THE STATUTORY RIGHTS OF PUBLIC SERVANTS

The Experience of Officers of the Commonwealth Public Service of Australia

by

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FOREWORD

The work for this thesis was undertaken at the Department of Political Science, School of General Studies, The Australian National University. A debt of gratitude is owed to many but above all I would like to thank my supervisor, Dr. L. Hume for his encouragement, advice and interest both in regard to my work and to my welfare.

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GLOSSARY OF TERMS

Officers	Officers of the Commonwealth Public Service of Australia, permanently employed under the Commonwealth Public Service Act 1922-65, henceforward referred to as the Public Service Act.
Officials	Permanent staff of public authorities.
Public servants	Persons directly employed by government departments. The term is used in preference to civil servants except where such use would be confusing.
Public employees	All persons directly employed by public authorities of all kinds.

CHAPTER 1

INTRODUCTION

The universal growth of governmental activities and the consequent expansion of public employment since the advent of the industrial revolution have extended the special relationship between the government and its employees to an increasing proportion of the workforce. While the rights and obligations of public employees are identical to those of private employees in many respects,[1] there are important differences which set them apart. The origin, extent, nature and justification of these differences are attracting greater interest on the part of both official and staff sides but the subject is complicated by difficulties of definition and conflicting concepts of rights. It does not seem to belong to a single discipline although the main body would properly belong to the realm of administrative law, as the rights and obligations of public employees involve delegated legislation, administrative tribunals and judicial review of administrative discretion.[2] In common law countries, this specialised

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[1] See V.A. Thompson, Modern Organization, New York, 1963, pp. 60-6.

[2] The definition of administrative law is discussed in J.A.G. Griffith and H. Street, Principles of Administrative Law, London, 2nd ed., 1957, pp. 2-5.

aspect of administrative law has been largely confined to the bare outlines of judicial decision, leaving the interpretation of rights and obligations virtually untouched. This study of the rights and obligations of Commonwealth public servants in Australia has a two-fold purpose - to raise some of the wider issues involved and to explore a relatively neglected area in Australian administrative law.

No two countries seem to treat the rights and obligations of public employees alike and within a country no two public authorities have an identical approach to the subject. For this reason, the scope of this study is limited to a consideration of the rights and obligations of officers of the Commonwealth Public Service only, though from time to time comparisons and contrasts will be made with the State public services in Australia and with theories and practices adopted in other democratic countries with a Western culture. The Commonwealth Public Service of Australia merits special attention, as from its establishment in 1903 it recognised and emphasised the rights of permanent officers in law. Although it has followed common law doctrines of Great Britain which formally insist upon unilateral interpretation of rights by the official side, and High Court decisions in disputes over interpretation of rights are based on British precedent, the rights and obligations of permanent officers are more liberal in content and practice than those in Britain. Examination of the experience of the Commonwealth Public Service in administering the

law relating to officers' rights and obligations during the twentieth century may therefore yield useful data for comparative purposes, may reveal difficulties and shortcomings in the Commonwealth's approach, and may even challenge the notion that public employees ought to possess fewer rights and owe more obligations than private employees.

The Definition of Rights

The increasing importance of the Commonwealth Public Service in Australian society has attracted the attention of academic scholars and they have been drawn into debates over the liberality of law relating to officers' rights and obligations, especially after the amendment of the law by the Menzies Government during the 1950s and early 1960s. They have tended to concentrate on the more spectacular issues, such as political rights,[3] public expression[4] and strike action,[5] while other aspects have been touched in passing in works dealing with public administration, industrial law and arbitration. Valuable as they are, none of these attempts to consider the whole field, to contrast experience in one area with another, or relate Commonwealth officers'

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[3] V. Subramaniam, 'Political Rights of Commonwealth Public Servants', Public Administration, (Syd.), pp. 22-33, March 1958.

[4] R.S. Parker, 'Official Neutrality and the Right of Public Comment', Public Administration, (Syd.), December 1961 and September 1964.

[5] G.E. Caiden, 'The Strike of Commonwealth Public Servants 1919', Public Administration, (Syd.), pp. 262-74, September 1962.

rights to community notions about the place of the public employee in the general order of things. Individually they have avoided the problems of defining rights in general and of deciding upon the existence of a particular right and some have ignored altogether the emotive overtones of the word 'rights' itself.[6]

These questions are part of a wider general discussion of rights with which this study is not concerned except as an aid in identifying rights. Rights may be divided into moral and positive rights. The former may be seen as claims upon ethical rather than legal grounds, and are not necessarily recognised by any authority. They vary according to the frame of reference of the person making them, and thus may be multiplied almost indefinitely in relation to any issue. Positive rights are those which are effective because of their recognition in law. They may be conceived either narrowly or widely.[7] Narrowly, they may be regarded as only those rights explicitly recognised in written law upheld through judicial procedures. More

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[6] Fo Ch'uan Chang has found 115 examples of different adjectives which have been used to describe the word 'right'. 'In Praise of "Right"', American Behavioural Scientist, pp. 7-9, January 1962.

[7] This division closely parallels that between two views of law, one of which recognises as law only the command emanating from a sovereign authority, while the other regards it as existing to satisfy human wants and consequently expressed in custom. See C.K. Allen, Law in the Making, Oxford, 6th ed., 1958, p.1.

widely, they may be considered in relation to the way in which people actually behave. Thus, effective rights may exist through customary acceptance in spite of their lack of recognition in law, while it is possible that legal rights may become inoperative.

This study is concerned mainly with positive rights, although reference is also made to moral rights which are claimed but not recognised, where these are relevant because they represent widely held views either in Australia or other countries. The written law - common law as embodied in judicial precedent, statute and regulation - is used as a starting point and compared with practice. Rights are thus loosely defined, based primarily on statute but extending beyond legal formulation to considerations of the officer's ability to enforce his claims through constitutional enactment, legal sanction, community mores, political action or group pressure. At one end of the spectrum are absolute rights enforced by the courts while at the other are discretionary privileges interpreted unilaterally by the official side. Between them lie conditional rights, still derived from law. These rights fall within the definition of 'a legal, equitable or moral title or claim'[8] and involve compulsion upon authority to satisfy them. A second category of rights, owing their existence to absence of restriction rather than positive enactment, may be termed 'liberties' to differentiate

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[8]Oxford English Dictionary

them from the first. Liberties may be judged according to generally prevailing standards and depend largely upon the individual for their effective exercise. They are the most contentious and frequently discussed of officers' rights and obligations. Consideration of them is inseparable from a consideration of attendant obligations as (a) such rights imply obligations on the part of the other side, (b) such rights may be recognised as compensation for obligations, and (c) such rights may be conditioned by obligations as, for instance, when the obligation of officers to give continuous service may override their right to strike.

The application of these definitions of rights to Commonwealth officers presents more difficulties than a description of an elaborate code, as in the case of some Western European countries. Firstly, the rights are not embodied in any single document, but are scattered in a number of separate statutes, regulations and departmental instructions. Secondly, obligations, both written and assumed, modify rights and liberties. Thirdly, the imposition of a statutory framework upon common law concepts which deny the ordinary rights of a contract of employment to public servants, results in anomalies in judicial decision, and tends to remove sanction for enforcement of rights from the courts of law. Fourthly, no agreement exists concerning the nature and extent of public servants' rights. Different views co-exist, the product not only of the specific historical development of rights within the Commonwealth

Public Service, but of deeply rooted notions concerning the nature of the state and the status of its employees. These theories derived from the experience of different countries form an essential background to the understanding of the current rights of Commonwealth officers. It is therefore necessary to present a brief outline of the derivation and implications of the major theories of the government as employer which directly affect the rights of public servants before commencing upon the main study.

Concepts of the Government as Employer

(a) The British Theory of Crown Prerogative

The reliance of Australian courts of law upon British common law doctrines and precedent makes the British theory of Crown prerogative of particular importance to the rights of Commonwealth officers. The relationship between the Crown and its employees is conceived as a defective contract based upon an inherent disability of the Crown to fetter its future actions. A term is implied in the contract of service which provides for dismissal at pleasure.[9] It has further

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[9] Several good discussions of the case law exist in standard texts on administrative law. One of the most comprehensive may be found in H. Street, Governmental Liability, Cambridge, 1953, pp. 111-9, which summarises the law as follows:

> that there is an implied term in the contract of civil servants that the Crown may dismiss them at will, that the implied term may be expressly or impliedly excluded, that provision for dismissal for cause will exclude it, but that employment for a fixed term will not in itself be inconsistent with the implied term. (p. 114)

been held that a British civil servant has no right to sue for arrears of salary.[10] The effect of this doctrine is to exclude interpretation of the rights of officials to their conditions of work from the purview of the judiciary and to vest them wholly in the hands of the Crown.[11]

> The Civil Service...owes its existence not to statute but to the prerogative powers of the Crown, a matter of common law. Common law may be as exact a form of law as statute, if defined by judicial interpretation; but in this instance there has been virtually no judicial interpretation. The Crown does not claim to apply any special form of law to its civilian servants: it disciplines them merely as its servants, as a mediaeval lord might manage his household or a nineteenth century industrialist his employees.[12]

This doctrine of rights may be seen as a continuation of the mediaeval property rights held by the king in relation to the officers of his household through whom he governed the country.[13] The Crown

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[10] See D.W. Logan, 'A Civil Servant and his Pay', Law Quarterly Review, Vol. 66, pp. 240-67, 1945.

[11] E.C.S. Wade and G.G. Phillips, Constitutional Law, London, 6th ed., 1962, p. 214:

> Pensions and superannuation payments are authorised by statute, but no recourse can be had to the courts to enforce payment of pensions, or to afford a remedy for wrongful dismissal against the Crown, the Treasury, or the head of department concerned.

[12] L. Mustoe, The Law and Organisation of the British Civil Service, p. 41, quoted in W.J.M. Mackenzie and J.W. Grove, Central Administration in Britain, London, 1957, p. 10.

[13] See D.L. Keir and F.H. Lawson, Cases in Constitutional Law, Oxford, 4th ed., 1954, p. 43.

then stood in the same relationship to its servants as any other feudal lord, whose freedom of action was derived from the absence of law covering master-servant relations and his immunity from litigation against him in his own courts.

Upon the emergence of the private contract and restrictions upon ordinary master and servant relations, the Crown retained the older position, in which in spite of the assumptions of a permanent relationship, the master is judge of the servant as well as employer and can dispense with his services at pleasure, while the servant can maintain no rights against the master. However the latter assumes moral obligations towards the servant, who finds his guarantees in accepted custom and in his status as representative of the Crown. An examination of early cases in the courts shows that

> at one time there was no inherent inability in the Crown to grant offices in the public service either in perpetuity or in appropriate cases for a term of years certain, subject to a possibility of forfeiture for abuse, refusal, or non-use, or to suspension...
>
> Confusion seems to have entered partly as a result of an atmosphere of discretion brought about by the statutory precautions against the existence of any enforceable claim to such matters as pensions, but principally as a result of cases concerning military officers.[14]

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[14] J.B.D. Mitchell, The Contracts of Public Authorities, London, 1954, pp. 34-5.

This extension was lent plausibility by the fact that the majority of leading cases were concerned with colonial civil servants whose heavy responsibilities in administering the British Empire did not differ to such a marked extent from those of the armed forces:

> The action of a civil servant of the Crown might, if he could not be dismissed, in some cases bring about a war. A contract to employ a servant of the Crown for a fixed period would be against the public interest and unconstitutional.[15]

It is usually pointed out that the legal formulation does not correspond to reality and some commentators consider it irrelevant, as

> it is a fact of common observation that a civil servant has a greater security of tenure than any person in private employment, and that he has substantial pension rights which he can enforce by the proper procedure.[16]

Others are uneasy at the existence of a rule whose justification is doubtful, is out of tune with alleged reality, lays a premium upon discretion where right should exist and which generally confuses the issue.[17]

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[15] Dunn v. R. (1896) 1 Q.B. 116.

[16] W.I. Jennings, The Law and the Constitution, London, 5th ed., 1960, p. 179. See also L. Blair, 'The Civil Servant - Political Reality and Legal Myth', Public Law, pp. 32-50, 1958.

[17] See J.B.D. Mitchell, H. Street and D.W. Logan op.cit., and also Z. Cowen 'The Armed Forces of the Crown', Law Quarterly Review, Vol. 66, p. 481, for criticism of the position in relation to non-civilian employment.

(b) The Theory of the Sovereign Employer

Co-existing with this mediaeval theory of public servants' rights is that of the sovereign employer,[18] which similarly vests interpretation of rights with the executive. Whereas under the former doctrine stress is upon the essential freedom of the Crown to administer its own private affairs in the way it deems fit, in the theory of sovereignty, the public nature of public employment is emphasised. The function of the state as the source of rights and duties in general, as the performer of tasks essential to the welfare of the community and the existence of ordered society, as the vehicle of the democratically expressed will of the community, is inseparable from its role as employer. Its employees partake of its sovereign nature and are in a fundamentally different position from other employees. On the one hand the state can recognise no binding rights against it for its essential attribute is its freedom to act in the public interest. On the other, the employee is identified with the state power over and beyond the fulfilment of his official functions and may maintain no legitimate separate interest of his own (a) because this might affect the manner in which his duties are carried out; (b) because this would be to threaten the essential independence of the state and (c) because it would place him in a position to dictate terms, putting a private interest above the public good.

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[18] See C.K. Allen, Law in the Making, Oxford, 6th ed., 1958, p.10.

This doctrine is derived from the period of absolute monarchy in Europe. It accords with the centralisation of power in the hands of the monarch personally and the extension of his sway over local power centres, demanding obedience to the king's law and loyalty over and above other loyalties. The public service, as the crucial instrument in attaining these ends, was identified with the power and prestige of the monarch, and correspondingly was expected to be free from contradictory loyalties. The public servant's rights and expectations were thus founded entirely in the organisation to which he belonged.[19]

The transfer of the theory to democratic government merely involved the substitution of the will of the people as represented by a sovereign legislature for the will of the monarch. In this form the theory of the sovereign employer has provided the dominant framework for public servants' rights in the United States of America. Its adoption has been traced to the inability of an individual to sue a State without its consent,[20] and the holding of office as a public trust compatible with rotation of offices under a spoils

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[19] The problem of maintaining loyalty to the state and personal incentives in relation to the German public service is discussed in H. Finer, 'The Civil Service and the Modern State', Public Administration (London), Vol. 7, pp. 323-42.

[20] W.R. Hart, Collective Bargaining in the Federal Civil Service, New York, 1961.

system.[21] Public office is held to involve neither property nor contract, and so is exempt from the Fifth Amendment to the Constitution enforcing due process on deprivation of property. The public servant has no right to his office and the executive is virtually unrestricted in its exercise of sovereignty over its own employees, parallel to the sovereignty it exercises in performing its functions in relation to the rest of the community. In the United States, its guarantee of the country's system of industrial relations has been held to preclude its participation in this system[22] and to justify the imposition upon the public servant of obligations which limit rights regarded as essential by private employees, in particular the right to bargain collectively supported by the sanction of threat to strike.

Democratic theory has in fact strengthened the doctrine of the sovereign employer, for in place of identification with the policies of

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[21] 'In a country where offices are created solely for the benefit of the people, no one man has any more intrinsic right to official station than another. Offices were not established to give support to particular men at the public expense. No individual wrong is, therefore, done by removal, since neither appointment to nor continuance in office is a matter of right. The incumbent becomes an officer with a view to public benefits, and when these require his removal they are not to be sacrificed to private interests... He who is removed has the same means of obtaining a living that are enjoyed by the millions who never held office.' P.P. Van Riper, History of the United States Civil Service, Illinois, 1958, p. 37.

[22] Since 1962 a limited form of collective bargaining has been in force in the Federal Civil Service under President Kennedy's Executive Order 10988. B.V.H. Schneider, 'Collective Bargaining and the Federal Civil Service', Industrial Relations, pp. 97-120, May 1964.

the monarch, conformity to the policies of a changing political executive has been substituted. The resulting political sterilisation of the public service is the price of permanence, and the voluntary nature of public employment is held to justify the restriction of constitutional liberties to free speech.[23] In the United States the background of the spoils system and the elimination of its abuses have resulted in a detailed restriction of political rights of public servants, clearly setting them apart from other citizens because of their employment by the public employer.

The negation of rights entailed in the theory of the sovereign employer has come under increasing criticism in recent years in the United States, mainly because it is the major obstacle to collective bargaining in public employment.[24] The sovereignty of the state as such has not been denied, but its meaning and consequences have been reinterpreted. Sovereignty is re-defined as the ultimate source of

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[23] For example, Chief Justice Holmes in McAuliffe v. Mayor of New Bedford (1892) 29 N.E. 517: 'The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of the contract'.

[24] M.R. Godine, The Labor Problem in the Public Service, Mass., 1951.
A. Dotson, 'The Emerging Doctrine of Privilege in Public Employment', Public Administration Review, pp. 77-88, Spring 1955.
W.R. Hart, Collective Bargaining in the Federal Civil Service, New York, 1961.
S.D. Spero, Government as Employer, New York, 1948.

political and legal authority, as opposed to an absolute despotic power. While the unique functions of the state, the necessity to preserve democratic processes, the need for loyalty on the part of the public servant, are all conceded, it is pointed out that although employer and employee can never be in a position of equality, the state need not exercise the whole of its power at any given time. Its effective power over its employees is in any case limited by such factors as the impact of public opinion, possible non-co-operation by employees, and morale as expressed through voluntary turnover and standard of work. Responsiveness to political control in its substantive functions by the public service need not be incompatible with the existence of a separate public service interest, which will exist whether allowed expression or not. It has therefore been concluded that

> There does not appear to be any cogent reason for concluding that the doctrine of sovereign immunity precludes the executive from voluntarily waiving his immunity.[25]

More specifically

> The state may consistently and practicably permit as a matter of everyday administration partial and responsible staff participation and consultation according to statutory standards and retain ultimate authority to establish basic personnel policies and to impose a solution of its own making should established procedures fail to function satisfactorily.[26]

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[25] Hart, op.cit., p. 45.

[26] Godine, op.cit., p. 58.

It is thus proposed to extend to the relationship between the state and its employees the same standards as apply to the other commercial dealings of the state, although it is recognised that special conditions apply to public compared with private employment. Any denial of those rights normally possessed by an employee must be justified not by the blanket negation of the sovereignty theory but by objective assessment of the importance of the right and the specific needs of government. A. Dotson has summarised the respective needs of government and employees as on the one hand faithful performance, managerial freedom, flexibility of policy and continuity of service, and on the other, reasonable working conditions, minimum security, participation in management and preservation of political status. His 'general theory of public employment' would alter the rights currently possessed by employees of the United States, and would deny the validity of the sovereignty doctrine on the grounds that

> We do not in other connections between the state and citizens interpose the abstraction of an almighty sovereign. On the contrary both government and citizens are restricted. Because the government may have extraordinary needs in public employment, it does not thereby earn a license to deprive its employees of their rights.[27]

These writers are primarily concerned with the removal of restrictions upon the liberties of public servants, and do not examine

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[27] A. Dotson, 'A General Theory of Public Employment', Public Administration Review, No. 3, 1956, p. 210.

the framework for their rights. The assumption is that these will continue to be subject solely to executive regulation modified only by collective bargaining arrangements. The tendency is to regard public employment as analogous to private employment, with particular public disabilities enforced in right of a private employer.

(c) Codes of Rights and Obligations

In contrast to the common law position in Britain and the United States most countries on the Continent of Europe have adopted a statutory form for public servants' rights and obligations. A public service statute provides a 'single source designated to serve as a coherent exposition of the civil service relationship in its various aspects', whose language is clear, concise and unambiguous.[28] Its effect is to give the public servant a special status in which his rights and duties bear no comparison with those of the private employee. Employment by the government is not simply a job but a social function.[29] The relationship between state and public servant is conceived as similar to that between state and citizen. It is regulated by legislation and disputes regarding rights are settled by administrative courts and not the ordinary

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[28] F.M. Marx, The Administrative State: An Introduction to Bureaucracy, Chicago, 1957, p. 84.

[29] '... administrer n'est pas un métier comme un autre. C'est une fonction sociale qui s'apparente plus ou moins à la magistrature, en sens donné à ce mot dans l'ancienne Rome.' R. Grégoire, La Fonction Publique, Librairie Armand Colin, 1954, p. 27.

courts of law. The result is on the one hand unilateral imposition of conditions of work fully in accordance with the theory of sovereignty, but on the other, the existence of a code of rights and acknowledgement of their validity against the state.

> ... the public servant enjoys a far greater degree of legal protection than in the common law jurisdiction, not only as regards his financial interests, but as regards his status. And some, if not all, of the credit due to this state of affairs must go to the clear recognition that there is a public law governed by conditions vastly different from, and inapplicable to, civil law relationships, but establishing conditions of mutual rights and obligations between public authority and the individual.[30]

The origins of the statutory relationship may be found in the impact of war and revolution in European countries, together with a tradition of codification of law, as opposed to the common law tradition. The ending of the era of absolute monarchy in France and Germany at the end of the eighteenth century would seem to have required the reshaping of the instrument of public power, but in fact the public servant remained identified with the authority of the sovereign. In France the Revolution transferred sovereignty from the monarch to the nation which guarded its exclusiveness no whit less thoroughly than previously. During the nineteenth century the state remained unwilling to surrender any degree of freedom to its officials. Repeated attempts to enact public service legislation of a general

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[30] W. Friedmann, Law in a Changing Society, California, 1959, p. 383.

scope were opposed by politicians and public servants alike (the latter fearing such legislation would increase and not diminish their helplessness in the face of authority) and the 1884 law recognising a general right of association for the community expressly excluded public employees. Nevertheless, piecemeal, specific rights were recognised in the last quarter of the century, and were secured through the strengthening jurisdiction of the Conseil d'Etat.

In Germany, strong professional organisation, strict public service ethics and autocratic administration based on the secret report emphasised the public service as a caste apart, the willing instrument of absolutism. Codes of public servants' rights, dating from 1794, were merely aimed at binding their fate more closely to authority. In 1919, the Weimar Constitution, seeking the reform of the public service as part of a radical change in the structure of government proclaimed: 'The duly acquired rights of civil servants are inviolable'.[31] The newly laid structure proved no guarantee against political and social upheaval, and the Law for Restoration of the Professional Civil Service of 1933 once again swept away rights, leaving the public servant as the unprotected subordinate of dictatorship.

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[31] Some implications of the rights guaranteed by the Weimar Constitution are discussed in H. Finer, The Theory and Practice of Modern Government, New York, 1949, pp. 915-6.

The codes of public service law issued in many European countries following the Second World War were similar in conception. The legislation aimed at reconstruction of the public service as the efficient instrument of a new democratic order. The state was conceived less as a sovereign, drawing legitimacy from the will of the nation, with correspondingly unrestricted powers, than as a supplier of services.[32] One consequence was the recognition in statute of public servants' rights to tenure, disciplinary process and protection from arbitrary action, as well as a wide measure of political, civil and industrial liberty. Rights were granted and obligations imposed in relation to the specific tasks to be performed by the public service rather than in accordance with notions of sovereignty or analogy with the contract relationship in private employment.[33]

(d) The Model Employer Concept

The statutory approach has some affinity with the theory of the

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[32] 'It is the business of government to organise certain services, to assure their continuity, and control their operation.

'Public law is thus no longer the body of rules regulating the relation of a sovereign state with its subjects; it is rather the body of rules inherently necessary to the organisation and management of certain services.' L. Duguit, Law in the Modern State, (trans. F. and H. Laski), London, 1921, p. 243.

[33] This approach is illustrated by the discussion of rights and obligations in J.P. Guinot, J. Isaac-Georges et R. Letrou sous la direction de Roger Grégoire, Guide pour l'établissement d'un statut du personnel des administrations civiles de l'état, Brussels, 1951.

state as a model employer. The state is conceived as leading other employers in the conditions it applies to its workforce, exploiting its position of freedom from the profit and loss criterion affecting private firms' ability to offer liberal conditions, and by example and competition raising the level of industrial conditions in employment generally. The state as employer ceases to be passive, relying on outside trends as its guide to the conditions it offers, and directly uses its role as employer similarly to its role as legislator. The theory has its roots in a socialist view of public enterprise, involving an increase in public employment, and therefore the need to work out the status of public employees. It is also connected with demands upon the state during the nineteenth and twentieth centuries to regulate conditions of employment directly with a view to raising their standard. In terms of public servants' rights and liberties the state is regarded as obliged to offer the maximum degree of freedom possible and those conditions which the community regards as desirable for all employees. The regulation of its own employees' conditions of work is therefore an alternative to direct regulation of conditions of work generally by the state.

The theory of the model employer, together with the statutory relationship in general has been criticised mainly on the ground that it grants no participation to the public servant in the determination of his own conditions of work and entrenches a sharp distinction between

private and public employment.[34] These criticisms rest upon the same assumptions as those made by proponents of collective bargaining in the United States. It is assumed that the area of public employment will continue to be limited and form a relatively small part of employment as a whole; that the roles of the state as sovereign legislator and employer may be separated so that the public employer may be regarded as almost identical to any other employer; that the rights and obligations and system of industrial relations appropriate to private employment may be equally applied to public; and that the rights and obligations existing in private employment in fact differ from and are more liberal than those in public employment.

(e) The Syndicalist View

The assumptions of those writers seeking to modify the impact of the doctrine of sovereignty in the United States, placed in a different political context, may be held to lead to a syndicalist view of public servants' rights. In this, the similarity of public and private employment is taken to mean the solidarity of the public employee with the working class movement[35] and the appropriateness of the system of industrial relations in private enterprise refers not to current arrangements but to those which will exist upon the radical transformation

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[34] See M.R. Godine, The Labor Problem in the Public Service, Mass., 1951, Chapter III: The State as an Employer - Theoretical Aspects.

[35] H. Laski, Authority in the Modern State, New Haven, 1919, p. 338.

of the organisation and ownership of the means of production. The syndicalist movement arose out of the dissatisfactions of public employees in France in the early part of the twentieth century. Its insistence upon the disappearance of the state, in view of the expansion of state functions, has reduced its popularity and relevance as a theory of public servants' rights. The elevation of the public service interest above the public interest, thus subverting democracy, is not generally regarded as legitimate, even where the right of public servants to an interest identically with others is conceded. The syndicalist theory of public servants' rights retains significance however because of the increasing extent of self-regulation by public services all over the world.[36]

Approach to the Study of Commonwealth Officers' Rights

These theories of public servants' rights which both complement and conflict with one another form the major strands of thinking upon the subject. In each case they attempt to provide the answers to certain basic questions, and the answers they provide are embodied in the legal and customary rules laid down for public servants' conduct and

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[36] 'Moreover, closer analysis reveals the extent to which nowadays civil services in all countries have become self-governing, self-administering groups, insulated from outside interference, whether social, political or judicial. This is by far the most significant event in this field in the last fifty years.' B. Chapman, The Profession of Government, London, 1959, p. 133.

entitlements. These questions concern the extent to which public servants should be treated differently from other employees, the form their rights should take and the means by which such rights are interpreted and made effective. The solutions found in each country vary according to the structure of the legal system, the functions performed by government, the extent and importance of government employment, the social mores of the community at large and historical factors.

By the time the Commonwealth Public Service was created at the beginning of the twentieth century, concepts of public servants' rights were already a matter of common parlance in Australia, although certain confusions existed concerning their nature and extent. Thus, although the study is concerned only with the officers of the Commonwealth Public Service, except where comparison with State services appears relevant, it has been necessary to include some description of developments prior to its creation in the colonial public services of the nineteenth century, which form the subject of Chapter 2 'The Origins of Rights'. Chapters 3 and 4 are concerned with the crystallisation of the concept of officers' rights, its acceptance by the authorities and the development of a measure of agreement upon what is meant by the term. Chapter 3, 'Rights or Privileges?', describes the main story of the establishment of rights against authority. Chapter 4 is concerned with the episode of the constitutional rights of transferred officers, which is not only of importance from an historical point of view but sheds

some light on subsequent attitudes in later similar situations and provides a major source for the study of litigation on the subject, illustrating the approach of the judiciary to the interpretation of officers' rights in general.

The current rights of Commonwealth officers are discussed from the point of view of the legal position as it existed at the end of 1965. It is obviously necessary to discuss rights at some degree of generality, for example, the right to remuneration rather than the right to a particular salary. Chapters 5 and 6 are concerned with positive rights of officers which distinguish them from other employees. Chapter 5 deals with the right to security of tenure and its limitations, and Chapter 6 with officers' rights arising out of the career structure. Chapters 7 and 8 are concerned with officers' liberties. Chapter 7, 'Public Obligations', examines the nature of restrictions upon officers' liberties and their justification, providing the framework for Chapter 8 which discusses the area of freedom allowed to officers. Division of rights between the two chapters is according to the actual legal position: thus an obligation to provide continuous service is discussed rather than a right to strike, as the latter is not acknowledged. The final chapter of the study attempts an assessment of the nature of Commonwealth officers' rights - their extent, sanction, manner of formulation and justification - and discusses current concepts and practice in the light of the various theories of public servants' rights.

CHAPTER 2

THE ORIGINS OF RIGHTS

Although the Commonwealth Public Service was not established until 1903, the history of the rights of Commonwealth officers can only be understood by reference to the practices and concepts which had already developed in the six Australian colonial services which preceded it. The history of these public services followed separate, and in some respects unique paths, so that the pace of change and the extent of the concrete rights gained in each colony differed, but it is possible to discern a broad trend of development from the period before responsible government to federation. Upon responsible government, the efforts of legislatures to assert their supremacy over the executive resulted in public service legislation, which incidentally gave public servants rights, departing from the British tradition of Executive regulation. In subsequent years the statutes fell into desuetude, but expansion of government functions in the 1880s resulted in demands for reform and new public service legislation. The new statutes reflected a concern for rights, viewed as those special conditions of work customarily enjoyed by public servants, and the entitlements they conferred were upheld by the courts. By the date of federation, the principle of public servants' rights was accepted, although the colonies differed in

the rights recognised in practice, and the concept itself remained ambiguous.

I

Before the granting of responsible government to the Australian colonies, the official in the colonies, identically with his counterpart in Britain, was regarded as the personal servant of the Crown. As such, he could claim no formal rights in terms of security of tenure, payment for services, uniform disciplinary procedure, or guarantee of conditions of work in general. The Colonial Office issued regulations, but these gave no legal rights in theory, while in practice their application was haphazard, as considerations of distance, more pressing problems at home and general acceptance of a similar situation in Britain, made for disinterest on the part of the Imperial authorities in their enforcement. The result was considerable diversity of conditions as between colonies and departments within the same colony.

It is doubtful whether lack of rights was of much concern to officials, who would hardly have conceived their position in terms of rights at all. As the rulers of the colonies in the absence of responsible government, they shared the esteem and status surrounding the Governors, on whose patronage their careers depended. Officials might have no security of tenure in law, but in fact their expectation

of continued employment, as long as they did their jobs reasonably satisfactorily, was steady, and their conditions of work were privileged compared with the rest of the population. Their corresponding obligation of loyalty to the Governor and consequent lack of civil or political liberty probably did not weigh heavily, in view of the restricted political rights of the rest of the population before self-government.

Only South Australia attempted to put the employment of its public servants on a different basis, by passing the first Australian public service legislation. In 1851 in an attempt to impose its control over the Governor and his establishment, and to remedy the severe recruitment problem caused by the gold rushes, the newly established legislature passed a Bill to regulate salaries and introduce reforms in administration. The Bill was rejected by the Governor, who introduced a Bill of his own the following year, apparently in an attempt to prevent further criticism. The 1852 Act set out the salaries to which public servants' were entitled, together with increments within each of three classes. Two years later a second Act provided for a voluntary contributory superannuation scheme for all public employees. Previously individual retiring allowances had been customarily granted, each of which had required separate passage through the legislature, and the new system, which was expected to be self-financing, was apparently intended to save both trouble and money.

Neither of the Acts had any effect upon public servants' rights. The 1852 Act, although it conferred entitlements, also made all disputes subject to the final decision of the Governor, so that it is doubtful if it conferred binding legal rights. In any case it quickly became obsolete, as inflation in the three following years resulted in salary increases which were made without alteration to the Act. It was repealed in 1858. The 1854 superannuation scheme quickly proved actuarially unsound, and ceased to operate as public employees naturally stopped subscribing to it. It remained on the statute book, however, as doubts existed concerning the legal necessity to repay contributors if the Act were repealed. The rights incidentally conferred by the legislation went almost unnoticed. More liberal benefits than those conferred by the Acts were already being received regularly, and for the present officials were shielded from attacks upon them through the dominant position of the Governor.

II

The decade between 1855 and 1865 was characterised by the initial reactions of the colonies to responsible government, which, except in Western Australia, was granted between 1855 and 1860. The local legislatures, for long thwarted by the powers of the Governor, could now assert their supremacy over the executive branch of government by attempting to control expenditure upon the public services and attacking

the privileges of officialdom.[1] The end of the gold boom made the officials, with their secure positions and privileges, a tempting target for attack. The legislatures had the power to reduce salaries and enforce retrenchments. Through the Estimates they could discuss the salaries of officials on an individual and personal level, and by refusing to vote funds for a position could achieve its abolition. Mindful of the previous political role of officials they could now limit their political activities or ensure their conformity to the policies of the government of the day, re-inforcing the provisions of the new constitutions which prescribed a division between political and non-political offices.[2]

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[1] See G.E. Caiden, Career Service: An Introduction to the History of Personnel Administration in the Commonwealth Public Service of Australia 1901-61, Melbourne, 1965, pp. 35-6.

[2] Votes and Proceedings of the Legislative Assembly (Vic.), 18.2.1856, 'Minute relative to subordinate officers of the government entering the legislature'. Having stated that officers were expected to abstain from political partisanship or action, the minute continued:

'The Constitution containing no express provision on the subject [the Government] do not wish to preclude public Officers from becoming candidates for the Legislature, but they wish to lay down the conditions upon which, if they do so, their offices will be held.

'If, therefore, any public Officer becomes a member of either House of Legislature, he will be expected to support the policy, and to take his share in the Legislative business of the Government, assuming no question to be an open one unless so informed.

'Further, the Government will not feel themselves justified in retaining in office, any person being a candidate for the Legislature, whose attendance in the House and on Committees would in their opinion interfere with the efficient discharge of his official duties.'

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Although the new legislatures were determined to assert their authority, they were aware of the necessity for a loyal and efficient administration to keep the affairs of the colonies running smoothly. While deploring the arrogance of some officials, they were not insensitive to the service which had been rendered prior to responsible government. In the atmosphere of progress which followed the termination of Imperial government, the positive need for reform and the negative impulse to 'clip the wings' of officialdom combined in the urge to bring the public service under law, as the instrument of the legislature, in the same way as the various activities of government were organised under law. Through legislation it was thought possible both to reduce officials' privileges and keep control of the size and expenditure of the administration.

Victoria was the first colony to bring in general legislation to regulate its public service.[3] The 1862 Civil Service Act conferred

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Such prohibition was apparently considered insufficiently stringent, for alleged interference by officials in elections resulted in a motion in the Legislative Assembly that the Government should prevent officials from taking any part in elections beyond casting their votes and demanding dismissal as the penalty for disobedience. (Votes and Proceedings of the Legislative Assembly (Vic.), 16.2.1859). South Australia had similar regulations which first laid down that officers could only engage in political activity in support of the Government and later prohibited all political interference. See G.E. Caiden, The Study of Australian Administrative History, Australian National University, Aug. 1963, Appendix p. 20.

[3]Professor W.E. Hearn who appeared to be largely responsible for the legislation was interested not only in the British Northcote-Trevelyan Report but also in the possibility of codification of the laws of Victoria.

rights upon officials incidentally, by guaranteeing them a salary according to their classification, promotion on the basis of annual efficiency reports, a right of appeal to a board of inquiry in disciplinary cases, recreation leave, furlough and non-contributory pension. Some of these benefits had existed previously, but had been haphazard in their application. In 1863, a similar piece of legislation was passed in Queensland. A non-contributory Superannuation Act in Tasmania in 1860 and legislation for contributory superannuation in New South Wales in 1864 were part of the same pattern - they cut down the resented privileges and extravagances of liberal, unsystematised gratuities, retiring allowances and pensions enjoyed at the public expense, and substituted what was hoped would be more economical schemes.

The legislation appeared to provide some protection for those included under it from the depredations and hostility of the politicians, although it reduced old privileges. But it is doubtful whether either those who framed the acts or the officials themselves were fully aware of the potentialities of legislation as a source of rights, or of the implications of legal rights as the basis of their employment. In any case only two colonies had passed general acts, and two others pensions legislation, leaving general conditions of work and basis of employment unchanged for the majority of public servants. While those public servants who were under the acts were to some extent protected by them, there was a growing body of public employees, resulting partly from the

expansion of public works and communications, appointed outside the acts, which could not claim their benefits. However, the very existence of the legislation and its differentiation between those employed under it and those exempt represented in itself a departure from the British tradition of governmental administration as the exclusive preserve of the executive.

III

The period from about 1865 to about 1880 saw a decline in public service legislation. The struggles of the early years of self-government were over, and executive responsibility to Parliament was ensured by its necessity to maintain a Parliamentary majority. The general level of prosperity in a period of expansion bred a lack of concern with the methods of public administration as long as tasks were reasonably well performed, although on any downswing in the economic cycle, popular reaction against the costs of government was swift and the latent hostility against the privileged official resulted in retrenchment, reduction of salaries and even on occasion dismissal of the public service following refusal by the legislature to vote a government money for salaries.[4]

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[4]G.E. Caiden, The Study of Australian Administrative History op.cit. Appendix p. 3.

In the face of other more pressing issues there was little inclination to continue the earlier legislative experiments, and the legislation itself fell into desuetude. The pension schemes proved either actuarially unsound where they were on a contributory basis or too expensive where they were not. Tasmania repealed its pension legislation in 1863, Queensland in 1869, New South Wales in 1873 and Victoria in 1881. The general public service statutes covered fewer and fewer people as the public sector increased in size with new functions of government, and whole new areas of public employment, including teachers, railway, construction and postal workers, were created.

Only two pieces of public service legislation reached the statute book during this period. In South Australia where the general concept of rights appears to have become well-established, a Civil Service Act in 1874 seems to have added little to the benefits and expectations which already existed, merely confirming them. The reasons for the passage of the Act are somewhat obscure, and probably personal motivation of a minister was the strongest element. In 1860 the public service had been re-organised without the use of legislation on the initiative of a newly elected government whose personnel remained unchanged in the ensuing fifteen years. Public servants, who were still confined to those in the older-established offices, could rely upon fair treatment as their customary due, as part of the respect they were owed, and felt entitled to their privileged conditions of work as a reflection of their social status

in the community. The benefits conferred by the 1874 Act - annual increments within classes, the right to a board of inquiry as part of the disciplinary procedure, compensation upon removal from office in the case of incapacity, recreation leave, sick leave, furlough, public holidays and retiring allowances - were already enjoyed by officials, and with a high degree of certainty that they would not be arbitrarily withheld. The incorporation of these benefits in statutory form added little to the customary guarantee, and in any case the Act was careful to vest final decision as to rights and obligations with the Governor. In Western Australia, still under Imperial rule, a Superannuation Act providing for non-contributory pensions was passed in 1871 in conformity with long-standing British civil service policy and in response to the beginnings of expansion in that colony.

IV

The boom period of the 1880s saw expansion of public services to keep pace with the demands of the growth of population, urbanisation and private enterprise, and resulted in increased public criticism of their deficiencies. Increase in size had clearly outdated traditional methods of administration based on personal contact, trust and regard which had to some degree obviated the need for formal rules or tempered their application by tolerance in individual cases without serious repercussion. In a larger organisation absence of clear rule bred

confusion; applied haphazardly privileges caused resentment; the consequences of deviation from rule became more serious and the weighing up of individual circumstances in every contingency more wearisome; administration became impersonal, petty dictatorships more onerous and conformity more difficult to enforce without written and strictly applied procedures. Public awareness of the change in the nature of public administration was expressed in the form of complaints at the low standard of services and expensive and wasteful administration, for which blame was placed at least partially upon the public servants themselves. The occasional public scandal emphasised the need for reforms and the serious consequences of drifting on in the old ways.

The concern of public servants for their interests was expressed through renewed efforts to associate. Up to this period, although the manual and less skilled workers had succeeded in forming unions, in the middle ranks of public employment organisation had made little headway. Sporadic short-lived attempts had been made to form associations since the 1850s, but once the issues which had sparked them off had been resolved, they tended to disintegrate. Public authorities were wary of organisation on the part of public servants which might challenge their rule, and without official permission the associations withered even if they were not actively broken up. Association tended to remain on an informal, social and educational level, at which it met with

official approval and the patronage of senior officials, but during the 1880s in response to legislative proposals more permanent organisations among such groups as teachers, telegraphists and the higher ranks of postal employees were formed.[5]

These public servants were concerned to preserve their status and privileges and to ensure that reforms were not made at their expense. Their success in gaining the concrete concessions they requested and in maintaining their organisations varied according to the political and economic climate in each colony, but their contribution to the debate on public administration was not without effect. From a conservative standpoint they expressed what they considered to be their rights - to the conditions of work to which they had been accustomed, to a sufficient salary to allow them to fill their recognised place in the community and to live at a standard suitable to their status. These were not rights which challenged the public employer in any way, or attempted to impose binding formal guarantees upon it, nor were they an assertion of workers' rights as such, comparable with the beginnings of the fight of industrial unionism outside. They represented, rather, a reminder that in return for faithful service, educational and technical qualifications, and a life-time of devotion

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[5] See G.E. Caiden, 'The Commonwealth Public Service Associations as a Pressure Group', Australian Journal of Politics and History, pp. 296-323, December 1964.

to the state, public servants were entitled to certain privileges, which in turn, were of benefit to the community in enabling them to fulfil their tasks to the full.

The legislation of the 1880s reflected both the desire for urgent reform and the notion that reform should not be at the unfair expense of the public servants. Victoria, forced into action by public outcry at accidents on the railways attributed to maladministration, re-organised first its railways and then the remainder of public employment, the latter under the single Public Service Act 1883. New South Wales followed suit with a Civil Service Act the following year and Queensland in 1889. The primary purpose of these acts was to bring about efficient and economical running of the public services, but they also reflected the public servants' concern with their existing rights. Thus the later statutes, in repealing older legislation, carefully if somewhat vaguely preserved the rights of public servants who had been appointed under them.[6] In giving the new central personnel agencies the power to reclassify the public services, the acts made

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[6]The Public Service Act 1883 of Victoria repealed the 1862 Civil Service Act 'save and except as to all matters and things done under and to all privileges and rights now existing or hereafter accruing of all persons now subject to the provisions of that Act... ' (Section 2).

The Civil Service Act 1889 of Queensland provided 'Nothing in this Act contained shall prejudice the rights or privileges secured to any officer or other person in the Service under the provisions of 'The Civil Service Act of 1863' or 'The Civil Service Act of 1863 Extension Act'.' (Section 83).

provision for the retention of their existing status by the incumbents of re-classified positions, although such provisions were carefully limited to preserve freedom of action for the authorities.[7]

The legislation tended to cover accepted conditions of work, which were already in existence if not on a regular or systematised basis. It did not intend to make any radical break with tradition, and cannot, particularly in view of confused drafting, be regarded as a code of rights for public servants. However, it broke with tradition in two ways. Firstly, whatever the dubious legal validity of such phrasing, the vocabulary of the acts was in terms of rights. Secondly, by giving

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[7] The Public Service Act 1883 of Victoria provided that officers classified under the 1862 Act should continue to receive the greater salary, if reclassified downwards, as long as they continued in that class. Compensation was allowed if overpaid officers previously unclassified could not be transferred to work equivalent to the classified salary. (Sections 27-8) The Governor in Council on the recommendation of the Public Service Board was given overriding power to fix the salary of any officer within a class, notwithstanding the classification.

The Civil Service Act 1884 of New South Wales provided 'that the classifications imposed by this Act shall not be held to diminish or affect the rights by way of precedence or otherwise except by way of emolument of any officer'. (Section 11) It was also provided that

'No officer shall be deemed to be entitled to any compensation by reason of any reduction of his salary or for any alteration of the limits of salary of his class as hereinbefore provided or by reason of any alteration in the scale of allowances or gratuities which may be made by any Act amending this Act or by the Regulations herein provided for'. (Section 59)

The Civil Service Act 1889 of Queensland contained a similar provision as to compensation as the Victorian Act (Section 16). The Governor in Council, following report from the Civil Service Board, had power to determine any question regarding rights under the Act (Section 72).

legislative sanction to privileges, the acts aroused public servants' expectations that these had been transformed into rights binding against their employer. Whereas following the legislation of the 1860s, public servants had neither fully realised its implications or been prepared to challenge decisions affecting them through it,[8] they were now ready to take advantage of the legal provisions, confident they had a right to do so.

The period from 1880 to the end of the century saw litigation by public employees of all kinds on the basis of the public service acts and other legislation covering specific groups of public employees. To the vague notion of rights was now added the concrete possibility of legal rights which would be upheld by the courts and which constituted a break from the British traditional doctrines of common law concerning the rights of public servants which were beginning to crystallise into a more certain form. In view of the generally held opinion that a contract of service with the Crown implied a condition that the Crown could dismiss its servants at pleasure, it was important to know whether the protection provided to public servants under an Act of Parliament could be overridden by the Crown employer at will. A case was brought under the New South Wales Civil Service Act 1884 by Gould, a clerk who had

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[8] The Australian Digest 1825-1933 mentions only four cases concerned with public servants before 1870, and a further four before 1880.

been dismissed from the service without the statutory procedure to which he held he was entitled and who claimed damages for wrongful dismissal. It was ruled that the provisions in the Act which regulated dismissal

> which are manifestly intended for the protection and benefit of the officer, are inconsistent with importing into the contract of service the term that the Crown may put an end to it at its pleasure. In that case they would be superfluous, useless and delusive. This is... an exceptional case in which it has been deemed for the public good that a Civil service should be established under certain regulations with some qualification of the members of it, and that some restriction should be imposed on the power of the Crown to dismiss them.[9]

A later Act of the New South Wales Parliament attempted to retrieve the situation by providing

> Section 58. Nothing in this Act, or in the Civil Service Act of 1884, shall be construed or held to abrogate or restrict the right or power of the Crown as it existed before the passing of the said Civil Service Act, to dispense with the services of any person employed in the Public Service.[10]

However it was held by the Privy Council that this section would not restore the previous right of the Crown to dispense with the services of any public servant who had been in the service prior to the passing of the 1895 Act, although a case immediately following decided that the prerogative right of the Crown to dismiss at pleasure was only

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[9] Gould v. Stuart (1896) 17 N.S.W.L.R. 331 at 333.

[10] Public Service Act (N.S.W.) 1895.

restricted in relation to cases of misconduct.[11] The importance of statute to public servants was further emphasised by a case concerning a Western Australian public servant, in which the Privy Council reversed a decision of the Supreme Court of Western Australia, and held that public servants were liable to be dismissed at pleasure.[12] In the absence of a statute regulating the public service in Western Australia, the Colonial Office Regulations which laid down conditions of service were held not to constitute a contract.

The courts of law were also called upon to settle disputes of status. The effect of later legislation which conserved the rights of those appointed under the earlier statutes, interim measures creating or abolishing special categories of public servants in relation to fresh or obsolete legislation, and the fluctuations in employment of many public servants resulting from periodic retrenchments, had created frequent doubts as to which piece of legislation should apply in any particular case.[13] The courts meticulously examined each dispute which

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[11] Young v. Adams (1898) A.C. 469.
Adams v. Young (1898) 19 N.S.W.L.R. 325.

[12] Shenton v. Smith (1895) A.C. 229. See also Mattingley v. The Queen (1895) 22 V.L.R. 80.

[13] For example, Fisher v. The Queen (1890) 16 V.L.R. 77, which affirmed the Governor in Council's right to fix salaries under the Victorian Public Service Act 1883, although the officer concerned had been appointed under the 1862 Act, and Browne v. The Queen (1886) 12 V.L.R. 397, which held that officers appointed under the Victorian Civil Service Act 1862 were subject to the dismissal provisions of that Act and not the Public Service Act 1883.

came before them on its merits and sorted out the jumble of legislative and personal circumstances on an ad hoc basis as best they could. Another major area of litigation was pensions, where questions of definition (whether the public servant was a temporary or permanent officer, whether a particular case fell within a particular statute, what comprised 'service' for purposes of pension computation) were again solved through strict statutory interpretation.

V

The depression of the 1890s in reaction to industrial strife and repression bred a general concern for rights in the community as a whole, expressed politically in labor representation in the legislatures and the creation of arbitration machinery recognising industrial rights. Industrial and unskilled workers within the public services were similarly affected to those outside, as the result of a crisis in government revenues and pressure to cut down staffs. The link with the labor movement was strengthened as unemployed workers moved into the ranks of the public service and contrasted the limitations upon their position in it with the aspirations and gains of outside unionism. The movement grew for the full recognition of industrial and political rights, aided by and aiding the labor movement outside.

Other public servants - such as the teachers, higher paid postal workers and clerks - saw their position somewhat differently. The

conditions of work which they had enjoyed and accepted as their due - the paid recreation leave, the relatively high salaries, the short hours of work, the increments, the retiring allowances - came under attack both through financial stringency and pressures by others less fortunate who could see no reason why a portion of the workforce should remain privileged in the face of their own misery. These public servants now found themselves not only less prosperous, but also insecure as the government policy of retrenchment affected their expectations of a career up to retirement and provision for their old age. The result was an increased emphasis on their rights, by which was meant specific benefits which would be binding on the authorities through the courts.

Governments themselves were well aware of the need for reforms. The inefficiency and irregularity of public administration, as revealed by Royal Commissions and other inquiries were found anachronistic at a time when Australian self-consciousness as a new nation was coming to the fore. Further the notion of the public services as a closed preserve for those who had contacts and could avail themselves of patronage, where steady application to duty was more important than initiative or talent, where a career was interpreted as employment for life rather than striving for the top positions, and where privileges were accepted as the reward for subordination to routine and compensation for loss of opportunities in the field of individual enterprise, was gradually fading. A newly emerging, more widely spread middle class, educated

through the state education systems, lacking contacts or independent capital, were attracted by the potentialities of a career in the public service, and pressed for open and equal opportunities to enter and rise through it. A corresponding need for the talents of able men emphasised the importance of offering them guaranteed conditions of work, and the prospect of appreciation of their services through steady promotion which would ensure the best use of those talents. In this context, rights acquired an additional meaning to be thought of as equal opportunity, fair assessment of individual worth, freedom from capricious political deprivation of security, favouritism and the uncertainties of lax administration - in brief the pre-conditions of a career system, in which rewards were balanced against honest endeavour.

The extent of re-organisation varied as between the colonies. In New South Wales the Public Service Act 1895 established a strong Public Service Board, whose retrenchments paved the way for more orderly administration and an extension of public servants' rights in 1899. In the other colonies the forces of reaction, which saw constructive effort at reform as an extension of public servants' privileges and their pampering at the taxpayers' expense, prevented anything beyond desultory attempts at reclassification. However the recognition of public servants' rights was taken a substantial step further by the imminent approach of federation.

It is a measure of the general acceptance of the concept of public servants' rights that in the series of debates on the federal constitution during the 1890s, the principle of the preservation of the rights of those public servants to be transferred to the Commonwealth was little questioned. As soon as it became clear that the Commonwealth would take over functions currently performed by the colonial governments, speculation grew among the public servants likely to be transferred with the colonial departments. The federalists were little concerned with the details of administrative machinery and left them to be worked out by the Commonwealth Parliament. However, anxious to attract as much support for their cause as possible, or at least to avoid creating opposition, they did their best to re-assure public servants that their conditions would be no worse than those to which they were accustomed. Thus, Section 84 of the final draft of the Commonwealth Constitution Act read:

> Any such officer who is retained in the service of the Commonwealth shall preserve all his existing and accruing rights, and shall be entitled to retire from office at the time, and on the pension or retiring allowance which would be permitted by the law of the State if his service with the Commonwealth were a continuation of his service with the State.

The pledge of the federalists to the public servants provided fresh impetus for legislation in the colonies. Colonial governments saw the opportunity to make amends for past neglect and shabby treatment and to placate the growing chorus of complaint at the least

possible expense to themselves. Vague though the wording of the constitutional provision was, it appeared that the rights referred to were statutory rights, so that public servants increasingly sought to ensure that they would not be penalised on transfer by demanding legislation. Following the example of New South Wales, Victoria and South Australia set up boards to classify their public services. Tasmania and Western Australia, which for decades had resisted the pressure for legislation, finally passed Civil Service Acts to regulate their administration. By the date of federation, all the colonies administered their public services through some form of legislation, although the benefits conferred by the statutes varied.

The general principle of security of tenure was accepted by all the colonies, but in each statute some provision was made to dispense with the services of those public servants no longer required. Except in Tasmania, some procedure was laid down for disciplinary proceedings, usually dividing minor from major offences. In South Australia, Queensland and Western Australia public servants could demand a board of inquiry which was appointed by the Governor (upon whom there was no obligation to act in accordance with its report). In New South Wales more serious offences were dealt with by the Public Service Board or a board of inquiry or person appointed by the Governor, and legal counsel was not allowed, although it was stipulated that a full record of proceedings should be kept. Public servants had a general right to

examine prejudicial decisions against them and to appeal against the Public Service Board to a District Court judge. In Victoria, departments could inflict punishment up to a £5 fine, against which no appeal was allowed. For more serious offences the Public Service Board could itself make an inquiry or appoint a board to do so, and legal representation was allowed.

A similar assumption was made regarding classification: once a public servant was classified it was assumed that he would not be reduced in salary, although each statute enumerated cases where any public servant could be reduced. In the general procedure for classifying the public services provision was usually made for public servants to retain their existing positions for a certain period of time, or until position and worth of incumbent could be matched up, and for appeal against the classification. In Victoria, a schedule to the Public Service Act set out a scale of annual increments which were dependent on good conduct, and against the deprivation of which right of appeal lay to the Public Service Board. Promotion in New South Wales and Victoria was regulated according to a combination of merit and seniority, vacancies were filled by the Governor on the recommendation of the Public Service Board, and examinations were held for progression from lower to higher classes. In the other colonies no system existed.

Public servants could also claim privileges in relation to leave, although except in Western Australia no entitlement existed. Generally they were allowed three weeks annual leave (two in Western Australia and an unspecified amount in Tasmania), public holidays (with the right to time off in lieu if they were required to work) and varying amounts of extended (sick) leave. Furlough was similarly discretionary except in Western Australia, and was usually for six months on full pay or twelve months on half pay after twenty years' service.

Public service employment was regarded as permanent, but because attempts to provide contributory or non-contributory pensions had in most colonies run into difficulties, the subject had become very complex. Retirement was usually stipulated between the ages of 60 (optional) and 65 (compulsory), although in South Australia and Tasmania no retiring age was laid down at all. New South Wales, Victoria and Tasmania had a system of compulsory life assurance, South Australia a rather sketchy scheme of retiring allowances and Western Australia retained non-contributory superannuation on the British model.

The rights incorporated in legislation were limited by obligations, on which as a rule the statutes were silent - obedience and deference to superiors, official secrecy as to the matters affecting office, propriety in private life, abstinence from political activity apart from voting, and acknowledgement that industrial tactics were out of

place in the public service. Rights were further limited by loose, complex and ambiguous phrasing which made evasion easy, and by the ample measure of discretion allowed to the authorities. It was difficult for public servants to challenge the authorities on the basis of the legislation, as the courts tended to uphold only absolute rights and because their position made them vulnerable to victimisation or unpleasantness if they protested. Nevertheless, on the eve of federation public servants' rights had become an accepted part of common vocabulary. The creation and formative years of the Commonwealth Public Service were to bring to the fore the ambiguities of the term, and to resolve major disputes as to its interpretation.

CHAPTER 3

RIGHTS OR PRIVILEGES?

Two Concepts of Rights

At the time of the establishment of the Commonwealth of Australia, the rights of public servants were the subject of considerable discussion. Public servants' existing and accruing rights were preserved in the Constitution Act; those about to be transferred were anxious to retain their existing conditions of work; the problems of public servants' liberty to associate or take part in politics remained unresolved; a certain guilt existed regarding the treatment of public servants during the depression years so that it was felt that some compensation was due to them; legislation affecting rights had been passed on the eve of federation by the colonial legislatures; and the necessity to shape legislation suitable for the Commonwealth Public Service made the issue of more than sectional or marginal interest.

However the concept of rights remained not only vague, but ambiguous. Much of the confusion which characterised discussion on the subject was due to a division between two major attitudes, although neither was completely distinct or adhered to consistently. They were implied rather than explicit. They overlapped, sub-divided, were subtly changed by differing emphases at different times and shaded

into one another. They differed upon which claims or conditions of work could be legitimately considered as rights, but agreed upon the recognition of certain concrete rights, although their justifications may have been different.

The view of rights which had emerged as dominant at the end of the nineteenth century was an essentially conservative one. The rights of public servants were conceived as the privileged conditions of work which they were owed in compensation for the limitations which their special position as servants of the Crown placed upon them, and also to enable them to maintain a status compatible with that position. They were expected to be politically neutral and circumspect, and to devote themselves to the service of the state alone, thus cutting themselves off from opportunities of personal gain. In return they could claim rights subject to the overriding claims of the public interest and to state sovereignty, as interpreted by the authorities and enforceable only by them, but which in a sense remained their due, even if authority exercised its discretion in refusing them. Legislation could be accommodated within this concept of rights, as it provided a written guarantee of customary expectation, although any rights conferred by it did not lose their character as benefits to be granted at the discretion of the authorities, and not as binding against them. The theory of the independent personnel agency and impartial administration of the public service, which was becoming accepted in Australia,

strengthened this concept of rights, by guaranteeing public servants against the depredations of politicians and setting up a system of fair administration. It emphasised even further the idea of public servants as a distinct group, whose legitimate claims could be met within the system in which they worked, thus obviating, and rendering improper, appeal or challenge through outside forces.

In contrast to the conservative view a more radical theory of public servants' rights was emerging. Public servants were considered to be entitled to the same rights as other employees. They should be neither deprived of rights, nor privileged above others, and so were entitled to full political, civil and industrial rights. Like other employees they were entitled to justice in their relationship with their employer, whose discretion in dealing with them ought to be limited by the concrete rights enforcing his obligations to them. Rights, to be meaningful, had to be binding against the employer, and as such constituted a legitimate challenge to him. Legislation, therefore, existed as a guarantee <u>against</u> abuse of discretion, and the creation of an impartial personnel agency did not obviate the need for rights or outside appeal.

Although both views used the same vocabulary, it seems that sometimes the word "right" was being used where "privilege" would be more appropriate, and some preliminary clarification would appear to

be necessary to avoid confusion on this point. In terms of legal phraseology (in the absence of any common law recognition of public servants' rights), the term "right" is confined to those benefits binding by virtue of their inclusion in mandatory wording in a statute. Where any discretion is conferred upon an authority to decide whether the benefit is to be granted, only a "privilege" exists. This distinction was not clearly appreciated when the initial Commonwealth legislation was framed[1] and even more confusion existed on the question of moral rights. Whereas in the conservative view, public servants possessed a moral right to certain conditions of work, based primarily on custom, in the more radical view, such a right existed only relative to the rights of others, so that any right claimed by public servants to superior conditions above what was thought to be appropriate for the rest of the workforce, was in fact a privilege. The development from privileges to rights, which took place between federation and the First World War, involved the eclipse of the conservative view in favour of

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[1]The difficulties of terminology may be illustrated by Isaacs' remark in relation to the preservation of the right to long service increments which he contended had been enjoyed by Victorian officers prior to transfer:

> There is a right in one sense, though not an absolute right in another sense. There is no absolute right to these long service increments unless the authorities choose to give them. But there is the right that officers may have these increments if the authorities choose to exercise their discretion to give them.

Commonwealth Parliamentary Debates, Vol. II, p. 2003.

the more radical, the substitution of binding rights for benefits dependent on discretion and the beginning of the improvement of conditions of work of the ordinary employee to a level comparable with those previously enjoyed mainly in the public service.

The Framing of the Commonwealth Public Service Act 1902

Apart from the constitutional guarantee to conserve the rights of transferred officers, the Commonwealth was given full powers to make arrangements for the Commonwealth Public Service. By federation legislation had become the accepted method of dealing with the public service, and in due course a Public Service Bill came before Parliament. It had been framed along conservative lines, chiefly on the basis of provisions culled from existing legislation and made little departure from older principles.[2] As far as rights were concerned, the attitude of those drawing up the Bill had been negative, as indicated by Clause 57, based on a similar provision in the Public Service Act (N.S.W.) 1895, which read

> Nothing in this Act shall be construed or held to abrogate or restrict the right or power of the Crown to dispense with the services of any person employed in the public service other than the commissioner and inspectors.

This lack of regard for officers' rights was regarded as unsatisfactory, and during the Parliamentary debates the Bill was transformed, so that

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[2]The derivation of the clauses of the Public Service Bill 1902 may be found in G.E. Caide, Career Service, Melbourne, 1965, p. 49.

the resulting statute was considerably in advance of State legislation in the rights it conferred.

A predominant influence upon the Bill was the largest, most influential officers' association - the Australian Commonwealth Post and Telegraph Officers' Association, which even before federation had become concerned with the rights its members would possess under the new administration.[3] The Association's view of public servants' rights was essentially conservative, bent on preserving the rights which its members already possessed, but the experiences of colonial administration had bred a distrust of discretion exercised without check, a preference for statutory enactment and an appreciation of the benefits it could confer, and a clear idea of the specific provisions desired. These officers conceived rights as their due, as a matter of fairness, in recognition of their services, their skills, the trust reposed in them, the limitations of office they assumed, and also as part of a particular view of their career, similar to that prevailing in craft occupations, in which a person was accepted initially into their calling, gradually learned the skills of the trade, and progressed accordingly. Their

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[3]The contribution of the A.C.P.T.O.A. to the framing of the Commonwealth Public Service Act has been drawn from G.E. Caiden, The A.C.P.T.A.: A Study of White Collar Public Service Unionism in the Commonwealth of Australia 1885-1922, Canberra, 1965, pp. 26-49. The proposals of the A.C.P.T.O.A. were adopted at the founding conference in October 1900, and added to by the deputation of leading officers of the Association to the Postmaster-General on 11.7.1901.

specific proposals concerning rights tended to reflect this concept. These included the right to a minimum adult wage, in recognition of their qualifications and as an attraction to good calibre recruits. Automatic increments, as skills improved, would provide steady progression, irrespective of promotion, up to a reasonably high level. Equal pay for female officers would prevent the undermining of rates of pay or the employment of females in preference to males. The elimination of political control of personnel matters and the entrusting of the public service to impartial administration as a self-regulating mechanism were appreciated, but did not over-ride a certain suspicion of senior officers. Proposals were therefore made for an Appeal Court, including an elected public servants' representative, thus widening participation in management. In addition suggestions were put forward for various allowances, for cumulative recreation leave and free accommodation in residential post offices.

The influence of these proposals was far-reaching. They were pressed directly upon Cabinet ministers and were taken up by Labor and radical Members of Parliament, who drew their implications in terms of their own view of officers' rights - those which it was generally desirable for employees to possess, and which would be completely binding against the employer. Whereas the officers had been content to conceive their rights as the privileged conditions of work to which they felt entitled by their office, the Labor Party was prepared to

go further, and to ensure political and industrial freedom for them. In an attempt to prevent future restriction by regulation, usual in Australian public services, it was proposed that

> Nothing in this Act shall in any way prevent an officer becoming a member of any properly constituted society or political association.

The motion was narrowly defeated, but Senator de Largie's (Labor, Western Australia) justification of his case indicated the general radical view of rights:

> We do not pay civil servants for talking politics. We pay them for eight hours' work and when they have done that eight hours' work the rest of the twenty-four hours should be their time and theirs alone. Neither the community in the shape of the Federal Government, nor any other body should have any controlling power which would enable them to say how they should spend their spare time. If the civil servant gives an equivalent in service for the salary he receives, that is all that the Commonwealth Government have any claim to. I do not see how we can expect anything more. We do not buy a man's political soul when we give him employment in the civil service... it may come about that the majority of the citizens of the Commonwealth will be working under the Government. Let honorable senators imagine the state of affairs if, during an election, the overwhelming majority of the citizens of the Commonwealth should not have the power to speak their minds upon politics.[4]

The proposals for the extension of public servants' rights were on the whole sympathetically received, and suggestions tended to be dealt with on their merits by both government and other speakers. The atmosphere of setting out on a new venture was responsible for a desire

[4]Commonwealth Parliamentary Debates, Vol. VII, p. 9435.

to create a lasting institution, worthy of the new Commonwealth, and for a willingness to ignore precedent in favour of pragmatic experiment. The colonial experience with its confusions, injustices, irregularities and discontents was no example for emulation, and a general determination existed to avoid pitfalls from the beginning. Efforts in this direction took two main paths - firstly to increase the powers of the Public Service Commissioner as an impartial independent administrator, in whose very presence many saw the guarantee of fair administration, and secondly, by firm provision to clarify the legal rights of public servants. The government, while willing to alter the Bill in the first direction was less willing to eliminate discretionary clauses, although Isaacs' attack on the principle of dismissability at pleasure was successful:

> Public servants ought to know, like any other contractors with the State, what are their rights. I certainly cannot recognise the position that these rights are only tentative, and, that civil servants are to understand that we are making provisions to which we do not intend to adhere... [This provision] deprives public servants of the power of going to court, and claiming that they have not had the formalities prescribed by this Act observed ... Let us either say that we will leave the matter absolutely in the hands of the Government or let us give a reality to those provisions which guard the rights of public servants.[5]

The Commonwealth Public Service Act which emerged from the debates reflected the general concern for public servants' rights and embodied

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[5]Commonwealth Parliamentary Debates, Vol. I, p. 1116.

many of their proposals. The principles of minimum wage, annual increments,[6] and equal pay for women were accepted. Although seniority as the basis of promotion had been rejected, the senior officer was safeguarded by the provision that he could not be passed over by a junior without the certificate of the Public Service Commissioner that no capable senior officer was available. In addition, a right of general appeal was granted to any officer affected by any report or recommendation made or action taken under the Act (with certain exceptions) to a board consisting of a Public Service Inspector, the chief officer of the department or his nominee, and a divisional representative. The board would hear the appeal and report back to the Public Service Commissioner who would determine the matter. The principle of an elected divisional representative upon disciplinary boards of appeal was also adopted. Public servants were re-assured as to the continuance of customary privileges through the repetition of the constitutional pledge to transferred officers, and through the

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[6] A certain vagueness seems to be apparent as to the nature of the annual increments. The general understanding seems to have been that they represented

> ... a guarantee that the meritorious and deserving public servant should get his increment, that he should not be dependent on the circumstances of the Treasurer of the day, but that whether promotion came his way or not, until he reached the top of the fifth class, he should be able to advance by steady stages so long as he was worthy of those advances.

Commonwealth Parliamentary Debates, Vol. I, p. 1544.

enactment of provisions for annual recreation leave, sick leave, public holidays, furlough and limitation of rent deduction in cases of compulsory residence, although much in this area was left to later regulation. Finally, an independent Public Service Commissioner, who in the original Bill had been conceived as merely a watchdog, had become through the transfer of functions to him, responsible for most aspects of personnel administration.

The Administration of the Public Service Act 1902

As the major responsibility for the implementation of the Public Service Act had been laid upon the Public Service Commissioner, the rights of officers in practice would depend largely upon his views. The First Public Service Commissioner, D.C. McLachlan, was not unaware of the importance of statutory rights to public servants.[7] His own personal career in the New South Wales administration during which he had seen considerable re-organisation[8] had given him an appreciation of the benefits of the protection of the career public servant from political interference. He regarded such protection, however, as only justifiable if it were matched by a fair and efficient administration. Public servants' rights were privileges, not as compensation for the

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[7] See First Report of the Public Service Commissioner, 1904, p. 45.

[8] See G.E. Caiden, 'The Early Career of D.C. McLachlan', Public Administration (Syd.), XXII, June 1963, pp. 199-201. Also G.E. Caiden, Career Service op.cit., pp. 72-74.

limitations of public office, but in return for individual effort and worth, which should be under continual scrutiny to ensure that each gave of his best. The only entitlement the public servant possessed was the right to fair treatment within the bounds of the public interest, both of which the Commissioner was in the best possible position to judge. All other benefits should be conditional to be withheld at the discretion of the authorities should conditions warrant. He would have preferred his administration untrammelled by the over-riding rights of officers which to him impeded sound administration and the essential exercise of wise discretion upon which it rested.[9] However, he was prepared to abide strictly by the letter of the law, but insisted upon any latitude it offered him.

To some extent the views of the Public Service Commissioner were influenced by the situation with which he was confronted. Apart from the diversity of practices existing through the transfer of departments from six separate State services, the legacy of confusion and

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[9] 'To whatever piece of Australian Public Service legislation one turns there will be found clause after clause and provision after provision designed solely in the interest and for the benefit of the officer, each of which has the logical and legal effect of cutting away from the Crown its erstwhile prerogative right of being free and untrammelled in getting rid of a servant, who, through wilful neglect, indifference to or disregard of, his employers' interest, and of his own responsibility therein, is undeserving of, and possesses no equitable claim for, continued employment.'

First Report of the Public Service Commissioner, 1904, p. 45.

maladministration of the colonial era threatened to perpetuate itself under the Commonwealth. Further, the burst of enthusiasm on the founding of the Commonwealth, had given way to a preoccupation with economy, in excess of what was required to meet the liabilities imposed on the Commonwealth by the 'Braddon clause' of the Constitution Act. The result was pressure upon staff, remuneration and conditions of work.

Thus, the Commissioner was early forced to distinguish rights from privileges, and in the promulgation of his regulations and ensuing annual reports, he made it clear that the privileges which officers received as a matter of custom were not to be automatic in their application, but conferred only in return for satisfactory service and subject to individual assessment. As the majority of these privileges did not exist outside the public services, the Commissioner had some justification for his views in this area. Recreation leave was to be dependent 'upon the good conduct and regular attention to duty of the officer',[10] and acted therefore as a disciplinary device operating outside as well as part of the normal disciplinary machinery. Furlough was not to be 'granted to any officer who has been reduced for misconduct or at any time deprived of leave of absence as a punishment for an

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[10] Commonwealth Public Service Regulations, 1902, Regulation 76. See also Third Report of the Public Service Commissioner, 1907-8, p. 23.

offence',[11] and was to depend not only upon an officer's 'diligence, efficiency, regular attendance, the cheerful and ready performance of all work entrusted to him', but also 'upon whether he can be spared without inconvenience to public business'.[12] Overtime payment was to be exceptional and applicable only to work 'which, from its character or from special circumstances, cannot be performed during the prescribed office hours', as determined by the Commissioner.[13]

The Commissioner was prepared to recognise the minimum salary provisions (for officers only and not exempt or temporary staff) and to award equal rates for men and women in the same positions (although he maintained that he had power through regulation to impose differential rates), but insisted that all increments were to be discretionary. Although in the Clerical Division he was prepared to grant increments in the lowest class provided the officer's 'conduct, diligence and general efficiency' were satisfactory, in all other cases increments were to be treated as sub-divisional promotions and to be dependent not merely on satisfactory performance of duties but also upon increased work value, either through a change in duties or through greater efficiency.[14]

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[11] Commonwealth Public Service Regulations, 1902, Regulation 89.

[12] First Report of the Public Service Commissioner, 1904, p. 39.

[13] Commonwealth Public Service Regulations, 1902, Regulation 98.

[14] Ibid., Regulation 57. See also Second Report of the Public Service Commissioner, 1905, p. 10.

While the Commissioner regarded such items as leave or increments as privileges, he considered that the officers' entitlement to fair treatment was amply covered in his administration, and that any officer who carried out his duties to the best of his ability had no reason to grumble. He had little sympathy with officers who came under suspicion as having committed an offence, but strictly carried out the procedures in the Public Service Act relating to disciplinary appeal. The general right of appeal granted to officers under Section 50 he resented more strongly on the grounds that it tied the hands of his administration and encouraged malcontents.[15] He took legal advice to restrict the interpretation of the section to cases where an officer was 'affected' only by a change in his own classification or a reduction of his own salary, so that appeal would not lie to an officer against another's promotion, or against transfer, or against an action not taken.[16] In practice, the chances of a successful appeal were even

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[15] "In view of the almost unlimited application of the right of appeal, it must at once be apparent that the hands of Chief Officers, Permanent Heads, the Inspectors and myself are unreasonably tied, and that our administration will remain greatly hampered until some amendment of the Act is effected, there being hardly a step taken in administration that cannot with impunity and absolute immunity from any pecuniary loss be made the subject of appeal at the hands of a disappointed, dissatisfied, or querulous officer, no matter how remote his chances of success may be, or how groundless his cause of complaint."

First Report of the Public Service Commissioner, 1904, p. 40.

[16] Second Report of the Public Service Commissioner, 1905, p. 18.

slimmer, for officers rarely knew of any report, recommendation or action taken before approval by the Governor General, after which, according to the Act, the right of appeal lapsed.

The attitude of the Commissioner towards appeal against his administration was intensified where officers used outside means to challenge his decisions, which he interpreted as both insubordination and an attempt to exercise improper pressure contrary to the intentions of the Public Service Act.[17] His attitude towards public service associations was therefore somewhat cautious. He stressed that no right to organise existed and that recognition depended on his own discretion and the proper behaviour of the associations themselves, but his own connection with public service unionism in New South Wales in the 1890s, and the recognition already extended by Ministers to the A.C.P.T.O.A., despite some difficulties in Victoria and Western Australia, had to some extent pre-judged the issue. He contented himself with laying down strict rules for the associations, which were in no sense to challenge his administration.[18]

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[17] "All the rights of officers are amply safeguarded by the Act, which, by establishing Boards of Appeal, provides abundant means for the impartial investigation and redress of legitimate grievances."
First Report of the Public Service Commissioner, 1904, p. 45.

[18] First Report of the Public Service Commissioner, 1904, pp. 54-5.
See also G.E. Caiden, Career Service, op.cit., p. 73.

In regard to political rights, the Commissioner, unrestrained by any limitation to the contrary in the Public Service Act, laid down the following prohibition:

> Officers are expressly forbidden to publicly discuss or in any way promote political movements. They are further forbidden to use for political purposes information gained by them in the course of their duty.[19]

He justified the prohibition in general terms:

> It would be impossible to secure that harmonious and united effort which officers should display in carrying on the executive business of Government unless there existed an unequivocal loyalty to whatever party happens to be in power; and the right of officers to publicly discuss questions of political policy, or to canvass or to advocate the views of any particular party or candidate, would certainly militate against that loyal co-operation which every officer should at all times render. Further, the public expression by Civil Servants of their views on political matters would in many instances lead to unfriendly relations with large bodies of the public with whom they have official relations, and this should be avoided.[20]

The promulgation of the regulations and the 1904 reclassification of officers, against which appeal had been allowed to the Commissioner, met with varying reactions among Commonwealth public servants, according to their effects upon different groups. Attitudes tended towards caution, so that although expectations were in some cases disappointed, officers were prepared to trust to the Commissioner and keep within his rules, partly in the hope that these tactics would bear fruit later,

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[19] Commonwealth Public Service Regulations, 1902, Regulation 41.

[20] First Report of the Commonwealth Public Service Commissioner, 1904, p. 37.

partly in fear lest worse befall. The predominant attitude towards rights was still conservative, and pre-occupation remained with customary conditions of work and the upholding of status.

By 1906 a change in attitude on the part of the public servants had become evident and there was less inclination to confine tactics to those approved by the Commissioner or accept his interpretation of their rights. It had become increasingly clear that the policy of the Commissioner was to recognise only those rights forced upon him through their absolute legal nature, and to regard all others as completely dependent on his discretion. Had he applied this policy in a liberal manner, little objection might have been taken to it, but in the increasingly stringent emphasis on economy, the exercise of discretion and invocation of the public interest became little more than a euphemism for saving money.[21] Officers saw their privileged conditions of work, thought of as their due and embodied in legislation, stagnate and decline as increments became rare, promotion for those doing work higher than their own position was withheld, furlough was restricted to those who wished to travel abroad, and unpaid overtime became a substitute for recruitment of extra staff. Discontent, with the bad conditions of work grew, particularly in the Postmaster-General's Department, and provided a stimulus to the formation of more militant

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[21] See G.E. Caiden, Career Service, op.cit., pp. 84-5.

associations in the lower ranks, as well as a less conservative attitude on the part of the older-established associations. The authorities were no more responsive to vehement protests and threats of strike action than they had been to polite representations, and the cleavage between the Commissioner's restricted interpretation of rights and that of the public servants grew as the latter, in the face of his stubbornness, were forced to clarify their views. They were no longer content with assurances of fair treatment, or with privileges to be denied at their expense in the cause of the public interest, or benefits which though provided for in legislation, were withheld as a matter of course. They wanted rights either automatic in their application or based on objective criteria open to appeal, as opposed to subjective discretion which could not be challenged. They were no longer prepared to confine their protests within the closed world of the public service, and the call for an inquiry into the Postmaster-General's Department, between 1906 and 1908, was the expression of what they considered their legitimate citizens' right to appeal to the legislature.

The Extension of Rights

The change in attitude of the associations had led to the re-opening of contacts with politicians, and particularly Labor politicians, who though not interested in preserving public servants' privileges, were for a number of reasons, concerned with public servants'

rights. The participation in the Labor Party of public employees such as railway workers and tramway workers and the history of deprivation of the rights of such groups by State governments, made it susceptible to pressure on their behalf. Restriction of full political and industrial rights of public servants did not only represent an infringement of the fundamental liberty of the citizen, but also the immobilisation of important potential support for the party. On an ideological level the Labor Party was committed to a Socialist platform, which implied the extension of public employment, and could therefore transform the problem from one concerning a minority to one affecting the majority. More generally sentiment in the party was against the atmosphere of subordination and hierarchy in the public services, and any expectation by senior officers of unquestioning obedience from the rank and file.

Until 1909 the Labor Party in the Commonwealth Parliament had had little opportunity to take any effective action upon the rights of public servants. In 1903 it took the initiative in debating political rights,[22] and in 1904 a minority Labor Government, in enacting arbitration legislation at federal level for workers in general, had intended by implication to include public servants. Governments

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[22] See V. Subramaniam, 'Political Rights of Commonwealth Public Servants', Public Administration, pp. 22-33, March 1958.

preferred to leave the administration of the public service to the Commissioner, and Parliamentary questions by Labor politicians had elicited little response. The main line of attack of the Labor Party was upon the Commissioner's regulation banning political activity by public servants, which included State and municipal as well as Commonwealth public affairs. As a result of the adoption of a resolution for full political rights in public employment at the Labor Party Conference in 1908, the matter was once again debated in Parliament[23] with little effect, but when shortly afterwards the Government fell and a second Labor Government took office, one of its first actions was to abolish Regulation 41, thus recognising the full political rights of public servants, short of Parliamentary candidature, and retaining only provisions relating to disclosure of official information.

The extension of political rights to public servants not only acknowledged the legitimacy of appeal outside the system of fair administration set up under the Public Service Commissioner, but was the first step in destroying the whole basis of the earlier doctrine that public servants were compensated for loss of political and civil rights by the possession of other privileges. The Labor Party saw the ending of restriction upon political rights as an equalising measure

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[23] Ibid., p. 24.

between public servants and the rest of the work force, opening the way for the assessment of public servants' rights, obligations and privileges in comparison with those of the rest of the population.

Although officers welcomed the recognition of political liberties,[24] their conception of rights and that of the Labor Party still did not co-incide. They saw the measure less as restoring to them the fundamental rights of the citizen, than as an indication that the Commissioner no longer blocked the channels between themselves and the government, which could now grant them their customary due.

The conflict between the two conceptions became apparent upon the return of the first majority Labor government, when officers expected alleviation of their conditions of work through direct legislative action. However the Labor government as employer was not prepared to improve the material working conditions of a single sector of the workforce by its own unilateral action, when it was precluded from extending such benefits to workers generally through constitutional limitation on its powers. The rights to which public servants were entitled were only those fairly applicable to other workers, and the government found itself in an invidious position in determining this standard. An alternative was

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[24]The attitude of public servants was still somewhat uncertain with regard to full political rights. In 1900 a motion for full political rights was lost at the conference of the A.C.P.T.O.A., in 1903 adopted, in 1905 lost once again, and also narrowly lost in 1906.

readily available in the form of the Commonwealth Court of Conciliation and Arbitration which had been set up in 1904. The Arbitration (Public Service) Act 1911 defined public servants as an industry and gave public service organisations the same right to approach the Court as other employees' organisations. The requirements for registration were modified to meet the smaller size of groups of workers in the public service, and the necessity for the existence of an inter-state dispute was waived. Otherwise the only departure from the general legislation was to allow the Court to make awards inconsistent with statute, and to provide that all awards should be laid before Parliament for approval before coming into force.

The introduction of arbitration for public servants marked a further step towards the dominance of the idea of public servants' rights as basically similar to those of the rest of the community. Firstly the Commonwealth Government had implied its willingness to assume the same relationship with its employees as was expected of other employers:

> No man that works for an employer in Australia is denied the right to go somewhere else over the head of the employer and ask, "Am I being treated justly? Are my rates of pay and conditions of labour those which ought to obtain?" The 35,000 public servants of the Commonwealth alone are denied that right, and are now being given it.[25]

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[25] W.M. Hughes, Attorney General, Commonwealth Parliamentary Debates, Vol. 63, p. 3632.

Secondly, arbitration implied definite recognition of the right to associate, which had not previously existed, and associations had on occasion met with difficulties through the disapproval of senior officers.[26] Thirdly, public servants gained rights through the arbitration procedure itself, as they now met their employer on equal terms, could press for reasons for decisions and cross-examine the authorities. Finally the rights gained through arbitration award were binding upon the employer indefinitely in the absence of later legislation to the contrary. True the Court had been given no power to enforce its awards, but a later decision of the High Court indicated that awards were recognised as legally binding.[27]

The change in the general nature of public servants' rights was recognised by the Court of Conciliation and Arbitration itself from the first determination for Commonwealth public servants handed down by Mr Justice Higgins in a case brought by the Australian Postal Electricians' Union in 1913. Higgins rejected the view that public servants deserved only low compensation in recognition of exceptional privileges they possessed, or that public servants should possess no

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[26] See G.E. Caiden, The A.C.P.T.A., op.cit., p. 105.

[27] Kay v. Commonwealth, 27 C.L.R. 327 (1920). It was held that an action would lie against the Commonwealth to recover the difference between the salary paid to an officer of the Public Service of the Commonwealth, and that to which he was entitled under an award made by the Commonwealth Court of Conciliation and Arbitration.

rights at all against their employer (although these were qualified through the demands of internal administration) or that political considerations should over-ride the justice of any claim, as unlike the ordinary employer Parliament could reject the award if it thought fit. He made it clear that through the arbitration process public servants could establish rights against the Commissioner, curtailing his discretion. Thus, he awarded certain classes

> a legal right to annual increments, unless in cases where the Commissioner determines that the officer has not been performing his duties satisfactorily... but there is a great difference between this power and the present position, where the officer has no right to the increment unless the Commissioner so determine, for any one of a multitude of reasons.[28]

Similarly he laid down that a higher duties allowance should be granted after one month's acting duty in a higher position, that promotion should automatically follow the passing of certain examinations, and that new salary scales should apply to particular classifications. The Commissioner attempted to by-pass the award by altering the classification, but a further application to the Court by the association ensured that in the future arbitration awards would supersede classifications made by the central personnel authority.

The officers' associations were not on the whole favourable to the idea of arbitration, and it was some time before they took advantage

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[28] Commonwealth Arbitration Reports, Vol. 7, p. 15.

of it. Not only did it mean changes in their organisation to accord with the rules necessary for registration and efforts to formulate plaints, but involved a re-alignment in thinking. It was no longer appropriate to rely upon the Government to recognise rights as a matter of custom and as its duty towards its employees without reference to the rest of the workforce and officers somewhat resented their assimilation to the position of the ordinary employee. Lagging conditions in the public services and the results of the first cases before the Court of Conciliation and Arbitration brought the realisation that through arbitration public servants could gain the same right which had been fought for by employees as a whole - adjudication of disputes by an independent authority, whose determinations were equally binding upon both sides.

The government had not surrendered its right to lay down conditions in the public service, and the introduction of the Commonwealth Workmen's Compensation Act removed another disability from Commonwealth public servants in relation to other employees. All the States except Victoria had Workmen's Compensation Acts applying to private employment, although only New South Wales and Queensland had legislation applying to public employment. It was doubtful if a Commonwealth public servant could sue the Commonwealth Government under the ordinary Workmen's Compensation Acts, and the common law position was unsatisfactory. Certain departments allowed compensation for injury as a general rule,

and others spasmodically, and the amounts necessary to cover the sums paid out had been appropriated annually when towards the end of each session an Officers' Compensation Act was hurried through Parliament. The procedure was open to obvious criticism since there was no certainty that compensation would be granted, only cases reaching the attention of the permanent head and minister were considered, departmental policies varied, no compensation was available for injury short of death or incapacity, and dependants of officers frequently did not even know they could claim compensation. The Commonwealth Workmen's Compensation Act, which was not opposed in Parliament, remedied the situation "not as charity, or even as the result of generosity on the part of the Government, but as a right".[29]

The beginning of the First World War did not mark the end of the development of the rights of Commonwealth public servants. Changes were made through the Public Service Act 1922, the Superannuation Act 1922 and the Public Service (Arbitration) Act 1920, and their subsequent amendments, which will be covered in later chapters dealing with particular groups of rights. Although many of these changes were of considerable importance, they did not alter the general concept of public servants' rights which had emerged during the earlier years. The theory

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[29] A. Fisher, Prime Minister, Commonwealth Parliamentary Debates, Vol. 67, p. 4850.

of privilege had lost its dominance, although echoes still remain in certain quarters. The general view of rights which has replaced it has as its core the notions that public servants' rights should be similar to those of other citizens and employees, and that these rights, expressed in legislation and arbitration awards, may be justifiably upheld by the public servant. The importance of absolute rights which could be insisted upon against the authorities had become evident, but of no less significance had been the development of the rights of the ordinary employee, which transformed what had previously been matters of discretion and privilege in the public service into the accepted conditions of employment which would be rarely denied.

CHAPTER 4

CONSTITUTIONAL RIGHTS

Although the practice of incorporating a Bill of Rights for the safeguard of fundamental liberties has recently become more fashionable in constitutions of countries of the British Commonwealth, the Australian Constitution Act is silent upon such matters. As in Britain, protection of individual rights is left largely to the interpretation of common law through the judiciary, so that citizens cannot claim constitutional rights. A departure from this principle was the constitutional preservation of the rights of officers transferred from State public services to that of the Commonwealth on federation. The wisdom of using a constitution for such a purpose may be questioned.[1]

Constitutional rights may be divided into fundamental, protecting the basic political and civil rights of citizens (such as the right to free speech), programmatic, ensuring the citizen the necessities for a full life (such as the right to education), and preservative, ensuring certain groups perpetuation of their present situation (such as guaranteed minority representation in a legislature). It would appear

[1]Other constitutions which have conferred rights upon public servants have been the German Weimar Constitution of 1919, the Constitution of the French Fourth Republic 1946, and the current Constitutions of Cyprus, Sweden and Norway.

inadvisable to confer the last category of constitutional rights except in cases of extreme political necessity. Because constitutional rights take precedence over all other rights and considerations, and alteration is often made intentionally difficult, changing circumstances may transform legitimate protection of a group's rights into the entrenchment of its privileges. Further, the interpretation of constitutional rights is essentially the province of the judiciary, which may not be suitable to settle this kind of dispute:

> The vaguer the standards to which legislative encroachments on the guaranteed freedoms must conform, the wider will be the field of uncertainty and the scope for speculative litigation. In the process of constitutional interpretation the private philosophies and prejudices of individual judges will inevitably emerge. Decisions in highly controversial cases are likely to be ascribed to the judge's personal predilections... Is it not wiser to leave these matters to be provided for by the ordinary law of the land?[2]

The Origins of the Constitutional Guarantee

The constitutional rights of transferred officers may be traced to the early discussions concerning federation, where discussion arose concerning those employed in departments which would be taken over by the Commonwealth. The principle expressed in the draft constitution presented at the 1891 National Australasian Convention that ' ... all existing rights of any such officers shall be preserved' was familiar

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[2] S.A. de Smith, The New Commonwealth and its Constitutions, London, 1964, p. 169.

in those colonies which had passed public service legislation during the 1880s.[3] As federation drew nearer, the concern of public servants that administrative change might involve deterioration of conditions became more acute, particularly in view of their treatment during the depression. Public service associations regained impetus and pressed their case upon the federalists, who, anxious not to antagonise any section of the population and gain votes in the coming referendum, were willing to allay their fears. The draft constitution presented at the Second Federal Convention in 1897 had, under watchful draftsmanship, apparently absolved the Commonwealth of responsibility for previous obligations assumed by colonial governments by substituting for preservation of the rights of transferred officers Clause 83 stating 'every officer shall be entitled to receive from the State any gratuity pension or retiring allowance, payable under the law of the State on abolition of his office'. By this date leading figures in the federation movement had become convinced of the necessity of assuring 'substantial justice' to the transferred officers, and were prepared to acknowledge some obligation towards them on the part of the Commonwealth.[4] Barton (N.S.W.) proposed an amendment that officers retained in the

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[3] Chapter IV, Clause 5. See Chapter 2.

[4] For example, at the 1897 Convention, O'Connor emphasised that officers should not be placed in an unfair position or lose any rights through transfer, and Barton considered that rights should gradually die out under the Commonwealth so that transfer should not prejudice any officer.

service of the Commonwealth should be 'entitled to retire from office at the time and upon the pension or retiring allowance permitted and provided by the law of the State on such retirement', and an amendment by Deakin (Vic.) extended preservation to the other rights possessed by officers. The final draft of the clause, agreed to at the Third Session of the Convention in Melbourne in 1898 read:

> Section 84: When any department of the public service of a State becomes transferred to the Commonwealth, all officers of the department shall become subject to the control of the Executive Government of the Commonwealth.
>
> Any such officer who is not retained in the service of the Commonwealth shall, unless he is appointed to some other office of equal emolument in the public service of the State, be entitled to receive from the State any pension, gratuity, or other compensation payable under the law of the State on the abolition of his office.
>
> Any such officer who is retained in the service of the Commonwealth shall preserve all his existing and accruing rights, and shall be entitled to retire from office at the time, and on the pension or retiring allowance, which would be permitted by the law of the State if his service with the Commonwealth were a continuation of his service with the State. Such pension or retiring allowance shall be paid to him by the Commonwealth; but the State shall pay to the Commonwealth a part thereof, to be calculated on the proportion which his term of service with the State bears to his whole term of service, and for the purpose of the calculation his salary shall be taken to be that paid to him by the State at the time of the transfer.
>
> Any officer who is, at the establishment of the Commonwealth, in the public service of a State, and, who is, by consent of the Governor of the State with the advice of the Executive Council thereof, transferred to the public service of the Commonwealth, shall have the same rights as if he had been an officer of a department transferred to the Commonwealth and were retained in the service of the Commonwealth.

Apart from the provision for retention of pension rights, the section was vague, and no attempt was made in the debates to define 'existing and accruing rights'. Delegates to the Conventions were not interested in the detail of public service organisation, nor prepared to limit the future Commonwealth Government in its dealings with its employees, and had little conception of any difficulties which might arise. The dominant voices at the Conventions came from those colonies which had fairly recently passed legislation setting out the rights of their public servants, and took little note of the customary practices which constituted rights in the view of public servants under the less formal type of administration in the other colonies. The only opposition to the preservation of rights came from Gordon (S.A.) and Higgins (Vic.), whose respective proposals for compensation instead of preservation of rights and clear definitions with a view to avoiding extensive litigation, were brushed aside, and the problems of dealing with the public service in general were left to the Commonwealth Parliament.

The debates on the treatment of transferred officers' rights in the Commonwealth Public Service Bill 1902 were a combination of reassurance and evasiveness. The constitutional pledge was repeated in Section 60 of the Act, and leading members of the Government promised that public servants would not be treated less generously by the Commonwealth than

they had been by the States.[5] But the relationship between the rights based on earlier legislation and the new legislative arrangements was already causing difficulties,[6] and the Government was cautious when pressed to compensate for the omission of the constitution-makers by defining specific rights.[7]

The Question of the Effective Rights of Transferred Officers

The Government was reluctant to compromise the Public Service Commissioner in advance, so that interpretation of transferred officers' rights was one of the general administrative tasks he faced on taking office. The desire of the Commissioner to unify the Commonwealth Public

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[5] 'We ought to legislate in such a way that transferred officers cannot be placed in a worse position than they would have been in had they continued in the State service...

'The spirit of the Constitution is that they are not only to be preserved in their rights and privileges, but to receive as fair and generous treatment from the Commonwealth as they received from the State Government'.

J.G. Drake, Postmaster General, Commonwealth Parliamentary Debates, Vol. VII, p. 9229.

[6] '... it would really be most inconvenient if the different laws and conditions regulating promotions and salaries which prevailed in the different States were to follow the officers transferred to the Commonwealth ... The sooner it is understood throughout the whole service of the Commonwealth that once a man becomes an officer of the Commonwealth he is under a uniform law, and does not carry with him exceptional advantages gained in the particular part of the continent from which he comes, the better it will be for the service...'

G.H. Reid, M.H.R. for East Sydney, C.P.D., II, p. 2074.

[7] 'No right will be taken away, and the whole of the members of the service must have the same rights, but it is too early to define what these rights are'.

Sir W. Lyne, Attorney General, C.P.D., II, p. 2005.

Service under his own strong direction, together with his general view of public servants' rights as conditional upon individual worth and subordinate to the public interest, resulted in a narrow interpretation, based on the advice of the Attorney General:

> The 'existing and accruing rights' referred to in Section 84 only apply to such absolute legal rights as were capable of enforcement at the time of transfer and... the Constitution merely preserves but does not extend such rights.[8]

However the replacement of the old conditions of work by the uniform administration of the Commissioner's Regulations, which came into force at the beginning of 1903, caused comparatively little protest among public servants as far as transferred rights were concerned, despite the disallowance of 'all sorts of State practices, privileges, permits, indulgences, concessions and discretionary allowances'.[9] Firstly, the regulations themselves were not illiberal and in some cases an improvement upon colonial practices, such as the need in Western Australia for an officer to pay for his own replacement before he could take recreation leave. Secondly they were not very different from those already existing in the larger States. Thirdly, there had never been any question of denial of major rights preserved by the Constitution, such as pensions.

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[8] First Annual Report of the Public Service Commissioner, p. 12.

[9] Ibid.

Difficulties arose less from the reconciliation of diverse statutory provisions than from the alteration of practices and privileges which had been accepted as rights in the laxer, more personal administration of those colonial public services where a firm statutory basis had not been adopted. The legal basis of these practices was at best doubtful; in Western Australia and Tasmania, the legislation of 1900 had received assent or had come into force too late to confer binding rights, and claims for free medical care and extended long service leave by Western Australian officers and gratuities for widows in Tasmania were quickly abandoned in the face of the Commissioner's firm attitude. The South Australian officers' position was somewhat different, as it appeared they could claim rights under the Civil Service Act 1874 and other legislation. In fact by the end of the nineteenth century the 1874 Act covered only a minority of South Australian public servants, but shortly before federation 'provisional and temporary' officers were also classified under the Act, to establish entitlements which had usually been received, but not as a matter of right. The new administration of the Commonwealth Public Service Act and Regulations had the effect of denying their claims to:

(1) Eight months' furlough on full salary after twenty years' service. Section 71 of the Commonwealth Public Service Act 1902 allowed only six months' discretionary long service leave.

(2) The right to continue in office irrespective of age, as no section in the 1874 Act laid down a retiring age. The power of the Governor to request resignation and ultimately to enforce removal subject to compensation had been held to apply only to incapacity as defined by Section 28 of the Act. Section 73 of the Commonwealth Public Service Act 1902 laid down a retiring age of 65.

(3) Increments claimed as the result of action by the South Australian government shortly before federation which had (i) transferred officers from 'provisional and temporary' status, under which they received no increments, to permanent status, and (ii) raised permanent officers at the top of their class to the next higher class, entitling them to increments of £10 p.a. for the next five years.

The South Australian transferred officers, who had previously been able to rely upon customary practices without the need for statutory rights (in fact most 'pro. and tem.' officers had received increments and continued in office irrespective of age) resented the withdrawal of what they held as rights, but their efforts to regain them were confined to representations to the Commissioner and the taking of legal advice on the matter.[10]

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[10] G.E. Caiden, The A.C.P.T.A. op.cit., p. 69.

Another group of transferred officers, from Victoria, had less hesitation in pressing their rights. Among the most blatant of the efforts by State governments to compensate public servants for neglect during the depression years at the least possible expense to themselves by the establishment of new legal rights was the Public Service Act 1900 (No. 1721), passed by the Victorian legislature, Section 19 of which read:

> From the commencement of this Act every officer of the Trade and Customs, Defence, Post and Telegraphs Departments shall be entitled to receive a salary equal to the highest salary then payable to an officer of corresponding position in any Australian colony; provided that this section shall not entitle any officer to receive more than £150 per annum.

Nothing had been done to put the measure into effect when transfer took place, and officers were still being paid the same amount as previously. Repeated claims against the Commonwealth for adjustment were refused, until the Victorian letter carriers, a less conservative group than the South Australian officers, with experience of statutory rights and official hostility, took legal action. E.D. Miller claimed salary up to the date of transfer at the rate of £150 p.a., which was being received by a letter carrier in South Australia, instead of the £90 p.a. he had himself been receiving. The claim was rejected, as the former salary had been achieved through accumulation of increments, but on appeal Miller gained the minimum salary of the class (£100 p.a.)

and his claim against the Victorian Government was validated.[11] He later sued the Commonwealth Government for the increments he had failed to gain in his original action, arguing that through the Victorian legislation he was entitled to the benefits of provisions of law applicable in another State as well as the salary payable, but this interpretation was rejected.[12]

The way was now open for action against the Commonwealth, which was taken by E.M. Bond, another letter carrier, who validated his claim against the Victorian Government and proceeded to action in the High Court to claim arrears of salary between 1.3.01 and 1.9.01 corresponding to the difference between his actual salary of £132 p.a. and £150 p.a. The Commonwealth refused the claim on the grounds that Section 84 of the Constitution was subordinate to Section 52 (ii) allowing Parliament to make laws for the Commonwealth Public Service and Section 83 empowering appropriation for salaries. Further no legal enforceable right existed even under State legislation to a particular salary. The Chief Justice held, however, that Bond had a definite 'existing' right against the Victorian Government which was preserved by Section 84 of the Constitution:

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[11] Miller v. R. (1903) 28 V.L.R. 530.

[12] Miller v. Commonwealth (1904) 1 C.L.R. 668.

> the existing rights of the plaintiff at the time of transfer included... a right to continue to receive a salary at the then existing rate until that rate was lawfully reduced by a competent authority. It was contended for the plaintiff that this latter qualification ought not to be added, because, it was said, the preservation of his existing rights precludes any such reduction. It is not, however, necessary, and, not being necessary, it is certainly not desirable, to consider this question in the present case.[13]

The test came when the Commissioner reclassified the whole Service. Although officers in positions which had been reduced in value retained their actual salary as long as they occupied the positions, and officers in positions which had been raised in value which they were not worthy to fill remained in them pending arrangements for transfer, the Commissioner ignored the effect of Section 19 of the (Vic.) Public Service Act 1900, under which as the result of Bond v. Commonwealth several Victorian officers had been receiving higher salaries than they had in the State service. A test case in the High Court was brought by James Cousins, a letter carrier, who had been paid £132 p.a. by the State, had been held entitled to £150 p.a. under Section 19, and had been reclassified at £138 p.a.[14]

The arguments of each side in the case centred on the nature of officers' statutory rights. The Commonwealth argued that as a salary could be altered by the State at any time, so it could also be altered

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[13] Bond v. Commonwealth (1903) 1 C.L.R. 13, at p. 24.

[14] Cousins v. Commonwealth (1906) 3 C.L.R. 529.

by the Commonwealth, and that all officers' rights were subject to later change by Parliament. Cousins submitted that such an interpretation made Section 84 of the Constitution meaningless, but the High Court based its judgment on an interpretation of Section 19 of the 1900 Act as a temporary expedient fixing the status of officers at time of transfer, beyond which it had no binding effect. As an amendment to be read in conjunction with the (Vic.) Public Service Act 1890, the section was subject to the overall powers of the Governor in Council as stated in that Act to fix salaries from time to time, a power which had now passed to the Commonwealth in terms of the (Commonwealth) Public Service Act 1902.

The apparent paradoxical implication of the case was that while the rights of transferred officers were preserved by Section 84 of the Constitution, public servants had no rights which could not be altered by subsequent statutory enactment, and as this power of change had passed from the State to the Commonwealth, no further attention need be paid to transferred officers' rights. In practice, the judgment did not affect transferred rights already granted, nor the possibility of litigation by individuals where a general right had been conceded but particular circumstances had to be taken into account, but it appeared finally to dispose of the more doubtful claims, prominent among which were those of the South Australian officers.

The Recognition of the Rights of Transferred Officers

The South Australian transferred officers had already suffered infringement of their alleged rights through the administration of the Commonwealth Public Service Act and Regulations. The classification made further inroads into the position they had previously occupied. Not only was the uniform system adopted less favourable to them than the more haphazard, customary arrangements they had previously enjoyed, but they also lost certain emoluments additional to salary. These consisted of a percentage commission on the sale of postage stamps to postmasters, payable under the Post Office Act 1876, and fees for Savings Bank business which postal officials had received from the Trustees of the State Savings Bank. Following the classification the South Australian officers had at last decided to test their rights in the High Court. Two cases were lodged, Pilgrim v. Commonwealth and Howley v. Commonwealth, but upon the decision in the Cousins case in 1906, legal action was abandoned, and the South Australian officers did their best to gain recognition of their rights by other means.

It seemed that in the absence of legal compulsion through the courts of law, which had been abandoned, the South Australian officers had little chance of regaining the rights they had lost. The Commissioner could see no reason to make exceptions in favour of clearly outdated administrative practices with which he was totally out of sympathy and which he had not hesitated to eliminate in other cases

where no constitutional right could be claimed.[15] He had established uniform regulations, certain in their application, and a rational classification, which appeared to meet the needs of the majority of officers, were fair to the taxpayer and represented sound administrative practice. He was prepared to recognise the absolute legal rights of officers, but no evidence existed that the South Australian practices were legal rights, and his view had been vindicated by the Cousins case.

Politically also the position of the South Australian officers was weak. The early Commonwealth Governments saw no reason to override the Commissioner on this matter in the absence of legal compulsion, as they had refused to do so on other matters.[16] They had comparatively little support from other public servants. Even when the attitude of the A.C.P.T.O.A., to which as postal officers the majority of them belonged, changed from caution about 1906, its support was not of an

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[15]For example in Tasmania also no retiring age had been laid down, but no real attempt could be made to claim a right as no legislation existed at date of transfer. The lack of retiring age was less a privilege than a convenient means of avoiding regular provision for the old age of officers.

[16]Both Reid and Deakin had expressed their views on the question of transferred rights. From Deakin's remarks during the Second Federal Convention, and as legal adviser to the Government, it appeared he had thought of the preservation of public servants' rights as merely temporary until uniform conditions could be established, while Reid's opinions voiced during the debates on the Commonwealth Public Service Bill have been noted in Footnote 6.

active kind,[17] although the South Australian officers benefited from the general tactics being used by public servants to draw attention to their cases. On the appointment of the Royal Commission on Postal Services in 1908 officials of the South Australian Posts and Telegraph Association took the opportunity to submit evidence.[18] They pointed out that the emoluments they had received had no more than compensated them for low salaries, that the increments to which they had become entitled on the eve of federation were long over-due because of the hold-up of promotion during the depression; that their right to continue in the service had always been considered as such, while few had any right to retiring allowances; and that the differences between 'provisional and temporary' and permanent officers were only of theoretical and not practical importance. Apart from the justice of their claim on moral grounds, their legal rights had been infringed. The federation debates had clearly shown the intention that transfer to the Commonwealth should not prejudice any officer; the constitutional provision itself did not indicate that preservation of rights was merely temporary; the Commonwealth Parliament through Section 60 of the Public Service Act 1902 had affirmed the binding nature of the promise, while the classification as an act of administration did not constitute a change in the Act and

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[17] South Australian delegates received support at the 1906 Conference, but only in a general way, and no decision was made to act upon the legal advice they had received. G.E. Caiden, The A.C.P.T.A. op.cit., p. 95.

[18] Report of the Royal Commission on Postal Services, p. 1040.

should not be inconsistent with it. Not surprisingly the Royal Commission was not prepared to decide questions of constitutional law, and declined to recommend recognition.

A spark of hope was kindled by the election of a majority Labor Government, and the South Australian officers hoped for some change in attitude in view of the new Government's readiness to over-rule the Commissioner on other issues. Negotiations were initiated with the Postmaster-General and Attorney-General, with a view to settlement of the claims through a mediator, but by the end of 1911 it became clear that the Labor Government had no intention of recognising so-called legal rights whose claimants were unprepared to prove their case in a court of law. Negotiations were discontinued, and the officers looked to the Opposition for sources of support.

Members of Parliament from South Australia were prepared to take up their case and towards the end of 1912, succeeded in debating the matter in both Houses of Parliament. In the House of Representatives, Gordon (Boothby) outlined the course of events since the constitutional promise had been made, and pointed out that promises by the federalists both at the Federal Convention in Adelaide and elsewhere had been broken since officers had suffered loss through federation. He implied that the Government had withdrawn its initial offer to allow arbitration through a mediator and had sheltered behind legal technicalities, refusing to

act except as a result of court action, although it had been admitted that it was within its powers to recognise the claims on its own initiative.[19] Other speakers took up the same theme of breach of faith, whatever the legal complexities, and attacked the Government for its proposal that the officers should take their case to the Arbitration Court although the latter was responsible for its own procedure. In the Senate, Senator Vardon (S.A.) moved that a Select Committee be set up to inquire into the claims, and again stressed that the 1904 classification negated the intentions expressed at the Second Federal Convention.[20]

The Government made little reply to the attacks, beyond indicating that South Australian officers could present their case to the Commonwealth Court of Conciliation and Arbitration, but the reasons for its disinclination to satisfy the claims may easily be inferred. The Labor Government saw no reason to act upon claims which had been steadfastly denied by previous governments, on official legal advice by experts in constitutional law. If any guarantee had been given, it had not been a party to it, and felt no moral commitment on its part to uphold doubtful obligations which leading federalists had for so long been in a position to fulfil themselves. The 'rights' which the South Australian officers were asserting had been claimed by no other group, and

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[19] Commonwealth Parliamentary Debates, Vol. 66, pp. 3231-9.

[20] Commonwealth Parliamentary Debates, Vol. 67, p. 5157.

constituted privileges as against the conditions under which other public servants were expected to work. In the absence of legal proof the Government would not concede that rights existed, although should the South Australian officers succeed in gaining the approval of the Court of Conciliation and Arbitration for their case the Government would honour its commitments. In fact attempts during the First World War by the South Australian officers to gain consideration by the Court failed when it declared constitutional determinations outside its jurisdiction.

After the war the matter was taken up by another association. At its 1919 Annual Conference, the Commonwealth Public Service Clerical Association decided to apply for legal advice on the rights to increments, emoluments and exemption from retiring age. Favourable advice being received on the latter a test case was selected and a writ issued in the High Court against the Commonwealth.[21] F.L. Le Leu a Customs Officer, had received notification of compulsory retirement on reaching the age of 65 on 20.9.1920. He claimed he was entitled to remain in the Service until death, a right preserved by Section 84 of the Constitution and Section 60 of the Public Service Act 1902.

The Commonwealth denied the claim on the ground that:

(i) As the South Australian Civil Service Act 1874 was silent upon the question of retiring age, public servants were dismissible at

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[21] Le Leu v. Commonwealth (1921) 29 C.L.R. 305.

pleasure in the absence of contrary statutory provision; and

(ii) Just as rights under a State statute could be varied by a State Parliament, the Commonwealth Parliament was also free to vary them.

The High Court upheld the claim of Le Leu. It held that Section 28[22] of the 1874 Civil Service Act had implied a definite right to tenure, its terms being incompatible with dismissal at pleasure, and that this right was preserved through Section 60 of the Public Service Act 1902, which dealt specifically with the rights of transferred officers. It therefore dissented from Cousins v. Commonwealth, in which it had been held that other sections of the Public Service Act 1902 over-rode Section 60. In a minority judgment Higgins J. held that the right would have been preserved under Section 84 of the Constitution and distinguished Cousins v. Commonwealth as referring only to salary and to an Act of the Victorian Parliament which could be construed as only temporary in effect.

The Consequences of Recognition

The immediate consequence of the Le Leu case was that Le Leu was re-instated, and other South Australian 'classified' officers (about 300) were allowed to continue in the Service beyond the age of 65.[23] The

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[22] 'The Governor may require any officer who has become incapacitated for the performance of his duties, to resign his office, and, in the event of non-compliance, may remove such officer, who shall thereupon be entitled to the compensation provided by this Act.'

[23] The arrangements made may be found in the 17th Report of the Public Service Commissioner, pp. 11-12.

officers who had been compulsorily retired between 1901 and 1921 lodged claims for compensation, and the basis of damages for breach of contract was decided in Lucy v. Commonwealth.[24] Although the Le Leu case had laid down the general principle that rights which had been binding against colonial governments remained binding against the Commonwealth, the South Australian officers did not attempt to take their other claims, on emoluments, increments or furlough to the High Court, and these were tacitly abandoned.

The reversal of the decision in Cousins v. Commonwealth may be attributed partly to the altered composition of the High Court, and to the changed attitude towards public servants' rights in which the obligations of the state had become more clearly defined. The recognition of transferred officers' rights in general by the High Court brought with it new problems of interpretation. For example what was the effect of State legislation subsequent to federation on transferred officers' rights? Where substantially the same limitation on rights existed in both State and Commonwealth legislation, were differences in procedure as between the statutes of importance? Could powers exercised by a State authority be exercised by a corresponding Commonwealth authority where the powers were identical? In assessing damages should salary be assessed as at date of transfer or at current salary rates?

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[24] Lucy v. Commonwealth (1923) 33 C.L.R. 229.

Some of these questions were never fully answered, but they were complicating factors in the cases which followed.

Le Leu v. Commonwealth did not provoke an overwhelming mass of litigation. The discretionary wording of many State legislative provisions had not yielded enforceable rights, legislation in two States which could have affected transferred officers' rights came into effect too late to do so, Commonwealth legislation in some cases improved upon State conditions, and a major area of rights, that of pensions, had been honoured by the Commonwealth. South Australian officers brought other cases, but the courts showed considerable caution in extending their rights. Thus, Bradshaw[25] brought a case claiming that he could not be dismissed on grounds of incapacity under the Commonwealth Public Service Act 1922 as the 1874 Act vested dismissal for incapacity in the Governor of South Australia, who could enforce it only after requesting resignation. Higgins J. and Isaacs J. were prepared to uphold Bradshaw's claims, as the due procedure had not been carried out, but the majority judgment held that Bradshaw could have been dismissed for incapacity under the State legislation, and had no right to any particular procedure.

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[25] Bradshaw v. Commonwealth (1925) 36 C.L.R. 585.

Other cases failed not on principle, but because on examination the claims of the officers were faulty. Among such failures may be counted Schedlich,[26] a postal clerk, whose right to increments had not been recognised in the 1904 classification, but who was found to have reached the top of his class by transfer so that the increments he had gained since then had not been in virtue of State rights; and Ferguson,[27] whose broken service in South Australia had deprived him of status as a 'non-classified' officer, a class discontinued in 1881, and thus of claiming the life tenure conferred on this class by legislation in 1890.

These two cases follow a pattern of litigation which had been established earlier, where the legacy of colonial maladministration caused difficulty. In this area the courts provided a means of appeal from decisions of the administration, but it is doubtful whether they handled more than a small fraction of the grievances of individual public servants. Most confined their protest to letters to their staff associations which did their best to sift the legitimate claims and contact the authorities, but which were wary of expensive litigation on behalf of causes which would benefit only an individual or perhaps a small group. When cases did reach the courts they were dealt with through strict statutory interpretation. Within this category fall the

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[26] Schedlich v. Commonwealth (1926) 38 C.L.R. 518.

[27] Ferguson v. Commonwealth (1938) 61 C.L.R. 516.

cases of Mason,[28] a telegraph line repairer whose name had been in error included in a list of those exempted from the superannuation provisions of the N.S.W. Civil Service Act 1884 and whose pension on retirement had been diminished in consequence; Hendy-Pooley[29] who in contravention of the 1884 legislation had been employed in a temporary capacity by the New South Wales Public Service for six years before permanent employment and wished to include this period in his pension calculation; and Blaney,[30] the breaks in whose service with the Victorian Government had coincided with the passage of retrospective legislation in 1883 which would have preserved his pension under the 1862 Civil Service Act, thus depriving him of its benefits.

In recognising the rights of transferred officers the decision in the Le Leu case had had the effect of crystallising these rights as at the time of federation, so that subsequent State or Commonwealth legislation was ineffective against them. The principle was still not entirely clear, since the possibility still existed that the rights of the transferred officers could be interpreted as those not at the date of transfer, but those which would have applied had they not transferred to the Commonwealth. The issue was finally decided in the cases which occurred during the Depression, when certain groups of transferred

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[28] Mason v. Commonwealth (1910) 10 C.L.R. 655.

[29] Hendy-Pooley v. Commonwealth (1912) 13 C.L.R. 609.

[30] Blaney v. Commonwealth (1917) 23 C.L.R. 177.

officers claimed exemption from measures taken to reduce salaries, allowances and pensions and to retrench staff.

The first case was brought by Flint,[31] a transferred Victorian officer, who had retired in 1924, and whose retiring allowance, to which he had a right under the Civil Service Act 1862, had been reduced under the Financial Emergency Act 1931. Flint claimed the difference between the amount he had received and the full pension. Had he remained in the Victorian service his pension would have been reduced under the Victorian Financial Emergency Act 1931. The High Court held that the rights preserved by Section 84 were those at a particular period of time, transforming them from ordinary statutory rights capable of change through legislative action, into absolute constitutional rights immune from alteration either by the Commonwealth or Victorian Parliaments. Flint's pension was therefore exempt from any reduction.

The principle was followed a year later in the case of Pemberton v. Commonwealth[32] in which a Victorian postal officer who had been deprived of a pension through an anomaly of nineteenth century legislation had been granted one under the Commonwealth Superannuation Act 1922. He claimed the higher pension which he would have received had he remained in the Victorian Service as the result of retrospective legislation

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[31] Flint v. Commonwealth (1932) 47 C.L.R. 274.

[32] Pemberton v. Commonwealth (1933) 49 C.L.R. 382.

passed by the Victorian Parliament in 1926 to correct the anomaly. The High Court refused to uphold the claim, since no right to the pension existed at the date of transfer, and subsequent action by the State legislature did not fall within the terms of Section 84 of the Constitution.

The policy of retrenchment carried out by the Commonwealth government affected the rights of those South Australian officers, who, though over the age of 65, claimed immunity from retirement in accordance with the decision in the Le Leu case. Retrenchment of these officers took place under powers exercised by the Public Service Board in accordance with the Commonwealth Public Service Act 1922 Section 20, which allowed retirement of excess officers. The action was challenged in a test case brought by Edwards,[33] a telegraphist, whose office had been abolished in 1932 and who was retired soon afterwards. The case was rejected by the High Court on the grounds that under Section 14 of the 1874 Civil Service Act, power existed to alter the establishment of departments and retrench staff. On appeal, however, it was held that under State legislation, retrenchment could only take place where an excess of officers existed in a department taken as a whole, while under the Commonwealth an excess in a particular classification was sufficient. Since Edwards' retrenchment did not fall within the State provision, it was held he had been wrongfully dismissed. The Court avoided considering

[33] Edwards v. Commonwealth (1936) 54 C.L.R. 313.

whether the powers exercisable by the Governor of South Australia could be exercised by the Governor General. Two cases, Ryan and Shephard v. Commonwealth,[34] followed to settle the basis of compensation.

The implication of the Depression cases was that certain officers, by virtue of their constitutional rights could claim exemption from government policy applying to public servants as a whole. The courts were strict in confining the application of the rights to those officers compulsorily transferred at federation, and later transfers or voluntary changes in employment were definitely excluded from its operation. Thus it was ruled that Trower,[35] a Queensland officer transferred to the office of the Director of Lands in the Northern Territory whose employment did not extend from a date prior to federation, and Cosway,[36] a blacksmith whose employment record had followed the vicissitudes of the Williamstown Naval Dockyard, were unable to claim constitutional protection of their rights.

The Impact of Transferred Officers' Rights upon Later Commonwealth Practice

It took until 1960 before it was finally ensured that the constitutional rights of transferred officers had disappeared, and Section 45 of the Commonwealth Public Service Act 1922-59 (which had

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[34] Ryan and Shephard v. Commonwealth (1936) 57 C.L.R. 136.

[35] Trower v. Commonwealth (1923) 32 C.L.R. 585 and (1924) 34 C.L.R. 587.

[36] Cosway v. Commonwealth (1942) 65 C.L.R. 628.

replaced Section 60 of the Commonwealth Public Service Act 1902) was repealed. Section 84 still remains in the Constitution, but its force is spent. The length of time taken for the effects of the constitutional guarantee to disappear may be illustrated by the necessity as late as 1956 to renew the Transferred Officers' Allowance Act, originally passed in 1948, to grant an increase in pensions to Western Australian transferred officers whose pension rights under the 1871 Superannuation Act had been preserved under Section 84 of the Constitution. Their pensions were varied in accordance not with Commonwealth increases in superannuation, but with increases made by the Western Australian legislature. The Commonwealth Government accepted the obligation to increase these non-contributory pensions, but refused to go beyond it to confer the more generous increases which were paid about the same time to Commonwealth officers.

Although the legal obligations of the Commonwealth related only to officers transferred at federation, consciousness of a general obligation to officers transferred from one authority to another remains. The lesson of the constitutional rights however has been learned, and care has been taken to specify exactly which conditions of work, irrespective of their previous legal standing, are considered as rights against the Commonwealth. Thus the Officers' Rights Declaration Act 1928-40 specifies the rights an officer of the Commonwealth Public Service who is transferred to certain Commonwealth authorities takes with him, viz.

leave on ground of illness, long service leave or pay in lieu thereof, superannuation, child endowment, and in the case of female officers, payment on marriage. Alternatively he may elect to become subject to the rule of the authority, and the case of an officer temporarily transferred and then re-employed in the Commonwealth Public Service is also covered.[37] Similarly, in the case of State officers or employees of Commonwealth instrumentalities transferred to the Commonwealth Public Service because of extended Commonwealth functions or re-organisation, provision has been made in the Commonwealth Public Service Act that remuneration should not be less favourable than previously, that prior service should be reckoned as Commonwealth service and that sick leave, recreation leave and furlough credits and entitlements should be preserved.[38] An alternative approach has been taken by the New South Wales Public Service Board when re-organisation involved transfer of employees from different authorities:

> The price of uniformity was to select the best conditions from each service and amalgamate them... Slowly but surely order and uniformity have been introduced, but generally only at the expense of giving much of the best of everything or of recompensing employees for lost privileges in their former employment.[39]

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[37] Officers' Rights Declaration Act 1928-40, Sections 5 and 6.

[38] Commonwealth Public Service Act 1922-60, Sections 81A - 81ZL.

[39] W.C. Wurth, 'Some public service management problems in New South Wales', Public Administration (Sydney), XIX, March 1960, p.36. The reference is to the establishment of the Electricity Commission, involving employees from the Department of Public Works, Sydney County Council, Department of Railways and private power authorities.

CHAPTER 5

RIGHT TO TENURE OF OFFICE

Factors Upholding the Right to Tenure

The need of the state for a permanent specialised workforce on the one hand and for flexibility in accordance with democratic control on the other, are responsible for a distinctive relationship between the state and its employees, expressed in a different form from other types of relationship. The ability of the voluntary association to rely upon the loyalty of its members without the need for formal ties, or the purely monetary arrangement expressed in the contract governing private employment are insufficient to guarantee the needs of the state.[1] Similarly the compulsion which characterises military employment, while it guarantees a permanent relationship, is out of place where civilians are concerned.[2]

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[1] The failure of the concept of contract to meet the situation in public employment may be illustrated by the tortuous legal arguments and uncertainties in common law countries, where attempts have been made to stipulate the contract as the basis of public employment while depriving it of its major characteristics. See Bond v. Commonwealth (1903) 1 C.L.R. 13 at pp. 23-4. In Commonwealth v. Quince (1944) 68 C.L.R. 227 at p. 242, it was held that no contract existed in civil as well as military employment. It has also been contended that the contract relationship is no longer applicable in private employment. See K.S. Carlston, Law and Structure of Social Action, New York, 1956, pp. 245-6.

[2] The compulsory nature of military employment may be illustrated by the case of Marks v. Commonwealth (1964) 38 A.L.J.R. 140, in which it was held that at common law the resignation of an office under the Crown requires acceptance to make it effective.

The common law doctrine of dismissibility at pleasure which is formally accepted in Australia as well as in Britain emphasises the necessity for flexibility in extreme terms notwithstanding the desire for security on the part of public servants and the requirements of a permanent workforce. The common law doctrine has lingered on in Britain, as the strength of the executive has been considered sufficient guarantee of employee security. In Australia the doctrine applies only to officials not appointed under public service legislation who cannot claim the protection of its provisions. The position may be illustrated by the case of Carey v. Commonwealth,[3] in which it was held that the Director of the Northern Territory who had been appointed with a fixed term of office under an Executive Minute had no grounds on which to sue for wrongful dismissal when his appointment was terminated before the term was completed. R.S. Parker has similarly remarked on the weak position of officials in statutory offices subject to removal by Parliament as compared with those appointed under public service legislation, and upon the situation where such officials are expected to act independently in the public interest.[4]

The effect of the statutory procedures safeguarding the security of the Commonwealth officer is to over-ride the common law assertion of

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[3] Carey v. Commonwealth (1921) 30 C.L.R. 132.

[4] R.S. Parker, 'Public Service Neutrality: a Moral Problem, the Creighton Case' in B.B. Schaffer and D.C. Corbett, Decisions: Case Studies in Australian Administration, Melbourne, 1965, pp. 201-222.

dismissibility at pleasure.[5] Therefore although no explicit right to continued employment is to be found in the Public Service Act, it is generally assumed that once an officer has been appointed and served the compulsory probation period, his future career is assured until the age of 60 (optional retirement) or 65 (compulsory retirement) when he will be entitled to a pension augmented by the Commonwealth based on the size of his contributions over his working life, and when he dies his widow will similarly be cared for.[6]

The security of tenure extended by statute is further buttressed by an emphasis on caution, security and order, perhaps resulting from climatic and geographical factors or the attitudes of an originally

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[5] Dismissibility at pleasure has been incorporated into public service legislation in New South Wales, South Australia and Tasmania. In the Commonwealth, the common law position is overruled by the procedures of the Public Service Act..See Gould v. Stuart (1896) 17 N.S.W.L.R. 331 and Williamson v. Commonwealth (1907) 5 C.L.R.:

'It seems to be beyond question that in the case of an officer under the Commonwealth Public Service Act 1902 there is no right to dismiss at will, or otherwise than in accordance with the procedure prescribed in the Act.' (Higgins J. at p. 179)

[6] Superannuation Act 1922-65, Section 37. The same assumption is not applicable to female officers. Upon her marriage a female officer must retire from the Service, receiving a bonus payment according to length of service. Married women may only be retained if there are special reasons in the public interest for doing so. In practice, married women tend to be re-appointed, or initially appointed, in a temporary capacity. The rule is under consideration at the time of writing.

migrant people questing security as a major motive of settlement.[7] The acceptance of the legitimacy of permanent employment in general modifies the exceptional nature of public employment and helps to ensure the security of the individual public servant. The atmosphere of security is enhanced by inbuilt factors affecting a large organisation whose permanence is assured. Minor fault is more easily hidden and responsibility less easy to allocate; complicated processes deter easy dismissal; work relationships tend to be more tolerant and status differentials narrower; and in the face of the general impersonality the small unit acquires its own friendships and interests against the rest of the organisation making strict action difficult as compared with highly personalised medium or small-scale enterprise where employer is clearly distinguished from employee. Further guarantee is extended by the existence of strong public service associations, which protect general job security for their members by insistence on the carrying out of due procedures, and watchfulness against the undermining of conditions. They are prepared to intervene on behalf of the individual member if the latter's case is strong, or where a test case is involved, although they are reluctant to act where an individual is attempting to assert a

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[7] The preference for security appears to be reflected for example in the extent of regulation of industry through enforceable arbitration award, and the premium placed on the continued existence of organisations employing large numbers, at the price of government subsidy for possibly inefficient working.

privilege over other members, or his case is poor and its pursuit may damage good relations with the authorities or other associations. They provide a more powerful voice, a kind of anonymous front for the individual who may find difficulty in defending his own interests or disturbing general smooth running semi-personal relationships of his work situation. It would only be in exceptional circumstances that an individual would venture to challenge the authorities through means outside the public service itself, as to do so would arouse an antagonism which would make concession and compromise almost impossible and strain relationships to such an extent that victory would be of comparatively little advantage, unless accompanied by arrangements for transfer or monetary recompense together with a decision to leave the Service. Such outside sanctions nevertheless provide protection through their existence, and include the normal channels open to any citizen aggrieved by governmental action such as newspaper publicity or approach to a Member of Parliament or political party. Recourse to such channels is rare, not only because of the factors mentioned, but also because of the careful definition of statutory procedures governing termination of employment.

The Limitations to Security

The concept of dismissibility at pleasure is the expression of the subordination of the officer's security of employment to the public good.

The Australian approach is essentially no different, but allows for officers' rights by specifying in legislation the causes for which an officer's services may be terminated, and outlining the procedures which must be adhered to in each case. The remainder of this chapter is concerned with the procedures applicable to the major causes of possible termination of service before normal retirement - retrenchment, misconduct and incapacity.

(a) Retrenchment[8]

It is a well-accepted principle of public service management that the permanent staff should be kept somewhat below strength, and fluctuations in workflow should be dealt with by the employment of temporary staff, who are not given any claim upon continued employment. This practice aims to ensure economy, for only the number of employees required is employed at any one time, while disruption of the major part of the public service through constant turnover of staff is avoided. It has the additional effect of ensuring security to permanent officers by encouraging a cautious approach to the creation of permanent positions. Provision is however made for the Public Service Board to transfer and in the last resort retire officers to even out staffing excesses or

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[8] Strictly speaking 'retrenchment' used only for the compulsory termination of the services of an exempt or temporary employee because his services are no longer required. For the purposes of this discussion the term has been expanded to include the premature retirement of excess permanent officers allowed for in the Public Service Act.

shortages.[9] It is obliged to attempt to find an excess officer a position of equal status; if none is available it may transfer him to a lower position; and only if no position can be found may he be retired from the Service. Such an officer of ten years' standing or more would be entitled to a refund of his contributions to the Superannuation Fund plus the proportional Commonwealth contribution, and if of less than ten years' standing, only to refund of contributions.[10] In practice, permanent officers are not retrenched and when reductions of staff are necessary they are made from among temporary and exempt employees.

The services of temporary employees may be dispensed with at any time, and continued employment is dependent on the annual certificate of the Public Service Board.[11] Nevertheless, because of the long-standing nature of some temporary employment, it has become accepted that temporary or exempt employees do have some claim upon their position. Thus temporary employees of more than five years' continuous service gained superannuation rights in 1942, furlough rights in 1943 and the right to a disciplinary procedure similar to that of officers in 1947. Should retrenchment become necessary, employees are dispensed with in order, co-inciding with the claim it is felt each possesses for continued employment based on a combination of criteria of length of service,

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[9] Public Service Act, Section 20.

[10] Superannuation Act, Sections 50-1.

[11] Public Service Act, Section 82(6).

efficiency and social responsibilities. Those with less than twelve months' service are retrenched first on a 'last on, first off' basis; secondly employees over 65 and married women not dependent on earnings, according firstly to efficiency and in the event of equal efficiency according to length of service; thirdly, other employees listed according to relative efficiency and in the event of equal efficiency, according to length of service, but subject to family considerations and returned servicemen's preference.[12]

Retrenchment becomes necessary because the number of persons employed exceeds that required for the amount of work which has to be done. An overall excess, during a period of expanding government services and general shortage of labour, is less likely than excess employees in particular areas at particular times due to local fluctuations. Another cause, possibly of greater significance in the future, affecting permanent as well as temporary positions, is redundancy through automation of work processes. It is usually accepted that automation should not cause overall unemployment, but may call for redirection of manpower, learning of new skills and so on. In private employment, the employer usually claims to be free from responsibility in this area. In the public sector it may be held that greater responsibility should be assumed by the public employer in view of its promise on recruitment

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[12]General Orders 13/B/1.

of a 'career', because special skills may be involved which had been acquired purely for the needs of the public service and in order to set an example to the rest of the community. In fact it is doubtful whether redundancy in the public service would be met by wholesale retrenchment, which would be contrary to the general assumptions regarding job security. It is more likely that staff would be reduced over time by failing to recruit replacements for those who retired. The problem cannot be considered as one that affects the public service alone, and the matter of rights is affected by government policy in general towards automation, the extent of the problem, the state of the employment market, and the strength and attitude of unions.

Retrenchment may also be caused through government economic policy, as in 1951 when retrenchments were instituted in order to redistribute labour in a period of overfull employment.[13] No permanent staff were involved, but it is a debatable point to what extent the career official should be expected to bear disproportionately the impact of political decisions, or a government should be entitled to use its power as employer as a factor in its economic policy. According to the theory of the sovereignty of the state, or of the law, such action is completely legitimate and it may be argued that the potential insecurity which the officer suffers is similar to that which the private employee

[13] G.E. Caiden, Career Service, Melbourne, 1965, pp. 341-6.

accepts if his employer is unable to remain in business. The public servant has no freehold tenure of his office, and the protection extended to employment has never been comparable to that extended to property, even though each may represent livelihood to its possessor. The subordination to the public interest, as represented by government policy ultimately responsible to the electorate, which is a characteristic of the public service, may similarly be held to govern this area, and it is difficult to find any basis for a right to security in this formulation. Nevertheless, should such a practice become frequent, effects on morale within the public service could be serious,[14] and the restraints which should characterise the use of power in a democracy may be held to have been infringed. The security which provides the basis of loyalty within the public service should not be lightly undermined for reasons not connected with the individual officer's conduct and efficiency.

(b) Misconduct[15]

The fundamental principle which governs the treatment of alleged misconduct in the Commonwealth Public Service is that

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[14] See F.M. Marx, The Administrative State: An Introduction to Bureaucracy, Chicago, 1957, p. 99.

[15] Discussion includes general disciplinary procedure, which is almost identical whether it results in dismissal or a lesser penalty. Problems of the definition of misconduct and types of misconduct not subject to the normal disciplinary procedure, including the questions of loyalty, criminal offences and strikes, have been given more detailed study in a later chapter.

> No officer may be punished or dismissed without a full inquiry and proper consideration of the reasons for his offence.[16]

Attempts to establish entitlement to regular non-personalised processes of disciplinary appeal were an early subject of legislation in Australian colonial services, and the principle is now interpreted as the right of an officer to appeal to a specially constituted tribunal against the authorities which originally charged him with the offence.

The disciplinary appeal procedures enjoy considerable confidence, due only in part to the nature of the formal procedures themselves, defects in which are compensated by the manner in which appeals are conducted. The boards of appeal or inquiry,[17] like those in the State public services, contain an elected representative of the public servants, so that discipline ceases to be a matter solely for senior officers in their discretion; a departmental representative, who is not the charging officer; and a legally qualified chairman. The members are under oath or affirmation to perform their duties and exercise their powers 'without fear or favour affection or ill-will',[18] and although complaints have

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[16]Training Document No. 1, Public Service Board, p. 27.

[17]First Division officers are entitled to a board of inquiry if they deny the truth of a charge, and punishment is recommended by the Public Service Board to the Governor-General. The composition of the board of inquiry is not specified in the Public Service Act and Regulations, except that it should not include the person by whom the charge was made.

[18]Public Service Act, Fifth Schedule.

occasionally been made that the departmental representative may have knowledge of the case before it comes before him, the seriousness with which the obligation is taken and a certain awareness of the role expected, irrespective of that assumed outside the hearings of the board, make for impartiality in practice.

The disciplinary appeal process is isolated from the normal departmental administration on the one hand and from the courts of law on the other. In some State services[19] the appeal tribunals are organised under separate legislation and fulfil purposes other than disciplinary appeal, while in New South Wales and South Australia, the chairman is not a public servant but a member of the judiciary. In the Commonwealth the separation is not carried as far, and usually all the members of the tribunal are public servants, but the tribunal's decisions are final and cannot be changed by the Public Service Board, except in the case of a recommendation to dismiss.

No further appeal may lie from a board of appeal or inquiry, and the extent to which decisions are subject to judicial review through common law action for breach of statutory duty, prerogative writ or declaration is unclear. The former would only lie if the statutory procedure had been carried out incorrectly. The prerogative writs only lie where the

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[19] New South Wales, Western Australia and Tasmania.

'rights of subjects' are affected, and at common law apart from statute, public servants have no enforceable rights.[20] The Supreme Court of New South Wales has asserted its authority to intervene by way of judicial review of decisions made by the New South Wales Crown Employees Board[21] and it has been suggested that similar considerations would also apply to similar Commonwealth tribunals.[22] It has also been suggested that

> a tribunal's decision is immune from attack provided that it 'is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body'.[23]

A proliferation of appeals does not necessarily ensure fairness, and in any case the tribunal, like those in the State public services, is directed to investigate the case before it

> without regard to legal forms and solemnities and to direct itself by the best evidence which it can procure or which is laid before it, whether the evidence is such as the law would require or admit in other cases or not.[24]

Although the board is given power to decide its own procedure, the officer has certain minimum rights. He must be given the charge and have

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[20] R. v. Metrop. Police Commissioner ex parte Parker (1953) 2 All E.R. 717.

[21] Ex parte Wurth re Tully (1954) 55 S.R. (N.S.W.) 47. However the C.E.A.B. differs from the Commonwealth tribunals because of the judicial element in its composition and the requirement for it to keep a written record.

[22] W. Friedmann and D.G. Benjafield, Principles of Australian Administrative Law, Sydney, 2nd ed., 1962, p. 166.

[23] R. Anderson 'The Application of Privative Clauses to Proceedings of Commonwealth Tribunals', University of Queensland Law Journal, Vol. 3, p. 51, 1956-9.

[24] Public Service Act, Section 57(2).

time to prepare his case; he is entitled to legal representation, to receive copies of documents where practicable seven days before the hearing, to receive at least seven days' notice of hearing, and to refuse to answer any question which would tend to incriminate him. He is not entitled to receive a written record of proceedings, to know reasons for the decision, or to appeal against (a) his punishment (b) a decision that his appeal was 'frivolous or vexatious' so that he becomes liable to pay all the costs of the case (c) an order by the Public Service Board on the recommendation of the Chief Officer that his salary be forfeit during a period of suspension (d) non-recommendation of payment of expenses where a charge is not proved.

Despite the establishment of judicial type procedures which are distinct from departmental administration, discipline in both Commonwealth and State public services remains primarily a function of the department and the extent of the powers which may be exercised by authorised officers without appeal varies. Offences are generally divided into minor and major categories. In the case of the former, the Chief Officer of a Commonwealth department or his delegate may reprimand the officer or fine up to 10/-. In Tasmania and Victoria fines may also be imposed[25] but in other States only reprimands may be issued.

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[25] In Tasmania up to £1 and in Victoria up to £5 with right of appeal to the Minister.

The summary procedure is abandoned where the offence is deemed more serious, a formal charge in writing must be issued, and the officer may be suspended from his duties. The Chief Officer, on receiving the reply to the charge, may then inflict a full range of punishments against which the officer may appeal except in the case of a fine of £2 or under. In the State services, the powers of departments, after laying the charge, are more restricted: in New South Wales, South Australia and Victoria, power exists only to refer the charge to the Public Service Board; in Western Australia a fine up to £10 may be inflicted with appeal to the Public Service Commissioner and in Tasmania a fine up to £5 with appeal to the Public Service Appeal Board only if the fine is above £2. Commonwealth procedure therefore differs from that of other Australian public services, in that initial punishment is decided within the department, and no appeal is allowed against a fine. These differences are not of great significance, firstly because the organisational context within each service varies, making strict comparison difficult, and secondly because, although a fine is recorded in the officer's personal record[26] the actual amount of fine against which there is no appeal, is, in terms of Australian salaries and spending habits very small, and would be considered analogous to similar summary fines for motoring offences.

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[26]The record of punishment for a minor offence is kept for 2 years, and for other than a minor offence for 10 years. Regulation 24.

The major characteristics of the Australian methods of dealing with misconduct are the formal right of appeal given to the officer, and the domestic nature of the proceedings. The result is a compromise between the rigid formal procedure of the courts of law and the arbitrary discretion of the superior officer, between the rights of officers and administrative expense and convenience. Present processes, whatever formal loopholes may exist for injustice, are generally considered to work smoothly and protect officers' rights.

(c) Incapacity

Before permanent appointment to the Service, officers are required to pass a medical examination so that it is hoped every recruit will be able to perform his duties to retiring age. It may be necessary, however, to retire officers prematurely if, due to invalidity, they become unfit to carry out their duties efficiently. Statutory procedure demands merely that the Public Service Board may, after report from the Chief Officer of the department and an investigation, retire the officer.[27] This procedure has been supplemented by provisions which make every effort to ensure the invalided officer receives full consideration. Before reporting to the Public Service Board, the Chief Officer must receive a report on the officer from the Commonwealth Medical Officer, and if permanent incapacity is indicated, the Chief Officer must inform the

[27] Public Service Act, Section 67.

officer of his intention to recommend retirement and his right to submit within a specified time a written statement setting out reasons why such action should not be taken, which is forwarded to the Public Service Board. Usually retirement on invalidity will only be considered where an officer has been ill for a prolonged period and consequently has exhausted much or all of his credits for sick leave with pay. Departments are therefore exhorted to take care that no officer is left without income due to any gap between exhaustion of sick leave and commencement of superannuation payments, if necessary by taking advantage of powers under the Public Service Act to pre-date retirement before completion of formalities (but only with the officer's consent).[28] Where an officer is retired on grounds of incapacity not due to his own fault, he is entitled to a full pension[29] and is deemed to be on leave without pay, so that if he is reappointed, the period of retirement is not calculated as a break in service. The Public Service Board has power to re-employ a retired officer if it thinks his health is sufficiently improved, in which case the pension ceases, but only if the officer is receiving not less than two-thirds of his previous salary, or a salary as agreed. Similarly if the retired officer finds other employment or is re-employed in a temporary capacity, the pension

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[28] General Orders 3/E/4.

[29] Superannuation Act, Section 45.

may be suspended if he earns more than two-thirds of his previous salary.[30] In addition if invalidity was caused by injury by accident 'arising out of or in the course of his employment', the officer is entitled to receive compensation in accordance with the Commonwealth Employees' Compensation Act 1930-62. The term 'injury' has been extended to cover sudden illness as well as accident, if this occurs at a compensable time, although the matter is still in some doubt.[31]

The provisions of the Public Service Act concerning incapacity are primarily intended to cover invalidity, but Section 67 also covers inefficiency or incompetency, where the same statutory procedure is applicable. The officer has the same right to show cause why he should not be transferred or retired. Occasional complaints have been made that this procedure is used to by-pass the procedure on misconduct, and that it violates an officer's rights as his file is not disclosed to him, nor is he allowed appeal against the decision of the Public Service Board. These criticisms become of less consequence when the nature of reasons for termination and prevailing mores in the public service are considered. The judicial procedures which are suitable when it is necessary to decide whether a definite offence has been committed and what punishment should be allotted, irrespective of organisational considerations, may be less

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[30] Ibid., Sections 64-5.

[31] P. Gerber, 'The Concept of "Injury" in Commonwealth Employees' Compensation Legislation', University of Queensland Law Journal, pp. 432-50, Apr. 1964. See Chapter 8 for fuller discussion.

appropriate when the apportionment of blame is of less consequence than assessing the impact of an officer's manner of carrying out his tasks on the organisation of which he is a part. Further, it is likely that considerable tolerance would be shown towards any individual who for reasons of health or otherwise was failing to meet accepted standards in performing his duties. Work performance is often difficult to assess; it is possible environmental factors are responsible for slowness, carelessness and so on; superiors are reluctant to single out a person lest blame for conditions should rebound upon themselves; the decision to retire a person must be made by a number of authorities; and in the prevailing atmosphere of security and routine, in the absence of profit motive, preference would be not to sacrifice the individual except in extreme cases, or where retirement was obviously in the interests of the officer himself.

The experience of the Commonwealth Public Service in guaranteeing security to its officers while retaining the right to terminate their services in particular specified circumstances, demonstrates that it is possible to bring this area under the rule of law. The overall discretion held necessary to enable the state to exercise its sovereignty may be replaced by listing the causes for which termination of services may take place. Such an approach enhances the rights of

officers, as cause must be assigned before termination of services may take place, and a definite procedure must be followed, eliminating the personal element in administering the provisions, and as a minimum involving collective decision-making. Although in practice the causes listed for termination of services may be comprehensive, and although the actual procedures involve considerable discretion on the part of the authorities, so that it would be difficult for any officer to challenge the administration through the courts except on technicalities, the legal rights conferred by the legislation are not without effect. The active intervention of the courts of law has been avoided, in view of their expense and technicality, the unwillingness of the officer to use such machinery, and their inherent unsuitability to decide matters of administration, but they remain as a sanction for the observance of due procedure. Essentially the security of the individual officer depends upon administrative and not judicial processes, and the general acceptance of the fairness of these procedures rests to a large extent upon the manner in which they are carried out.

CHAPTER 6

CAREER STRUCTURE

The Nature of a Career

The concept of a career service is a logical development from the security of tenure offered in the public service. The public servant demands not merely guaranteed employment to retiring age but the opportunity of rising in status from initial entry level according to ability and effort. To the public employer the career concept provides a means of attracting and retaining able employees, furnishing an incentive to maximum effort and filling the higher positions according to merit.

The public service tends to be distinguished from other organisations by the potential career it offers its officers. This career tends to be characterised by the same preference for uniform regulation as opposed to haphazard practices which permeate its methods of work in the conduct of public business as a whole. The tendency is strengthened by the permanent nature of employment which makes the area of advancement of acute importance to individual and organisation alike; by the scale of governmental organization; and by the self-regulating nature of personnel administration implying that decisions as to advancement are made by officers themselves so that interests in the process are not

sharply divided and uniform criteria tend to be preferred to invidious distinctions among colleagues.[1] In the formal career structure which results, the rights of officers may be conceived in terms of the safeguards surrounding their positions, the operation of a merit system (as opposed to favouritism, patronage etc.) governing selection for higher positions, and over and beyond these, though influencing their nature, the possibilities open to the individual to challenge the decisions by the authorities regarding his future career.

The establishment of rights of the last kind within the career structure of a public service raises many problems. Firstly, the number of higher positions available depends upon organisational demand, ultimately decided by political decision. Their inevitable limitation - not everybody can get to the top - must result in competition by officers to achieve them. Consequently, unlike other rights which lie solely against authority, these affect other officers also, and it is extremely difficult to satisfy all concerned that a correct choice has

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[1] H. Finer contends that in private employment 'a certain ruthlessness is exercised by both employers and employed. The employer wants the best person at the top and the worst at the bottom, and the immediate index of the rightness of choice is the profit-and-loss account. Further, the relationship between employer and managers, and often even with individual workers, is close enough for the employer to sum up personal qualities. Nor is there any sense of colleagueship to prevent the expression of such a judgment. The tradition and spirit of private industry is all against it.' The Theory and Practice of Modern Government, New York, 1949, p. 848.

been made. Secondly, intrinsic difficulties exist in selecting an individual for a new work situation and particular administrative unit. It involves the prediction of performance and personal suitability which cannot be divorced altogether from personal factors. The results of selection cannot be assessed by objective criteria, and there is no means of deciding whether the 'right' choice has been made, as the personal and organisational factors which affect such a judgment remain fluid and unforeseen. Thus it has been contended that the concept of individual rights is inapplicable to this area because of its intrinsic uncertainty and the need to balance conflicting sets of rights which can never be completely accommodated, in particular those arising from efficiency and seniority. Further, the quest for an illusory perfect justice may involve adverse effects upon morale and discipline and result in rigidities in the system unsatisfactory to both organisation and individual alike.

If it were impossible to apply this concept of rights to the career process, there would be little point in discussing the subject any further. However if the aim of law and administrative arrangements is to satisfy human wants rather than establish a perfect justice, the incorporation of rights within any system of organisation depends less on abstract argument than on the practicalities of the situation. It is indeed the intrinsic uncertainties in the selection process which stimulate a demand for rights, as the individual feels he has as good a

claim to judge the issue as those in authority and is suspicious of arbitrary decision and conscious or sub-conscious bias on the part of the selector. On the other hand, the administrator asserts the desirability of being allowed to choose those with whom he has to work. The dual purpose of the career process - meeting the individual's desire to progress upwards and the organisation's need to fill positions - results in differing sets of criteria by which it may be judged, and although these co-incide to some extent, at certain points they remain irreconcilable. Resulting procedures form a compromise.

In the Commonwealth Public Service, the emphasis on officers' rights is reflected in two main ways. Firstly, classification is based upon the position, a group of duties, and not the officer personally. To each position is attached a salary scale, whose maximum is reached by annual increments, allowing limited advancement within the position. Rights arise from the impersonality of the system, the rules observed in relating position to salary and qualifications, and the guarantees of status implied in the position. Secondly, officers are eligible to advance according to merit from the base grades to the top positions. In practice, the Divisions into which positions are grouped form barriers based on educational qualifications, and further limitations exist through the extent of lateral recruitment in the higher grades, and the need for technical qualifications in certain areas. Temporary employees are excluded from the career structure while women tend to

be confined to particular female occupations, which are generally regarded as carrying only limited career prospects. Rights arise from specific safeguards connected with selection for promotion from lower to higher positions.

Rights within a position

To the officer his position is of vital importance as it determines his duties, remuneration, status and prospects, his rights to which have been defined, safeguarded and limited by statute, regulation and arbitration award.

(i) Right to a position

No officer has an absolute right to his position as the distribution of positions depends upon organisational needs. Powers therefore exist to create and abolish offices (Section 29, Commonwealth Public Service Act), to transfer excess officers (Section 20) and to transfer officers temporarily from one department to another 'in the interests of the Commonwealth Service' (Section 51). Although organisational requirements take precedence over personal preference, the officer is not without rights, as removal to a position lower than the one he occupies is usually regarded as a punitive measure. Section 52(2) makes refusal to comply with an order of the Public Service Board directing removal from one position to another of equal or higher status a breach of the Public Service Act, implying there is no

obligation upon an officer to accept a lower position.[2] An officer has a right to appeal to the Public Service Board against a promotion or transfer which is not to a position of equal importance, involves pecuniary loss or to which he objects for 'other cogent reasons' and if the Board finds the objection well-founded, he may be permitted to decline without prejudice 'to his right of future promotion or transfer' in accordance with Section 52(1) of the Public Service Act.[3]

(ii) Right to remuneration

According to British common law a public servant has no enforceable right to his pay.[4] In the Commonwealth Public Service, the officer may rely upon statutory right for his salary, since the Public Service Act provides for mandatory payment of salaries (Section 30), such payment being dependent on Parliamentary appropriation for the purpose (Section 90).

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[2]This refers only to transfer from one position to another, as Section 20 clearly covers transfer of an excess officer to a lower position. Of course, an officer is always free to resign rather than accept the position offered.

[3]Regulation 111.

[4]Lucas v. Lucas and the High Commissioner for India (1943) 2 A.E.R. 110.

In spite of early doubts on the matter,[5] the necessity for Parliamentary appropriation, is not usually brought forward by the Commonwealth as an objection to monetary claims on the part of public servants, once these have been legally proved on other grounds.[6] Acceptance of the principles of public service arbitration implies the honouring of awards in spite of Parliamentary authority to reject the award as such. Legally it has been held

> 'that an action will lie against the Commonwealth to recover the difference between the salary paid to an officer of the Public Service of the Commonwealth and that to which he was entitled under an award made by the Commonwealth Court of Conciliation and Arbitration pursuant to the Arbitration (Public Service) Act'.[7]

The Commonwealth public servant is entitled to receive his salary in full, subject to deduction for taxation, in the same way as any other employee. Certain statutory deductions may be made e.g. fines for

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[5] In Miller v. R. (1903) 28 V.L.R. 530, the lack of Parliamentary appropriation was not held to affect the validity of a claim for arrears of salary due under statute, following Fisher v. Reg. (1890) 26 V.L.R. 781. In Bond v. Commonwealth (1903) 1 C.L.R. 13, Section 78(1) (corresponding to Section 90 of the current Public Service Act) was not held to debar the operation of a constitutional provision 'as a charge upon the Commonwealth Revenue of a sufficient sum to give effect to it, and as a sufficient authority to the Executive Government of the Commonwealth to make the necessary payments to the persons entitled to receive them.' In Cousins v. Commonwealth (1906) 3 C.L.R. 529, these precedents were overruled, but this was not the main ground for rejecting the case.

[6] E.g. Lucy v. Commonwealth (1923) 33 C.L.R. 229; Ryan and Shephard v. Commonwealth (1936) 57 C.L.R. 136.

[7] Kay v. Commonwealth (1920) 27 C.L.R. 327.

disciplinary fault, amounts to satisfy court judgment for debt, but the amount which may be deducted is limited.[8] Additions to salary may be made by way of allowances. Under Public Service Regulations, right to allowances usually only exists where these are intended to re-imburse expenditure clearly incurred in performing duties. Where any doubt may arise as to the exact circumstances which may result in a claim, the authorities have retained discretion in granting the allowance.[9] Provisions for allowances are modified through detailed arbitration awards, which may or may not over-ride the discretion of the authorities as to whether an allowance should be granted at all.

(iii) Right to higher duties allowance

The main significance of the position concept is that the public servant is allotted certain duties for which he is paid a certain salary,

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[8] In relation to deductions for overpayment of salary in error see E.E. Crichton, 'The Case of Miss Sonja Haansen', in B.B. Schaffer and D.C. Corbett, Decisions: Case Studies in Australian Administration, Melbourne, 1965, pp. 244-55.

[9] Mandatory allowances include overtime payment, higher duties allowance, meal allowance, travelling time allowance, travelling allowance, allowance for relieving officers, allowance additional to fare, allowance for camping, allowance in lieu of quarters for postmasters, removal expenses, allowance to married women on retirement and allowance to married minors.

Discretionary allowances include allowances to persons sleeping on office premises, shipkeeping allowance, travelling allowances in New Guinea, forage allowance, car or cycle allowance, allowance for cleaning and lighting, education allowance for lightkeepers, living away from home allowance, allowance where officers are unable to find quarters, and district allowances.

and is not expected to perform other duties. The origins of this principle may be traced to the bitter experiences of the early years of the Commonwealth Public Service when officers were expected to perform duties of positions higher than their own for long periods of time, although promotion was denied. The situation was ameliorated by the introduction of a regulation in 1911, providing that an allowance be paid to those who acted in a higher position beyond six months, but the principle was developed through public service arbitration.[10]

Regulation 87, which corresponds to the provisions of the current General Conditions of Service Determination,[11] sets out the detailed rules covering the right to higher duties allowance. An officer who performs all the duties of a higher office for more than one day is entitled to be paid the difference between his salary and the minimum of the higher class, although higher paid officers must serve a week in the higher position in order to become eligible. Above a certain salary level, any allowance is dependent on the discretion of the Public Service Board. While acting in a higher position an officer is entitled to receive the increments of that position if he serves for long enough, and special provision is made for broken service. If an acting officer is

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[10] See Chapter 3, p. 73.

[11] The General Conditions of Service Determination incorporates the identical provisions of a large number of awards in order to ease reference. It does not apply automatically, but covers a large number of current awards.

permanently promoted to the office, he may not suffer reduction in salary as a result, by being made to start at the bottom of a class in which he has already built up increments. The choice of officer for temporary transfer to higher work is also carefully regulated.[12] For transfer up to one month the senior efficient officer is selected, but where higher duties are to be performed for more than one month, the most efficient available officer is chosen, and the same appeal procedures operate as in the case of promotion.

(iv) Right to increments

Limited advancement in salary is assured to the officer through the annual increments attached to his position. Under the Public Service Act 1902, the incremental scales were relatively long, and had increments been granted purely on the grounds of satisfactory service as intended, they would have provided a guaranteed career within a position. The interpretation of the Public Service Commissioner had the effect of limiting the scales, so that increments above a certain point became exceptional. The reversal of this interpretation through public service arbitration was short-lived, since the Public Service Act 1922 substituted short over-lapping salary ranges for the long incremental scales. Although increments could now be regarded as virtually automatic, the limits were reached comparatively quickly, and for advancement, an

[12] Regulation 116.

officer had to seek promotion. Through arbitration, the classification in the Fourth Division was restored to the previous position, but in the Third Division short salary ranges remained, although during the 1960s efforts were being made by the Public Service Board to rationalise the situation by broad-banding.

Increments are granted in recognition of increased proficiency, and right to them depends on the 'conduct, diligence, efficiency or attendance for duty of an officer'. An officer who is refused an increment is entitled to receive from the permanent head of the department a copy of the order denying payment and a statement of reasons for the decision. Within seven days he has the right of appeal to the Public Service Board.[13]

Rights within the promotion process

The extent of advancement within a position is not great, and to further his career an officer must seek promotion to a higher position. Rights have taken the form of spread of responsibility for choice including provision for staff participation, thus wresting power over the careers of officers from the authorities alone, and the establishment of definite criteria for advancement as opposed to individual discretion. Concern with promotion processes ante-dates the establishment of the

[13] Public Service Act, Section 31, and Regulation 114.

Commonwealth Public Service, and although right of appeal was accepted from the beginning it was not considered effective for over forty years. The fate of Section 50 of the Public Service Act 1902 illustrates both the anxiety of officers to establish effective appeal rights and the wariness of the authorities in granting them.[14] Section 50 had provided for general appeal to an advisory board by officers against recommendations affecting them to the Governor General, but power over promotion remained solely in the hands of the Commissioner, and loose drafting made it possible for him to refuse to consider appeals.

It was not until 1914 that the legality of the Commissioner's ruling was challenged. A case was brought by P.H. Killeen, who had been passed over in promotion by a junior officer, and whose appeal under Section 50 as an 'affected' officer had been refused hearing by the Commissioner. The High Court was called upon to consider the general interpretation by the Commissioner of the word 'affected' as confined to circumstances in which 'the officer's status in the service is altered to his detriment'. Although the Chief Justice upheld the Commissioner's view, the majority held that Killeen was 'affected' as 'the loss of eligibility is a real deprivation, and whatever deprives an officer of the capacity of advancement necessarily affects him prejudicially'. However, as the

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[14] See Chapter 3, pp. 60 and 65 for a description of the origins and early administration of the provision.

position was now filled, mandamus to compel the Commissioner to hear the appeal was held to be futile, and the High Court could offer no remedy.[15] Greater satisfaction resulted from a case brought by P.A. O'Brien, who had been denied the right to appeal against being passed over as the most efficient officer. The High Court held that O'Brien was entitled to appeal and had made out a case for relative efficiency.[16] However the High Court continued to take each case on its merits, refusing to lay down any general principle as to the interpretation of the word 'affected'. Thus, when Kenny who had successfully won an appeal under Section 50, and was consequently recommended for promotion, attempted to appeal against cancellation of the recommendation when an excess officer was transferred to the position in question, the High Court, with the dissent of Higgins J., held he was not 'affected' under the Act.[17] More serious was the administrative obstacle to appeal against which the favourable court rulings had provided no remedy. Unless the officer concerned knew of an adverse recommendation to the Governor General, he was obviously unable to appeal against it, and as officers were generally not notified until the recommendation was accepted, the right of appeal was virtually

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[15] R. v. Public Service Commissioner for the Commonwealth of Australia ex parte Killeen (1914) 18 C.L.R. 587.

[16] R. v. Public Service Commissioner for the Commonwealth of Australia ex parte O'Brien (1919) 26 C.L.R. 380.

[17] R. v. Acting Public Service Commissioner for the Commonwealth of Australia ex parte Kenny (1922) 30 C.L.R. 343.

useless. In any case final determination of the appeal rested with the authority originally responsible for the promotion.

Section 50 disappeared with the repeal of the Public Service Act 1902, but its legacy remained in the desire of public servants to gain effective appeal against decisions affecting their careers. The Public Service Act 1922 gave the Public Service Board power to make promotions and also hear appeals. In 1924 the Act was amended in conformity with its original plan, so that promotions were made within departments subject to appeal to the Public Service Board.

Dissatisfaction continued for in spite of the provision for appeal, decision remained in the hands of the authorities and the whole process was carried out in secret. The only right an aggrieved officer had was to submit a written statement to be forwarded through the department to the Public Service Inspector who dealt with it as he saw fit and recommended accordingly to the Public Service Board. The system was based on confidential reports which could not be challenged by the officer concerned, and the public service associations pressed for an independent appeal authority. In spite of increased discontent and association pressure during the depression, no change was made in the system until the end of the Second World War. The expansion of the Service, the enhanced strength of the associations in common with the rest of the labor movement, the appreciation of the Labor government

for the co-operation of the associations during the war, and the contribution of several associations to the gaining of a Labor victory provided the opportunity to achieve reforms. A Committee of Inquiry (Bailey Committee) was set up, including senior officers and association representatives, and its recommendations which were incorporated without further discussion in the Public Service Act 1945 form the basis of current rights.[18]

Rights within the promotion process vary according to the position involved. In certain designated positions, where, because of the nature of the work, it would be extremely difficult to distinguish between officers on the basis of merit, promotion lies to the senior efficient officer.[19] Once seniority is calculated (according to detailed regulations) an automatic criterion is available, ruling out bias or favouritism on the part of the selecting officer. In other cases, apart from the First Division,[20] promotions are made on a provisional basis only, according to relative efficiency, or, in the event of equal efficiency, relative seniority, by the permanent head of the department in which the vacancy exists. If the position is advertised and the

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[18] See G.E. Caiden, Career Service, Melbourne, 1965, pp. 293-7.

[19] Public Service Act, Section 50 (3A) and Regulation 109G.

[20] Appointments and promotions in the First Division are made by the Governor General on the recommendation of the Public Service Board and appointments to the position of Permanent Head may be made without reference to the Public Service Board. (Public Service Act, Section 54).

senior applicant is not promoted, he is entitled to be informed of any specific adverse matter decisive against his selection - a right somewhat difficult tc enforce.[21] Any officer who feels he is superior in efficiency to the officer promoted, or is of equal efficiency but senior in status, may appeal to a Promotions Appeal Committee.[22]

Promotions Appeal Committees exist in each State, the Australian Capital Territory and the Northern Territory. Each consists of a Chairman appointed by the Public Service Board (in Queensland, South Australia, Western Australia and Tasmania, the Public Service Inspector), an officer nominated by the permanent head of the department in which the provisional promotion was made, and an officer nominated by the appropriate organisation. Members of a Promotions Appeal Committee are under oath to perform their duties 'without fear or favour affection or ill-will'[23] and are empowered to make inquiries 'without regard to legal forms or solemnities'.[24] A Promotions Appeal Committee has power of final decision over appeals below a certain salary level where the appeal concerns only one State. Where the office concerned is above a certain salary, or an inter-State appeal is under consideration, the

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[21] Regulation 108B.

[22] Public Service Act, Section 50(5).

[23] Public Service Act, Sixth Schedule.

[24] Regulation 109F.

Committee may only report and recommend to the Public Service Board which makes the final decision.

The formal requirements of the appeal process are slight and it is not surprising that from time to time efforts have been made to extend rights. Suggestions have been made to formalise the procedure by which the departmental nominee is chosen; to raise the salary limits within which the Committees have final decision; to place final decision for inter-State appeals with a Central Promotions Appeal Committee instead of the Public Service Board; to grant appellants fuller access to documents, information regarding the position and details of other appellants, the right to refute points made against them or fresh evidence arising in the course of inquiries, and entitlement to a personal hearing.

It is generally acknowledged that formal rules alone cannot eliminate prejudice or abuse. The rights embodied in the promotion process rest less on procedural requirements than upon the way in which it is accepted that they should be carried out. The perception of their role by the members of a Promotions Appeal Committee, especially of the staff representative, is a crucial factor. While participants accept the principle that promotion should be in the best interests of the public service, fair procedures are held to be of equal importance and contribute to the same object.

It is difficult to assess the extent to which the rights available to officers arising out of the career structure, particularly those relating to appeal, are satisfactory either to the authorities or to the individual officers. Such an assessment would require detailed research into organisational goals on the one hand and individual opinions on the other, beyond the confines of this study.[25] It is suggested however that acceptance of these rights may be related to attitudes affecting also other areas of administration such as preference for impersonal procedures and collective decision-making, embarrassment in confronting a fellow officer with unpleasant personal facts, as well as suspicion of unchecked authority. In the Australian context they represent an extension of the procedures ensuring regularity in personnel administration, and while it is unlikely that any change will take place in the direction of further individual rights, it is doubtful whether any limitation in the interests of administrative flexibility will take place, although modifications in the career structure itself may well alter their relative importance.

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[25] See V. Subramaniam, Public Service Promotion in Australia, Ph.D. Thesis, Australian National University, 1959.

CHAPTER 7

PUBLIC OBLIGATIONS

The rights the Commonwealth officer enjoys are counterbalanced by the obligations he accepts. These arise from the standards which the community demands of those in its permanent employ. They may be seen as an extension of the obligations which the ordinary employer imposes upon his employees, or as arising from the special functions of the state and its peculiar political position as expressed in the constitutional doctrine of ministerial responsibility. Obligations refer both to official duties and extend beyond them into the private lives of officers. They are expressed in law, and also in the unwritten assumptions governing officers' behaviour. Some of them infringe rights which are claimed by members of the community who are not officers. Other unwritten obligations modify rights allowed to officers by law. Officers' obligations may be divided into those relating to probity and disinterested service, those concerned with efficiency and continuous service, and those arising from the position of the state as protector of the public interest and executor of the wishes of the electorate.

Probity and disinterested service

It is generally assumed that official duties should be carried out according to strict standards of honesty, and that the laws and

regulations of the Commonwealth government should be applied according to their terms irrespective of personal consideration. The assumption is unstated in law, but is expressed by the oft-quoted 1928 British Treasury circular:

> The State is entitled to demand that its servants shall not only be honest in fact, but should be beyond the reach of suspicion or dishonesty. A civil servant has not only to subordinate his duty to his private interest, but neither to put himself in a position where his duty and interests conflict. He is not to make use of his official position to further these interests, but neither is he so to order his private affairs as to allow the suspicion to arise that a trust has been abused or a confidence betrayed.

Dishonesty is dealt with through the ordinary laws of the land, which enumerate specific official offences, as well as offences in relation to public functions which may be committed by officials or other persons. The most general of these laws is the Crimes Act, which includes a special part relating to offences by Commonwealth officers, covering stealing or fraudulent misappropriation of Commonwealth property (Section 71), falsification, damage or destruction of documents, furnishing of false returns (Section 72), obtaining or attempting to obtain bribes (Section 73) and the making of false statements regarding remuneration or receipt of property (Section 74). These are criminal offences and are punishable by terms of imprisonment laid down in the statute. Financial loss or irregularity is covered by the Audit Act, under which the Auditor General has power to surcharge any officer for deficiencies in funds for which he is responsible, the officer having

the right of appeal to the Governor General (Section 42). Penal provisions of the Act cover misappropriation of funds and fraudulent conversion (Section 64), forging and counterfeiting (Section 65), failure to attend for examination by the Auditor General (Section 67), making of a false declaration (Section 68) and any action contrary to the provisions of the Act (Section 69). Other statutes, applying to both officers and public, cover offences in relation to particular areas of government functions. For example the Post and Telegraph Act covers such offences as negligent loss, wilful delay or detention of the post (Section 108), loitering while delivering the mail (Section 110), fraudulent receiving or embezzling (Section 114), tampering with the post (Section 115), violation of the secrecy of telegrams (Section 127) and the re-issuing of postal notes (Section 135). As officers are generally protected in the proper conduct of their official duties, by specific provision of statutory authorisation, against legal action by members of the public, the clear enumeration of criminal activities is of considerable importance.

The assumption of honest service extends beyond the committing of criminal offences, as internal public service law prohibits certain activities which might place the public servant in a position in which he might be tempted to commit an offence. Officers are prohibited from seeking outside influence to obtain personal advantage (Regulation 36), accepting gifts or fees from members of the public directly or indirectly

concerned with their duties (Regulations 37 and 38) and borrowing from or lending to one another (Regulation 39). Less clearly stated is the general concept of 'misconduct', which is enforced through the disciplinary procedures of the public service alone. In relation to the official duties of the officer, misconduct includes wilful disobedience or disregard of a valid order (Public Service Act, Section 55(1)(a)), negligence or carelessness in duties (Section 55(1)(b)), inefficiency or incompetency through causes within his control (Section 55(1)(c)), breach of the Act or regulations (Section 55(1)(f)) and the furnishing of incorrect or misleading information on appointment (Section 55(1)(h)).

The concept of misconduct extends beyond working hours into the private conduct of the officer. The justification for this intrusion may be seen as a reflection of the paternal interest of the state in the affairs of its employees, the desire to uphold the prestige of public service as such, the possibility of incompatibility between private and official activities, the possible effect on public confidence of untoward private behaviour, and the possible impingement of outside activities on performance of work. Public service law does not lay down any single statement as to the expectation of private behaviour, perhaps because of a distaste for embodying in statute or regulation positive standards which cannot be enforced by formal disciplinary sanction. Thus the Public Service Act contains only an outline of negative and specific sanctions, although the underlying concept of misconduct

itself is broad and includes as a specific offence without further definition 'disgraceful or improper conduct in official capacity or otherwise' (Section 55(1)(e)).

Certain aspects of private life are clearly indicated as being of concern to the authorities. Thus, excessive use of intoxicating liquors or drugs is regarded as a disciplinary offence, although it is doubtful whether any action would be taken against an individual unless there were interference with his official duties, or his indulgence were connected with other private or official shortcomings (Section 55(1)(d)). Bankruptcy was originally of concern to the authorities because at common law a creditor could not take action against a Crown officer. Since private financial difficulties may place him in a position of temptation in relation to official funds or lay him open to blackmail, provision is made to require an officer who becomes a bankrupt to inform the Chief Officer of his department and furnish any other information required. The department is entitled to deduct amounts from salary to satisfy judgment debts up to a limit of two-thirds of net salary (Sections 63-65).

More drastic disciplinary action results from conviction of an officer upon a criminal offence. The Public Service Board has power to dismiss the officer, reduce him in rank or salary or impose any other punishment, and unlike other offences against discipline no appeal is

permitted (Section 62). Justification for the provision may be found in the protection of the public from persons in official positions whose honesty or obedience to the law are in question in any way, and in the upholding of the status of public service as an honourable career for which criminal activity renders a person unfitted. The Public Service Board has discretion as to the action it takes, the interposition of an Appeal Board is unnecessary as the courts have already proved the guilt of the accused, and the Public Service Board even under ordinary disciplinary procedure decides upon dismissal, whereas the Appeal Board may only recommend. Objection may be made to the provision as contrary to the fundamental principle that a person should not be punished more than once for the same offence, and that the punishment acts as complete retribution for the offence. The argument that the action of the Public Service Board is of a purely disciplinary nature does not detract from its punitive effect, and its exemption from ordinary disciplinary processes sets it apart from normal disciplinary fault. If other employers took the same attitude, social consequences concerning rehabilitation of prisoners could be serious, and the attitude of the public service may only be justified by its special obligation to protect the public.

Finally, the public service demands the full effort and allegiance of its officers. Section 91 of the Public Service Act forbids, except with express permission, public or private employment, the conduct of

any business or profession (whether remunerative or not) or any remunerative employment other than an officer's duties for the Commonwealth. An officer may own shares in a company, but may not take part in its conduct except through his voting rights as a shareholder. The section was amended in 1945 to allow an officer, with approval, to act as director of a co-operative society, so long as it does not contract with the Commonwealth. Justification for these restrictions (and therefore the principles on which permission may be granted) lies in the possible inefficiency which may result from fatigue in performing two jobs; a long-standing resentment against public servants with one secure job already competing in the labour market for extra employment, possibly depriving others of a livelihood; and the possibility of incompatibility between outside employment and official duties, which may bring the impartiality of the officer into question.[1] Whereas the first two of these reasons may appear of little account in a full employment economy where a second job is becoming increasingly common, particularly among lower paid workers, the third, affecting middle and top management levels is becoming of even greater consequence as government functions expand and the public servant is increasingly called upon to deal with competing pressure group claims, government contracts and the application of regulations to a mixed enterprise

[1] General Orders 14/D/1 - 14/D/7.

economy. The statutory restriction is less severe than its counterpart in European countries, where some restriction is also imposed on the public servant's wife and family,[2] or Britain, where a public servant may not take up employment within two years of retirement without prior permission. It has been suggested that the latter restriction should be applied to officers of the Commonwealth Public Service who retire to take positions with private firms contracting with their departments, on the grounds that the offer of such a position to an officer runs counter to the accepted principles of disinterested service, and the firm which succeeds in recruiting such an officer gains official knowledge to which it has no right.

These restrictions are the clearest expression of the general concept of the manner in which it is desired officers should carry out their duties, which cannot be divorced from their own personal conduct and connections. Analogy with the loyalties owed in private employment is misleading, as public employment demands higher standards in official dealings and abhors discrimination quite legitimate in private business. The Commonwealth Public Service attempts to interfere as little as possible with the private lives of its officers, but where official activities are prejudicially affected is bound to enforce its standards

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[2] See B. Chapman, The Profession of Government, London, 1959, p. 134.

of self-discipline, so that some degree of aloofness and reserve becomes a characteristic of the public servant. The enforcement of these standards rests primarily on the awareness of their importance by officers themselves, organisational pressures and the incentives offered by the career service. At the most important points these are supported by severe legal sanctions, but the latter can only operate in extreme cases, as the enforceability of patterns of conduct rests less on legal enactment than upon the unwritten law of the organisation itself.

Efficiency and continuity

The obligation upon Commonwealth public servants to provide efficient service is similar to that expected of private employees. During the hours of official business they are expected to devote themselves exclusively and zealously to the discharge of public duties, behave with courtesy to the public, obey superior officers promptly and correctly carry out all duties and comply with all laws and instructions concerning their duties (Regulation 32). In addition they may be required to work special hours, to live within a certain distance of their work, to perform work after hours on request, and so on, according to particular job needs.

The need for continuity in public services imposes upon the public employee an obligation to refrain from strike action, although freedom to withdraw services is usually recognised as a fundamental

right of the worker. The prohibition against strikes is expressed in Section 66 of the Commonwealth Public Service Act, which places offence against it outside the normal disciplinary process:

> Any officer or officers of the Commonwealth Service directly fomenting, or taking part in any strike which interferes with or prevents the carrying on of any part of the Public Service or utilities of the Commonwealth shall be deemed to have committed an illegal action against the peace and good order of the Commonwealth, and any such officer or officers adjudged by the Board, after investigation and hearing, to be guilty of such action, shall therefor be summarily dismissed by the Board from the Service, without regard to the procedure prescribed in this Act for dealing with offences under the Act.

In addition, it is an offence under the Crimes Act for any person by threats or intimidation to obstruct or hinder the provision of public services by the Commonwealth, to compel or induce any public employee to surrender or depart from his employment by the Commonwealth, or prevent any person from offering or accepting employment in connection with the provision of any public service by the Commonwealth, on pain of one year's imprisonment. In a state of emergency, it is also an offence to encourage a strike in the public service.[3] More effective than either the disciplinary or penal sanctions against public service strikes are the normal procedures connected with the system of compulsory arbitration. The Industrial Court, under the Conciliation and Arbitration Act has power to fine or de-register any organisation upon

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[3]Crimes Act, Sections 30J and 30K.

breach of an award. It has become increasingly common also to insert clauses in awards forbidding strikes, so that an employer in the event of a strike may apply to the industrial court for an order to enjoin breach of award. Should the strike continue, penalties may be imposed for contempt of court.[4] These provisions would also apply to public service organisations, which register under the Conciliation and Arbitration Act despite their separate system of arbitration under special legislation.

Strike action by Commonwealth public servants has been specifically prohibited since 1922, when the original Public Service Act 1902 was replaced by the current statute. Previously, in spite of sporadic strikes or threats of strikes in both Commonwealth and State public services, strike action on the part of public servants was regarded as of doubtful legitimacy as a tactic. The general atmosphere of labour unrest following the First World War, and a prolonged and mishandled strike of Commonwealth public servants in Western Australia in 1919 demonstrated the vulnerable position of the Commonwealth government, which took legislative action to provide it with powers to act

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[4] See E.I. Sykes, Strike Law in Australia, Sydney, 1960; K.F. Walker, Industrial Relations in Australia, Massachusetts, 1956; and J.E. Isaac, 'Penal Provisions under Commonwealth Arbitration', Journal of Industrial Relations, pp. 110-20, October 1963.

summarily.[5] It justified statutory prohibition of strikes on the grounds that public servants had adequate remedy for their grievances through appeal to Parliament and arbitration, and it was opposed on the grounds that strike action in the last resort was a fundamental right, denial of which amounted to forced labour.[6]

In its most extreme form, the case for formal and severe prohibition of public service strikes may be stated as follows:

> Government is not an end in itself. It exists solely to serve the people. The very right of private employees to strike depends on the protection of constitutional government under law. Every liberty enjoyed in this nation exists because it is protected by government which functions uninterruptedly. The paralysis of any portion of government could quickly lead to the paralysis of all society.
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> Paralysis of government is anarchy and in anarchy liberties become useless. A strike against government would be successful only if it could produce paralysis of government. This no people can permit and survive.[7]

Strike action by public servants may be viewed less as an attack upon the sovereignty of the state or social order than as the interruption of essential services which should be avoided at all costs. Legislation aimed specifically at public servants may not be the best means of

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[5] See G.E. Caiden, 'The Strike of Commonwealth Public Servants 1919', Public Administration (Sydney), pp. 262-74. September 1962.

[6] See Commonwealth Parliamentary Debates, Vol. 94, p. 7365 and Vol. 101, pp. 3251-3263.

[7] Veto Memorandum, March 27, 1947, quoted in H.E. Kaplan, 'Concepts of Public Employee Relations', Industrial and Labor Relations Review, pp. 206-30, January 1948.

ensuring continuity of services, as has been pointed out by L.D. White.[8] Firstly it is possible that bad conditions may exist in public as well as private employment. Secondly, private undertakings may perform essential services whose interruption causes as much general inconvenience as it would in public services. Thirdly, strikes in the public service are likely to be exceptional, due to conservatism and immobility, and when undertaken as a last resort may serve the public interest in drawing attention to bad conditions. Fourthly, the right to withhold labour is fundamental and risk of serious disruption is too small to justify its curtailment. To these arguments may be added that of Spero,[9] who points out that punitive legislation is rarely effective in actually preventing strikes and may hamper resumption of services which should be the ultimate goal.

These writers, although phrasing their arguments in general terms, are strongly influenced by a background of industrial relations based

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[8] L.D. White, 'Strikes in the Public Service', Public Personnel Review, pp. 3-10, No. 1, 1949. D.M. Watters (Assistant Secretary to the Canadian Treasury Board) has put forward the view that a limited right to strike ought to be conceded in the public sector, since the consequences are no more serious than those arising from strikes in many areas of the private sector. (Public Personnel Review, p. 266, October 1963) See also K.G.J.C. Knowles, Strikes: A Study in Industrial Conflict, Oxford, 1952, pp. 100-6.

[9] 'Government has never conceded the right of its employees to strike and has always had ample powers to stop such strikes even without specific anti-strike legislation. However the knowledge of these facts has not prevented public service strikes.' S.D. Spero, Government as Employer, New York, 1948, p. 14.

upon collective bargaining, to which the threat of strike action is fundamental, representing the strength of employees. It is worth noting that a right to strike has been recognised in no formal international text on human rights except by the Inter-American Charter of Social Guarantees.[10] In Australia, because of the acceptance of the principle of compulsory arbitration, a strike tends to be regarded as a breakdown which the system was designed to prevent, rather than as a right on which it depends. Discrimination against public servants is therefore less in this context, particularly as strikes in the Commonwealth Public Service have been few and limited, and when they have occurred have neither invoked the specific statutory sanctions nor achieved their aims. It is suggested that the absence of strikes in the Commonwealth Public Service rests less on the existence of discriminatory legislation than upon:

(1) The ordinary sanctions applying to all organisations under the arbitration system, and the existence of public service arbitration itself. These sanctions have the merit of being non-discriminatory against public employment as such, involving no victimisation of leaders, nor depending on purely government action for their application.

(2) The importance of public opinion, particularly in view of a certain latent hostility against the public servant as such. In a

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[10] C.W. Jenks, The International Protection of Trade Union Freedom, London, 1957, p. 359.

prolonged strike or one involving considerable disruption, it is doubtful whether much public support would be forthcoming for the strikers, so that the political position of the government would be strengthened.

(3) General acceptance by the majority of Commonwealth public servants of the obligation to keep services working. This might apply less outside the administrative and clerical groups, but even in these a limited strike is rarely seen as a useful industrial tactic. Such minor stoppages are not regarded as serious either in private or public employment, while a prolonged strike is only ever undertaken after considerable hesitation. The splintered nature of employee organisation in the Commonwealth Public Service makes it difficult to organise or sustain a widespread strike, and even in the larger associations difficulties of communication between branches and leadership and rank-and-file exist.

It is difficult to calculate the exact efficiency as a deterrent of the specific sanctions against strikes in the Commonwealth Public Service. It is possible that their existence adds little to the sanctions applying to other employees and the general factors limiting public service strikes. It may be argued that the ability of the government to act summarily is necessary in emergency, but it is doubtful whether the exercise of these powers would succeed in gaining the resumption of services, and the government has adequate powers under separate emergency provision (Crimes Act, Section 30J). However,

repeal of Section 66 of the Public Service Act or Section 30K of the Crimes Act might produce the impression that strikes are condoned, while their retention as the formal expression of a general obligation does not appear to limit significantly the liberties of Commonwealth officers.

Loyalty

Freedom to hold and voice opinions contrary to government policy and to belong to any organisation not prescribed by law is an acknowledged right of the citizen, but one which is restricted by the obligations of public service. Because of the nature of government functions and the strategic position of the officer in administering them, he is expected to refrain from what may be construed as subversive activities. This limitation affects the rights of the officer in that, not only is he precluded from taking part in activities which are perfectly legal, but he is also constantly subject to surveillance in order to ensure his loyalty. If he becomes suspect, the safeguards of ordinary judicial or disciplinary procedures do not apply, and action is likely to be taken against him on evidence he is not allowed to challenge or even know.

In the Commonwealth Public Service the loyalty of officers may be enforced in a number of ways. Before appointment every entrant must make an oath or affirmation swearing allegiance to the Sovereign and to

uphold the Constitution.[11] Violation of this oath is an offence under Section 55 of the Public Service Act. While the oath of office forms the basis of the obligation upon the officer, it does not express fully the insistence upon loyalty which has become a major characteristic of public services throughout the world since the Second World War. Whereas in many public services, attempts have been made to limit the sweeping powers over officers by the establishment of procedures designed to protect the individual, the Public Service Act does not do so, and is somewhat vague regarding powers in this connection. Section 94 passed during World War I empowers the Public Service Board to recommend dismissal of any person whose birth or parentage is adversely reported upon by a Royal Commission. The Public Service Board may also as a result of its own inquiry recommend dismissal on the grounds that employment of a person is 'detrimental to the public safety or the defence of the Commonwealth'. It appears however that this section is not used in cases where public servants come under suspicion of disloyalty. Security check before appointment may result in non-employment, even if no other grounds exist, through the Public Service Board's power to reject any applicant who is not 'a fit and proper person to be an officer of the

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[11] 'The taking of this oath is designed to prevent the admission to our Public Service of persons who are opposed to constituted authority.' Commonwealth Parliamentary Debates, Vol. 104, p. 7366.

Commonwealth Service'.[12] Security cases within the Service are apparently dealt with by transfer or dismissal upon other grounds.[13]

It is not difficult to fault these procedures or lack of them, according to the criteria of the rule of law, but it is doubtful whether the procedures used in other countries represent any great improvement. They attempt to provide a gloss of justice over what is essentially a political judgment, underlined by the participation of the political authorities in most of these procedures.[14] The apparent necessity for hunting out the 'unreliable', and the methods inevitably used for the purpose can only be justified in an assessment of the safety of the community, in its total form ever an excuse for the sacrifice of the individual and his rights.

Public Expression

Subject to the laws of libel, obscenity, incitement etc., the citizen has a right to express his opinions in written or verbal form

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[12] Public Service Act, Section 34.

[13] 'Australia has no security system as such. Powers now possessed by the Public Service Board, to dismiss or transfer an officer if it should find him not necessary for the efficient working of a department or inefficient, are employed to take care of security cases.' D.C. Jackson, 'Individual Rights and National Security', Modern Law Review, pp. 364-80, July 1957, p. 370.

[14] 'Why should a person charged with treason be allowed to confront his accusers, and yet a person about to be dismissed because he is likely to commit treason be denied these minimum judicial rights?', H. Street, Freedom, the Individual and the Law, London, 1963, p. 228.

without restriction. The Commonwealth officer is subject to further restrictions arising out of his office. These relate to general comment on political affairs or governmental administration and the disclosure of official information. They have been held to arise from the constitutional doctrine of ministerial responsibility, the requirements of official neutrality and the nature of government functions. The responsibility of the minister for his department has been held to imply his monopoly upon all information relating to it, since unofficial disclosure amounts to active intervention by the officer who is merely an agent and politically irresponsible - 'a kind of perpetual secretary'.[15] Public service neutrality is the price of permanence in the face of potentially changing political control, and involves the subordination of personal views to official policy, lest ministers lose confidence in their permanent staffs who thereby become unfitted to serve them. The nature of governmental functions, touching upon the private affairs of individuals, the conflicting interests of groups and the internal and external security of the community, demands that the officer be discreet as well as disinterested in carrying out his duties.

In the Commonwealth Public Service these restrictions are expressed through criminal and public service law. Commonwealth officers are

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[15] H. Laski, Authority in the Modern State, New Haven, 1919, p. 344.

precluded by Section 70 of the Crimes Act, under penalty of two years' imprisonment, from publishing or communicating except to an authorised person any fact or document secured in virtue of their office and which it is their duty not to disclose. Until 1960, this provision related specifically to communication of information which it was the duty of officers to keep secret. The effect of the amendment has been to give penal sanction to existing Regulations (previously enforced only by internal disciplinary procedures), prohibiting the use of official information for other than official duties, public comment on the administration of any department or release of official information without authority.[16] At the same time, the provisions of the Crimes Act were extended to apply to persons who had left the Service, unless they could prove lawful excuse or authority.

These provisions have been criticised on two main grounds - as being based upon faulty theoretical assumptions, and as running contrary to the principles of democratic administration. It is not difficult to point out flaws in the doctrines of ministerial responsibility or public service neutrality.[17] Both appear unrealistic in view of the obvious

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[16] The Regulations allow public comment upon affairs within the Australian Capital and Northern Territories. For the history of the amendment see G.E. Caiden, 'Ellis and the Department of the Interior', in B.B. Schaffer and D.C. Corbett, Decisions: Case Studies in Australian Administration, Melbourne, 1965, pp. 225-243.

[17] See B. Chapman, British Government Observed - Some European Reflections, London, 1963, p. 39; and W.A. Robson, 'The Public Service', in The British Civil Servant, London, 1937, p. 19.

limitations to ministers' personal direction of departmental business, the well-known fact that officers are not merely obedient servants but play a part in the initiation as well as the carrying out of policy, and that they do hold personal opinions which affect their duties whether these are expressed or not. Such criticism however remains unhelpful, since it is difficult to suggest an alternative to official subordination and neutrality which does not involve the direct participation of the public service as an autonomous political force.[18]

Criticism from the point of view of the requirements of democratic administration has been more fruitful. Enforced official silence has been decried as limiting the potential contribution of officers on academic matters touching upon governmental policies or administration, depriving the public of knowledge to which it is entitled regarding the administration of public business, restricting frank testimony before Royal Commissions or committees of inquiry, interfering with legitimate staff association activity and giving rise to suspicions of abuse. Its limitation of the civil rights of officers may be considered to amount to the maintenance of autocracy in the midst of democracy. Efforts have therefore been made to liberalise existing restrictions, not by attempting to supplant the doctrines of ministerial responsibility

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[18] See G.E. Caiden, 'The Political Role of the Commonwealth Bureaucracy', Public Administration (Sydney), March 1966.

or public service neutrality but by modifying the implications which have been drawn from them.

Thus, Professor R.S. Parker[19] has proposed that only the release of official secrets should be classified as a crime, and the release of other information should be conditional upon the good sense of officers themselves, with internal disciplinary action where established convention was overstepped. General freedom of public comment should be allowed save in the 'white collar' administrative classes, except so as to identify an official with support or criticism of a political party on matters of controversy, to criticise the minister of his own department (unless he believes unlawful action has been taken), to comment on policy currently being considered by the government or to embarrass international relations. Beyond these formal restrictions, all officers would be expected to observe a general code of discretion in their public comment.

Professor Parker's suggestions would not absolve the officer from obligations which may conflict with the rights enjoyed by other citizens. The problem is the merging of the role of citizen and employee, which transforms normal employee obligations into those affecting citizen rights. Clearly there is an area of general

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[19] R.S. Parker, 'Official Neutrality and the Right of Public Comment', Public Administration (Sydney), December 1961 and September 1964.

discreetness regarding private affairs of citizens which is directly analogous to similar obligations in the field of private employment, and which does not conflict with usually accepted rights. The further restriction upon disclosure of information regarding governmental administration may be justified in similar terms. However fear exists that the officer may be forced to keep silent through official obligation upon matters which it is his duty as a citizen to reveal in the public interest. The private employee is faced with a similar dilemma regarding the activities of his employer, and has only the same sanction at his disposal - resignation - if he wishes to dissociate himself. The officer's position differs in degree and because he faces penal sanctions (as the law currently stands) and not merely disciplinary ones. This is indeed the heaviest burden of public service employment, for an individual can never be wholly irresponsible for the actions he takes, irrespective of the dictates of constitutional doctrine.[20] Finally, the officer is restricted from general comment upon the affairs of government and therefore from the right to join in political discussion.

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[20] Provision is made for an officer who considers he has grounds of complaint arising out of an official instruction or any other cause to appeal to the Chief Officer of his department, but he must carry out the instruction unless it is countermanded by competent authority. Appeal lies against the Chief Officer to the Permanent Head of the department, who must transmit it for determination to the Public Service Board if he does not allow it. (Regulation 33) See B. Chapman The Profession of Government, op.cit., pp. 142-4, for a discussion of this problem, and comparable regulations in European countries.

The law is framed to prohibit only public comment, and relates only to departmental administration and not matters of broad political interest. In fact the provision is broadly construed, and its sanctions are less those of the law or internal discipline than inculcated attitudes and fear of repercussions upon future career.

The obligations of the officer therefore set him apart to a greater or lesser extent from other citizens, in view of his dual role as citizen-employee, in which the citizen tends to be subordinated to the officer. Obligations are enforced through the criminal law, internal discipline and the unwritten assumptions governing behaviour. The latter are equally, if not more, important than the former, as enforcement of any law depends upon majority acceptance and conformity, particularly where misdemeanor is difficult to prove, and implied obligation supplements written precept and modifies the exercise of rights.

CHAPTER 8

POLITICAL AND INDUSTRIAL RIGHTS

The obligations assumed by the officer affect the extent of his rights. This chapter examines the area of freedom allowed to him to enjoy rights possessed by the rest of the community. Discussion falls into three main areas - political liberties, industrial rights and rights to guaranteed conditions of employment. In spite of the special position of the officer which affects certain aspects of these rights, the tendency has been towards greater similarities between public and private employment, so that the existence of a right depends to a large extent on comparisons between the two sectors. In each case, the right is not wholly conditional upon absence of restraint, but depends to a greater or lesser degree upon positive enactment by the Commonwealth in relation to its officers, which may or may not result in equivalent rights to those possessed by other individuals by virtue of a different source.

Political Rights

The civil and political rights of Australian citizens depend not on written constitutional guarantees but upon lack of restriction by statute and the general freedom allowed under common law and upheld by the courts. The Commonwealth officer is included in this general

assumption of liberty subject to the obligations discussed in Chapter 7. Certain of his political rights fall within this category, and where no legal restriction exists, may be exercised without hindrance, and without the need for positive enabling enactment. Thus, the exercise of voting rights through secret ballot has never been in dispute in the Commonwealth Public Service, and the removal of regulations restricting political activity in 1909 left the officer free to join a political party, attend its meetings and engage in political activity at the various governmental levels without hindrance.[1] The question of parliamentary candidature was more complex. The incompatibility of the political and official careers had been recognised soon after the grant of responsible government to the Australian colonies, and officers, as occupying a place of profit under the Crown, remained ineligible for parliamentary candidature. In 1945, the Public Service Act was amended to permit an officer to retire from the Service to contest a federal or state election and if unsuccessful to be re-appointed at the same salary without loss of rights due to discontinuity of service.[2] He is entitled to his previous salary and to have his absence reckoned as leave without pay. Resignation from the Service must take place not earlier than one month before the closing date for election nominations, and the officer must apply for re-appointment

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[1] See Chapter 3, pp. 65-9 ; also V. Subramaniam, 'Political Rights of Commonwealth Public Servants', Public Administration (Sydney), pp. 22-33, March 1958.

[2] Public Service Act, Section 47C.

within two months after the declaration of the result. It is stressed that leave of absence will not be granted to any officer to enable him to campaign for election.[3]

This right is one of eligibility rather than an absolute entitlement, for the Public Service Board retains discretion as to the re-appointment of an unsuccessful candidate. It has never exercised this discretion, for to do so could be regarded as victimisation, amounting to censorship of the activities of a parliamentary candidate. Further, although re-appointment without loss of status is virtually assured following initial electoral defeat, the officer loses his eligibility for re-instatement if he wins a seat and loses it at the subsequent election. The career service is closed once the choice is made to adopt a political career.

In the case of general political liberties, the written obligation as to public comment and the unwritten assumption as to political neutrality take precedence over what would otherwise be rights under common law in the absence of restriction (as statute overrides common law). The limited right to parliamentary candidature has been granted by means of positive enactment. The question therefore arises whether the obligations assumed by the officer are incompatible with the

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[3]General Orders, 3/D/8.

exercise of this right, and if so, how they have been accommodated. Incompatibility may be fundamental, for the parliamentary candidate should be independent of official influence or pressure and in a position freely to criticise the government: separation of the political and the administrative careers is a basic feature of British parliamentary democracy. More practically, the declaration of allegiance to a particular party by a candidate reveals publicly political opinions of the officer, which, should he return to the Service may be embarrassing, breaching official neutrality and anonymity.[4] The written obligation not to comment upon governmental administration cannot be adhered to in an election campaign in which the candidate is expected to voice his opinion on the policies and administration of the government. The same does not necessarily apply to disclosure of official information, although once again the knowledge of official matters by a member of the opposition party could be politically embarrassing.

There has been no reconciliation of an officer's right to parliamentary candidature and his obligations on a theoretical level.

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[4] 'Clearly it would be impossible for a civil servant having vociferously championed the losing party in an election and vilified the victors, to return to his desk to execute policies he had declared to be execrable. The civil servant attempts no schizophrenic gymnastics. He keeps his politics to himself, maintaining freedom to serve all comers to Westminster impartially.' T.A. Critchley, The Civil Service Today, London, 1951, pp. 45-60. See also H. Laski, Reflections on the Constitution, Manchester, 1951, p. 191.

It may be argued that a neutrality which rests upon the suppression of the real views of officers is an artificial creation, that the officer's political opinions still exist whether they are declared or not, that a government should have nothing to hide and that the opposition party and community in general should have wider access to administrative affairs than exists at present. However such accommodation as exists derives from more practical considerations. Firstly, the formal position ensures that before an officer may become a candidate he must resign from the Service, so that the only restriction which still applies to him is that applicable to past officers under the Crimes Act.[5] Secondly the problem of incompatibility only arises with officers in policy-making positions, and these rarely exercise the right to candidature.[6] Upon defeat they have not resumed their Service career. Should they choose to do so, it is unlikely that their future career would be entirely unaffected. For the career official, therefore, the right cannot be regarded as absolute in the sense that its exercise will have no effect on his treatment. The officer who deliberately breaches

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[5] See Chapter 7, pp. 167-9.

[6] The case of Dr J.W. Burton is discussed in G.E. Caiden, Career Service, Melbourne, 1965, p. 339. The announcement of the decision of Dr R.A. Patterson to stand as a candidate for the Australian Labor Party at the end of 1965 similarly raised problems regarding his status in the Service prior to his resignation under Section 47C of the Public Service Act. (Sydney Morning Herald 19/8/65; Canberra Times 20/8/65; The Australian 9/9/65 and 24/9/65; Age (Melbourne)28/9/65).

anonymity takes the risk that his political preference may be considered, particularly in relation to promotion, in the same way as his other personal characteristics. It is therefore feared that if the obligations of the career service are allowed to become subordinate to political rights, a spoils system will arise.

It has been suggested that a relationship exists between the temper of politics in a country and the extent to which it is permissible for the bureaucracy to participate in political activity. Thus in Denmark, Sweden, Austria and Finland, public servants may retain office while sitting in Parliament. In France, Holland, Italy and Spain, they may take leave of absence and return later to their official career. In Switzerland, Portugal, Belgium and West Germany, public servants may stand as candidates in national elections but must resign before taking their seats. In Australia the conventions of parliamentary democracy and the relative absence of rigid social divisions tend to lessen the intensity of political conviction and narrow the differences between political parties. The right to stand for Parliament is exercised by comparatively few people, and many others, besides public servants, would feel that their occupation and its obligations do not allow them a concurrent political career. The limitations upon the right of Commonwealth officers may be viewed in this light.

Rights of association

Like political rights, rights connected with association depend on both absence of legal restraint and positive legal recognition. The general freedom to join associations which is available to the citizen extends also to the officer, who may participate in associations consisting exclusively of public servants, or those containing both private and public employees. The public service associations themselves are free to affiliate with trade union bodies such as the Australian Council of Trade Unions and the Australian Council of Salaried and Professional Associations, and also with one another. They are equally free to affiliate with or support political parties and to further their interests by direct pressure group activity.

However for their effective existence as a legal entity apart from their members, associations depend upon positive recognition in law. An association unless recognised in law has no legal protection of its property, cannot enforce its rules upon its members nor exercise any form of industrial rights. This position derives largely from historical factors, since trade union activities in both Britain and Australia were unrecognised at common law and were held to conflict with the individual's freedom to contract for employment. Their original proscription as criminal conspiracy was modified in favour of their existence outside the law, although their activities, apart from friendly society functions, remained illegal. The recognition of their

legitimacy in the 1870s left their internal affairs outside the jurisdiction of the courts and some of their activities open to prosecution in tort, which in Britain (and also in Queensland) led to further legislation to counteract decisions of the courts. In Australia the adoption of compulsory arbitration[7] changed radically the status of trade unions, and led to their recognition,

> 'as bodies which can take part in a process which results in an award fixing wages and conditions for their present members. They are not merely agents of their members. They are bodies whose concern is the industrial condition of the whole trade or industry which is covered by the constitution of the union. Awards may be made binding on employers in an industry in respect of their employees whether members of the union concerned or not, and a union is able to take steps to have wages and conditions fixed in an establishment in which it has no members at all.'[8]

Possession of industrial rights in Australia therefore implies legal recognition of status and participation in the processes determining conditions of work. Trade unions are granted authority in relation to their members, non-members and employers which are kept in check by corresponding obligations administered through the device of registration with the arbitration authorities. Organisations are entitled to participate in the process of award-making, to be recognised

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[7] Victoria and Tasmania adopted a wages board system and not compulsory arbitration. 'The main distinction between wages boards and arbitration courts is that the former do not recognize trade unions. An arbitration award can impose rights and duties on a trade union, a wages board determination cannot'. J.H. Portus, The Development of Trade Union Law, Melbourne, 1958, p. 147.

[8] Ibid., pp. 129-30.

as representative of employees in an industry, to sue for breach of awards, to exercise disciplinary powers over members and possibly to occupy a privileged position in relation to employment in the industry through the provisions of awards. In return the rules of an organisation must contain satisfactory provisions for democratic election of the governing body. Those which are contrary to law or to an order or award, are tyrannical or oppressive, prevent members from observing law or award, or impose unreasonable conditions upon membership, may be disallowed.[9] Awards may also set out rights enabling association officers to carry out work of organisation or to police awards. These include rights by accredited union representatives to interview employees on legitimate union business during non-working hours such as lunch breaks, to interview the management on union business at all reasonable times by appointment, to enter the premises, and for job representatives to be allowed necessary time during working hours to interview supervising authorities.[10]

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[9] Conciliation and Arbitration Act 1904-64, Sections 132-58; Regulations 115-46.

[10] For example, Determination No. 39 of 1951, 31 C.P.S.A.R. 198; No. 51 of 1951, 31 C.P.S.A.R. 263; No. 34 of 1952, 32 C.P.S.A.R. 203; No. 53 of 1954, 34 C.P.S.A.R. 433; Nos. 94-96 of 1959, 39 C.P.S.A.R. 611. Career officers of the Commonwealth Public Service appear to have placed less emphasis upon such rights, as such provisions appear to be confined to awards relating to temporary and exempt employees belonging to unions outside the Commonwealth Public Service.

The rights of officers' associations are almost identical to those of other unions, although they are based upon separate legislation. Their right to arbitration has remained unchanged in essence since its recognition in 1911, in spite of organisational changes.[11] In 1920, a new Arbitration (Public Service) Act deprived Commonwealth public servants of the right to appear before the Commonwealth Court of Conciliation and Arbitration, largely in order to avoid the delays and inconsistencies which had developed under the original legislation. It established a Public Service Arbitrator, whose functions and powers differed little from those previously exercised by the Court in relation to public service organisations. Re-integration of Commonwealth public service arbitration with Commonwealth arbitration in general began in 1952, when the Arbitrator was empowered to refer matters of importance, and either party was empowered to appeal, to the Full Court of the Commonwealth Court of Conciliation and Arbitration. In 1956, the Arbitrator was permitted to refuse claims where employees belonged to organisations of both public and private employees, and his jurisdiction was limited to exclude matters under the Commonwealth Employees' Compensation Act 1930-54, the Commonwealth Employees' Furlough Act 1943-53, the

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[11] See Chapter 3, pp. 72-77. The history of arbitration in the Commonwealth Public Service is covered in E.E. Crichton, Arbitration in the Commonwealth Public Service, Canberra, 1960, and 'The Development of Public Service Arbitration', Public Administration (Sydney), pp. 150-66, June 1956; pp. 214-31, September 1956; and pp. 319-33, December 1956.

Superannuation Act 1922-56 or any other prescribed Act. In 1959, the Arbitrator became empowered to sit with the Commonwealth Conciliation and Arbitration Commission which had succeeded the Commonwealth Court of Conciliation and Arbitration.

The differences between the right to arbitration possessed by Commonwealth officers and those of other employees subject to federal award are relatively slight. Firstly, officers' plaints are dealt with at least in the first instance by a separate tribunal, and under special legislation. Secondly, awards are subject to disallowance by Parliament. Thirdly, awards of the Public Service Arbitrator, or of the Commission acting under appeal and reference provisions, over-ride current and subsequent legislation and regulation. Fourthly, Commonwealth public servants' organisations enjoy concessions relating to the number of their members requisite for registration and are exempt from the necessity to prove that an inter-state dispute exists before applying for an award.

The close identity between the right to arbitration of Commonwealth officers and other employees appears to lie largely in the deep-rooted acceptance of the principle of appeal from the authorities, similar to the right of the outside employee to appeal against his employer. The size and variety of the public sector means that conditions of work are increasingly interwoven with those outside, so that it had long been necessary for the public employer in employing categories of workers

extensively employed in industry, to observe awards of other arbitration tribunals. The principle of arbitration tends to be regarded as an extension of the delegation by the Commonwealth government of direct responsibility in personnel matters to independent authority.

Similar assumptions apply less to other forms of association participation in management. Collective bargaining or direct negotiation by associations with management has on occasion been put forward on a variety of grounds as preferable to arbitration in the Commonwealth Public Service.[12] In a limited form it exists as conciliation, the process of reaching agreement without the necessity of intervention by the Public Service Arbitrator except as a means of ratification. Conciliation is regarded almost as a duty rather than a right and needs no enabling legal authorisation to take place. The only compulsion upon either side to conciliate derives from the attitude of the Public Service Arbitrator. It may be noted that collective bargaining involves somewhat different premises as to rights compared with arbitration. Under the former an equality between employer and employee is assumed which takes no note either of the over-riding power of the government or of the obligation as to continuity of service limiting the equivalent sanction available to the employee, whereas under arbitration equality is enforced through joint consent to submission to a third party.

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[12] Ibid., Chapter 9, 'In Criticism of Public Service Arbitration'.

Other rights exist to participate in management.[13] The vesting of responsibility for personnel administration in the Public Service Board and departments implies that officers are themselves responsible for their own control. Beyond participation through the self-regulating administration, staff associations have gained rights to participate in certain processes in order to safeguard fair treatment for the individual through access to official information, a check upon official reasons for decisions and the possibility of more effective intervention with the authorities than the individual himself could undertake. The rights of elected divisional representatives to sit upon disciplinary tribunals and Promotion Appeals Committees have already been discussed.[14] Similar rights existed between 1945 and 1952 in relation to Classification Committees.[15] Efforts to achieve direct representation as of right upon the Public Service Board by staff associations have failed, although in 1945 the informal consultations between staff and official sides were formalised through the establishment of a Joint Council consisting of representatives of organisations and departments chaired

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[13] Union participation in management in Australia is not an extensive practice. For a description of its extent in several industries, see K.F. Walker, Industrial Relations in Australia, Massachusetts, 1956.

[14] See Chapter 5, pp.118-21 and Chapter 6, pp. 137-45.

[15] For an explanation of the role of Classification Committees in the reclassification of the Service following the Second World War, see G.E. Caiden, Career Service, op.cit., pp. 302-3 and 351-2.

by a representative of the Public Service Board.[16] Its function is to consider matters of general interest relating to the Commonwealth Public Service, and if it wishes, to make recommendations. However its existence implies neither a right to consultation nor the delegation of any part of the responsibility for personnel administration.

The evolution of the notion of rights to conditions of employment has been discussed in Chapter 3. Such rights may be considered in two ways - firstly in terms of their enforceability against the employer and secondly in relation to those of other employees. In the first case, certain difficulties of definition exist as it may be argued that those conditions of work which formally rest upon discretion are just as much rights in effect as those acknowledged as such by mandatory wording. However the distinction still does retain some significance. Firstly, the authorities are allowed discretion in applying the rules to the marginal situations which are bound to arise, without the necessity to argue legal technicalities before any other body (except through the general appeal allowed any officer to the Public Service Board), and in particular the courts of law are clearly excluded. Secondly, it is possible for benefits to be withdrawn or lapse where the demands of public service outweigh the convenience of individuals. Thirdly, deprivation or lapse of benefits give rise to no monetary claim on the

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[16] Public Service Act, Section 19A.

part of the officer, particularly upon leaving the Service. Fourthly, in several cases a distinction is drawn between the career service of permanent officers, particularly the top echelons, whose loyalty is expected to transcend considerations of individual right, and temporary and exempt employees who are hired in much the same way as a private employer would hire his employees, and subject to similar rights.

Certain difficulties also exist in comparing these rights with those of other employees, in view of the variations which exist in the pattern of industrial relations as between different industries and different States. Further, minimum provisions binding as rights against an employer by virtue of State legislation or arbitration determination may not represent rights above the minimum arrived at through collective bargaining in firms or industries. Similarly, in the Commonwealth Public Service no single code of rights exists. Sources of rights cover general statutes and regulations, other legislation covering officers in specific departments, and awards of the arbitration authorities applying either exclusively to officers or to both officers and other employees. These tend to overlap, create disparities between different types of public servant, occasionally provide choices between different rights and make it difficult to ascertain the rights which an officer may claim. The purpose of this study is neither an analysis of Australia-wide industrial conditions nor the detailed enumeration of comprehensive conditions of work in the

Commonwealth Public Service, several of which have been covered in earlier chapters. Its purpose is rather to consider how far the various conditions of work can be classified as rights binding upon the public employer. Account has been taken of differences between the conditions of officers and other employees only for the purpose of illustration in relation to particular examples.

The foundation of officers' conditions of work and the manner in which they are administered may be found in the Public Service Act. A feature of many of these statutory conditions is that they tend to retain their original character as privileges, reflected in the lack of mandatory phrasing in the Act, although they have been supplemented by arbitration award. Thus, departments may grant recreation leave up to a maximum number of days annually (Public Service Act, Section 68), but no right exists. Officers may be directed to take leave due to them 'at such time as is convenient to the Department' (Regulation 46), and recreation leave may not accrue for more than two years (Regulation 48) except in special cases (Regulation 49), otherwise it lapses (General Orders 5/B/1). In contrast, temporary employees are entitled to receive a monetary equivalent for leave outstanding when their employment is terminated. They may also receive rights to recreation leave under the General Conditions of Service Award or the award of any other applicable industrial tribunal (General Orders 5/B/17). The former entitles temporary employees to three weeks' annual leave for each year of

completed service, together with payment in lieu, on termination of employment, of $1\frac{1}{2}$ days' pay for each completed month of continuous service. Annual leave has long ceased to be a privilege of public servants alone and in 1963 the Commonwealth Conciliation and Arbitration Commission granted three weeks' annual leave to workers under Commonwealth awards.

A similar situation exists in relation to furlough. Permanent officers may receive furlough under the Public Service Act and payment in lieu may be made in the event of retirement or death (Public Service Act, Sections 73-4). The discretionary nature of the benefit is underlined by the necessity to examine an officer's conduct record, the desirability for officers to state the reasons why they are seeking furlough, the disapproval of officers taking up employment when on furlough, and the loss of eligibility for furlough upon dismissal (General Orders 5/G/1-19). Temporary and exempt employees may receive furlough under the Commonwealth Employees' Furlough Act on similar terms. In contrast, private employees receive long service leave under State legislation passed during the 1950s, which varies in the benefits it confers.

Several other conditions of work are governed jointly by public service legislation and arbitration award, although their status as rights is not necessarily affected. For example, details of the

administration of sick leave (such as production of medical certificates) are contained in Public Service Regulations, but the amount of sick leave and the terms on which it is available are subject to the Common Rule on Sick Leave for permanent officers, and the General Conditions of Service Determination or other award for temporary employees. None of these sources confers a right to sick leave. On the other hand such normally expected conditions of work as payment for overtime, stipulation of hours of work, payment for work on Sundays and public holidays, which are closely regulated by award in private employment tend to be similarly treated in the public service, so that although regulations exist which govern computation of payment, entitlements can only be ascertained by reference to various awards. A result is that definite rights are recognised to these conditions of work, although they do not apply to the higher ranks of the Service, who are expected to devote themselves to the public weal without account of hours spent.

In contrast to the extension of officers' privileged conditions of work to other employees, the right to compensation for injury against their employer follows a pattern of legislation which had already been adopted by State governments.[17] It therefore shares features common to such legislation in relation to type of benefit conferred, the necessity for election in claiming the benefits of the legislation, and

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[17] See Chapter 3, p. 75-6.

appeal to courts of law in case of dispute. However, particular characteristics which differentiate officers' conditions of work remain, such as the avoidance of granting clear over-riding rights, administration from within the public service, and the intervention of arbitration.

Upon injury, officers elect between the benefits of the Commonwealth Employees' Compensation Act, the Common Rule on Accidents made by the Public Service Arbitrator in 1925, sick leave under the Public Service Act or litigation for negligence. Under the Commonwealth Employees' Compensation Act, lump sum compensation is payable to the dependants of an employee upon death, and weekly payments upon total or partial incapacity, as well as medical expenses. These payments are subject to a maximum amount laid down in the Act and the weekly payments are reduced where superannuation is received from the Commonwealth. For specific injuries, lump sum payments are made according to a scale set out in the Third Schedule. The Act covers employees of the Commonwealth Government, but officers may elect to forego its benefits and claim instead under the Common Rule on Accidents. This distinguishes between cases where the department is responsible for the accident (a minority of cases) and those where no blame can be attached. In the former case, leave on full pay up to a maximum period is granted without deduction from sick leave credits and hospital and medical benefits are paid. In the latter, leave on half pay up to a maximum period without deduction from sick leave credits is granted,

and only first aid expenses are paid. The benefits of the Common Rule, or any other compensation or damages, may not be claimed in addition to compensation under the Act, so that officers must make a choice. The administration of the Common Rule is in the hands of the departments, while the provisions of the Commonwealth Employees' Compensation Act are administered by the Secretary of the Treasury, ex officio Commissioner for Employees' Compensation, who has power to determine all matters and questions arising under the Act, subject to appeal to a County Court. Reported litigation under this heading has not been extensive, and has been concerned mainly with definitions under the Act. Cases have arisen regarding industrial diseases eligible for compensation,[18] the interpretation of the phrase 'arising out of or in the course of employment',[19] the permissible form of appeal,[20] the definition of travelling to and from work,[21] the right to sue in cases of negligence,[22]

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[18] Commonwealth v. Ockenden (1958) 32 A.L.J.R. 235; Commonwealth v. Matheson (1955) 29 A.L.J. 81; Bavcevic v. Commonwealth (1957) A.L.R. 1065; Alcorn v. Commissioner for Employees' Compensation (1938) 32 Q.J.P. 7.

[19] Goward v. Commonwealth (1957) 31 A.L.J. 618; Commonwealth v. Oliver (1962) 36 A.L.J.R. 133.

[20] Martin v. Commissioner for Employees' Compensation (1953) Q.S.R. 85; Commonwealth v. Walker (1962) A.L.R. 312; Swartz v. Commonwealth (1959) 33 A.L.J.R. 115.

[21] Commonwealth v. Anderson (1957) 31 A.L.J. 608; Commonwealth v. Wright (1957) 30 A.L.J. 592; Carter v. Commissioner for Employees' Compensation (1946) 40 Q.J.P. 44.

[22] Thomson v. Commonwealth (1948) S.A.S.R. 116.

and the coverage of employees by the Act.[23] The general tendency has been to widen the concept of 'injury' since the amendment of the Act in 1948 substituting 'or' for 'and' in the phrase 'arising out of or in the course of', although the courts have been slow to recognise the implications of the change,[24] and a degree of uncertainty as to the exact liability of the Commonwealth has resulted in anomalies and increased importance to the discretion allowed to the Commissioner in the Act.[25]

The existence of special provision for Commonwealth public servants may be seen as an assertion of the sovereignty of the public employer, but appears to arise rather as the result of the constitutional position of the Commonwealth government which has no jurisdiction over industrial conditions in general and can only legislate in this sphere for its own employees. The significance of this position results from the dual nature of the government-employer on the one hand and the citizen-employee on the other. Rights to conditions of work in general depend jointly upon legislation, arbitration award and initiative by

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[23] Doust v. Commonwealth (1944) 61 N.S.W.W.N. 250.

[24] P. Gerber, 'The Concept of "Injury" in Commonwealth Employees' Compensation Legislation', University of Queensland Law Journal, pp. 432-50, April 1964.

[25] The Commonwealth Employees' Compensation Act contains no schedule of diseases eligible for compensation, and it is obviously difficult to ascertain whether certain causes of death or disablement such as heart disease have resulted from employment.

private employers in a full-employment economy. Unless a policy of 'model employer' is adopted, officers tend to be deprived of the benefits of the last of these sources, previously expressed in the traditional privileges of the public service career, as their rights to actual conditions of employment tend to be conceived in relation to the rights of other employees' minimum conditions of employment. Officers, therefore, in spite of growing identity between the conditions applying to them and other employees - whether these relate to political liberties, industrial relations or conditions of work - continue to remain in a special position owing to the different basis for their rights.

CHAPTER 9

CONCLUSION

No general theory of rights has emerged from the experience of the Commonwealth Public Service, and the co-existence of several theories, in certain respects incompatible with one another, tends to confuse arguments where specific rights are in dispute. Two of these views deny entirely the possession of rights by public servants. For instance, the British doctrine of dismissibility at pleasure is reflected in the attitude of the courts of law in their interpretation of statutory provisions. Absolute mandatory rights only are recognised, no inquiry may be made into the exercise of discretion and documents may claim Crown privilege.[1] The fiction of the contract is maintained although one party retains the right to alter its terms unilaterally. More generally, the theory of the sovereignty of the state, founded in the mandate of the government of the day to implement the will of the electorate, denies the individuality of the public servant, who becomes merely a part of governmental machinery, assumed as neutral in political affairs.

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[1] In an unreported case, Tracy v. Bradley, No. 2413 of 1936 in the Supreme Court of New South Wales, Mr Justice Maxwell held that even if false and defamatory statements were made in a report upon an officer, the document was privileged and the officer could not sue for defamation. The records of the case are held in the Archives of the Australian National University, Canberra.

Enforcement of neutrality necessarily denies to public servants the rights possessed by other individuals to participate in the political process, or to act in their own interest as a group. The essential independence of the sovereign state precludes its acceptance of binding rights against it by its servants, and the necessity for their public identification with government policies denies their liberties.

In contrast to these views, a general consensus appears to exist that public servants in Australia do possess rights. These are expressed through statute and statutory procedures to which adherence by the authorities in relation to the individual is ensured by application of the legal principle of ultra vires, insisting that the exercise of power conforms to its authorisation by law in the circumstances laid down by law. Thus the relationship between public employer and public servant may be regarded as statutory, although it falls short of the European conception of a code of rights, being neither comprehensive nor dependent upon a coherent system of administrative law. Somewhat more vaguely, it is felt that public servants are entitled to fair treatment from their employer in much the same way as other employees, and that there is an obligation upon politicians to ensure this. In Australia the theory of 'model employer'

is not a radical doctrine.[2] In one form it expresses the freedom of the public employer to stipulate whatever conditions it likes upon its own responsibility bound only by the moral obligation assumed by the good employer; in another it is expressed by the willing commitment of the public employer to arbitration which transfers decisions as to fair conditions to another authority and ensures comparability with other employees. Finally, elements of syndicalist theory are reflected in participation by public servants in a representative capacity in the administrative processes affecting them as individuals, which is accepted as legitimate in areas such as discipline and promotion.

The generally accepted concept of public servants' rights in Australia may be considered as having three main aspects. Firstly, rights are conceived in terms of a challenge to the discretion of authority. As such they imply recognition by the public employer of rights against it, irrespective of considerations of sovereignty, and a

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[2] See e.g. the speech by Senator Playford (S.A.) in the debates on the Public Service Bill 1902:

'We treat our civil servants better than any private establishment, and it is quite right that we should do so, because the state ought to be a model employer.' Commonwealth Parliamentary Debates, Vol. 7, p. 9227.

See also the speech by Senator Russell (Vic., Vice President of the Executive Council) in the debates on the Public Service Bill 1921:

'We must have a contented Service if we are to have an effective Service, and, therefore, the conditions ought to be just, if not even generous, because the Commonwealth should be one of the best and not one of the worst employers. At the same time, we are entitled to demand effective business methods and a fair day's work for a fair day's wage, and to expect a united Service, actuated by a keen desire to give the very best return to the country which employs it.' Commonwealth Parliamentary Debates, Vol. 94, p. 7358.

more liberal attitude towards political and industrial rights than would appear to be implied in the doctrines of British Parliamentary democracy. Secondly, the term rights conveys the enjoyment of similar conditions of public servants to other employees, and the avoidance of discriminatory restrictions upon generally accepted liberties. Finally, rights are conceived as objective standards expressed through law. These aspects are not wholly consistent, do not completely correspond with reality, are the subject of considerable debate, and raise both theoretical and practical problems in their implementation. Nevertheless they represent a trend of thought which provides a departure from the dominating Western traditions and practices.

(a) Rights conceived as a challenge to authority

The sovereignty of the state, as usually conceived in Western Parliamentary democracies, does not admit the legitimacy of a challenge to it by its employees, and consequently all rights of public servants are subject to unilateral determination by the state. In Australia, sovereignty is not an issue of importance. Its relegation to the background may be seen as a reflection of the federal nature of the state and the tendency to delegate to non-political bodies responsibility for functions requiring discrimination among individuals, in particular personnel administration. This tendency makes plausible the separation of the functions of state and public employer necessary to accommodate

rights within the framework of sovereignty. Perhaps more important however is the habit of pragmatism, in which law adjusts itself to needs and pressures irrespective of basic theory, so that the claims of sovereignty tend to be ignored rather than refuted through argument.

The theory of sovereignty is, however, reflected in relations between the government and the administration, in which ministerial responsibility implies the observance of neutrality on the part of public servants. The obligation upon them to stand aloof from the political arena as individuals and to avoid using potential powers as a group to act as an autonomous force, tends to modify political and industrial liberties that are not explicitly restricted or may even be authorised by law. The theory remains intact because obligations, whether written or unwritten, take precedence over the exercise of rights, less through formal sanctions (although the disciplinary concept of 'misconduct' is sufficiently wide to cover disciplinary action on charges relating to breaches of expected standards of behaviour) than through organisational pressures, fears of repercussions upon career, conformity to official mores, individual inclination, and acceptance by public servants themselves of the need for a self-denying ordinance in conformity with the expectation of society that official and political hierarchies should be strictly differentiated. This should not be held to imply that rights do not exist, but merely that their impact is muffled by the manner in which they are in fact exercised. If they were insisted upon more

stringently, it is possible that they might modify the governmental structure accordingly, e.g. in the direction of a modified spoils system in top positions. The balance between rights and obligations and between law and practice is a delicate one, depending less upon written enactment than upon people's conceptions of their role. The problem may be illustrated by the statutory prohibition upon strikes in the Commonwealth Public Service, which, for a variety of reasons, has not been put into force to deal with strikes, and consequently appears of little more than theoretical interest. If, however, the pattern of industrial relations within the Service changes, it may be necessary either to implement the provision, or to re-assess the position of strikes in relation to public servants. Social trends can never be completely contained within legal formulation. In the case of Commonwealth public servants the latter is both buttressed and modified by a sophisticated conception of their role in relation to constitutional norms and community needs.

The peculiarly public nature of the public bureaucracy has had the effect of enhancing the rights of public servants. In the same way as the public tends to insist upon democratic procedures in its relations with the administration, it tends to be sympathetic to similar procedures within the administration, allowing the individual public servant rights of appeal against decisions which affect him, and the ability to insist upon his entitlements against his superior, thereby

restricting the discretion of the latter. It may be argued that such rights are irrelevant, for in any bureaucratic organisation uniformity and regularity are essential elements. The individual finds his rights not in assertion against authority, but in the regularity of administration and the uniformity of rules and conditions which are bound to apply in a large organisation. While the individual is submerged in the system, his rights are automatically safeguarded by the very lack of impact his individual claims make. Rights thus become merely the benefits which the individual receives from the automatic working of the machine, which prevents distinctions as between persons and subordinates all equally to uniform rule.

An opposing view of bureaucracy similarly denies the applicability of rights, not because their existence is automatically ensured as the corollary of large-scale organisation, but because they stand in direct opposition to the essential principles of hierarchy and subordination characteristic of bureaucracy. The recognition of legal rights does not reflect the situation of the individual who wishes to exercise them. In gaining his short-term goal, the individual runs a variety of long-term risks, such as alienation of the sympathy of his colleagues and antagonism of superiors with subsequent detrimental effects upon his career.

> ... the doctrines of democracy and liberalism which underlie our state have made almost no impact upon our bureaucratic organizations. The only nonlabor-union movement in this direction has been the attempt by some personnel people to introduce into the bureaucracy rudimentary elements of procedural due process to protect the personal goals of employees. But because of the persistence of the old role definitions and the actual power of hierarchies, the assurance of procedural due process is problematical in any particular organization and more or less dependent upon the personalities or connections of the people involved. To avail oneself of such protection is to risk impossible working relations with the boss.[3]

Attempts to confer rights may also be regarded as undesirable, since the achievement of organisational goals frequently requires subordination of individual rights. Individual interest may conflict with general interest. Rigidities caused by insistence upon challenge by individuals may impede smooth working. Not everyone may direct the enterprise. Infinite appeals may prove expensive, time wasting and distracting for all concerned, defeating their own purpose by the pursuit of an illusory justice. The procedures and assumptions suitable for a court of law are unsuitable for the administration of an organisation.

Further, the purposes of the organisation may themselves determine the kind of rights permissible, and where the former change, the latter may be evaded or become an impediment. This is particularly the case in relation to promotion, where selection for high office

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[3] V. Thompson, Modern Organization, New York, 1963, p. 65.

depends not only upon the availability of positions but the type of person desired for them. In the career as 'progress through life', the deserving do not necessarily receive the reward to which they are morally entitled: the organisational career is no different. Organisational need and character are not neutral but the result of human manipulation, and in this situation rights may be inapplicable if they demand an objective standard which is out of keeping with reality.

However the basis of the concept of public servants' rights lies not in arguments about relative efficiency or bureaucratic norms, but in liberal democratic thought and the assertion of the common man against authority which is the major contribution of Western democracy. To deny such rights absolutely would be to subordinate the individual to the state and the means to the end, and to deny the fallibility of authority. The problem is to define the permissible extent of those rights, to balance the demands of the organisation, derived from those of the public, against individual interests. In the Commonwealth Public Service, the solution appears to have been to define the extent of rights allowed to officers in terms of those applicable to outside employment with modifications where necessary to meet the special demands of public service.

(b) Rights conceived as equality of conditions of work

Rights may therefore be conceived in terms of a comparison between the public servant and the ordinary employee. Fair conditions are thought of as those applicable to employees in general, whether political or industrial liberties or concrete benefits. This approach is manifest in the correspondence between actual conditions of work in private and public sectors, the enjoyment of arbitration rights by public servants and the large measure of political liberty allowed them. The approach is appealing as it appears to offer a ready-made standard by which to decide upon the extent of public servants' rights.

The analogy may however be misleading. A basic problem is lack of knowledge of the effective rights of the ordinary employee. Although the legal formulation may be found in the law relating to master and servant and industrial relations, statutory regulation of industrial conditions, provisions of the awards of industrial tribunals and welfare legislation, it is difficult to ascertain the rights of private employees in general because (a) these vary from industry to industry and State to State, (b) they are dependent upon individual negotiation, and (c) employers are reluctant to permit research in this area. There is a tendency to assume that the private employee enjoys enhanced effective rights compared with the public servant, although supporting evidence is scanty. For example, the private employer is free to impose standards of dress and behaviour upon his employees as part of the employment

contract and to refuse to allow challenge to his decisions regarding deployment of work force, relative salary and so on. The employee who fails to conform to the conditions offered, or proves himself unsuitable by his public activities has little redress against his employer.

Public servants' rights on the other hand derive from the needs of the state for a permanent workforce of a particular kind. Thus they become entitled to a security of tenure which, though not absolute, is assured by the continuity of the functions of the state, while the private employee is ultimately dependent upon his employer remaining in business. From permanence derive the limited rights to a career implied in a career service, which the ordinary employee does not enjoy apart from particular posts in large-scale organisation. The standards of democratic administration which the public expects of its public service spill over into the personnel field to allow the public servant rights of appeal against his superiors inapplicable to private employment - the right to appeal to the legislature in right of citizen although relating to employment; the general right to query decisions by appealing beyond his superior to the Public Service Board; the right to internal judicial inquiry when charged with an offence; the right to challenge another officer's promotion.

The public servant is also set apart by his obligations enforced through internal discipline and directly through the ordinary law of

the land. The former, through the concept of misconduct applied through special procedures and resulting in special sanctions, subjects the public servant to a private system of law which has the backing of the state but does not apply to the community generally and is divorced from normal judicial procedures. On the other hand, the public servant is directly liable for breach of certain of his obligations in criminal law, in which case the state-employer uses its powers as state in relation to its own employees.

It is this dual concept of state-employer and citizen-employee which proves confusing in any comparison of the rights of public servants and other employees. In certain respects the state acts in relation to its employees as does any other employer, but in others the powers asserted are those of the state. Conversely in certain respects the public servant is in the same position as any other employee, while in others he enjoys special rights and obligations. It is difficult, therefore, to place the state employer in exactly the same position as any other employer, since it retains its special characteristics in applying law to the rest of the community in relation to its own employees. It is not subject to the limitations of profit and loss and external control which determine the extent of rights appropriate in private employment. The state-employer is therefore forced to create different criteria from the private employer in dealing with emerging problems such as the effect of automation on public servants, the impact

of political decisions upon organisation of its administration and the repercussions upon the community in general of its policies towards its workforce, all of which affect public servants' rights.

In Australia such problems are eased by the diversity of forms of public employment and public authorities. In particular, the Commonwealth Government, because of its restricted jurisdiction over industrial and social matters, is somewhat isolated from difficulties arising from comparisons between the treatment of its own workforce and the community and in general. However its constitutional inability to pass laws in industrial and social spheres, except in relation to its own employees, appears to have resulted in a reluctance to take the initiative in extending their rights, relying upon arbitration to take the place of direct bargaining in private industry except in particular areas such as superannuation.

In spite of these criticisms, the concept of public servants' rights as analogous to those of other employees retains significance. Firstly, it places the onus upon the state, in imposing obligations upon the public servant, to justify departures from the normally accepted rights of citizens. Secondly, it helps to prevent the emergence of public service as a privileged caste above the vicissitudes of life affecting the rest of the community. Thirdly, it extends to the public servant the benefits of normal industrial procedures and helps ensure that public service conditions do not lag too far behind those in other occupations.

It is misleading insofar as it ignores the special rights and obligations applying to public servants and attempts to provide a complete analogy with or justification for them.

(c) Rights conceived as set standards expressed in law

Rights may be expressed in a number of ways - through contract between parties, constitutional or statutory enactment, delegated legislation or customary arrangements. Each has different advantages for different situations, and public servants' rights represent a combination of all of them.

According to judicial precedent, following British doctrine, the relationship between the Crown and its employees is a contractual one. A contract is usually distinguished by mutual agreement between the parties signing it, and unilateral abrogation may give rise either to enforcement or damages upon application by the aggrieved party to the courts. Attempts to apply this doctrine to the public service relationship have met with difficulties, not only because British common law doctrine insists upon dismissal at pleasure robbing the contract of its binding power, but also because of the intrinsic inequality of the parties to the alleged contract and the ability of one party to alter its terms at will through its sovereign power. Further, as it is not possible to point to any single document as being the contract, disputes exist as to whether specific conditions of employment are contractual,

and terms which clearly do form part of an employment contract may be negated by directly contrary implied terms. It may therefore be suggested that the relationship is one of status rather than of contract. Such a relationship is perhaps not as exceptional as it might seem, for the concept of contract in the case of large-scale enterprise generally is becoming drained of its meaning, the source of rights and obligations beind founded rather on a kind of internal law applicable to all employees without exception, arrived at through collective bargaining or arbitration and binding upon third parties not directly involved in its creation.

> As we move to the role of the worker, i.e., those members of the organisation whose norms for conduct are highly concrete and specific, we find that such norms apply to many instead of few. To create and sanction these norms as law through contract becomes impossible as a matter of individual, person-by-person negotiation. There cannot be a multitude of disparate employee contracts, each having a different normative content, when workers all perform essentially similar functions, occupy similar relationships, and hence are all subject to essentially similar norms.[4]

In the Commonwealth Public Service, the idea of contract is subordinated to that of statute. It is possible to argue that in view of the attitude of the courts, this formulation of rights is without significance, as both their creation and enforcement rests entirely in the hands of the state. This view ignores certain practical features

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[4]K.S. Carlston, Law and Structures of Social Action, New York, 1956, pp. 244-5.

of statute as employed in the Commonwealth Public Service. The statute provides a clear statement of definite rights to which the public servant is entitled. It sets out the conditions in which claims are regarded as valid, and the doctrine of ultra vires provides the same check to discretion, irrespective of common law relating specifically to public servants, as it does in other areas concerning the use of powers by the administration. Further, a statute is a public document, unlike a contract which concerns only its signatories. Changes in statute cannot be made simply at will, but involve the necessity of finding space in the Parliamentary timetable and running the gauntlet of public debate upon the proposals for change. Thus, by the manner of its creation, statute confers upon the public servant a public status, emphasising his position as different from the private employee of the state-employer.

The self-denying ordinance of the courts restricting their own jurisdiction over the discretionary element in public service legislation should not be held to imply a denial of rights to the public servant. Rights may be enforced by means other than the judiciary. In the case of public service legislation, interpretation is not entirely unilateral. At points where the disputes affecting the individual most intensely occur, quasi-judicial procedures have been incorporated into the system of administration. Personnel administration is not a unity: it involves a number of participants, a feature which in itself helps to ensure rights, since it makes individual arbitrary or illegal decision

more difficult. It also makes possible effective appeal rights within the administration itself, particularly where staff participation is permitted. In these appeal procedures it is not always possible to allow for 'openness, fairness and impartiality', as individual rights are not absolute against organisational policy. However the existence of administrative tribunals and other appeal procedures may be seen as an embryonic form of administrative justice, which it has been freely acknowledged may be as efficacious a means of preserving rights as justice administered through the courts of law.

It is evident, therefore, that the formulation of rights in the Commonwealth Public Service has departed from the British common law conception and bears some resemblance to that current in European countries. It differs from the latter chiefly by reason of the fact that rights are not codified in a single statutory source. In order to ascertain his rights the Commonwealth public servant has to consult a number of statutes, and the regulations and instructions made under their authority. He has also to discover the arbitration award applicable to his appropriate association and note its provisions as varied from the date of their original promulgation, as no time limit is placed upon their continuance and they over-ride statute. Finally, in the exercise of his rights the public servant has to observe unwritten rules of behaviour, which smooth the difficulties arising from the strict letter of the law - a kind of lubricant preventing friction.

The complexities and uncertainties of the current situation in which the rights of Commonwealth public servants are scattered throughout a number of sources might be remedied through the adoption of a code of rights and obligations similar to that in European countries, thus gaining the advantages of clarity, simplicity, precision and ease of access. Whatever the merits in theory of codification, it appears unlikely it will take place in relation to the Commonwealth Public Service, at least in the near future. Any attempt to do so would involve debate upon the problem areas of public servants' rights in an effort to clarify them which, however praiseworthy, would disturb existing compromises. It would be difficult to find a time which would ever be convenient for such a reappraisal, and debate would probably be characterised less by a discussion of first principles or abstract considerations than by practical politics in which the parties concerned would strive to gain maximum advantage for themselves. Such a debate would bring to the fore incompatibilities in rights and obligations, and might restrict the area of desirable discretion, and with it the area of tolerance which accommodates them. The extension of the law into the sphere of unwritten rights and obligations might raise problems of enforcement, at present solved not through external restraints but individual consciousness. It is rarely desirable to incorporate into law vague standards of behaviour, particularly where these relate to private conduct, breaches of which are capable neither of precise definition nor of being easily

discovered. It would also be difficult to accommodate within the code the varying provisions of arbitration award, or to allow for public service arbitration itself, which modifies the unilateral regulation of the public service implied by a comprehensive codification of rights and obligations.

Some of these problems may be solved by the adoption of a code of ethics, which would clarify standards of behaviour expected of public servants without involving the rigidities caused by the exigencies of law enforcement.[5] To some extent the adoption of a code of ethics involves the same difficulties as codification of the existing law - incompatibilities would be revealed, problems sharpened, and the area of tolerance reduced. Additional problems arise from the status of such a code. It is possible that if its provisions are to have more than the status of mere suggestions they would drift into the same position as law, and be enforced in the same way. On the other hand, they may merely reflect wishful thinking, and fail to correspond to reality, so that yet a third set of standards of behaviour may arise, taking precedence over both law and the code of ethics. The ambiguity of such a code, attempting to express both desirable standards of behaviour and those which actually exist, would probably make for a confusion which does not

[5] A proposed code of ethics for Commonwealth public servants has been circulated by the A.C.T. Group of the Royal Institute of Public Administration. At the time of writing no action has been taken to implement the suggestion.

attach to law which clearly sets out what behaviour is regarded as intolerable, and which enforces its standard through penalties. The present situation, whatever its drawbacks, has at least the merit of flexibility, which in view of the disparate concepts of public servants' rights at present held in Australia, is a desirable asset.

It may be concluded that the Commonwealth officer cannot ascertain exactly what his rights are. Although over a wide area concrete entitlements are clear, in others, conflicts between written enactments and the differing standards expected by administrative authorities, politicians, the public and officers themselves produce confusion as to the correct course of action or the extent to which any firm right exists. The three aspects of the concept of public servants' rights tend to merge into one another and become confused in any discussion of the subject. The fundamental difficulty is that while in many respects the rights of the public servant may be compared with those of the private employee the analogy is not complete. The right to challenge the public employer within legally defined channels, and the recognition by the public employer of rights binding against it by virtue of statute, express the special position of the public servant in relation to the rest of the work force. This position is further expressed in the rights he possesses to tenure and within the career process as well as

in the obligations he assumes in response to community demands. The particular compromise between these three aspects is one which has been found suitable for the needs of the Commonwealth Public Service at the present. Needs, however, are constantly changing and if it is the task of law to fulfil them, it too must change in response. The present synthesis between the three aspects of rights may be sufficient to accommodate emerging problems; alternatively the balance between them may require adjustment in accordance with the needs and desires of those whom the law exists to serve.

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