contractors Pty Ltd*¹²¹ Commissioner Cribb held that it was reasonable to redeploy CW1 labourers who had worked on building sites to work as CW1 labourers on civil construction sites, despite the fact that the employees in

¹¹⁵ Ibid [36]–[37].

¹¹⁶ *Community and Public Sector Union v Australian Securities & Investments Commission re Australian Securities & Investments Commission Level Enterprise Agreement 2009–2011* [2010] FWA 9494 (13 December 2010) [17]–[27].

¹¹⁷ Ibid [12].

¹¹⁸ Ibid [24].

¹¹⁹ (2010) 199 IR 363, 370 [27].

¹²⁰ Ibid [28].

¹²¹ [2012] FWA 5322 (26 June 2012).

question had not been trained, and did not have experience in, civil construction.¹²² If the FWC continues to adopt this approach, the potential range of jobs into which an employer may be required to redeploy an affected employee could be as broad as any position at or below the employee's level which is broadly comparable to the employee's old job. Given the proactive nature of the obligation, this could require an employer to place an employee into a very wide range of positions.

Aldred is another instance of the redeployment obligations being interpreted beneficially, this time in relation to location. In *Aldred*, Commissioner Lewin did not accept the employer's argument that it had not considered redeployment opportunities for one of its Victorian workers in Queensland because the various national divisions were operationally distinct, and the cost of any relocation would have been significant.¹²³ Commissioner Lewin concluded that the employer was not contractually obliged to pay the relocation costs, and that the employee was willing, and could have been, redeployed into vacant positions in Queensland.¹²⁴ This decision obviously imposes an extraordinary burden on large employers such as the Commonwealth, who have offices all over Australia.¹²⁵

A FWC Full Bench has also made it clear that redeployment enquiries must include less senior roles, provided such roles are available, if the employee has the skills to perform them and the employee consents.¹²⁶ It is now virtually incumbent on an Agency Head to ask excess employees if they are willing to be redeployed to a less senior role and, if so, to attempt to work out the types of role which the employee would consent to. Whilst such consultation may seem to represent good management practice, it is submitted that the proactive nature of the employer's obligation to redeploy and the breadth of the redeployment obligation would make the ascertainment of available positions extremely burdensome. This is particularly the case with respect to involuntary redundancies, where an employee can elect under many, but by no means all, enterprise agreements to remain in employment on a retention period of between seven and 13 months. Making the enquiries outlined above for this length of time would be extremely onerous, particularly if, as this article argues, the nature of the redeployment obligation is such that it may require redeployment across the APS. It is to this question of what is meant by the 'employer's enterprise' that this article now turns.

3 What is meant by 'the employer's enterprise'?

The most problematic aspect of the obligation to redeploy is what is meant by the term 'employer's enterprise', the meaning of which is uncertain in the APS context. It is clear that APS employees are employed by the Commonwealth. But does the term 'employer's enterprise' mean the Commonwealth – an interpretation which could require the Commonwealth to redeploy an APS employee to Commonwealth employment outside the APS – or something else?

¹²² Ibid [123].

¹²³ [2012] FWA 8289 (26 October 2012) [21].

¹²⁴ Ibid [39]–[47].

¹²⁵ A recent decision of the FWC indicates that redeployment obligations for Australian based employees are unlikely to extend to overseas locations of associated entities: *Roy v SNC-Lavalin Australia Pty Ltd* [2013] FWC 7309 (30 September 2013).

¹²⁶ See *Jenny Craig Weight Loss Pty Ltd v Margolina* [2011] FWAFB 9137 (23 December 2011) [28].

(a) *Does the 'employer's enterprise' include non-APS employees?*

It is submitted that the term 'employer's enterprise' does not include non-APS Commonwealth authorities who employ staff under legislation establishing the entity concerned. Examples of such entities include Airservices Australia¹²⁷ and the Civil Aviation Safety Authority.¹²⁸ These organisations are separate legal entities to the Commonwealth, and do not fit the definition of associated entity under the *Corporations Act 2001* (Cth).¹²⁹ Section 389(2) of the *FW Act* does not require redeployment to an unrelated entity of the employer. It seems clear therefore that consideration of any redeployment opportunities which may exist at such entities is not required.

What about non-APS Commonwealth employees employed under separate legislation such as political staffers,¹³⁰ staff of the Governor-General¹³¹ and the High Court of Australia,¹³² employees of the Australian Security Intelligence Organisation,¹³³ employees (but not members) of the Australian Federal Police¹³⁴ and casual statisticians engaged to conduct the census?¹³⁵ Some of these employees are employed, like their APS counterparts, on behalf of the Commonwealth, whilst others are employed directly in accordance with the statute establishing the organisation. Could the Commonwealth be required to redeploy an APS employee to one of the abovementioned organisations?

A recent FWC decision supports the view that redeployment in these circumstances does not encompass an obligation to redeploy across the Commonwealth. In *Lindsay v Department of Finance and Deregulation*¹³⁶ Ms Lindsay, a former political staffer to Dr Jensen MP, argued that the Commonwealth's redeployment obligations included not only redeployment within Dr Jensen's office, but redeployment to the office of another Member or Senator or, in the alternative, redeployment into the APS more generally.

Commissioner Williams recognised that such an argument was open to Ms Lindsay:

At its broadest in the circumstances of this case s 389(2) involves consideration by the Respondent of the possibility of redeployment to any other Member of Parliament's electoral office, or given the employer is the Commonwealth, potentially to positions elsewhere in the public sector.¹³⁷

However Commissioner Williams rejected these arguments. The Commissioner recognised that the scheme of the *Members of Parliament (Staff) Act 1984* (Cth), under which Members and Senators hire their own staff on behalf of the Commonwealth, 'is a somewhat unique arrangement and one that is different from employment with the

¹²⁷ *Air Services Act 1995* (Cth).

¹²⁸ *Civil Aviation Act 1988* (Cth).

¹²⁹ For the definition of 'associated entity' see *Corporations Act 2001* (Cth) s 50AAA.

¹³⁰ See *Members of Parliament (Staff) Act 1984* (Cth).

¹³¹ See *Governor-General Act 1974* (Cth) s 13.

¹³² *High Court of Australia Act 1979* (Cth).

¹³³ *Australian Security Intelligence Organisation Act 1979* (Cth) s 84.

¹³⁴ *Australian Federal Police Act 1979* (Cth) pt 3 div 2.

¹³⁵ See *Census and Statistics Act 1905* (Cth).

¹³⁶ (2011) 210 IR 25 (*Lindsay*).

¹³⁷ *Ibid* 41 [133].

Commonwealth in the public service generally which is subject to separate legislation.¹³⁸

It is submitted that *Lindsay* was correctly decided. The particular statutory functions of certain non-APS Commonwealth organisations, together with the separate legislative schemes under which such organisations operate, makes it inappropriate that the Commonwealth's obligations to redeploy excess APS employees should extend so far.

(b) Does the 'employer's enterprise' mean APS employment?

More problematically is whether or not the 'employer's enterprise' encompasses APS employment, or only employment in a particular agency. If the term 'employer's enterprise' means the former, the Commonwealth will have broader redeployment obligations than at any time since the introduction of the *PS Act* in 1999. If the latter, the Commonwealth's obligation to redeploy will have an outer limit – the employee's agency.

There is no clear answer to the question as to what is meant by the term 'employer's enterprise' in the context of APS employment. On the one hand, there are powerful arguments which, if accepted, would limit the meaning of 'employer's enterprise' to the level of the employing agency. It could be argued that s 795 of the *FW Act* operates in combination with the *PS Act* to constrain any obligation the Commonwealth may have under s 389(2) of the *FW Act* to redeploy beyond the employee's agency. Section 795(1) is in the following terms:

For the purposes of this Act and the procedural rules, the employer of an employee (a public sector employee) employed in public sector employment must act only through the employee's employing authority acting on behalf of the employer.

Despite its convoluted language, s 795 makes it clear that, for the purposes of the *FW Act* and the procedural rules, the Commonwealth, in relation to an employee employed in public sector employment, 'must act only through the employee's employing authority...'¹³⁹ On one view, any act done as a result of a *FW Act* requirement on behalf of the employer in relation to 'public sector employment' can only be done by an 'employing authority'. The term 'public sector employment' is defined to include employment under the *PS Act*.¹⁴⁰ The 'employing authority', through whom the Commonwealth must act in order to discharge its *FW Act* obligations, can be the Public Service Minister, the Agency Minister, an Agency Head or an APS employee.¹⁴¹ Under the *PS Act*, the vast majority of employment powers must be exercised by an Agency Head, or an APS employee with appropriate delegations from the Agency Head.¹⁴² The Agency Minister's powers are limited to a handful of matters concerning heads of Executive Agencies and the like.¹⁴³ Likewise

¹³⁸ Ibid 45 [135].

¹³⁹ *FW Act* s 795(1).

¹⁴⁰ Ibid s 795(4)(a).

¹⁴¹ *Fair Work Regulations 2009* (Cth) sch 6.3.

¹⁴² *PS Act* s 78.

¹⁴³ The employment and appointment powers of an Agency Minister include the appointment of the head or acting head of an Executive Agency, along with limited powers in relation to that head (*PS Act* ss 67-9), the right to be consulted concerning the appointment of Departmental Secretaries (s 58), limited employment powers in relation to Agency Heads

the Public Service Minister has limited powers in connection with APS employment,¹⁴⁴ none of which would generally impact on APS redundancies.

Whilst an Agency Head, or an APS employee with delegation from the Agency Head, has almost all of the employment powers under the *PS Act*, the exercise of these powers is limited to APS employees in the particular agency. It follows that an Agency Head or APS employee of one department (Department A) has no legal power to require another department (Department B) to take Department A's excess employees. As explained earlier, the APS Commissioner can, by direction in writing, transfer an excess employee between agencies without the consent of either the employee or the relevant Agency Heads.¹⁴⁵ But the APS Commissioner is not an 'employing authority' for the purposes of s 795, and therefore the argument could be put that the Commonwealth cannot be required to act through the APS Commissioner for the purposes of discharging its obligations under s 389(2) of the *FW Act*. The argument can be summarised as follows: the obligation to redeploy across the 'employer's enterprise' arises because of s 389(2) of the *FW Act*, and the employer is the Commonwealth. But the Commonwealth, as employer, can only act through an employing authority, and no relevant employing authority has the power to redeploy across the APS.

The argument that the combined effect of s 795 of the *FW Act* and the provisions of the *PS Act* limits the Commonwealth's s 389(2) redeployment obligations to the employing agency has not been explicitly made before the FWC. However in *Noronha v Department of Veterans' Affairs*,¹⁴⁶ the interaction of s 795 of the *FW Act* and the provisions of the *PS Act* were discussed as part of an argument that Commonwealth agencies were not associated entities for the purposes of the redeployment obligations in s 389(2)(b) of the *FW Act*.¹⁴⁷ Deputy President Booth left open the possibility that two Commonwealth departments could be associated entities, but held that on the facts the Department of Veterans' Affairs ('DVA') had satisfied any redeployment obligations it owed to Mrs Noronha.¹⁴⁸ With respect, it is submitted that the Deputy President focussed on the wrong question. There was never any prospect that two government departments could be associated entities, as a government department is not a separate legal entity but is a part of a single entity being the Commonwealth. Rather the question should have been whether the combined effect of s 795 and the provisions of the *PS Act* limited DVA's obligations under the *FW Act* to redeployment within the agency, or more broadly across the APS. Unfortunately *Noronha* was an opportunity missed to clarify this issue.

and forfeiture of remuneration (s 31), and the power to direct Agency Heads in relation to Heads of Mission (s 39).

¹⁴⁴ These powers include the making of classification rules (*PS Act* s 23) and a power to determine APS pay and conditions 'because of exceptional circumstances' (*PS Act* s 24(3)). The s 24(3) powers are most frequently invoked during wartime, though they have been used by the current government to facilitate the Machinery of Government changes in the wake of the September 7 election: see Australian Public Service Commission, *Circular 2013/9: Transitional Arrangements for APS Employees Affected by Machinery of Government Changes* (18 September 2013).

¹⁴⁵ *PS Act* s 27.

¹⁴⁶ [2013] FWC 1299 (8 May 2013) ('*Noronha*').

¹⁴⁷ *Ibid* [79].

¹⁴⁸ *Ibid* [78]-[81].

Despite these arguments it is submitted that the better view is that the term 'employer's enterprise' means the APS. The drafting of s 389(2), consistency with the obligations owed to redeploy to associated entities of the employer, the interpretation of the section by the FWC and the APS Redeployment Policy ('Policy') all point in favour of a requirement to redeploy across the APS.

The Full Bench in *Ulan Coal No 2* recognised the different style of drafting used in s 389(1) as compared to s 389(2) when it stated: 'It can be seen that the definition has an inclusionary aspect, that in s 389(1), and an exclusionary aspect, that in s 389(2).'¹⁴⁹

The language of s 389(1) is directed at the actions of a particular employer. By contrast, the language of s 389(2) is directed to a particular state of affairs – whether 'it would have been reasonable in all the circumstances for the person to be redeployed within ... the employer's enterprise'. The drafting of s 389(2) is possibly explained by the need to capture the obligation to redeploy to associated entities. Whatever the thinking of the drafters, it is arguably the case that s 389(2) is not concerned with what an employer, or in the APS context 'the employing authority', can legally do, but rather whether, in all the circumstances, it would have been reasonable for an employee to be redeployed within the employer's enterprise. If this argument is accepted, any limiting effect s 795 of the *FW Act* and the provisions of the *PS Act* may have in relation to limiting redeployment to the employing agency falls away.

Such an interpretation is consistent with the extension of the redeployment obligations to associated entities.¹⁵⁰ A FWC Full Bench held in *Ulan Coal No 2*

that it might be reasonable for an employee dismissed by one employer to be redeployed within the establishment of another employer which is an entity associated with the first employer. It follows that an employer cannot succeed in a submission that redeployment would not have been reasonable merely because it would have involved redeployment to an associated entity.¹⁵¹

These observations were made in the context of coal mines which were operated by separate legal entities, which had autonomous management and employment arrangements, with a policy of not redeploying redundant employees between the mines, the nearest of which was more than 100 kilometres from the mine at which the affected employees worked. There are no Full Bench authorities considering redeployment within an employer, such as the Commonwealth, which operates a number of organisationally or operationally distinct parts of its undertaking. However it would be incongruous if the obligation to redeploy to an associated entity was broader than the obligation to redeploy within the employer itself. If the legal and management separation in *Ulan Coal No 2* did not stop the Full Bench from confirming a first instance decision¹⁵² that the affected workers should have been redeployed to an associated entity of Ulan, it is unlikely that the FWC would consider favourably an argument that the Commonwealth cannot redeploy across the APS.

Subsequent FWC decisions support the view that redeployment must be across the whole of an employer's enterprise. In *Aldred*¹⁵³ Commissioner Lewin, in rejecting the

¹⁴⁹ (2010) 199 IR 363, 365 [5].

¹⁵⁰ *FW Act* s 389(2)(b).

¹⁵¹ (2010) 199 IR 363, 370 [27].

¹⁵² *Howarth v Ulan Coal Mines Ltd* [2010] FWA 4817 (12 July 2010) [50]–[53].

¹⁵³ [2012] FWA 8289 (26 October 2012).

respondent's submissions that it did not need to consider redeployment of one of its Victorian workers to available positions in Queensland because the employer comprised a number of operationally distinct divisions, took the view that the words 'employer's enterprise' should be given 'full and beneficial meaning. To confine the consideration to a particular geographic zone or division of an employer's enterprise or those of associated entities, in my view, would unjustifiably limit the words used in the statute which encompass the *whole* of an employer's enterprise ...'¹⁵⁴

By analogy of reasoning, the APS could be considered the 'employer's enterprise', with each of the agencies comprising 'divisions' of that overall enterprise. Such an interpretation is consistent with the Commonwealth's Policy, introduced by the former government in April 2011, which aims to facilitate redeployment of excess employees across the APS.¹⁵⁵ The Policy formed part of the then Labor government's response to the *Ahead of the Game Report*,¹⁵⁶ the first major review of the APS for nearly two decades. Among other things, the report had a vision for an APS which was 'unified by an enterprise agreement bargaining arrangement that embeds greater consistency in wages, terms and conditions.'¹⁵⁷ Recommendation 6.1 gave effect to this vision by recommending that 'employment bargaining arrangements support one APS.'¹⁵⁸

The then government's response to this recommendation included the promulgation of the *APS Bargaining Framework* and the Policy. The *APS Bargaining Framework* required, inter alia, agencies to consider negotiating the introduction of model clauses,¹⁵⁹ including those dealing with redundancy, in agency enterprise agreements. However the long standing practice that existing redundancy entitlements were not to be enhanced was continued, 'other than where required by legislation, or in exceptional circumstances with the approval of the Special Minister of State for the Public Service and Integrity'.¹⁶⁰

Accompanying these clauses was the Policy, which was aimed at facilitating the redeployment of excess APS employees on a whole of APS basis. The Policy seeks to enhance the redeployment prospects of excess employees by requiring the employee's agency to consider excess or potentially excess employees in isolation for any vacancies which may arise, prior to externally advertising.¹⁶¹ The Policy also provides for the establishment of an APS-wide online register for excess employees.¹⁶² Agencies who are recruiting are required to consult this register prior to advertising externally or drawing on an existing order of merit, although any decision concerning whether or not to hire an excess employee is at the discretion of the hiring agency.¹⁶³ The Policy also seeks to allow employees wishing to accept a VR to undertake a 'job exchange'

¹⁵⁴ Ibid [44].

¹⁵⁵ Australian Public Service Commission, *APS Redeployment Policy* (last updated 12 July 2013).

¹⁵⁶ Department of the Prime Minister and Cabinet (Cth), *Ahead of the Game: Blueprint for the Reform of Australian Government Administration* (2010) ('*Ahead of the Game Report*').

¹⁵⁷ Ibid 54.

¹⁵⁸ Ibid 55.

¹⁵⁹ *APS Bargaining Framework* cl 1.8.

¹⁶⁰ Ibid cl 4.2.

¹⁶¹ Policy cls 1.1, 1.2.

¹⁶² Ibid cl 2.1.

¹⁶³ *PS Act* s 26.

with excess employees.¹⁶⁴ This can be done within an agency, as well as across the APS via an online job exchange register. Finally, the Policy makes it clear that involuntary retrenchments are to be an option of last resort.¹⁶⁵

The Policy clearly articulates the Commonwealth's preference for excess employees to be redeployed across the APS (although it should be emphasised that the Policy does not require the Commonwealth to be as proactive in redeploying excess employees as the FWC decisions discussed above would require). The Policy adds weight to the argument that the 'employer's enterprise', for the purposes of s 389(2)(a), should be the APS.¹⁶⁶ This view is strengthened still further by amendments made to the *PS Act* which took effect from 1 July 2013. The amendments, among other things, give the APS Commissioner power to make written directions concerning 'redeployment' of APS employees.¹⁶⁷ Currently no such directions have been made, but the fact that the APS Commissioner has the power to make them strengthens the argument that the Commonwealth could, if it chose, enhance redeployment processes across the APS beyond what has been done through the Policy.

D Legal implications of the *FW Act* changes

Two points can be made about the *FW Act* genuine redundancy exclusion. The first is that it is quite difficult to satisfy the genuine redundancy exclusion as a jurisdictional matter, either because of non-compliance with the consultation provisions of an industrial instrument, or because of the breadth of the redeployment obligations discussed above. The upshot of this is that issues concerning consultation and the appropriateness of various redeployment actions are now frequently being adjudicated upon as part of the merits of an unfair dismissal claim.¹⁶⁸ This is a marked departure from the pre-*Work Choices* position under the *PS Act*, where, as discussed earlier, challenges to redundancy dismissals were usually concerned with issues such as the method of selection of employees. The outcome of these changes for Agency Heads are that employees can litigate – and are more likely to win – concerning the merits of redundancies in circumstances where success would have been less likely under previous iterations of Commonwealth unfair dismissal law.

In addition, Agency Heads must now ensure that their conduct complies with three sources of obligations concerning redeployment: those contained in enterprise agreements, the Policy and the *FW Act* obligation contained in s 389(2). As previously explained, the redeployment obligations in agency enterprise agreements are all slightly different, but many typically do not require an Agency Head to seek to redeploy an excess APS employee beyond the employee's agency. But Agency Heads must also comply with the Policy, which as explained earlier requires, inter alia, Agency Heads to consider excess employees in other agencies for vacant positions.

¹⁶⁴ Policy cl 2.2.

¹⁶⁵ *Ibid* cl 1.8.

¹⁶⁶ The Policy also adds weight to the argument, discussed earlier, that the 'employer's enterprise' should not be taken to mean Commonwealth employment outside of the APS.

¹⁶⁷ *PS Act* s 11A(1)(c).

¹⁶⁸ See, eg, *Ulan Coal No 1* (2010) 196 IR 32; *Ulan Coal No 2* (2010) 199 IR 363; *Crema v Abigroup Contractors Pty Ltd* [2012] FWA 5322 (26 June 2012); *Aldred* [2012] FWA 8289 (26 October 2012); *UES International* [2012] FWAFB 5241 (14 August 2012); *Ball v Metro Trains Melbourne* [2012] FWA 7729 (11 September 2012).

However neither the obligations typically found in enterprise agreements, or the Policy, are as far-reaching as the s 389(2) obligation. This could leave an Agency Head in a position where he or she has complied with enterprise agreement obligations and the Policy in dismissing an employee on the ground that the employee is excess to the requirements of the agency, yet the Commonwealth could still be held liable in an unfair dismissal proceeding due to the breadth of the redeployment obligations in s 389(2). This is an extremely undesirable outcome.

E Practical implications of the *FW Act* changes

Despite the arguments previously advanced in this article, it is unlikely that these issues will be frequently litigated. This is because the majority of any proposed APS redundancies are likely to be voluntary. In the APS, a VR still involves the agency terminating the excess employee's employment.¹⁶⁹ But even though such a termination would be at the initiative of the employer,¹⁷⁰ it is hard to see the FWC having much sympathy for an employee who accepts a VR, and then complains that it was unfair. Likewise an excess employee who is redeployed will have nothing to complain about.

Where these issues are likely to arise is in circumstances of involuntary redundancy. Although at present there are no substantial programs of involuntary redundancies, it is likely for the reasons discussed at the beginning of this article that in the short-to-medium term some involuntary redundancies will occur in the APS. If this happens, the new redeployment obligations and the like are likely to be extremely significant. When an employee is involuntarily retrenched in the APS, they can typically remain in employment for a retention period of between seven and 13 months.¹⁷¹ Consulting with such employees and being proactive in finding redeployment opportunities is a difficult task, particularly if it must be done across the APS for a period of up to 13 months! It is in this context that the onerous *FW Act* obligations will be tested.

F Critiquing the *FW Act* obligations in APS employment

It is submitted that the new *FW Act* obligations create tensions on a number of levels concerning redundancies in the APS. Firstly, and assuming that the most likely scope of the 'employer's enterprise' under s 389(2) of the *FW Act* is the APS, it is submitted that there is a tension between the broad obligation to redeploy under the *FW Act* and the devolution of employer powers to the level of the agency under the *PS Act*.

Opponents of this view may seek to argue that the *FW Act* obligation to redeploy is not inconsistent with the *PS Act* framework. Although most employment powers are vested in Agency Heads, the *PS Act* does provide for redeployment across the APS through the powers given to the APS Commissioner to compulsorily transfer excess employees between agencies.¹⁷² This position is backed up by the APS Employment Principles which commence with the words '[t]he APS is a career-based service',¹⁷³ and by the new powers given to the APS Commissioner discussed earlier to issue

¹⁶⁹ *PS Act* s 29.

¹⁷⁰ *FW Act* s 386.

¹⁷¹ For an example of such a retention provision see *DAFF Agreement* cl 94.

¹⁷² *PS Act* s 27.

¹⁷³ *Ibid* s 10A(1).

directions concerning, among other things, 'redeployment'.¹⁷⁴ On one view the Policy, which encourages redeployment across the APS, can be seen as reflective of this broader commitment to redeploy across the APS.

It is submitted however that such arguments do not give sufficient weight to the fundamental changes to the APS which began in the 1980s and were completed with the introduction of the *PS Act*.¹⁷⁵ The devolution of employment and financial accountability to the level of the employing agency has had a profound impact on the operation of the APS. Commonwealth departments now operate as separate units within the overall structure of government, each with their own financial accountability obligations,¹⁷⁶ with each Agency Head holding the bulk of the Commonwealth's employment powers and with separate enterprise agreements. Although the *Ahead of the Game Report*¹⁷⁷ proposed greater consistency of employment conditions across the APS, neither side of politics has shown any inclination to reverse the devolution of employment and financial accountability to Agency Heads.

Whilst the notion that the APS is a career-based service has continued to enjoy the support of both sides of politics, a 'career-based' service is different from a single 'career' service. Nethercote writes that a 'career' service 'has been taken to mean competitive appointment, promotion largely on merit, and security of tenure in the sense that termination may occur only for cause. In practice, it took the form of young people joining at junior levels of the hierarchy and working their way up until retirement between ages of 60 and 65'.¹⁷⁸ Nethercote argues that this employment profile has changed:

The APS still has a career framework but entry is possible at any stage in the hierarchy; employment on a fixed-term contract basis is increasingly used ... and there are now well established procedures for redundancy on a voluntary and involuntary basis.¹⁷⁹

To these matters can be added the streamlining of discipline and termination procedures under the *PS Act*,¹⁸⁰ and the phasing out of generous defined benefit

¹⁷⁴ Ibid s 11A(1)(c).

¹⁷⁵ For a discussion of these changes see Australian Public Service Commission, *A History in Three Acts: Evolution of the Public Service Act 1999*, Occasional Paper No 3 (2004) chs 6–8.

¹⁷⁶ These APS financial accountability obligations are contained predominantly in the *Financial Management and Accountability Act 1997* (Cth) ('FMA Act'). The FMA Act and the *Commonwealth Authorities and Companies Act 1997* (Cth) will be replaced by the *Public Governance, Performance and Accountability Act 2013* (Cth), the provisions of which are expected to take effect from 1 July 2014.

¹⁷⁷ *Ahead of the Game Report*, above n 156.

¹⁷⁸ John Nethercote, 'The Australian Public Service: Statutory, Doctrinal and Institutional Arrangements for its Governance' in Marilyn Pittard and Phillipa Weeks (eds), *Public Sector Employment in the Twenty First Century* (ANU E Press, 2007) 70.

¹⁷⁹ Ibid.

¹⁸⁰ For an account of the legal changes to APS employment law since federation, see Phillipa Weeks, 'The Reshaping of Australian Public Service Employment Law' in Marilyn Pittard and Phillipa Weeks (eds), *Public Sector Employment in the Twenty First Century* (ANU E Press, 2007) 11; Mark Molloy, '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)' in Marilyn Pittard and Phillipa Weeks (eds), *Public Sector Employment in the Twenty First Century* (ANU E Press, 2007) 81.

superannuation schemes.¹⁸¹ These changes point toward a career-based, but not career, public service.

Whilst the APS Commissioner has powers to involuntarily transfer excess APS employees, the Explanatory Memorandum to the Public Service Bill 1999 (Cth) made it clear that such powers were to be exercised rarely. The Explanatory Memorandum stated that 'as a matter of practice, [the s 27] power will normally only be exercised by the [Australian] Public Service Commissioner after consultation with each of the Agency Heads.'¹⁸² Whilst the APS Commissioner's discretion is technically unfettered, the Explanatory Memorandum makes any unfettered exercise of the power unlikely. Indeed to date the writer is unaware of any instance where the power has been used, possibly because consultation with each of the affected Agency Heads means, in a practical sense, obtaining their agreement. Such an approach is consistent with the overall devolution of the bulk of employment powers under the *PS Act* to Agency Heads.

Even the Policy, under which the Commonwealth clearly sought to encourage redeployment across the APS, nevertheless preserved the ultimate authority of a receiving Agency Head to agree to the APS-wide redeployment of an excess employee. In this sense the Policy kept faith with the reforms of the last decade which devolved managerial power to the level of each individual agency. The *FW Act* obligations discussed earlier which, it is submitted, require the Commonwealth to proactively redeploy excess employees across the APS, are inconsistent with the Policy, and with a *PS Act* model of employment which seeks to devolve responsibility to the agency level.

Secondly the new redeployment obligations require agencies to comply with three often inconsistent sets of obligations. Enterprise agreements generally do not require redeployment beyond the level of the agency. But as explained earlier the *FW Act* obligations (and the Policy) are much broader, and potentially encompass redeployment across the APS. Compliance with multiple and inconsistent obligations is undesirable from the perspective of Agency Heads, for the reasons discussed earlier in this article. For employees, it creates uncertainty as to the content of an employee's rights, particularly in relation to redeployment.

VI OPTIONS FOR REFORM

This article has sought to explain the reach of s 389 of the *FW Act* as it applies to APS employment, and to argue that the current *FW Act* redeployment obligation, and its interpretation by the FWC, creates tensions at a number of levels with *PS Act* employment. The obvious question that follows is – how should the law be reformed? In many ways the answer depends on whether the Commonwealth, as a matter of policy, wants to maintain the *PS Act* approach of the last decade of devolving personnel powers to Agency Heads, or whether it wants a more unified service-wide approach to personnel management. Certainly the previous Labor government did

¹⁸¹ Both the Commonwealth Superannuation Scheme (CSS) and the Public Sector Superannuation Scheme (PSS) were generally regarded as quite generous defined benefit superannuation schemes: see *Superannuation Act 1976* (Cth) and *Superannuation Act 1990* (Cth) respectively. The CSS was closed to new members in 1990, and the PSS scheme closed to new members from 30 June 2005.

¹⁸² Explanatory Memorandum, Public Service Bill 1999 (Cth) [4.18].

appear to favour a shift toward the latter approach, as evidenced by its acceptance of the recommendations of the *Ahead of the Game Report*¹⁸³ and the Policy. But the situation is complicated by the election of the new Coalition government, which has not expressed firm views on the matter but which historically has favoured devolution of employment powers to the level of each individual agency.

Given this policy uncertainty, the writer puts forward two proposals for reform. Both are formulated on the basis that the 'employer's enterprise', for the purposes of s 389(2)(a) of the *FW Act*, is the APS. The first assumes that, as a matter of policy, the Commonwealth's goal is to facilitate redeployment across the APS. The second assumes that, as a matter of policy, the Commonwealth wishes to limit redeployment to the level of the agency.

A Option 1

Option 1 would seek to remove any doubt surrounding the service-wide redeployment of an excess APS employee pursuant to s 389(2) of the *FW Act*. This could be achieved by amending the *Fair Work Regulations 2009* (Cth) ('*FW Regs*') and the promulgation of directions by the APS Commissioner to facilitate the use of the APS Commissioner's s 27 redeployment powers.

Item 2 of sch 6.3 of the *FW Regs* could be amended to include the APS Commissioner in the definition of 'employing authority'. This would overcome the argument discussed earlier in this article concerning the limiting effect that s 795 of the *FW Act* may have on the Commonwealth's *FW Act* redeployment obligations. Such an amendment would be enhanced by the promulgation by the APS Commissioner of directions setting out a process by which redeployment of excess APS employees could occur.

It is acknowledged that amendments along the lines suggested could impact other areas of personnel management. For instance an amendment which gave the APS Commissioner the status of an 'employing authority' could be used by trade unions to argue that the Commonwealth should be treated as a single business for the purposes of enterprise agreement negotiations. But whilst a trade union could make that representation, the make up of a particular bargaining unit would still likely be a policy decision for the Commonwealth to make.¹⁸⁴ Notwithstanding these issues, it is submitted that giving the APS Commissioner the status of an 'employing authority' and the promulgation of directions would act to facilitate the service-wide redeployment of excess APS employees.

B Option 2

Option 2 would seek to limit redeployment to the level of the employing agency. This would require the redrafting of s 389 to remove what the Full Bench of the FWC described as the 'exclusionary aspect'¹⁸⁵ of s 389(2). The obligation to redeploy would

¹⁸³ Elizabeth Byrne, 'Rudd Backs Public Service Shakeup', *Australian Broadcasting Corporation* (online), 9 May 2010 <<http://www.abc.net.au/news/2010-05-09/rudd-backs-public-service-shake-up/427874?section=justin>>.

¹⁸⁴ Subject, of course, to the possibility that a trade union, as a bargaining representative, could apply for a scope order: see *FW Act* s 238.

¹⁸⁵ *Ulan Coal No 2* (2010) 199 IR 363, 365 [5].

need to be recast to make it clear that a dismissal will be a genuine redundancy if the employer has taken steps to redeploy the employee within the employer's enterprise. The extension of an employer's redeployment obligations to associated entities in s 389(2)(b) would also need to be deleted. If the section was re-drafted in these terms the arguments discussed previously concerning the limiting effect of s 795 of the *FW Act* would apply, and redeployment would be likely to be limited to the level of the agency.

Whilst Option 2 may limit *FW Act* redeployment obligations in relation to excess APS employees to the level of the employing agency, it is submitted that amendments of this character would be undesirable, unless amendments were made as part of a package of overall workplace relations reform. Most obviously the proposal to amend s 389(2) will impact the private sector to an even greater extent than the public sector, and will emasculate redeployment obligations concerning associated entities. Any reduction in the scope of s 389(2) is a matter which is best considered by the Productivity Commission as part of the new government's commitment to ask that body to conduct a review of the Fair Work laws.¹⁸⁶

VII CONCLUSION

This article argues that the *FW Act* genuine redundancy exclusion has fundamentally changed the nature of redundancy obligations in the APS. Whilst decisions concerning whether or not an employee is excess will continue to be made as they were prior to the *FW Act*, the new statutory consultation obligations permit employees to argue that any defects in the consultation process effectively represent a stand alone ground of unfairness.

In relation to redeployment, agencies must now comply with three, often inconsistent, sets of obligations – namely those found in agency enterprise agreements, the Policy and s 389(2) of the *FW Act*. It is further contended that the employer's *FW Act* obligation to redeploy requires the employer to be proactive, and to redeploy an excess employee into available vacancies potentially across the APS. This is a marked departure from the pre-*FW Act* position under the *PS Act*, which generally did not require an Agency Head to consider redeployment beyond the employee's agency. The inconsistencies between this obligation to redeploy and the provisions of the *PS Act* create tensions in the law which are undesirable. The article argues that the law should be reformed, and suggests that policy makers should first determine whether, as a matter of policy, they wish to provide for redeployment across the APS or limit it to the level of each individual agency. In relation to the former, the article suggests amendments which would put beyond doubt the Commonwealth's legal capacity to redeploy across the APS. If the latter view is adopted, the article suggests that amendments would be needed to s 389(2), but cautions that any such amendments would impact the private sector as well. Accordingly, any such reforms should be considered as part of the proposed Productivity Commission review of the Fair Work laws.

¹⁸⁶ Liberal/National Party Coalition, above n 16.

VIII POSTSCRIPT

Following the acceptance for publication of this article, redundancies have occurred or are occurring in a number of APS departments and agencies.¹⁸⁷ The Coalition government has also imposed a hiring freeze across the APS,¹⁸⁸ interim arrangements for which require Agency Heads to cease non-ongoing contracts at the end of their term, and refrain from employing non-ongoing employees except in instances of 'critical business demand'.¹⁸⁹ If a vacancy needs to be filled, and is ongoing, the claims of 'displaced (or potentially displaced)'¹⁹⁰ employees within the agency, followed by displaced employees on the APS redeployment register, must be considered in isolation.¹⁹¹ If a suitable candidate cannot be identified, the agreement of the APS Commissioner is required before an Agency Head can fill the vacancy from within the APS.¹⁹² Appointments from outside of the APS can only be made with the agreement of the APS Commissioner, and in very limited circumstances.¹⁹³

The priority given to displaced employees under these interim arrangements, and the oversight of the APS Commissioner, increases the possibility that any hiring of a displaced APS employee will also satisfy the Commonwealth's obligations under s 389(2) of the *FW Act*. However it is too early to reach a definitive view on, or to identify, any potential inconsistencies between, the interim arrangements and obligations existing under enterprise agreements, the Policy and the *FW Act*. It is also noteworthy that the interim arrangements have been described as 'temporary'.¹⁹⁴ In the writer's view it is unlikely that the interim arrangements will be retained in the long term. Once the interim arrangements are withdrawn or replaced, the issues identified in this article, along with the proposed reforms, will come into sharper relief.

¹⁸⁷ See, eg, Noel Towell, 'Health Staff Told 350 Jobs in Sights', *Canberra Times* (online), 7 November 2013 <<http://www.canberratimes.com.au/national/public-service/health-staff-told-350-jobs-in-sights-20131106-2x20a.html>>; Noel Towell, 'AusAID Graduate Program Scrapped', *Canberra Times* (online), 8 November 2013 <<http://www.canberratimes.com.au/national/public-service/ausaid-graduate-program-scrapped-20131108-2x6it.html>>; Noel Towell, 'Sacked Public Servants "Parked" in New Division and Paid to Show Up', *Canberra Times* (online), 14 November 2013 <<http://www.canberratimes.com.au/national/public-service/sacked-public-servants-parked-in-new-division-and-paid-to-show-up-20131114-2xhzh.html>>.

¹⁸⁸ Eric Abetz, 'Interim Arrangements for APS Recruitment' (Media Release, 31 October 2013).

¹⁸⁹ Australian Public Service Commission, *Interim Arrangements for Recruitment in the Australian Public Service – Guidance for Agencies* (14 November 2013) [4(f)].

¹⁹⁰ *Ibid* [4(b)]. The expression "'displaced employees" covers both ongoing SES and non-SES employees and includes employees who are identified as excess or potentially excess': [4(b)] n 1.

¹⁹¹ *Ibid* [16].

¹⁹² *Ibid* [17]–[18].

¹⁹³ *Ibid* [19]–[20].

¹⁹⁴ *Ibid* [5].