

EXERCISE OF POWERS UNDER SECTION 20 OF THE PUBLIC SERVICE ACT 1999 (Cth)

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Introduction

When the new Commonwealth *Public Service Act* was made in 1999 much emphasis was placed in the Parliamentary speeches and in the Explanatory Memorandum (EM) on the need to bring public service employment conditions and practices into line with the private sector. Clause 3 of the EM said:

The Government considers that the APS [Australian Public Service] should operate, to the maximum extent consistent with its public responsibilities, under the same industrial relations and employment arrangements as apply to the rest of the Australian workforce.

It was said that agency heads were to be able to act as if they were the employer of their officers. To achieve this end s 20 was included in the Act. It reads:

20 Employer powers etc. of Agency Head

- (1) An Agency Head, on behalf of the Commonwealth, has all the rights, duties and powers of an employer in respect of APS employees in the Agency.
- (2) Without limiting subsection (1), an Agency Head has, in respect of APS employees in the Agency, the rights, duties and powers that are prescribed by the regulations.

The EM relating to this section said:

Clause 20 - Employer powers etc. of Agency Heads

4.1. An Agency Head will, on behalf of the Commonwealth, have all the rights, duties and powers of an employer (Bill s-cl.20(1) - cf NZ State Sector Act 1988 s-sec.59(2)). Because, constitutionally, the ultimate employer of any APS employee is the Crown in right of the Commonwealth, the Agency Head will be given 'the rights, duties and powers' of, but will not be described as, 'the employer'.

4.2. This will change the basis of the current system where many of the current staffing powers are exercised by Agency Heads, but only by delegation from the Public Service Commissioner. This change will ensure that at law an Agency Head will have all the powers of an ordinary employer recognising that the employment laws for the APS are to be aligned as far as possible with the private sector.

4.3. These general powers will enable an Agency Head to do the following without separate statutory authority

- establish appropriate employment and management arrangements that best support the functions of the Agency, while having due regard to the needs of employees;

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- create administrative positions if these are needed (creation of positions where these are needed to achieve certainty of delegation is dealt with in Bill cl.77);
- determine any arrangements in relation to the resignation of APS employees;
- require APS employees not to engage in employment outside the Agency without permission;
- deal with underperformance - including to reduce remuneration for poor performance where this is expressly provided for in AWAs, certified agreements, or other arrangements with an employee (reduction in classification following misconduct proceedings is covered in Bill cl.15 - see also Bill cl.24 dealing with determination-making power); at common law it is not possible to reduce remuneration unless this is an express term of the contract of employment; and
- re-engage a person who has ceased to be an APS employee (cf 1922 PSA s.47B) - the Commissioner's Direction on Merit in Employment will allow re-engagement in certain circumstances without a full merit selection process.

There are many questions that arise from s 20 of the Australian *Public Service Act 1999* (PS Act). It is proposed here to discuss just two – and they are to some extent inter-related. First, what is the nature of the relationship that is created between an Agency Head and APS employees by the operation of the section. Secondly, can an Agency Head delegate to another person the exercise of 'all the rights, duties and powers of an employer' that the section places on the Head.

Agency Head – APS employee relationship

The private sector employer – employee relationship is governed by the common law, primarily the law of contract. However, the nature and terms of such a contract are subject to many statutory limitations. These relate to such things as workers' compensation, long service and other forms of leave, unfair dismissal, discrimination, etc. The *Workplace Relations Act 1996* imposes significant controls over the employment contract. The days have long gone when a private sector employer could itself determine all the terms on which it employed a person.

By equating public sector employment with private sector employment, s 20 does not have the effect of removing the public sector from whatever controls might be imposed by legislation. Just as legislation has displaced a number of aspects of the common law in the private sector, so it does in relation to APS employment. Accordingly, to determine the nature of the APS employer – employee relationship it is necessary to look beyond the common law basis of the employment relationship. The common law has effect subject to statutory limitations so it is only if there is no statutory requirement applicable to the relevant aspect of the employment relationship that s 20 will apply to determine the terms of the APS relationship.

Clauses 4.2 and 4.3 of the EM which are set out above seemed to contemplate that many of the basic elements of the APS employment relationship would be dealt with by common law rules. While recognising that the Commonwealth is the employer of APS employees, cl 4.2 says that s 20 'will ensure that at law an Agency Head will have all the powers of an ordinary employer recognising that the employment laws for the APS are to be aligned as far as possible with the private sector'. The Agency Head is to be able to do the things listed 'without separate statutory authority' (cl 4.3).

However, the apparent scope of the section is markedly diminished by the other provisions of the PS Act and Regulations. Specific provisions are included to deal with many of the significant elements of the employer – employee relationship: engagement and classification (ss 22, 23); remuneration and conditions (s 24); movement between positions (ss 26, 27); discipline (ss 15, 28, 29) to name but some. These provisions vest power of action in the Agency Head but they are stand alone powers and are not dependent upon the relationship

created by s 20. Nor is it said that these express powers are to be exercised having regard to the principle enunciated in s 20.

It would appear that there is still some room for the operation of s 20 as not all aspects of an APS employee's position are dealt with in legislation. However, rather than being the leading provision determining the APS employer-employee relationship, it provides a fall back role. If a matter is not dealt with in the PS Act or Regulations or in other legislation, eg the Safety Rehabilitation and Compensation Act, the Long Service Leave Act, the Maternity Leave Act, the Superannuation Act, etc, the Agency Head can deal with it in the way open to a private employer. There are some topics that will fall within this description, eg while provision is made in relation to the holders of specific offices, there do not appear to be general provisions relating to the resignation of an APS employee. However, the important point to bear in mind is that, in relation to the matters that are dealt with by legislation, s 20 has no room to operate.

For the sake of completeness it should be noted that the regulation-making power in subs 20(2) has been used to make regulations relating to health clearances, medical examinations and skills schemes for non-ongoing employees (regs 3.1-3.3). It has thus not been used as a major source of power to manage the APS.

From this summary of the place of s 20 in the functioning of the APS, it can be seen that it has not assumed the significant role that a reading of the second reading speeches and the EM would have led one to expect. Its function seems to be to authorise an Agency Head to fill in around the edges of the legislation that is the principal determinant of the APS employer – employee relationship.

Many aspects of the management of that relationship are, of necessity, dealt with by officers acting on behalf of an Agency Head. This invites consideration of the capacity of a Head to pass on his or her management powers and responsibilities to others.

Delegations and authorisations

It is not practicable for the heads of major entities to exercise personally all the powers involved in the management of that entity. Hence the law has recognised that other persons may be authorised to exercise those powers on behalf of the person in whom the powers are legally vested. When a power is exercised by another person in this way, that person is acting as the agent of the person in whom the power is legally vested. However, the latter remains the repository of the power and continues to be responsible for the way in which it has been exercised by the agent pursuant to the authorisation.

A second approach to decision-making is commonly taken where the power to be exercised is included in legislation. The legislation may permit the repository of the power to delegate the exercise of that power to another. A right of delegation must be provided expressly in the legislation for it to exist. It is not a right recognised at common law. For this reason, the concept of delegation is seldom relevant to decision-making in the private sector. It is a gift of statute. While it is possible for powers to be vested in private sector entities by legislation, this seldom occurs. The more usual occurrence is for private sector entities to have responsibilities or duties imposed on them by legislation.

In contrast, public sector officials from the Minister down in status are entrusted with many legislative powers.

Before turning to the specific issue of delegation under s 20 of the PS Act, it is useful to note some general principles relating to delegation and authorisation, particularly as affected by the PS Act and the *Acts Interpretation Act 1901* (Cth) (AIA).

Section 78 of the PS Act provides for the delegation of powers vested in persons under that Act. In respect of Agency Heads, s 78(7) permits the delegation to another person any of the Agency Head's 'powers or functions' under the Act. There are like provisions in associated public service legislation.

A delegation may be made either generally or as otherwise provided by the instrument of delegation: AIA s 34AB(a). From this it can be said that an Agency Head can choose the powers that he or she wishes to delegate.

A repository of a power who is permitted to delegate that power cannot limit the discretion of his or her delegate. Once the power has been delegated, the discretion to make a decision and the content of that decision becomes the responsibility of the delegate. However, an Agency Head can attach directions to a delegation under the PS Act: s 78(11). It would seem that any such directions must be general in nature rather than concerned with the exercise of the delegation in relation to a particular instance.

As a general rule, a power that has been delegated cannot, in the absence of express authority, be delegated further: AIA s 34AB(b). Section 78(9) of the PS Act qualifies this general principle by expressly permitting delegation to a second delegate. However, the general rule prevents the second delegate from delegating the power further. The second delegate can have no greater power than the first delegate. Accordingly, if the power delegated to the first delegate is subject to directions, those directions will apply also to the second delegate: PS Act s 78(9).

A person to whom a power has been delegated exercises that power in their own right as distinct from being an agent of the delegator: AIA s 34AB(c); *Re Reference under s 11 of the Ombudsman Act 1976; ex parte Director-General of Social Services*¹; *Forest Marsh Pty Ltd v Resource Planning and Development Commission*². This is the principal distinction between delegation and authorisation.

The delegation of a power does not prevent the exercise of the power by the delegator: AIA s 34AB(d). However, once the power has been exercised by the delegate in particular circumstances, that decision cannot be revisited by the delegator as it has become the decision in the matter³. It would seem also that the delegator cannot review the decision of the delegate as the delegate's decision is the operative decision.

Delegation instruments are strictly construed: *Perpetual Trustee Co (Canberra) Ltd v Commissioner for ACT Revenue*⁴.

As noted previously, the delegation of a power is not the only way in which a person may be empowered to act on behalf of another person. A senior government official may, in the ordinary course, authorise a person to act on his or her behalf: *Carltona Ltd v Commissioners of Works*⁵. This will not be possible where the legislation indicates that the power is to be exercised personally. Such a proscription on authorisation may be implied from the nature of the power itself. In addition, *Carltona* noted that the authority to exercise the power must be given to a person of a level or status appropriate to exercise the power. The authorisation of an inappropriate person may lead to the decision being open to challenge as 'unreasonable'.

The right of an official to authorise a person to act on his or her behalf applies even though the official concerned has a power of delegation unless again it is apparent that the legislation intended that only a delegate should exercise the power: *O'Reilly v State Bank of Victoria*⁶.

Where a person is authorised to act on behalf of a senior official, the decision taken is that of the official, not the authorised person. Accordingly, the official continues to have responsibility for the decision and, unless its making renders the agency *functus officio*, presumably the official may revisit the decision⁷.

It is unlikely that a delegate would be able to exercise a power that has been delegated to him or her as if he or she were authorised to exercise the power. The fact of delegation displaces any authorisation⁸.

The foregoing propositions indicate that, in most cases, little practical difference in result arises from whether a power has been exercised under a delegation or pursuant to an authorisation (or agency). However, the power in s 78(9) of the PS Act permitting a sub-delegation of a power or function vested in an Agency Head under the Act is significant in terms of the management of an agency. It allows an officer lower in rank to the Agency Head to whom a delegation has been given to pass the exercise of a power further down the line of office holders. This permits line officers (the second delegate) to exercise a power that has been vested in the Agency Head but allows oversight of the exercise of the power by officers below the level of Head (the first delegate).

It is significant that this management of the exercise of a power is not available in respect of an authorisation of a person to exercise the power. The second delegate approach is applicable only to delegations of power.

Delegation under section 20

How do these general principles operate in respect of the vesting by s 20 of the 'rights, duties and powers of an employer' in an Agency Head?

Two matters stand out. First, these rights, etc, are vested in an Agency Head 'on behalf of the Commonwealth'. It is the Commonwealth which continues to be the employer of the APS employees in the agency. Secondly, there is a significant difference in language between s 20 and s 78(7). An Agency Head 'has the rights, duties and powers of an employer'. The power to delegate is of the Agency Head's 'powers and functions' under the PS Act.

I suggest that the correct way to view s 20 is as a statement of responsibility and not a power as such. The section leaves the relationship of APS employee and the Commonwealth as employer intact – as it must as the Agency Head is not the employer. However, it requires the Agency Head to assume responsibility for the implementation of that relationship.

This indicates that the statutory responsibility given by s 20 of the PS Act to exercise the rights, powers and duties of an employer on behalf of the Commonwealth cannot be delegated by an Agency Head. This responsibility is expressly stated as having to be exercised 'on behalf of the Commonwealth'. The nature of the authority given to the Head is such that it must be considered doubtful whether it can be passed on to another person to exercise. The Agency Head must retain the responsibility of acting on behalf of the Commonwealth. The status of the person carrying out this function is significant. It should not be open to a Head to pass it on to another person of the Head's choosing. Under s 78(9) of the PS Act, that person could in turn delegate the task further. This does not seem to accord with the significance of the responsibility given by the section to the Agency Head.

However, a distinction can be drawn between this statutory responsibility and the exercise of the common law and statutory powers that are applicable to the implementation of the rights, duties and powers that are vested in an employer. A person does not cease to carry out these rights, duties and powers by giving another person responsibility for, for example,

making appointments to an office or granting leave. These are powers that are a necessary part of the implementation of the rights, duties and powers that are vested in an employer at law but they can properly be seen as distinct from those rights, duties and powers.

This conclusion is supported by the comparison of the wording of s 20 and subs 78(7) of the PS Act referred to above. Section 20 refers to 'rights, duties and powers of an employer' being exercised by an Agency Head. Subsection 78(7) refers to the delegation of an Agency Head's 'powers or functions under this Act'. The change in language is significant. The reference in subs 78(7) is to powers whose source is the PS Act. The powers that are to be exercised to implement the obligation placed on an Agency Head by s 20 arise from the powers that a private sector employer has in regard to an employee.

A comparison can be made with the cases relating to the meaning of 'decision under an enactment' under the *Administrative Decisions (Judicial Review) Act 1977*. The courts have drawn a distinction between decisions which are authorised by an Act and decisions made under, for example, a contract that is authorised by the Act but which exists independently of the Act. The source of power in the latter case is the contract, not the Act.⁹

As has been noted above, delegation is not a concept recognised as applicable to common law powers. Rather the doctrine of agency or authorisation founds the basis for permitting another person to act on behalf of a person making a common law decision.

Accordingly, it would be possible for the powers that accrue to an Agency Head to carry out his or her responsibility under s 20 to be managed through authorisations as they are clearly not activities that the Agency Head could be expected to perform¹⁰.

As suggested previously, the powers to be exercised under s 20 in order to implement the employer-employee relationship will either flow from the common law or will involve a mix of common law and statutory powers. It is not appropriate to talk of delegating common law powers. Delegation is limited to statutory powers. A person exercises common law powers as an agent of, that is to say, as authorised by, another person.

If this reasoning is correct, it means that care must be taken in drafting delegations under the PS Act. It is permissible to delegate and then sub-delegate those many powers and functions that are expressly vested in an Agency Head by the PS Act. However, there should not be a purported delegation of the 'rights, duties and powers' referred to in s 20. It is permissible for an Agency Head to authorise the performance of powers necessary for a Head to carry out the responsibilities vested in him or her by s 20. However, that responsibility is such that he or she cannot pass it on to another officer in its totality. Nor can an officer authorised to perform functions on behalf of an Agency Head under s 20 authorise another officer to perform those functions on that officer's behalf.

Endnotes

- 1 (1979) 2 ALD 86.
- 2 [2007] Tas SC 50.
- 3 *Forest Marsh*, above n 2.
- 4 (1994) 123 ACTR 17.
- 5 [1943] 2 All ER 560.
- 6 (1983) 153 CLR 1.
- 7 *Reference under s 11*, above n 1.
- 8 *Ibid.*
- 9 *Griffith University v Tang* (2005) 221 CLR 99.
- 10 *O'Reilly v State Bank of Victoria*, above n 6.