

Public Employment Law, by GRAHAM F. SMITH. (Butterworths, Sydney, 1987), pp. 1-203, with index recommended retail price \$29.00 (ISBN 0 409 49256 6)

The contents of this book belie the title: this is *not* a book concerned with public employment law. The author acknowledges this on page 23 where, after confessing that his analysis is selective in both political and legal terms, he goes on to admit that "[t]he task of writing a more comprehensive outline of the complex myriad of statutory regulation of public employment throughout Australia will be left to others". The first fifty pages contain very little in the way of analysis. Rather there is extensive description and the pages are replete with extracts from legislation and quotations from commentators. Chapter two, which treats labour relations law in British public employment, is presented in a similar manner. In chapters three, four and five both the content and the writing pick up and the shape of the argument becomes clearer.

The central argument is simple to express: are persons who work in the public sector, including Crown servants, employed pursuant to a common law contract of employment or is their relationship to be characterised in some other way? This is an important and relevant question. It is public employees, and their trade unions, which are at the forefront of industrial activity in both Australia and Britain and are likely to remain so for many years. In all industrialised societies government is the largest employer. How that employer treats its employees will set the scene for industrial relations practices in Australia and Britain. Thus the law surrounding the employment of nurses, teachers, local body employees, members of the police force and the armed forces and employees of public corporations is in need of clarification. Have common law rights and duties been displaced by the plethora of statutes which apply to such employment? If so, how are rights and duties enforced? Are there novel remedies available to public servants which advantage them over their counterparts in the private sector? Are there "codes" of conduct emerging in the public sector which alter the legal position of employees? Is there a difference between the development of Australian and British public sector employment law? Each of these questions is addressed by Smith in the central chapters of his book and it is here that the most satisfying analysis is achieved.

Smith takes the reader through a series of illustrative cases dealing with traditional employer rights to control, discipline and dismiss employees at

common law and under public sector legislation and looks at the remedies available to the aggrieved employee. In Chapter three the author demonstrates the uncertainty about the relationship between statutory employment terms and the common law, analyses the difficult question of whether public sector legislation applies only by virtue of the contract, and challenges the presumption that common law terms will apply unless clearly excluded by statutory or award terms. When he turns in the following chapter to rights and duties in employment he agrees with British academics that there is today "a public service employment relationship which overlaps with but operates differently from the private law contract of employment". In Chapter five the author develops this theme by advancing a cogent case to support his conclusion that there is a growing convergence between the principles of the common law which traditionally governed employment and the principles of administrative law. In short, public law remedies are increasingly available to public sector employees and it is in this marriage between public and private law that the future is glimpsed. In the final chapter Smith draws together the threads and concludes that there is a significant divergence between the British and Australian experience in evolving a body of principles peculiar to public employment. At the same time Smith is prompt to warn his readers in both Britain and Australia to treat each other's case law in this area with caution. And in this warning, at page 193, the author puts his finger on the problem which confronts the reader from the moment the book is opened.

It will be remembered that the book is entitled *Public Employment Law*. When the cover is turned a secondary title is disclosed: *The Role of the Contract of Employment in Australia and Britain*. Clearly author and publisher are undecided as to the neatest description of the contents. Unfortunately neither title is a proper description. For reasons given above this is not a text on public employment law. Nor is it a text on the contract of employment. Too much is either left unexplained or taken as understood for this to be useful for those coming fresh to employment law. For example, at least twice in the text the concept that an employee might have a "status" relationship is suggested yet this controversial concept is never explained and there is no index reference to "status". The notion that an employee might have more than mere contractual rights in a job is highly relevant to the remedies available, amongst other matters, and elaboration of this argument would advance the theme of the book, in particular the issues raised in chapters four and five. Furthermore, Smith takes for granted an understanding of the concepts of offer, acceptance and consideration as applied to the formation of employment contracts. There is no index reference to these matters notwithstanding the reality that there is a growing body of legal principles surrounding the hiring of employees which both deserves and requires treatment in a book which purports to examine the role of the contract of employment. Nor is the substantive treatment of areas of employment law free from controversy. An example is the assertion on page 152 that an employee engaged under a fixed-term contract "may normally be dismissed . . . on reasonable notice". There is ample authority to support the

view that a fixed-term contract cannot be unfixed.

Notwithstanding the most strenuous efforts of author and publisher every book escapes into the market-place with small blemishes. This book is no exception. On page 67 a sub-heading is presented as "The contractual effect of Whitley agreements" and while the proper term "contractual" is employed immediately thereafter the neologism "contractual" reappears on one later occasion. On page 122 we learn that certain employees had been "on stike".

All reviewers enjoy identifying the small warts. What they must not ignore is the complete portrait and this reviewer enjoyed the broad picture painted by Graham Smith. It is an academic text in the best sense: a thoughtful extended essay. It opens interesting doors, provides some fresh insights and raises issues where there is room for genuine differences of opinion amongst those who study labour law. Most importantly this contribution to the literature enables students of labour law in Britain and Australia to see their own law and practice in a different light.

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