THE LEGAL STATUS OF THE AUSTRALIAN RAILWAYS SERVICES AND OF RAILWAYS EMPLOYMENT

BY GARTH NETTHEIM*

Introduction

Over the years there have been established, at Commonwealth and State levels, a multiplicity of independent or semi-independent public bodies outside the traditional departmental structure.[1] As far as conditions of employment with such bodies are concerned, some fall within the Public Service Board system, while others are governed by separate legislation which tends, however, to bear considerable similarities to the prevailing Public Service Board system.[2] In addition, there may be some intersection of institutions—in New South Wales, for example, employees of a number of bodies which are not under Public Service Board control have, in common with public servants, a right of appeal to the Crown Employees' Appeal Board (though railway and transport employees retain their own appeal tribunal).[3]

There are, thus, increasingly similar patterns in legislation governing most forms of public employment in Australia (though there will probably always remain differences in matters of detail). But a serious impediment to the development and exposition of principles of a general body of law on public employment lies in the distinction between public servants in a narrow sense and other public employees.

The law relating to public servants in Australia (including public school teachers and the police) has long been plagued by a tension between two conflicting elements. In the first place, public servants (in common with other classes of public employees) are today subject to elaborate and detailed legislative codes governing their employment which represent a sharp contrast from the position in the United Kingdom.[4] But at the same time common law preconceptions have been preserved—either expressly in the legislation, or indirectly in judicial interpretation of the legislation—according to which Crown servants have only limited rights in their employment. In particular, it has frequently been stated that public servants are liable to dismissal at pleasure. Decided cases as to public servants do little to resolve these conflicting elements but rather highlight the inconsistencies. So cases

* LL.B. (Syd.) A.M. (Tufts); Senior Lecturer in Law, University of Sydney. This comment is part of a work in progress on the law relating to public employment.

[1] D. G. Benjafield and H. Whitmore, *Principles of Australian Administrative Law* (3 ed., 1966) 314-326.

[2] *Id.*, 52.

[3] *Ex parte Wurth; re Tully* (1954) 55 S.R. (N.S.W.) 47, 58 *per* Brereton J.

[4] L. Blair, "Public Employment—An Australian Contrast", [1960] *Public Law*, 246.

concerning public employees other than public servants—persons whose employment rights are not complicated by any involvement of that troublesome abstraction "the Crown"—are worth study, not only for their own sake but also for the sake of any light they may cast on a general corpus of Australian law on public employment. Cases concerning the status of railways employment can be particularly useful.

The value of railway cases on dismissal, etc., derives in part from the relative antiquity of the railway services as an important though separate branch of public employment—conditions of service have been evolving over the same period as have conditions in the public service proper; in part from the similarities in the railways legislation of the different states at different periods; and in part from the cumulation of judicial decisions over the years as to the rights of railway employees. The separateness of the railways services from the public service proper does not make the railways cases irrelevant to the public service (or *vice versa*) because the courts have taken the view that, for some purposes at least, the railway service is Crown service.

Legal status of the railways services

The provision of railway services has been regarded as one of the principal functions of Australian governments since (and even before) the attainment of responsible government in the 1850's. This, as an important factor in the peculiarly "developmental" function of the colonial governments, was recognized by the Privy Council in *Farnell v. Bowman.*[5] In *Victorian Railway Commissioners v. George Brown,* O'Connor J. in the High Court felt justified in grouping the railways service with the public service proper and the colonial defence forces as "the three great branches of the Public Service".[6] The colonial defence forces of course were superseded on Federation by Commonwealth forces, but the railways (and other public transport services) remained, and remain, a major state responsibility.[7]

The railway services have, for the most part, been kept outside the scope of public service legislation and, although administrative patterns have varied from time to time and from place to place, the tendency has been to place them under the management of a non-political Commissioner or Commisioners.[8] Partly this was to avoid the evils, apparent in the 1880's, of "log-rolling" in procuring the construction of new lines and of patronage in staff appointments.[9] At the same time the pattern of a fully-independent statutory corporation has generally been avoided

[5] (1887) 12 A.C. 643, 649.

[6] (1905) 3 C.L.R. 316, 338.

[7] For a concise account of the administrative history of one State railway system in the 19th century, see R. L. Wettenhall, "Early Railway Management Legislation in New South Wales", (1960) 1 Tas.Univ.L.Rev. 446.

[8] It has been suggested that the Australian railway services provided the prototype of the public corporation as an instrument of public administration: *ibid.*

[9] *Id.*, 456-459.

as the railways have been too important to the economies, and, hence, to the politics of the States to be left completely free of governmental restraints. The degree and types of government control have varied, but, of course, even where the legal powers in question have been vested in independent hands it is not unknown for Ministers to use "influence".[10]

The legal status of the railways services was considered by the High Court in 1906 in the *Railway Servants' Case*.[11] The question before the High Court was whether the railway service of New South Wales was a function of government so as to be a "State Instrumentality" and, hence, immune from Commonwealth interference, under the constitutional doctrine then prevailing. That doctrine was subsequently discarded by the decision in *The Amalgamated Society of Engineers v. The Adelaide Steamship Company Ltd.*,[12] but the High Court's view of the constitutional position of the railway services, for other purposes, was not questioned. In delivering the judgment of the High Court in *The Railway Servants' Case* to the effect that the Commonwealth Conciliation and Arbitration Act, 1904 was *ultra vires* and void so far as it purported to affect State railways, Griffith C.J. said:

> With regard to State railways it is a matter of history that before 1890 all the six Colonies had established State railways, the control of which formed a very large and important part of State administration, and that very large financial obligations, amounting to a sum far exceeding £100,000,000, had been incurred by the Colonies for their construction, as is expressly recognized in sec. 102 of the Constitution. In each case the actual administration of the railways was entrusted to a body specially constituted under State law for the purpose, but the revenue from the railways was State revenue, and the obligations incurred by their managers were State obligations. It is a fact also that the ability of the Colonies to meet their financial obligations in respect of loans was largely dependent upon the successful and profitable employment of the railways. It cannot, in our opinion, be disputed that the State railways were in their inception instrumentalities of the Colonial Governments, and we do not know of any authority for saying that this position was affected by the incorporation of the Railways Commissioners, which, in our opinion, was a matter of purely domestic legislation for the convenience as well of management as of the assertion and enforcement of contractual rights in respect of the commercial transactions involved in the transport of goods and passengers.[13]

---

[10] For example, *Watson v. Collings* (1944) 70 C.L.R. 51.

[11] *The Federated Amalgamated Government Railway and Tramway Service Association v. The New South Wales Railway Traffic Employees Association* (1906) 4 C.L.R. 488.

[12] (1920) 28 C.L.R. 129.

[13] (1906) 4 C.L.R. 488, 534-535. See also *Wynyard Investments Pty. Ltd. v. Commissioner for Railways (N.S.W.)* (1955) 93 C.L.R. 376, 385, 390 *per* Williams, Webb and Taylor JJ.; G. Sawer, "The Public Corporation in Australia" in W. Friedmann (ed.), *The Public Corporation* (1954) 10.

O'Connor J. who was a member of the Court, subsequently said that since that decision

> . . . it must be taken as authoritatively settled that the systems of State railways in each State are governmental functions of the State, recognized as such by the Constitution.[14]

Napier J., in *Re Commonwealth Agricultural Service Engineers Ltd.* subsequently commented:

> The later decisions of the High Court have rejected the conclusion based on this premise; but the accuracy of the premise was not questioned.[15]

The accuracy of the premise, as a general statement, has not been questioned. But it is too general to be relied on as providing the answer to the particular problems that arise in litigation, and reference must then be made to the specific provisions of what Griffith C.J. had described as "purely domestic legislation".[16] As a consequence, the Railway Commissioners of the various States have been treated as the Crown for some purposes but not for others.

Thus, provisions making the Commissioners liable to be sued in the ordinary manner have been accepted as subjecting them to the ordinary incidents of litigation without the benefit of any immunities which might attach to the Crown.[17] Provisions vesting the legal and beneficial ownership of property in them have served to deny them Crown immunity from statutes affecting property[18] though not in the face of a provision that "for the purposes of any Act" the Commissioner shall be deemed to be "a statutory body representing the Crown".[19] On the other hand, provision that moneys received should go into Consolidated Revenue has been held to give debts due to the railway service priority as Crown debts in winding-up proceedings.[20]

Legal Status of Railways Employment

The employment status of a railway servant was at issue in *Brown v. Commissioner of Railways*.[21] The Court had to determine whether a pension under the Superannuation Act, 1926-1935 (S.A.) should be

---

[14] *Attorney-General of New South Wales v. Collector of Customs for New South Wales* (1908) 5 C.L.R. 818, 841.

[15] [1928] S.A.S.R. 342, 348.

[16] See *per* Herring C.J. in delivering the opinion of the Victorian Full Supreme Court in *Victorian Railways Commissioners v. Herbert* [1949] V.L.R. 211, 212-213, overruling the decision of Gavan Duffy J. in *Victorian Railways Commissioners v. Greelish* [1947] V.L.R. 425.

[17] *Skinner v. Commissioner for Railways* (1937) 37 S.R. (N.S.W.) 261; *Ward v. Blue and Red Buses Ltd.* [1956] Q.S.R. 515.

[18] *Victorian Railways Commissioners v. Herbert* [1949] V.L.R. 211.

[19] *Wynyard Investments Pty. Ltd. v. Commissioner for Railways (N.S.W.)* (1955) 93 C.L.R. 376, 384. But see the dissent of Fullagar and Kitto JJ.

[20] *In re Commonwealth Agricultural Service Engineers Ltd.* [1928] S.A.S.R. 342; *In re Oriental Holdings Pty. Ltd.* [1931] V.L.R. 279.

[21] [1942] S.A.S.R. 91.

taken into account, in fixing an award under the Workmen's Compensation Act, 1932-1941 (S.A.), as a "payment, allowance or benefit" received "from the employer". It was held that a railways employee was an employee of the Government for the purpose, though the decision was based on specific provision in the Public Service Act, 1936 (S.A.), sections 6, 75, that employees of the Commissioner are "employed in the public service of the State".

Similar questions arose in *The Queen v. Clarke*[22] in deciding, *inter alia,* whether an Assistant Commissioner of the State Railways fell within the scope of the Criminal Code, 1913, section 84 referring to offences committed by persons "employed in the Public Service". The Court of Criminal Appeal held that he did (though he was acquitted of the charges). Dwyer C.J. said:

> Section 1 states that the phrase includes officers and men of the Defence Force, Police Officers, persons employed to execute process of the Courts and persons employed by the Commissioner of Railways. Such persons would not be regarded in England as in the Civil Service, nor in W.A. (except the Police Force) as in the State Public Service; nor does payment of salaries from moneys provided by the Government (for instance University grants) make the payee a public servant. The Code was copied from that then lately prepared by Sir Samuel Griffith and enacted in Queensland, and there Railway Commissioners were expressly included. The omission of Railway Commissioners in W.A. was obviously deliberate, the Commissioner being a Minister of the Crown, answerable to Parliament. There has never been any amendment of the definition to cover Commissioners and the express inclusion of the employees of the Commissioner suggests that the Commissioners are still not covered. Had it not been for the amendment of the Government Railways Act in 1948, I should have thought the ruling of the trial Judge was correct. I have, however, come to the conclusion that section 8(2) and (7) of that Act has made each commissioner a person employed in a Department of the Public Service and so now subject to Section 84 of the Code.[23]

But certainly, at least in the absence of such a provision in New South Wales legislation, a railways employee is the servant of the Commissioner for Railways of that State, as all members of the High Court agreed in *Commissioner for Railways (N.S.W.) v. Scott*[24] in deciding whether or not the Commissioner could bring an action for trespass *per quod servitium amisit* in respect of the loss of the services of an engine driver caused by the negligence of a third party. Kitto, Taylor, Menzies and Windeyer JJ. (Dixon C.J., McTiernan and Fullagar JJ. dissenting) held that the Commissioner was entitled to bring the action.

---

[22] (1957) 60 W.A.L.R. 83.
[23] *Id.,* 87.
[24] (1959) 102 C.L.R. 392.

The case is complex, and the seven individual judgments can only be fully appreciated against the background of the history and development of the course of action. The High Court itself had earlier held, with the approval of the Privy Council, that the action was not available in respect of loss of services of a member of the armed forces[25] or a constable.[26] The English Court of Appeal had held[27] that the action was not available in respect of an established civil servant, a tax officer, on grounds based on a reading of the history of the action which would confine the scope of the remedy to very narrow dimensions. The Court of Appeal's reasoning was rejected by a majority of the High Court, on the ground that the history of the action did not justify it (though Dixon C.J. was of the opinion that the limitation ought, none the less, to be accepted).

The question then was whether an engine driver came within a category comprising servicemen and constables so as to be outside the scope of the action, or whether he was outside such category so as to be within the scope of the action. Windeyer J. considered that each of the two earlier decisions had been based on the special nature of the service in question. *Quince's* case had been based on "the essentially different relationship between the Crown and a member of the armed forces" from "the contractual relationship of master and servant".

> And a constable has been held to be in the same position as a soldier. Do these decisions proceed from any common factor, and one present in the case before us? As I read their Lordships' judgment, soldiers and constables are assimilated because "there is a fundamental difference between the domestic relation of servant and master and that of the holder of a public office and the State which he is said to serve".[28] They said of the constable that "he is the holder of an office which has for centuries been regarded as a public office"[29] . . . But railway engine drivers cannot boast a like ancestry; and nothing that their Lordships have said makes me think that an engine driver in the service of the New South Wales Government Railways, *even if he can properly be considered as a Crown servant,* is to be ranked with members of the armed forces and constables. If the rule had been simply that *the Crown* can never bring an action *per quod servitium amisit* then the examination which Viscount Simonds' judgment makes of the office of a constable would have been unnecessary.[30]

It was enough, therefore, for Windeyer J., to hold that an engine-driver is not "the holder of a public office", though he did agree that he was a servant of the Commissioner, not of the Crown.

---

[25] *The Commonwealth v. Quince* (1944) 68 C.L.R. 227.
[26] *Attorney-General for New South Wales v. Perpetual Trustee Co. (Ltd.)* (1952) 85 C.L.R. 237; [1955] A.C. 457.
[27] *Inland Revenue Commissioners v. Hambrook* [1956] 2 Q.B. 641.
[28] [1955] A.C. 457, 489.
[29] *Id.*, 490.
[30] (1959) 102 C.L.R. 392, 442-443 (Italics supplied).

Kitto J. however, with Taylor and Menzies JJ., subsumed members of the armed forces and constables under a much broader category, namely, servants of the Crown, so that it became essential to decide whether the engine-driver was a servant of the Commissioner or whether both were

> . . . simply two functionaries whose only relation to one another is that each performs duties arising from a relation between himself and the State and whose respective duties interact. If the railways were run by an ordinary government department, the Commissioner being the permanent head of that department, I should think that the latter description might well be applied. But we are not here concerned with an ordinary department.[31]

And, after considering provisions of the Government Railways Act, 1912-1955, Kitto J. concluded:

> One cannot fail to see that the resemblance between the railway service and the ordinary public service is close. Yet one difference remains, and that the vital one. An officer in the public service enters into no contract of service with any individual. If he can be said to enter into a contract at all it is a contract with the Government. But an officer in the railway service enters into the employment of the Commissioner.[32]

This view of the relationship was also accepted by Taylor J.,[33] Menzies J.,[34] Windeyer J.,[35] McTiernan J.[36] and Fullagar J.[37] Likewise Dixon C.J. said:

> I do not regard *Wynyard Investments Pty. Ltd. v. Commissioner for Railways (N.S.W.)* as meaning or implying that the Commissioner for Railways is not the juristic person with whom the engine driver stands in legal relations and I am quite unable to accept the argument that the relation, notwithstanding that it is regulated in many respects by the Act, is not that of master and servant.[38]

Such cases, recognizing the railways services as Crown service for certain purposes but not for other purposes including (*prima facie*) employment, have little direct bearing on the issues of tenure and dismissal for, as Rich J. said of Commonwealth Railway employees:

> It would be academic to consider whether, as between the Commissioner and railway employees, he should be regarded as "the Crown", and they as servants of the Crown. The Act in express

---

[31] *Id.*, 418-419.
[32] *Id.*, 419.
[33] *Id.*, 427.
[34] *Id.*, 438.
[35] *Id.*, 463.
[36] *Id.*, 406.
[37] *Id.*, 410.
[38] *Id.*, 404.

> terms regulates the conditions of employment and dismissal, and leaves no room for the rules of the common law relating to the dismissal of servants of the Crown . . .[39]

The same, of course, can be said of members of the public service proper. But the absence, from the railway cases, of any direct involvement of "the Crown" has meant that the legislation on tenure and dismissal has been treated as posing no more than problems of interpretation, attracting few of the preconceptions that still occasionally distort cases concerning Crown servants.

It is submitted that the railway cases on tenure and dismissal (together with cases concerning other forms of public employment) should be treated as of direct relevance in eliminating those vestiges of English common law thinking on Crown service[40] which still haunt Australian courts today[41] when the employment rights of public servants are in question. In particular, a power to dismiss a public employee at pleasure should not be implied as a common law principle when there is legislation specifying grounds and procedures for dismissal—and when the legislation itself recognizes a power to dismiss at pleasure, it should be treated not as an overriding power but as residual only, so as to justify summary dismissal only on grounds not covered by specific provisions of the legislation in question.

---

[39] *Watson v. Collings* (1944) 70 C.L.R. 51, 57.

[40] For example, *Shenton v. Smith* [1895] A.C. 229; *Dunn v. The Queen* [1896] 1 Q.B. 116; *Hales v. The King* (1918) 34 T.L.R. 341, 589; *Denning v. The Secretary of State for India in Council* (1920) 37 T.L.R. 138; *Rodwell v. Thomas* (1944) K.B. 596; *Riordan v. War Office* [1959] 1 W.L.R. 1046.

[41] For example, *Adams v. Young* (No. 2) (1898) 19 N.S.W.R. 325; *Ryder v. Foley* (1906) 4 C.L.R. 422; *Carey v. The Commonwealth* (1921) 30 C.L.R. 132, 135; *Fletcher v. Nott* (1938) 60 C.L.R. 55, especially at 67-68 *per* Latham C.J.