An Uneven Playing Field: Executive Public Servants and the Public Interest

GREG McCARRY*

The *Public Service Act* 1895 (NSW) was not a particularly well drafted piece of legislation. It was passed following the Government's acceptance of the main recommendations of a Royal Commission into the state of public services. Yet that acceptance is now regarded as a "watershed in the history of public personnel administration in Australia".[1] The policies embodied in the Act, and sometimes its structure, were widely followed throughout the public sector in Australia up until the last ten or fifteen years. One of its objectives — in which it and its imitators and offspring largely succeeded — was to remove political patronage from appointment to the public service and, it seems, from promotion, dismissal and personnel management generally. After 1895, appointment and promotion in the New South Wales service were done through a central board. The board also had to investigate and re-organise the service, which had been found to be over-staffed.

The Issues Outlined

The pattern set by the 1895 Act spread through most of the public sector. The features of that pattern, the values it embodied and the kind of "career" public service it engendered are noted in this article. It seemed a stable model until 10 or 15 years ago, when changes started to occur. The changes ranged widely and arose in a climate of economic rationalism which caused the public sector to embrace some of the managerial techniques of the private sector. Personnel management was included in their sweep, and public employment was re-ordered, especially at the senior levels, in ways which supposedly contribute to greater efficiency. These changes are the focus of this article. The arrangements now in place in New South Wales are of particular interest. They depart further from the traditional pattern than do those introduced in other services, and appear to draw more heavily on private sector practices. It is argued that, on examination, they are in many ways less favourable than what obtains in the private sector. More seriously, new regimes for senior executives in the public sector do not seem to embody many of the values and features which were regarded as essential in Westminster systems of public service. The legislative frameworks now in place have the potential to allow emergence of a very different and more "political" kind of public service, far less able than the older models to serve

* Associate Professor of Law and Hyman Lecturer in Industrial law, University of Sydney.

1 Caiden, G E, *Career Service* (1965) 43.

what has hitherto been regarded as the public interest. This potential in the legislation is demonstrated and discussed.

The Old Framework

Public service legislation in the States and the Commonwealth was generally modelled on that 1895 Act. The legislation itself and the practices it fostered or required had a number of distinctive features which were conducive to removing patronage, or to preventing its re-emergence, and to fostering the growth of a professional and apolitical service. These features included the establishment of strong and independent central personnel agencies, substantially free from ministerial control, to manage the public services. These public service boards or commissions were responsible not only for personnel administration in a narrow sense, but were usually charged with a wider responsibility for efficiency, for industrial relations and for the determination of job classifications and wages and conditions in the services which they superintended. Secondly, "officers" in these services were, in practice, appointed permanently, albeit after a probationary period. The qualification "in practice" is necessary, for, in some services at least, the Crown's common law prerogative to dismiss at pleasure continued (and continues) to exist,[2] although it was rarely used.[3] If, in theory, officers in such services were the least secure of all employees because of the prerogative, in reality they were among the most secure, for, with those few exceptions, involuntary termination of employment occurred only by retirement, medical disability or by dismissal following proved and serious dereliction of duty.

Another feature was that, once an officer had become "permanent", there was a career structure available. Promotion through this was largely influenced by seniority, although that was never an absolute criterion. Merit and "special fitness" came into it, especially in promotions to more senior posts. Seniority was easy to define, although it was defined differently in different services, and it was relatively easy to apply however it was defined. More importantly, it was "neutral" and "objective" and was perceived as conducive to the policies behind this form of legislation. In many circumstances there was a right of appeal against a missed promotion. While it was difficult, if not impossible, to become rich on a public servant's salary, it was also unlikely that the prudent would starve. Moreover, their wages and conditions had statutory or, in some cases, award underpinning. If misconduct or incompetence was alleged against an officer, he or she had the benefit of elaborate procedures ensuring "due process". Then there was "the golden chain" — defined benefits superannuation, fructifying at career's end on a scale which was seen as reasonably generous. Public servants enjoyed long service leave well before it spread to the workforce at large. Not all of these features applied to the most senior officers. For them, seniority was less important or

2 A fairly common statutory provision to the effect that an office holder shall be deemed to have vacated the office "if he is removed from office by the Governor" probably has the effect of preserving the prerogative power. See *Singer v Statutory and Other Offices Remuneration Tribunal* (1986) 5 NSWLR 646 at 648, 656, 661.

3 But for recent examples of its use see *Public Service Association of NSW v Public Service Board of NSW & Anor (Re Ferguson)* (1988) 25 IR 148, and comment thereon by McCarry, G (1988) 62 *ALJ* 1054, and *George v Minister for Education* [1990] AILR 355, which concerned removal of a member of a University Senate, not an employee.

irrelevant. Appeals against the promotion of others were often not available. But mostly the differences were of degree and form rather than substance.

A Wave of Change

From the early 1980s, or a little earlier, this pattern started to change. Some central boards and commissions of the traditional mould were restructured or abolished altogether and their functions were abandoned, re-defined or assigned to other persons or agencies, such as individual heads of department, who were often closer to ministerial control or at least influence. Seniority virtually disappeared, to be replaced by what have proved to be rather more elusive concepts of "merit".[4]

Of course, not all of the familiar pattern disappeared. Much survived, albeit in modified form, at least for the general run of public servants. The virtual disappearance of seniority has probably been the most widespread change. Moreover, some of their conditions, such as superannuation and greater job protection, are now regarded as apt for the workforce at large, although by no means all workers yet enjoy them.[5] But change there has been. Some of the most important alterations have concerned the way in which senior officers are engaged and governed and it is with those alterations that this article is mainly concerned.

Even if there has been a tendency to exaggerate the importance of some of these officers,[6] they are central to the scheme of public administration. They are usually involved not only in the superintendence of government programs, but also in giving advice to ministers and the government and in the development of policy. Necessarily, they have a considerable impact on the nature and quality of the output of the public sector. There is variation in the legislative changes for these "executives", as the statutes are now likely to describe them. The arrangements for senior officers in New South Wales depart furthest from the familiar pattern, and indeed are quite radical.

---

4 Seniority was not easily circumvented by anyone so minded. Sometimes, as in New South Wales, the right to appeal against the promotion of another was conditional on the promotion having infringed the appellant's seniority. Seniority probably inhibited patronage by administrators themselves rather than by politicians. Its replacement by "merit" as the criterion for promotion has no doubt eradicated the shortcomings of a seniority based system, but at the cost of introducing a new set of difficulties.

5 With many corporate private employers now resembling public bureaucracies in appearance and effect, the question has been raised whether administrative law concepts should not apply to the governance of their employees. Collins, H, "Market Power, Bureaucratic Power and the Contract of Employment" (1986) 15 *Industrial LJ* 1 at 13. Public interest considerations may justify greater protection for those employed in private bureaucracies. In an American context it has been argued that, given the power and influence of many modern corporate employers, there should be established a due process guideline protecting their employees from arbitrary discharge: Siewerth, S C, "Patronage, Arbitrary Discharge, and Public Policy: Redefining the Balance of Interests in Employment" (1981) 14 *John Marshall L R* 785.

6 Butler warns against over-emphasising the significance sometimes accorded department heads: Butler, W, "Public Service Reforms and Professionalism", in Curnow, G R, and Page, B, (eds) *Politicisation and the Career Service* (1989) 217.

Forces for Change

Changes in the public service sector during this time extended far beyond personnel management to planning, budgeting and organisational matters. O'Brien has identified the Royal Commission on Australian Government Administration chaired by Dr H C Coombs in the mid-1970s and the work of Dr P Wilenski in New South Wales as attempts to "reorient the social democratic concept of the state, which seemed to prosper during the great post-war boom, to the harsher environment of the growing fiscal crisis of the state which characterised the later 1970s and 1980s".[7] Since the early 1980s, public administration has been pervaded by attitudes and techniques borrowed from the private sector. Their proponents have sought to justify them by reference, in the main, to "economic rationalism", which is alleged to yield greater "efficiency". Efficiency can mean different things. In the present context, it is commonly used in the economists' sense of obtaining more output from a given input. The measure of this kind of efficiency is the measure of the market. Yet it "is not an incontestable, self-evident value that should subordinate all others".[8] It is a crude, or at any rate a narrow, measure of efficiency, confined, as it is, to dollars and cents. "Considerations of need, desert, merit, equity, equality, worth and the like are beyond the scope of the cash register" yet if not "taken into account in government policy and administration they will eventually make themselves felt the hard way".[9]

Nevertheless, the "new managerialism" swept through the public sector. O'Brien says that the shift in management strategy in the public sector from inputs and processes to outputs and results "required a redefinition of the nature of public employment".[10] "Required" may be too strong, but the changed managerial focus was certainly associated with new legal structures for executives in the public sector.

These new structures are characterised in varying degrees by less secure tenure, altered conditions, "performance" linked pay, remuneration "packages", contract employment, and other practices imported from the private sector.

The contributions to efficiency made by these new arrangements are said to include "flexibility" and "mobility", which seem to mean the ability to remove or transfer executives with relatively less due process and accountability. This is explained as necessary to meet a perceived need to strengthen "the political grip on departments"[11] so as to enhance their responsiveness to the requirements of the government of the day. One of the reasons for the introduction of flexibility in Victorian arrangements for senior executives was that it was thought desirable for a government to be able to appoint people who "understand the government's objectives and are able to implement them".[12] It seems that the new managerialism does not baulk at allowing the

---

7 O'Brien, J, "Privatising state workers: The case of academics", (1990) 33 *The Australian Universities Review* 30 at 31.

8 Painter, M, Commentary (1990) 49 *Aust J of Public Administration* 154.

9 Jackson, M W, "The Eye of Doubt: Neutrality, Responsibility and Morality" (1987) 56 *Aust J of Public Administration* 280 at 285.

10 O'Brien, J, above n7 at 32.

11 Wass, D, "Public Service in a Democratic Society" in Curnow, G, and Page, B, (eds) above n6 at 49.

12 Smith, R F I, "Working With Ministers" in Curnow, G, and Page, B, (eds) above n6 at 105.

appointment of partisans to senior positions in the bureaucracy.[13] This flexibility also facilitates easier removal of "under-performers".

In this climate, scant attention has been given to the nature of the state as an employer. Recently it has been argued that it is in a unique position. Its distinctive features may well mean that it cannot be made to function in the same way as the private sector.[14] Apart from theoretical considerations arising from the nature of the state, at a practical level the still emerging picture of private sector performance in Australia in the 1980s counsels extreme caution in assuming that the ways of the private sector are likely to be the bearers of a golden age of efficiency and effectiveness in the public sector.

This new mood and its accompanying changes for public sector executives seem to challenge the impartial/neutral principle and the very basis on which the hitherto dominant Westminster model is based. The extent of the change and its implications become clearer when that model is examined more closely and the new legislation is measured against it.

Westminster Values

Political patronage, although not an unalloyed evil, was seen as a major problem, perhaps the major problem, in public administration in the second half of the nineteenth century in England, America and also in Australia. The reforms of that era were intended to see that a service based on patronage was replaced by one which was professional, neutral, impartial, anonymous, and free to serve equally effectively any duly elected government.[15]

Ministerial responsibility was the basic principle on which the necessity for neutrality and anonymity of the public servant was grounded. These elements — ministerial responsibility and an anonymous civil service — seem to have been established in England by 1830, although 1830 to 1880 must be seen as a formative period.[16]

These terms — impartial, neutral and so on — now seem to have no fixed meaning and have "become blunted and confused with time."[17] Williams has identified eight elements in the notion of neutrality and three schools of thought on the subject.[18] One writer says that political neutrality originally referred to party political neutrality, non-partisanship. It did not refer to

---

13 Curnow, G, "The Career Service Debate" in Curnow, G, and Page, B, (eds) above n6 at 18. This must not be confused with the appointment of politically committed advisors to the staffs of ministers. These persons, whose numbers and no doubt influence have increased since the middle 1970s, are on the personal staffs of their ministers and are not part of the career bureaucracy. They are not able to directly superintend the implementation of programs, and they normally lose their posts when their minister goes.

14 Fredman, S, and Morris, G, "The State as Employer: Is it Unique?" (1990) 19 *Industrial L J* 143.

15 Kitson Clark, G, "'Statesmen in Disguise': Reflexions on the History of the Neutrality of the Civil Service" *The Historical J*, II, I (1959), 19. Wilenski has claimed that arguments of this kind are ex post justifications and that the real reason for the nineteenth century reforms was that they produced a service which was cheaper and more docile; Wilenski, P, "Ministers, Public Servants and Public Policy", (1979) 51 (No 2) *Aust Quarterly* 31.

16 Kitson Clark, G, above n15 at 24, 28, 30.

17 Bailey, P H "'Professionalism' and 'Ethics'" in Curnow and Page (eds), above n6 at 231.

18 Williams, C, "The Concept of Bureaucratic Neutrality" (1985) 44 *Aust J of Public Administration* 46.

"apolitical instrumentalism, with which it is now often confused." That is, the career public servant aspires, or should aspire,

> to the neutral competencies of public management: a cost efficient instrument of administration, ready to implement the programmes of whichever political party holds power as the government of the day.[19]

This does not necessarily imply that political neutrality is synonymous with automatic obedience to the government of the day. Uhr himself says that the core activities of public servants at all levels involve political judgments on a daily basis, using "political" in the sense of public or community affairs. Williams argues that the traditional notion of neutrality in fact disguises the real distribution of power and influence.[20] It is thus important to identify the values and the morality embedded in the administrative process, and not to deny their existence.

From a different and more individual angle, Jackson has argued cogently that neutrality means not mere obedience but morality. The usual arguments against ethics — that it is impossible, unnecessary and impractical — are shown by him to be unpersuasive. The main problem in the twentieth century has not been the disobedience by officials of morally acceptable laws, but their obedience to morally unacceptable laws.[21] Thus neutrality in this sense may sometimes require disagreement with the Government or minister, or disobedience or even denouncement.[22]

So far as the common law is concerned, the position of the public servant is much the same as that of the private employee in that both are obliged to obey lawful, or perhaps lawful and reasonable, orders.[23] The executive government itself must also obey the law.[24]

If an order is unlawful, the public servant is not obliged to obey it; indeed there is a positive duty to disobey it.[25] But as Jackson points out, that may not mean much where the employer, the government, can make and unmake the law.[26]

It has also been said that a neutral senior public service is, in any case, a myth,[27] that impartiality cannot exist,[28] and that an awareness by public

---

19 Uhr, J, "Ethics and Public Service" (1988) 47 *Aust J of Public Administration* 109 at 114.

20 Williams, C, "The Concept of Bureaucratic Neutrality" above n18.

21 Jackson above n9 at 287.

22 In the private sector, the employee's obligations to obey and to keep the employer's secrets are not unqualified in law (let alone in ethics), although the circumstances in which disobedience or disclosure is permitted will not necessarily be co-extensive with those applicable in the public sector. See Macken, J, McCarry, G, and Sappideen, C, *The Law of Employment*, (3rd edn, 1990) 133 and 124; McCarry, G J, *Aspects of Public Sector Employment Law* (1988) 232.

23 For example, *Bayley v Osborne* (1984) 4 FCR 141 at 144-145; *Jenkins v Gleeson* (1981) 55 FLR 368; *Police Service Board v Morris and Martin* (1985) 156 CLR 397 at 402 per Gibbs CJ.

24 *A v Hayden (No 2)* (1985) 156 CLR 532 at 562 per Murphy J, at 580 per Brennan J.

25 *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 206 per Windeyer J; *A v Hayden (No 2)* (1985) 156 CLR 532; *Raleigh v Goshen* [1898] 1 Ch 73 at 77; *James v Cowan; Re Botten* (1928) 42 CLR 305; *Watson v Collings* (1944) 70 CLR 51 at 58.

26 Jackson, M W, above n9 at 287.

27 Williams, C, above n18.

28 Kingsley, J D, *Representative Bureaucracy: An Interpretation of the British Civil Service* (1944).

servants that bias of various kinds may enter their work is as much as can be expected.[29] These contentions recognize, expressly or impliedly, that politics and values (morality) enter into it. The presence and recognition of values in the administrative process need not be inconsistent with a neutral public service, as long as one does not define "neutral" too narrowly.

Indeed the need for the public servant to have regard to a wider range of interests and values in addition to the minister's wishes has recently been re-affirmed in investigations into alleged corruption. "No public servant should be heard to say that something was done because it was what the Minister wanted, and that is that".[30] Adherence to these tenets is almost impossible if the statutory employment framework is not drafted so as to enable the executive to act without fear of reprisal.

A Career Service

These values supposedly fostered and were in turn manifested by a career service of the kind described earlier — permanent, with structured progression based on "objective" criteria and a high degree of job security.

The advantages of such a system include continuity and stability of administration, the development of expertise, a relatively high level of general competence and a premium on honest, professional behaviour. There are benefits to society. "The independent secure public servant, providing impartial advice, can act as a counterweight to balance the more passionate enthusiasm of political masters". There is loyalty to the democratically elected government of the day, regardless of its policies. Public servants may also act as the de facto representatives of the less powerful interests in society. And the service may promote social mobility within its career structure.[31]

Curnow identifies a number of criticisms of the traditional career service. They include the political role of the bureaucracy. This in turn includes its power, derived from its expertise, for the exercise of which it was not sufficiently"accountable".[32] The political role of the career service is also said to be exemplified by its absence of impartiality, an almost inevitable absence given that policy recommendations are based, at least in part, on values which are likely to be conservative. It is claimed that the merit principle has failed and that the career service has become the preserve of the (white Anglo-Saxon) middle class.[33] Further, it has been said that given the

---

29 Caiden, G E, *The Commonwealth Bureaucracy* (1967) 391.

30 Independent Commission Against Corruption, *Report on Investigation into the Silverwater Filling Operation* (1990) 14. The report says that the public servant's advice should be frank and fearless, and should, if necessary, be pressed, possibly in writing in some circumstances, until the Minister has made a decision or said that he or she will hear no more. For a consideration of the extent to which a public servant must have regard to Ministerial wishes in exercising a discretion, see McCarry, G J, above n22 at 208ff. See also Fitzgerald, G E *Report of a Commission of Inquiry Pursuant to Orders in Council*, 3 July 1989, 130-132.

31 Curnow, R, above n13 at 15-16. This and the following paragraph in the article draw heavily on these pages.

32 Wass, D, above n11 at 46. As Curnow notes, departments and senior public servants have always been responsible and accountable to ministers and, for many years, to public service boards and commissions. In addition they are now scrutinised by ombudsmen, appeal tribunals and parliamentary committees and are often subject to judicial review.

33 If this was true, anti-discrimination and equal opportunity legislation, including affirmative

size and complexity of administration, ministers find it difficult to see that officials do all that they legitimately require to be done. Top civil servants may be seen to be, and perhaps sometimes are, impediments to developing and implementing new policies.[34] This alleged lack of responsiveness of hitherto satisfactory, non-political career services may be explained by a number of factors, possibly including the changing nature of politics, but has been urged as a justification for strengthening "the political grip on departments".[35]

Politicisation

Politicisation of the public service can mean a number of things. One of the more important meanings is partisanship or activism, which can in turn mean "the extent to which membership of or support for a political party is a necessary, even if not sufficient condition of appointment to and promotion in public office"[36] (and one may add removal from office). The Report of the "Fitzgerald Inquiry" points out that a system which gives the Executive Government control over the careers of public officials adds enormously to the pressures on even those who are moderately ambitious. As a result:

> merit can be ignored, perceived disloyalty punished, and personal or political loyalties rewarded. Once there are signs that a Government prefers its favourites (or that a particular Minister does so) when vacancies occur or other opportunities arise, the pressure upon those within the system becomes immense.[37]

Nevertheless it has been opined as likely that partisan factors are playing an increasingly significant role at the senior levels of bureaucracies, regardless of the party in power.[38]

Politicisation can also mean the ways in which political allegiance affects the decisions of an official.[39] In that sense, "the line between political sensitivity and political partisanship has depended as much on the standpoint of the observer as on anything else".[40] Again, politicisation can mean or entail "civil servants having a greater role as political advisors to and collaborators with ministers", a consequence of which is likely to be that new ministers will be inclined to wish to dismiss higher public servants.[41]

Uhr encapsulates the notion by saying that it "implies undue political interference with bureaucratic discretion on matters of program administration or resource management" although this does not help us decide what is "un-due" interference and what is not.[42] Again, the standpoint may be important.

---

action programmes, may well have redressed or be in the process of redressing the imbalance. There can be a certain tension between redressing social disadvantage and adhering to a merit principle. See Wass, D, id at 42.

34 Leemans, A F, "Recent Trends in the Career Service in European Countries" in Curnow, G, and Page, B, (eds) above n6 at 368.

35 Wass, D, above n11 at 49.

36 Curnow, G, above n13 at 19.

37 Fitzgerald, G E, above n30 at 130.

38 Ibid.

39 Ibid.

40 Smith, R F I, "Working With Ministers" in Curnow, G, and Page, B, (eds) above n6 at 106.

41 Leemans, A.F., above n34 at 367.

42 Uhr, J, "Ethics and Public Service" (1988) 47 *Aust J of Public Administration* 109 at 111.

The assumption since the nineteenth century has been that partisanship and allowing political allegiance to affect an official's decisions are wrong and quite at odds with the values embodied in the Westminster model. Nowadays, not all, or at least not all politicians, accept the inappropriateness of political appointments.[43] It seems that in various ways the:

> Westminster-style relationship of intimacy between minister and department is being broken, leaving a huge question about who is to provide the policy advice and system-monitoring capacity that departments have for so long given to their ministers.[44]

The problem of politicisation is not confined to Australia. The independence and impartiality of the international civil service, which contribute greatly to its effectiveness, seem to have been reduced by politicisation.[45]

The significance of the statutes

The statutes which governed public servants for three-quarters of a century established for them an employment regime which was in important respects different from, and in many ways more favourable than, that which governed workers in the private sector.[46] Nowadays these more favourable conditions are often seen as no more than conditions of employment and accordingly are sometimes derided as "perks". To so regard them largely misses their point. With the possible exception of long service leave, their features, outlined earlier, were conducive to the attainment of the objectives and policies of the legislation — the elimination of patronage and the establishment or enhancement of a professional public service exhibiting "Westminster" characteristics. The argument was (and is) that these distinctive conditions, especially the de facto security, were necessary to provide a working environment in which officials could carry out their functions professionally and in a non-partisan way for the government of the day without the fear or the actuality of adverse action from politicians who did not always like what they were advised or told. "In fact, the conditions of employment of a professional public servant have no justification if they do not promote moral responsibility in the widest sense."[47] Thus the hitherto normal scheme of employment regulation was not put in place primarily for the benefit of the employees. It was seen to be in the public interest that the community should have a public service arranged in this way so that it could do its work properly.[48]

In addition, there has at times been a policy that the public sector should be a "model" employer, leading other employers by example.[49] This may also go some way towards explaining some of the distinctive features which have been noted, but it is probably only a secondary reason.

---

43 Collins, P, "Public Servants and Policy: New South Wales" in Curnow, G, and Page, B, (eds) above n6 at 156.

44 Wettenhall, R, and Scott, R D, Editorial (1989) 48 *Aust J of Public Administration* 4.

45 Jonah, J O C, "Independence and Integrity of the International Civil Service: The Role of Executive Heads and the Role of States" (1981) 14 *J of International Law and Politics* 841.

46 For a fuller treatment of the differences, see McCarry, above n22 passim; Smith, G, *Public Employment Law* (1987) passim.

47 Jackson, M W, "The Eye of Doubt: Neutrality, Responsibility and Morality" above n9 at 288.

48 *Pace* the claim of Wilenski referred to in n15.

49 Caiden, G E, *Career Service* (1965) 7; Fredman, S and Morris, G, "The State as Employer: Is it Unique?" (1990) 19 *Industrial L J* 143.

Senior Executive Services

The round of legislation making new arrangements for the governance of senior executives in the public sector came quickly, relatively recently and unevenly.[50] At the most general level, the statutes identify or define a senior executive service and provide that these executives are treated in ways which are more or less different from those which regulate the bulk of "non-executive" public servants and which are different from what has hitherto been usual. Senior executive services had ancestors, such as the "Special Division" in the New South Wales public service, but the offspring have evolved into what is really a different species of public service governance.

There is variation between the statutes. First, most draw some distinction between arrangements for department heads[51] on one hand and other senior executive officers. Sometimes, the differences are not large; in other places, they are extensive. These department or agency heads are important (although their importance can be exaggerated[52]), but there are relatively few of them, compared with the total of senior executive officers. Moreover, in a pragmatic way, it is plain that a minister and an agency head need to be able to work together, and most would agree that the government can and perhaps should be given considerable latitude in appointments to these posts. Interest centres not so much on the arrangements for agency heads, but more on the expansion of political intrusion and "market" practices below that level to a much larger number of senior posts. Therefore the material which follows will not systematically attempt to catalogue the minutiae of statutory arrangements in different places for heads of agency. As it happens, a good deal of what is set out will apply to them in any case, and, more importantly, so will the principles to be discussed. But the emphasis will be on senior executive services, whether or not they happen to include heads of agency.

Differences between the statutes are not confined to heads of agencies. The way in which the services of senior executives are managed also varies from

---

50 The Senior Executive Service in the Australian Public Service was established in 1984: *Public Service Act* 1922 (Cth), s26AA, inserted by the *Public Service Reform Act* 1984 (Cth), s16. Victoria's Senior Executive Service also appeared in 1984: *Public Service Act* 1974 (Vic), s28A, inserted by the *Public Service (Amendment) Act* 1984 (Vic), s12, while Western Australia introduced its in 1987: *Public Service Act* 1978 (WA), s35, inserted by Act No 113 of 1987, s21. The Senior Executive Service in New South Wales was established in 1989: *Public Sector Management (Executives) Amendment Act* 1989 (NSW). Queensland has proceeded more cautiously. The *Public Sector Management Commission Act* 1990 (Qld) obliges the Commission constituted by the legislation "to investigate the establishment of a chief executive service, a senior executive service or other specialised divisions of service...": *Public Sector Management Commission Act* 1990 (Qld), s2.14(a)(ii).

51 These officials are known by a variety of designations in the different services. The older "Under-Secretary" and "Permanent Head" have fallen into disuse. Those designations served to distinguish the incumbent public servant from the Parliamentary Secretary or Parliamentary Head, that is the Minister of the Crown. "Secretary" is the term now used in the Australian Public Service. It is "Department Head" in NSW, "chief executive" in Queensland, "Chief Executive Officer" in South Australia and Western Australia, "Head of Agency" in Tasmania and "chief administrator" in Victoria. However named, these people are those non-elected officers who are in charge of designated public service departments or units. They are the most senior public servants, and, under the minister, or sometimes under a board or corporation which in turn answers to a minister, they are responsible for the business of their department or unit.

52 Butler, above n6 at 217.

place to place. The arrangements introduced for public sector executives by the *Public Sector Management Act* 1988 (NSW) seem to depart further from the accustomed pattern of regulation than the other changes in the 1980s. That Act will therefore be the focus of analysis, because it enables the issues posed by changes of this nature to be seen more starkly. But where useful its provisions will be contrasted with arrangements elsewhere.

To avoid any possibility of misunderstanding, I should state what I hope is clear in any event, and that is that this discussion is directed only at the statutory frameworks and their meaning, underpinnings and implications. That is, there is no discussion of particular appointments and terminations of officers and it is not suggested or implied that the disconcerting potentialities of some of the provisions have in fact been misused by any person or government.

Appointment and termination are the two most important aspects of employment and will now be examined in turn to see the nature and extent of the changes for executives. The most striking feature which will be examined is the relative ease with which the statute in New South Wales allows officers in the senior executive service to be dismissed and the limited range of protection available for them. But first the provisions for appointment of senior executives.

Appointment

Overhaul of the appointment process was probably the main goal and the main achievement of the nineteenth century reformers. Statutes were drafted substantially to exclude ministerial or political intervention in the appointment process, and to give that responsibility to an independent agency. Initial appointment was on merit, usually defined by reference to educational attainments attested to by examination.[53] Later advancement was also on merit or fitness or on seniority or on a combination of fitness and seniority. The statutes precluded almost all political involvement in the processes of initial appointment and subsequent promotion of officers.

In New South Wales, there is a Chief Executive Service comprising the persons holding the 90 or so positions referred to in Schedule 3A of the *Public Sector Management Act* 1988 (NSW) and there is a Senior Executive Service comprising the persons holding over 1,000 positions referred to in Schedule 3B. Department Heads are among those included in the Chief Executive Service. The term "executive officer" is used in the Act to mean either a chief executive officer or a senior executive officer. Appointments to vacant senior executive positions are made by the Governor on the recommendation of the appropriate Department Head.[54] There are provisions which require selection for appointment to the public service generally to be on merit, and which normally require advertisement. These are made applicable in respect of appointments to the Senior Executive Service.[55]

53 In New South Wales, and it may be elsewhere as well, success in the state public service entrance examination by school leavers was a highly regarded attainment especially in the years before large numbers started to stay at high school for the full five years, as it then was, and then go on to tertiary studies. Schools used proudly display the number and names of students who had done well in the public service examination.

54 *Public Sector Management Act* 1988 (NSW), s13.

55 *Public Sector Management Act* 1988 (NSW), ss15, 26, 31.

Although it is mandated that executive officers hold office for a period not exceeding five years at a time[56] and that their employment be governed by a contract of employment,[57] the contract does not normally effect the appointment, although it may do so if the person signing the contract with the officer is also the person authorised to make the appointment.[58]

Elsewhere, for example in Western Australia[59] or in the Australian Public Service, a term appointment to executive level is permissible but not obligatory. That is, the person can be appointed as a career officer, or sometimes on a temporary basis.[60] In the Australian Service, with some statutory exceptions, executive vacancies are to be notified in the *Gazette* and are open to application by both officers and outsiders.[61] The normal arrangements for appointment apply, save in the case of fixed term appointments where, among other things, special arrangements for compensation and superannuation can be put in place at the time of appointment.[62] If the appointment is by internal promotion of an officer, relative efficiency of competing applicants is the sole criterion for selection and efficiency is extensively defined.[63] In South Australia even appointments on negotiated conditions cannot be made unless the person is selected through the selection processes required by the Act.[64]

Somewhat more divergence seems possible in Victoria if the senior executive position is a "prescribed" office, in which case the Governor in Council may appoint a person to that office on the recommendation of the chief administrator.[65] Even so, the recommendation for prescription is from the chief administrator, not the minister, and more importantly the office cannot be prescribed other than on the recommendation of the Public Service Board after consultation with the relevant association of employees. This offers considerable protection against the possibility of abuse in the appointment processes.[66] Otherwise, appointments to the Senior Executive Service in that State seem to be governed by the same procedures and criteria as are other appointments. In Western Australia, further protection is afforded by an express provision that no member of Parliament shall interview or

---

56 They can be re-appointed.

57 *Public Sector Management Act* 1988 (NSW), ss42A, 42B, 42G. This reference to a contract of employment is apt to be confusing, because most, if not all, executive officers are employees in the common law sense and, accordingly, there necessarily exists between them and the Crown a contract of employment, irrespective of the provision for one in s42G. The statute can be regarded as confirming the common law position and, more importantly, as both prescribing and circumscribing the scope of the contract between the parties. The contract cannot vary or exclude statutory provisions, and it must deal with the duties of the executive officer's position (including performance criteria for mandatory annual performance reviews), with remuneration and with any election by an appointee who was previously in the public sector to retain a "right of return" to the public sector. It may deal with certain other matters: *Public Sector Management Act* 1988 (NSW), s42G, s2H & s42I.

58 *Public Sector Management Act* 1988 (NSW), s42G.

59 For example *Public Service Act* 1978 (WA), s41

60 For example in South Australia: *Government Management and Employment Act* 1985 (SA), s50(1).

61 *Public Service Act* 1922 (Cth), s33AA.

62 *Public Service Act* 1922 (Cth), ss44, 45.

63 *Public Service Act* 1922 (Cth), s49C.

64 *Government Management and Employment Act* 1985 (SA), s50(4).

65 *Public Service Act* 1974 (Vic), s23D.

66 *Public Service Act* 1974 (Vic), s23D.

communicate with the Public Service Commissioner regarding the appointment of any person in the Public Service,[67] which includes posts in the Senior Executive Service.[68] So, putting aside for the moment the issue of fixed term appointments, the various statutes require broadly the same qualifications and procedures for appointment of executives as are required for non-executive officers, although some exceptions can be made.

It follows that the statutes generally require that "merit" or "efficiency", as variously defined, must be the criterion for appointment of executives, as for other ranks. At the time of the nineteenth century reforms, "merit" for initial appointments to public service was often measured by a competitive entrance examination or by possession of other equivalent qualifications. Most would now probably regard this as too narrow and certainly the definitions of efficiency and merit in modern legislation cover much more. The advantages of the examination system were that it was seen as "objective", was relatively easy to administer and was almost impossible to circumvent. The additional elements in efficiency nowadays may include such things as experience, previous work performance, personal qualities, the nature of the position to be filled and more besides. To criticise these criteria nowadays is to criticise Mother's Day. However many of the elements in these definitions involve value judgments and leave room for considerable discretion in the decision maker. Moreover it has already been noted that there are limited circumstances in which appointments can be made without following some of the otherwise applicable processes, such as advertisement.[69] So there may be room for abuse in the generally applicable appointment processes by anyone so minded.[70]

This raises a wider question whether appointment criteria and processes in the public sector at large have become dangerously diffuse and unregulated.[71] But this is a problem affecting all appointments made under generally applicable criteria, and not just appointments to the senior executive services. Discussion of that general question is beyond the scope of this article. The concern here is whether senior appointments can be carried out by a markedly different process which enables the generally applicable criteria and processes to be readily circumvented, whatever those processes happen to be. By and large the substantially the same arrangements apply to all appointments.

---

67 *Public Service Act* 1978 (WA), s55.

68 *Public Service Act* 1978 (WA), s20.

69 The report of the Fitzgerald Inquiry saw no reason why there should be power to make exemptions from the requirement to advertise and why all vacancies should not be advertised: Fitzgerald, G E, above n30 at 131.

70 It is not suggested that such abuse has in fact occurred. However, it is difficult to detect or remedy if it does, although the use of selection committees and merit protection agencies offers some safeguard.

71 A Select Committee of the New South Wales Legislative Council recently reported that it regarded the use of selection panels in the promotion process for police as "too subjective" and that police at all levels had complained that they had perceived favouritism, unfairness and inaccuracy in the selection processes. Other evidence gathered by the Committee indicated the use of selection committees or oral boards was subjective, subject to manipulation and gave rise to a huge volume of appeals. The Committee recommended that existing arrangements be replaced by a different system, which it regarded as "totally objective". Parliament of New South Wales, Legislative Council, *Report of the Select Committee on the Police Promotion System* (1991) at 32, 47.

The fixed term

In the various public services there is the capacity, and in New South Wales the obligation, to appoint for a fixed term, usually up to a maximum of five years. This feature invites consideration. Fixed term appointments can obviously bring a measure of flexibility and mobility to the upper ranks of a public service and can enable the introduction of specialist expertise. They can appeal to some appointees as well as to governments. Provided the usual appointment procedures are required to be followed, there cannot be much objection in principle to allowing some of them, although it is very difficult to see why all senior appointments should be for a fixed term as is required in New South Wales. That aside, potential problems arise not from the fact of term appointments, but from the conditions on which they are made. If the term can easily be ended before its expiration or if it can expire with no certainty about what is to happen on expiration, then the incumbent is exposed, or may be thought to be exposed, to real or perceived pressure to take partisan or personal considerations into account in discharging the duties of the position. This is especially likely towards the end of the term when renewal of the appointment may be under consideration.[72]

There are a number of ways in which this can reduced even if not completely avoided. Some are only theoretical possibilities, such as either making term appointees ineligible for renewal or guaranteeing them renewal. Those options are hardly practicable. The best course is first to ensure by legislation that whatever term is agreed is firm and cannot easily be ended before its expiration and then only for demonstrated cause, and secondly to specify, again preferably by legislation and in some detail, what is to happen when the term expires whether by effluxion of time or before the term is up. Particular attention needs to be given to the treatment to be afforded the officer in the event that he or she is not re-appointed. To avoid, or rather to minimise, the risk of partisan or self interested service, especially towards the end of the term, it seems essential that the treatment for those who are not re-appointed should be on the generous side, providing a "soft landing".[73] This is not suggested merely as a matter of equity, but on grounds of policy. Its rationale is simply to help ensure that while in office the appointee is not put in a position which is likely seriously to impair the quality of service rendered.

---

72 Anecdotes prove nothing, but some years ago a now deceased union official told the author that he kept in his drawer a copy of the appointment dates of the members of the industrial tribunal with which he normally dealt. He was of the view that their behaviour unconsciously changed as the time for renewal of their appointments approached and that it changed in a way he did not regard as favourable to the union. He endeavoured to keep his union's matters out of the lists of tribunal members in that situation.

73 Fitzgerald says that the independence of term appointees will be enhanced "if superannuation rules are adjusted to allow members to leave the service with their own and the employer's contribution and accretions prior to retiring age and without fiscal penalty." Fitzgerald, G E, above n30 at 132. This is so, but it does not go far enough. The amount of superannuation available after, say, five years, is unlikely to be great unless the fund is structured so as to be more than usually generous. Perhaps this should happen. But, even if this were done, the ability of a term appointee actually to receive the money before retirement at age 55 or older is limited by Commonwealth legislation. It would very likely have to be "rolled over" into another fund.

The various statutes address the consequences of termination or non-appointment, and this will be examined in more detail in a moment. It will be suggested that arrangements in New South Wales fall short of what is desirable, particularly in the relative ease with which appointments can be terminated during their currency. That aside, the legislation governing the Australian Public Service provides useful illustrations of ways in which conditions of appointment can be, and it is submitted, should be clarified with particularity at the time of appointment. For example, where a fixed term appointment is made (and appointments to that Senior Executive Service do not have to be for a fixed term) the Public Service Board (not the Minister) may determine at the time of appointment what compensation is to be payable if the person is retired from the service before the expiration of the term. Similarly, arrangements can be made at the time of appointment with respect to superannuation.[74] In some respects fixed term appointees are in a less advantageous position than others[75] but the point is that these matters too are clearly set out in the statute and known to the appointee at the time of appointment. Short of legislative amendment, these statutory conditions will operate according to their terms on termination to the foreknowledge of all concerned and regardless of any thoughts to the contrary which may be entertained if and when termination occurs.

Termination

New South Wales

An executive officer's position in the New South Wales Service can become vacant in a number of ways. These include completion of a term of office without re-appointment and removal from office.[76] So far as removal is concerned, s42Q(1) provides that the Governor may remove an executive officer from an executive position at any time. Removal from office is not the same as termination of services, although it can be a first step on the way to that. Thus the Governor may declare an officer who has been removed from office an "unattached officer," in which case the person is still to be regarded as an executive officer and continues to be entitled to remuneration and employment benefits. The Governor may revoke any such declaration. If a person is removed from an executive office and no declaration is made or, having been made, is revoked, the person ceases to be an executive officer (unless appointed to another executive position) and, if an officer in Crown service, also ceases to be an officer in the relevant service or authority, (again unless appointed to another position).[77] That is, the officer's services have been terminated.

Section 42Q thus effectively makes nonsense of the provision in s42F that an executive officer holds office for a period not exceeding five years specified in the instrument of appointment, for it gives the Governor an absolute right to dismiss an executive officer at any time without notice or

74 *Public Service Act* 1922 (Cth), ss44, 45.

75 Say with respect to retirement and redeployment: see *Public Service Act* 1922 (Cth), s44(6) which provides that Division 8B of Part 111 of the Act does not apply to fixed term appointees.

76 *Public Sector Management Act* 1988 (NSW), s420.

77 *Public Sector Management Act* 1988 (NSW), s42Q.

cause by removing the person from office and then making no declaration.[78] A person who was an officer before appointment to the executive service may have a contractual right of return to an inferior post or an entitlement to limited compensation; but this does not gainsay the sweeping nature of the right to dismiss. Moreover, the power under s42Q does not prevent removal of an executive officer apart from the section, say under the disciplinary provisions (which is unobjectionable) or pursuant to the prerogative,[79] which is far more questionable. This might be compared with, say, Western Australia where there is special power to remove senior officers, but it is conditioned on the Commissioner's satisfaction, after inquiry, that the officer is inefficient as defined.[80]

In New South Wales, some executive officers who are removed from office can apply for compensation. Broadly speaking, the officers who can do this are those who are removed (other than for misbehaviour) and who do not have a "right of return",[81] or who have elected to take compensation in lieu of their right of return.[82] In addition, an executive officer who was first appointed from the public sector and whose term expires and who is not re-appointed can apply for compensation. However, those who are removed or not re-appointed but who are appointed to an equivalent office in the executive service are not entitled to compensation.

Claims for compensation, if available, are determined by the Statutory and Other Officers Remuneration Tribunal. It seems from the presence of the phrase "compensation if any" in s42S(2) that it is open to the Tribunal to determine that no compensation is payable in a particular case.[83] Moreover, the Tribunal may determine that compensation is payable for failure to re-appoint only if it is satisfied that the person "had a reasonable expectation of being re-appointed", and in addition the Tribunal "must have regard to any general directions given to the Tribunal by the Minister as to the matters to be taken into consideration when it makes determinations under this section." Further, there is an upper limit on the amount of compensation payable. It is an amount equal to the person's remuneration package for a period of one year. Rights to other compensation for removal or retirement or failure to re-appoint are abolished[84] and a person awarded compensation is precluded from employment in state agencies for the period to which any compensation

78 There is a parallel provision in s90 which enables the Governor to remove term appointees to statutory offices, subject to a possible award of compensation.

79 The disciplinary code is contained in Part 5 of the *Public Sector Management Act* 1988 (NSW), while s54 preserves the Crown's prerogative right to dismiss, notwithstanding anything else in the Act.

80 *Public Service Act* 1978 (WA), s42A.

81 The only executives who can have a right of return are those who were officers in the public service when first appointed to the executive service who have contracted and paid for the right in their contracts.

82 *Public Sector Management Act* 1988 (NSW), s42T.

83 *Singer v Statutory and Other Offices Remuneration Tribunal* (1986) 5 NSWLR 633 at 659 per Kirby P.

84 This section does not in terms do away with any right of action for breach of the employment contract, and it refers to "compensation" which may or may not include damages. But regard should be had to s42J which may rule out at least some contractual actions. It may be possible that in a given set of facts, an aggrieved executive could thread his or her way through the sections and bring an action for some breach of the employment contract.

relates.[85] An executive officer with a "right of return" under s42R may elect instead to take compensation under s42S.[86]

There are privative sections in New South Wales. The relevant part of the Act prevails over any inconsistent Act, law, appointment or contract, even an Act which excludes its application, unless the relevant part is expressly excluded.[87] The appointment, or non-appointment, of a person to an executive position or the removal, retirement, termination of employment of or disciplinary action against an executive officer or the remuneration or conditions of employment of an executive officer are excluded from the jurisdiction of the State Industrial Commission and of the Government and Related Employees Appeal Tribunal. Industrial awards do not have effect with respect to the employment of executive officers, although they may be made applicable by regulations under the *Public Sector Management Act* 1988 (NSW). Finally, proceedings for a wide range of remedies or relief are excluded in respect of the appointment or non-appointment of a person to an executive position, the entitlement or non-entitlement of persons to be so appointed and the validity or invalidity of such an appointment.[88]

Other Public Services

In the Australian service, where the Commissioner is satisfied that the services of an officer in the Senior Executive Service cannot reasonably be used in that service, the Commissioner may give the officer a notice assigning the officer to a specified office of lower classification, making the officer an unattached officer of lower classification or, if the officer is already unattached, lowering his or her classification or retiring the officer from the Service.[89] There are some safeguards for the officer: first, the Commissioner must, before giving notice, take reasonable steps to identify other offices or duties to which the person could be assigned and perform efficiently; secondly, in deciding whether an officer could perform efficiently, the Commissioner is to have regard to criteria specified in the Act, although these conclude with a general "any other matter that the Commissioner considers relevant"; thirdly, in deciding whether to give the notice the Commissioner is again required to have regard to specified criteria, including the views of the officer and the time left before the officer could retire in the normal course of events, although again the list concludes with a reference to "any other matter" considered relevant; finally, the officer has a right of appeal to a Committee against the giving of the notice.[90] An officer in the Senior Executive Service may be retired, with his or her consent, on the basis of physical or mental incapacity. As with Departmental Secretaries, special benefits may be made available to retiring officers.[91] Officers in the Australian Senior Executive Service have the benefit of a fairly elaborate redeployment process in Division 8B of Part 111 of the Act.

---

85 *Public Sector Management Act* 1988 (NSW), s42S.
86 *Public Sector Management Act* 1988 (NSW), s42T.
87 *Public Sector Management Act* 1988 (NSW), s42Z.
88 *Public Sector Management Act* 1988 (NSW), s42J.
89 *Public Service Act* 1922 (Cth), s76L.
90 *Public Service Act* 1922 (Cth), s76L.
91 *Public Service Act* 1922 (Cth), s76R.

In the Australian Service, the Board may terminate the services of a fixed term appointee before the expiration of the term, but not for a reason which would have grounded a disciplinary charge;[92] that is, the fixed term appointee is entitled to "due process" for misconduct. Moreover, the Act allows a pre-determination of compensation for early termination to be fixed at the time of appointment.[93]

In Victoria, a "prescribed" office can include an office in the senior executive service. Where a person who is not an officer is appointed to a prescribed office for a fixed term and is not re-appointed when the term expires, he or she is entitled to be appointed to an office in the public service if appropriate provision was made in the Order by which the appointment was effected.[94] This may well represent one of the most appropriate ways to treat fixed term appointees who were not officers before appointment and who are not re-appointed. It enables the consequences of a failure to re-appoint to be settled in advance and includes among the possible consequences the right to arrange for another public service appointment, although not normally at senior executive level. Again, the justification for this or some comparable scheme for persons in this category does not lie in equity, but in the need to facilitate the proper discharge of the functions of the office, that is if one continues to set some store on the Westminster model.

In Victoria, senior officers can be disciplined and retired, but in much the same way as the general run of officers.[95] They have some promotion appeal rights.[96] The main difference for them is that an office in the Senior Executive Service which has been prescribed will not be governed by the provisions in the Act concerning appointment and transfer.[97] Save as may be provided for in certain industrial agreements, no compensation is payable for dispensation of services "in accordance with" the Act.[98] This section is applicable to all officers, does not preclude action, if otherwise available, for a termination which is in contravention of the Act and, most importantly, occurs in an Act which contains extensive "due process" sections for all officers. The prerogative right to dismiss does not seem to be expressly preserved and it has very likely been abrogated, at least in part.[99]

Part V of the *Tasmanian State Service Act* 1984 (Tas) makes special provision for heads of agency and the holders of other prescribed offices. The provisions of the Act relating to appointment do not apply to appointments under Part V and the parts of the Act dealing with secondment, redeployment, incapacity discipline and conduct do not apply to those appointed under Part V. The Governor may remove these persons from office, but only on the grounds set out in s30(3), which include incapacity and inadequate or unsatisfactory performance. A person who

> ceases to be the Head of an Agency or the holder of a prescribed office by

92 *Public Service Act* 1922 (Cth), ss44(3), 44(4).
93 *Public Service Act* 1922 (Cth), s44(2).
94 *Public Service Act* 1974 (Vic), s23D(16).
95 *Public Service Act* 1974 (Vic), ss58, 52.
96 *Public Service Act* 1974 (Vic), s38.
97 *Public Service Act* 1974 (Vic), ss23D(16), 23D(25)
98 *Public Service Act* 1974 (Vic), s72.
99 *Gould v Stuart* [1896] AC 575; Cf *Adams v Young* (1898) 19 LR (NSW) 325.

> reason of the expiration of his term of office or his resignation or his term of office being terminated before the expiration of that term,

may, if a permanent employee immediately before appointment, elect to go on to the unattached list.[100] This confers a high degree of protection for it gives the electing officer a statutory entitlement to appointment to a position no lower than that held before his or her appointment as a head of agency or to a prescribed office.[101] It has been noted that the right of return in New South Wales has to be contracted for and purchased in the contract. Elsewhere rights to re-appointment are usually given by statute.

Comment on Termination Provisions

Even to summarise these provisions is to show that senior executive officers in New South Wales can be removed from office rather more easily than in other services, and with limited redress. Other regimes provide hardly less flexibility but it is submitted that they mostly contain provisions which are not only fairer to appointees, but which are more likely to serve the public interest.

These termination provisions can be considered from two viewpoints. They may be compared with the law which governs executives in the private sector. And they may be examined to see what kind of public service they are likely to foster.

Private sector comparisons

At common law and in almost all written executive contracts and in award regulated industries, the only circumstance in which an employer can terminate a contract of employment without notice or perhaps payment in lieu of notice is where the employee has committed some significant breach of the contract or is guilty of sufficiently serious misconduct, negligence or incompetence.[102]

The position of the executive officer in the New South Wales service is far less secure. Term appointment only is available. It has been pointed out how the use of s42Q can enable lawful, summary termination of the services of an executive officer without cause or notice at any time, even where the term of the officer's contract has not expired. (This is quite apart from the prerogative right to dismiss). The statute has effectively said that there is no such thing as the wrongful dismissal of an executive officer. It is true that in the private sector an employer can in fact terminate the services of an executive (or any employee) before the expiration of the term of the contract or without cause. But in such a case the termination will be unlawful and will expose the employer to a range of possible remedies. In the case of unlawful termination of an executive's fixed term contract a significant time before the term would

---

100 *Tasmanian State Service Act* 1984 (Tas), s29(13). This right would not in terms seem to be available to a person who was removed from office by the Governor under s30(3).

101 *Tasmanian State Service Act* 1984 (Tas), s51(2A). A temporary contract employee who held a state service position before becoming a contract employee has a similar right of election under s38 with similar protection.

102 This is a short statement of the general principle. For the necessary elaboration on and qualifications to the principle, see eg Creighton, B & Stewart, A *Labour Law — An Introduction* (1990) Chapter 7; Macken, J , McCarry G, & Sappideen, C, above n22 passim.

otherwise have expired, the most useful remedy is likely to be an action at common law for damages, at least in New South Wales.[103]

This leads to the next point of contrast between the public sector executive and his or her private sector counterpart, namely the amount of damages or compensation available. Take the case of a fixed term contract for five years which is terminated without lawful cause after say two years. In the private sector, the starting point for the computation of damages is the amount which the executive would have earned had the contract run its course. To this is added the value of any other contractual benefits to which the executive would have been entitled during the balance of the term. There may, usually will, be deductions from this sum to allow for mitigation of damages and contingencies. But even this rough outline shows that damages could easily be substantial. Most importantly, there is no upper limit of 12 months remuneration.

The executive officer in the New South Wales service is worse off because of the limitations on compensation noted above. These include: the upper limit of an amount equivalent to 12 months' remuneration, regardless of the period of the contract left to run; the requirement that the Tribunal have regard to any general directions from the minister and the need for it to find a reasonable expectation of re-appointment before any compensation at all can be awarded for failure to re-appoint. Then there is the restriction on employment in the public sector during the period to which any compensation awarded relates. Even the officer who has a "right of return" is worse off, because such a person has had to pay for the right as part of the contractual terms, is not entitled to any statutory compensation and is most likely to be returned to an office of lower status and remuneration.

Finally, an executive in the private sector is not limited in the remedies he or she may choose to pursue if wrongfully dismissed. Of course, not all remedies will be useful or available in every case, but this will be on account of the nature of the remedies themselves, not because of their exclusion by statute. There are a number of limitations in the New South Wales Act not found together elsewhere, although Victoria contains a limitation.[104]

The first limitation is that in s42S(5), which says that a person with an entitlement to compensation under s42S "is not entitled to any other compensation for the removal or retirement from office or for the failure to re-appoint the person or to any remuneration in respect of the office for any period afterwards...". There is a distinction between removal from office and breach of an employment contract by wrongful dismissal, and this sub-section refers only to removal or retirement from office or failure to appoint to an office. It is true that at common law, and absent a statute to the contrary, the Crown is not liable to pay compensation for removal of an office holder in any event.[105] If it were correct to regard these executive officers as officers simpliciter, then the provision of any compensation at all for removal from

103 In award regulated industries penalties for breach of the award may be available under industrial legislation. If the dismissed employee is a unionist, a re-instatement application is another possibility. The conditions on which statutory remedies are available in other states vary.

104 *Public Service Act* (Vic), s72.

105 *Young v Waller* [1898] AC 661.

office could be argued to be generous, given that the common law gives none. In other jurisdictions, the question of compensation, if any, for loss of office is mostly left at large to be determined by the common law. However, these persons may not be officers in any but a formal statutory sense, or if they are indeed officers at common law, they are also employees both at common law[106] and, at least in New South Wales, by statute.[107] Thus if s42S(5) is read as confined to removal from office, it may do no more than codify the common law and still leave open the possibility of an action for damages for breach of contract, if otherwise available.[108] In addition, s42S(5) in terms precludes only "compensation", and for removal, retirement, or non-appointment. If "compensation" is construed to mean only statutory compensation and not to include damages[109], the provision would not preclude a damages action, if a cause of action could be found. The one which suggests itself is a damages action for breach of the contract of employment. However if "compensation" means damages as well as statutory compensation, then even that possibility is excluded.[110]

But even if this section is construed so as not to preclude a damages action in contract which is otherwise available, it may be of no practical use. A contract purporting to give any greater tenure or security than that allowed by s42Q would arguably be inconsistent with s42Q and therefore impermissible by virtue of s42G(6). And s42Q is the section which effectively makes term contracts terminable at will, apart from the prerogative right. So even if the cause of action is not taken away by s42S, damages may, by operation of s42Q and s54, be next to nothing.

All this obtains in addition to the other privative section, s42J. This casts its exclusionary net to cover appointment, failure to appoint, removal, retirement termination of employment or cessation of office, disciplinary proceedings or action and "the remuneration or conditions of employment" of an executive officer. These matters are declared not to be industrial matters within the purview of the Industrial Commission.[111] No proceedings for prohibition, certiorari, mandamus, declaration or injunction "or any other relief" lie in respect of the appointment or failure to appoint or the entitlement or non-entitlement of a person to be appointed or the validity of any such appointment.

It may be possible to thread a way through all this in some circumstances. For example, the section may not preclude an action under s88F of the *Industrial Arbitration Act* 1940 (NSW) claiming that a term of the contract was unfair or harsh. In theory this could be useful, if, say, an executive officer signed a contract which contained unreasonable performance criteria and

106 McCarry, above n22 at 11ff.

107 *Public Sector Management Act* 1988 (NSW), s2G.

108 Eg Performance criteria must be specified in the contract (s42H). If an officer was removed from office for failing to satisfy criteria other than those agreed, there may be a possible cause of action for breach of the term specifying the criteria to be used. As will be seen even if such a course of action can be mounted it may be useless in practice.

109 As, for example, in *Re Gordon; Ex parte Weedon v Pipkin* (1985) 59 ALR 596 applying *Dixon v Calcraft* [1892] 1 QB 548 at 463 per Lord Esher.

110 As in *Joyce v Australasian United Steam Navigation Co Ltd* (1939) 62 CLR 160.

111 Compare this with the *Public Service Act* 1978 (WA), s3 which effectively provides that State's *Industrial Relations Act* 1979 prevails over the *Public Service Act*.

sought to have them varied. Once again, if this remedy is legally available it may not always be of much practical use, given the existence of the unfettered right to remove in s42Q.

The Courts usually construe sections like s42J and s42S strictly, so as to confine them to that which is unambiguously stated by Parliament. Even with the benefit of this approach it is clear that the sections put the executive officer in a much more complicated and disadvantageous position than his or her private sector counterpart.

This completes a comparison of some of the main provisions governing termination of the services of executive officers with the law by which executives in the private sector are governed. It was mentioned that the law can also be examined from another perspective and that is to see what kind of public service it is apt to foster. The little that needs to be said here is obvious.

As we saw, the provisions in New South Wales preclude appointment of senior executives other than for a fixed term and then make the stipulation of that term almost illusory. If persons can be appointed and got rid of either during their term or at its expiration with no or with very limited safeguards and remedies, then a situation arises where an officer can feel or may be thought to be under great, although perhaps unrecognised, pressure to keep an eye on his or her future and the mood of the minister, especially if the term is coming up for renewal. In other words, the capacity to act properly and in accordance with any of the models above may be or may be perceived to be impaired. The point is not met by saying that this or that minister or government does not actively apply such pressure. No suggestion is made that pressure is in fact brought to bear. The point is that the very legislative framework itself creates the problem. The problem, of course, becomes actual should a politician in fact take advantage of that framework to apply pressure.

It is not only the Westminster model that is compromised by such a structure. Pressure to act in expedient self-interest, even if not given in to, scarcely makes for decisions which accord with the assumptions on which market models are supposed to work.

Concluding Remarks

Public service legislation in Australia possessed some common features from early this century until the last decade or so. Many of them can be explained by the desire to eliminate political patronage from personnel management, especially from the appointment process. The legislation was also intended to foster a Westminster model of public service, non-partisan and professional, able to serve governments of different political persuasions with non-partisan and, if need, be courageous advice and administration. Achievement of this was facilitated by distinctive employment conditions, most notably a high degree of security and well defined processes for removal from office.

Legislative changes of recent years have been occurred against the background of a move to private sector management techniques in the public sector generally. They have been justified on various grounds, including "efficiency" (by which is often meant a narrow market efficiency), and the need for governments to secure more control over and greater responsiveness from the bureaucracy ("flexibility"). The changes have included, but have not

been confined to, the creation of senior executive services in the Australian Public Service and most of the State public services. These have been the focus of attention in this article.

Among other changes in recent times there has been a widening of the concept of "merit" or "efficiency" as a criterion for appointment to and promotion within the services generally and not only in senior executive services. These expanded criteria replaced older systems largely based on examination attainments and seniority. A serious question arises as to whether criteria and procedures have become so diffuse and discretionary as to be almost meaningless and so easily able to be circumvented or turned to partisan use. To counter such a possibility there is scope for enhanced merit protection mechanisms in at least some services, and a case for a return to centralised, independent personnel management and possibly other protections. However, discussion of this general issue is beyond the scope of this article. If appointment and promotion criteria have become too imprecise, they are imprecise for all appointments and not only those to senior executive services. A narrower issue is whether the processes and requirements differ markedly for senior appointments and other appointments. By and large they do not, although there are provisions here and there which allow modifications for executive level appointments. The need for these is questionable.

Whatever general defects may exist, the terms and conditions of appointment and the mode of termination of senior executives have their own problems which are a cause of concern. In the various public services there is the capacity, and in New South Wales the obligation, to appoint for a fixed term, usually up to a maximum of five years. Provision for some fixed term appointments can have advantages, provided the usual appointment procedures are required to be followed, but it is very difficult to see why all senior appointments must be for a fixed term as is required in New South Wales. There seems to be little justification and considerable danger in appointments for so-called fixed terms which can easily be ended before they are due to expire. It is also unsatisfactory to have a system where fixed term appointments can run their course with no sufficient certainty about what is to happen on expiration, especially if there is to be no reappointment. In this situation, the incumbent is exposed, or may be thought to be exposed, to real or perceived pressure to take partisan or personal considerations into account in discharging the duties of the position. This is especially likely towards the end of the term when renewal of the appointment may be under consideration. Some services minimise these risks with no apparent loss in effectiveness by ensuring by legislation that whatever term is agreed is firm and cannot easily be ended before its expiration and then only for demonstrated cause, and also by specifying by legislation and in detail what is to happen when the term does expire. Particular attention needs to be given to the treatment to be afforded the officer in the event of that he or she is not re-appointed. To avoid, or rather to minimise, the risk of partisan or self-interested service especially towards the end of the term, it seems essential that the treatment for those who are not re-appointed should be on the generous side, not as a matter of equity but to help ensure that while in office the appointee is not put in a position which is likely to seriously impair the quality of service rendered. The Victorian arrangements go some way in this direction. There, a person not in the service who is appointed for a fixed term and then not re-appointed

can be entitled by statute to another public position if this is provided for on initial appointment.

Some attention was given to the termination arrangements in New South Wales. They are in some ways less favourable than private sector arrangements and give the senior executive less security than elsewhere in the public sector. This arises from a combination of factors: the requirement that all appointments be for a fixed term; the facility with which that term can be ended before its expiration; the relatively limited nature (or possibly the complete absence) of compensation for early termination, and the sections in the Act restricting access to many other possible forms of legal redress.

Arrangements of this kind jettison, or at least greatly impair, many of the safeguards which were taken for granted under the older arrangements. As the Fitzgerald Inquiry said, this can add enormously to the pressures on officials and can result in the punishment of perceived disloyalty, in merit being ignored and in personal or political loyalties being rewarded.[112] Such employment arrangements make it next to impossible for an executive to act in the way the Independent Commission Against Corruption has said a public servant should act.[113] It is not suggested in this article that the legislation in New South Wales or elsewhere has in fact been misused in that way by anyone. The problem is not only or even primarily that arrangements of this kind leave open the possibility of a "spoils" system. Their main vice is that they do not present any, or any sufficient, bulwark against maladministration and corruption. The restricted rights and security now often found for senior executives in the public sector seem to go beyond what is needed to secure flexibility and efficiency, however defined. Aspects of the altered regimes have the potential to allow partisanship and self-interest into public administration, or at least to make it appear that way, to a far greater degree than was possible under even imperfect traditional models. This is not to say that the Westminster model did or could attain neutrality in the sense of value free or apolitical administration. But it did at least make partisanship and self-interest in the administration of the public service more difficult. Something more moderate than the New South Wales Act, perhaps drawing on arrangements in the Australian and other State public services, would be less open to the risk of political abuse. Even if the statutes are tedious, the issues of policy are important: do we wish to attempt to retain whatever virtues the older model gave us or do we wish to move consciously away from that, and if so towards what? These questions deserve a wider audience and a wider debate than has hitherto occurred.

112 Fitzgerald, above n30 at 130.
113 Above n30.