

Chapter 2. The regime of contestability

Almost immediately following the 1996 election, the new Government made it clear that it was now up to public servants to prove that they could offer the services it required as efficiently and effectively as the private sector.¹ At the same time, the Government reduced the size of the public service by around 10,000 people in each of the years 1997, 1998 and 1999.² The Government argued that the disciplines of contestability would mean increased cost-effectiveness for the public. For the public service, as one secretary argued, it meant:

Just generally greater insecurity—not just for you but for your department. Really knowing that you're in a contestable, competitive environment ... knowing that you've always got ministers asking if you can do it better elsewhere, doing it outside the public service. So it's insecurity, not for myself but the insecurity of the public service environment, I think that's a profound change.³

The new onus of proof for public service delivery raised a notoriously difficult question of which services were core public sector activities and which were not. According to the Auditor-General, the answer was that 'any definition of core government seems to be constantly changing ... including even those that would be considered to be traditional public services, such as policy, including legal advising, corporate management and the delivery of welfare services.'⁴ How, in practice, does the requirement that public servants contest their role in delivering policy advice for government intersect with the APS Values that are meant to characterise the public service? In particular, how can the public service compete with organisations that say (because it suits their constituency or because they, too, are competing) what a government prefers to hear? How can they compete with ministerial advisers, who will also have the minister's personal political interests at heart? What does responsiveness mean in such a context? Does apolitical professionalism really represent a competitive edge in getting the attention of government under such circumstances? Is competition a useful model for the delivery and receipt of policy advice? How do these questions affect the decisions made by public servants on a day-to-day basis? These are the questions that are considered below.

Contestability in theory

The answer, according to the former head of the Department of the Prime Minister and Cabinet, is that competition is honing the skills of public servants who have entered the new marketplace and are now 'vying' for ministerial attention:

The administrative reforms that have marked generational change in the APS, often characterised as the 'new public management', have been

extolled, debated and criticised. But, beneath, something far more profound has happened almost unnoticed. Governance has been democratised ... [and] the making of public policy has become increasingly democratic. There is more competition in ideas than ever before. Think-tanks, research institutes, consultancy companies, private sector lobbyists and community advocates each pursue their particular interests with increasing professionalism, vying with public servants for the ear of ministers and their political advisers. To my mind that's beneficial. Why would one want public servants to have exclusive access to a minister? Why would public servants not themselves want to listen to the views of those who share an interest in the outcomes of public policy?⁵

Vying for ministerial attention is not just about being interesting or novel, or even open and contestable. Increased competition for ministerial favour may not have the effect of broadening debate any more than increased competition in the fast food sector broadens the menu. In fact the market for ministerial attention is no simpler than other markets, and the competition of ideas is not a simple contest on an even ground, where the best idea wins. In practice it takes place in a highly landscaped playing field in which interests and interdependencies create gently rolling hills, pitfalls, wind tunnels and extensive deserts—and where the goalposts are moved constantly.

Contestability in practice

Take the very simple case of gathering data, which is an everyday reality for public servants in both policy and program-delivery departments. Let me offer a scenario that is, I suggest, not entirely unrealistic. The government wants a survey done that will enable it to claim support for a particular policy decision that it has already agreed to implement in exchange for the support of a particular interest group. It wants to be able to say that the research is wholly independent, so it asks the public service to commission an outside organisation to do the research. Once it is clear that the government wants data gathered outside the public service, the default public service approach is to try to ensure that it receives good quality evidence, and an academic consultancy is considered. The public service knows that there are individual academics and particular institutions with views that have not been supportive of government policy in the past and is aware that the government (not unnaturally) does not wish to commission those groups. For this reason, the public service has established, in agreement with the minister, research panels that include academics who are supportive of the government's policies, and it proposes to commission one of these without going through the rigors of a public tender process.

At the same time the government wants (also not unnaturally) to control the questions that will be used to gather the data, and it also wants to include among them some that are not consistent with the usual academic standards for setting survey questions, but are consistent with the government's reasons for wanting the data collected (push-polling). The favoured academics decline to proceed with the questions concerned, and the government then decides to commission a private sector organisation that will conduct a survey that includes any question for which it is paid. In addition, the government wishes to support the interest group that supports the government's policy (and indeed lobbied for it in the first place) to undertake its own independent research among its own membership that will subsequently reinforce the government's position.

The government may also decide to engage an eminent person, who is supportive of a much more radical version of their policy, to undertake a study that advocates the more extreme view and, thereby, make the government's position look moderate. In this case, it is not the policy usefulness of the consultancy but the known policy position of the eminent person that is important. In the end, the survey company and the eminent person are commissioned by the public service and the interest group receives a small grant to survey its constituency; the evidence is duly found and the arguments are duly made. The government points to the independence of its sources and the moderation of its policy. The policy becomes draft legislation; and the quality of the data underpinning the legislation becomes a matter for sporadic debate in the Parliament.

There is nothing about this scenario that is dependent upon applying the principles of NPM: public servants have never had exclusive access to a minister or a monopoly on advice. There have always been lobby groups and think tanks and academics that are sympathetic to the government of the day and those that are not, and governments have always used the former strategically and the latter sparingly, or preferably not at all. The difference following NPM is partly a matter of degree. It is also, I suggest, the unquestioning legitimisation—even celebration—of the proposition that competition for the ministerial ear, of necessity, increases the range of what ministers hear and thereby improves the democratic foundation of their decision making. This is only likely to happen if ministers actually want it to. If they don't want to hear from a range of competitors, they won't; or they will send in a public servant to do the listening for them. If the implicit argument here is that increased contestability will broaden public debate even if it does not affect government's policy predispositions, the jury is still out. But if the implicit argument is that government itself has become open to a wider range of opinion, then the evidence has not been forthcoming.

Take the case of the *WorkChoices* legislation. According to an insider—albeit one without sympathy for the legislation—'the detail of policy guidelines and

drafting instructions ... was supplied in the main by drawing upon submissions from the Business Council of Australia, one mining industry peak council, and several other national employer bodies'.⁶ It is reasonable to assume that in this, as in other cases of significant Howard Government policy initiatives, any mooted 'growth in ... alternative sources of policy advice'⁷ did *not* occur independent of increased demand from Government. The interaction of supply and demand for non-APS organisations (considered below) has been evidently affected as much by the laws of politics as those of economics, strictly speaking. For the APS, any increased reliance by government on alternative sources of advice raises two questions: what is the role of an 'impartial and professional' APS in maintaining the uneven playing field for policy advice, and what is the impact of contestability on the apolitical or professional nature of the APS's own role in advising on policy?

For a comprehensive view of how interest groups stage their interactions with government, it is worth considering the chronology of business, community and government commentary on legislative change to the Australian workplace relations system produced by the Parliamentary Library in 2007.⁸ The actions and interactions, pronouncements and campaigns of those involved suggest that there is considerable orchestration of the public release of contestable policy advice to government on these issues. It is not by any means clear, for example, what proportion of public lobbying of government is actually directed to government and what proportion is directed to building community support for (or opposition to) intended government policies, whether or not those policies have been publicly announced. Ambit claims are made of government in order to radicalise its position, and are cited by government in order to make its position appear moderate. There is no means of distinguishing between those who are vying for the ear of ministers and their political advisers and those who are being used, willingly or not, as stalking horses, unless they themselves are happy to say as much:

The Institute of Public Affairs is Melbourne's most prominent think tank and regularly acts as a policy ambit setter for the Federal Government. Its head, John Roskam, says part of its role is to push the boundaries of debate so political parties can move in that direction. By not moving as far, politicians are seen as pragmatic and considered, he says.

For example, the Institute wants a radical deregulation of the labour market, arguing the Government's new industrial relations laws don't go anywhere near far enough—a helpful point of view when the Government is trying to convince a sceptical public that its laws are moderate.⁹

In this case the democratic contest of ideas is not between the APS and other sources of policy advice, or among those sources with the APS abstaining, but

between public relations strategists for control of public opinion. The Institute of Public Affairs may be fully committed to a radical deregulation of the labour market, but both it and the then Government knew, at least in broad outcome, what the short-term policy outcome would be.

It is not clear, either, whether the ‘vastly increased alternative sources of policy advice’ to government are offering different views from each other, or only different views from those offered by the previous government. The hypothetical increase in alternative sources of policy advice would surprise many academic commentators, who have argued that neither the supply of nor the demand for scholarly policy input is flourishing. On the supply side, Edwards has identified problems associated with available funding, data access, comprehension of the policy process and government timelines amongst researchers, and effective communication of academic research findings. On the demand side, she has identified:

- anti-intellectualism in government: the policy process is driven by an ethos that militates against the use of research in policy making—a fear of the critical power of ideas;
- government capacity to absorb research: policy-makers and leaders being dismissive, unresponsive or incapable of absorbing research; and
- politicisation of research: lack of objectivity of many policy-makers and researchers.¹⁰

Those demand factors have also influenced changes to institutional arrangements intended to increase central control over what can be said—for example, the CSIRO’s instructions to its scientific experts not to comment on issues that have policy implications, and the replacement of the entire board of the Australian Research Council by an advisory committee with no decision-making power.

More broadly, academics are now required to make their contribution to the competition of ideas within a financial environment characterised by increasing reliance on industry research funding, fee-based courses and consulting services. These trends, in turn, involve closer attention to the needs of ‘consumers’ and ‘markets’. While there is a case to be made for some industry funding to act as a lever to prioritise and increase relevance of research, 41 per cent of Australian social scientists responding to a 2001 survey of social scientists from 13 universities, ‘reported that they had experienced discomfort with publishing contentious research results (13 per cent to a major extent) and almost half (49 per cent) reported they had experienced a reluctance to criticise institutions that provide large research grants or other forms of support (16 per cent to a major extent).’¹¹ The consequence of these developments is that some academics, at least, are finding it challenging to establish a direct line of sight from increased

competition for the attention of ministers to increased democracy in the making of public policy.

The hypothetical 'vastly increased alternative sources of policy advice' might also come as a surprise to some community advocates, who have argued, conversely, that governments at both state and federal levels have deliberately reduced the size of the nonprofit sector by 'nationalising groups of nonprofit organisations, by ending their funding arrangements or by changing the rules by which nonprofits receive government funding to provide services; or by using their power as the main source of funds to force amalgamations of several nonprofits'.¹² Federal governments have generally been selective at best about involving the community sector in the democratisation of policy making. Shortly before the 1996 election, for example, the leader of the Opposition made a virtue of proposing to exclude 'interest groups' outside 'the one mainstream' from 'the ear of the government' if elected, on the ground that they had had too firm a hold on the ear of the previous government:

The power of one mainstream has been diminished by this government's reactions to the force of a few interest groups. Many Australians in the mainstream feel completely powerless to compete with such groups, who seem to have the ear completely of the government on major issues.

This bureaucracy of the new class is a world apart from the myriad spontaneous, community based organisations which have been part and parcel of the Australian mainstream for decades. These trends reflect a style of government which will change profoundly under the Liberal and National Parties.¹³

The reported experience of community advocates following the 1996 election—particularly those singled out in the new Prime Minister's pre-election lecture—supports the view that, with honourable exceptions, their contribution to the contest of ideas was not encouraged by the Government either as part of policy input or as part of the consultations that occur following decision making:

Three quarters of [NGO] respondents (76%) disagreed with the statement that 'current Australian political culture encourages public debate', with one quarter disagreeing strongly. Similarly, three quarters (74%) believe that NGOs are being pressured to make their public statements conform with government policy. 92% of respondents said they disagree with the view that dissenting voices are valued by government as part of a robust democracy; 42% strongly disagree. Similarly, 90% of respondents believe that dissenting organisations risk having their funding cut.¹⁴

The capacity to award government grants enables governments to shape, in a broader way, the democratic competition for ideas by ceasing to provide funding for those non-government organisations that are dependent on support made

available under previous governments, as happened following the 1996 election in the case of selected groups representing women and youth.¹⁵ Conversely, governments can fund those organisations whose views they believe should be aired. This process is not unique to any specific government; many demonstrate their democratic credentials by funding those voices they want to hear, and ceasing to fund those whose views are likely to be less compatible with their own. NPM has, however, added contracting and competitive tendering to the resources available to government for these purposes. This new discipline is considered at greater length in Chapter 6. In the present context, it is enough to note that, in 2004, 'among those [NGOs] fully or partially funded by government, around 70% reported that, at times, their government funding restricted their ability to comment on government'.¹⁶ A subset of this group was not explicitly constrained by funding agreements, but nevertheless saw a need for self-censorship, referring to the inadvisability of 'biting the hand that feeds them'. Even in the case of very high profile community organisations and those not contractually prohibited from speaking, government funding through grants or contracts can still have the effect of encouraging them to 'choose their battles'.

When individuals rather than organisations are considered, it is still not clear whether increased contestability of policy advice means more actors vying with public servants for the ear of ministers and their political advisers or fewer actors doing it more frequently and possibly in different hats. Take Peter Hendy, until recently the Chief Executive of the Australian Chamber of Commerce and Industry (ACCI). He was an adviser to Peter Reith, the Minister for Industrial Relations during the waterfront dispute and later, during the initial work on what became the *WorkChoices* legislation.¹⁷ Subsequently he became ACCI's spokesperson on the same legislation; undertook a benchmarking study for the Treasurer that covered, *inter alia*, business tax; and then, following the 2007 election, left ACCI to become Chief of Staff to the new Leader of the Opposition. He is like many other people who meet themselves coming and going in ministers' offices, shuffling the hats of ministerial adviser, interest group representative and consultant.

This recycling of ministerial advisers is far from a recent development. From 1972 to 1974 Dr Peter Wilenski was principal private secretary to Prime Minister Gough Whitlam and in later years he revolved through a number of positions inside and outside the public service that enabled him to both advise on and shape public administration, including the *Members of Parliament (Staff) Act 1984*, which provided authority for Ministers to employ their own staff and to engage consultants. Of course it is not to be expected that ministerial advisers will cease to seek and to find employment once they have left the minister's office. It would be hard to argue that people with an understanding of particular issues should not be able to take that understanding across sectors, or even that

such movement might not broaden their policy perspective. Broadening your perspective is one thing, being able to respect the distinctive roles of a lobbyist and a public servant is another (which is considered below). A third issue is whether the recycling of lobbyists and advisers can properly be said to contribute to the increasing contestability of policy, or the process of 'making of public policy ... increasingly democratic':

Grains Council people go on AWB board, Grains Council people go on WEA, the gun-totin' Trevor Flugge steps down from AWB but is hired by government to undertake a mission to Iraq: and the Ministers concerned (especially Vaile as Trade Minister and a senior National Party Minister) all know these people and interact with them continually. Grains Council, NFF, National Party, senior Trade officials, senior Agriculture Department officials – see each other regularly, form part of the same club ... One of the key players in affected agencies at the time, Peter Langhorne, went from a senior position in DPIE to a senior position in Austrade to heading up John Andersen's [sic] office in 2001 as Chief of Staff; and as revealed in Andersen's press release of 13 March 2001, had also been an office bearer of the National Party while in senior public service policy advising positions. These are frequently highly competent people – some of them, like Peter Langhorne, I have worked with closely and have utmost respect for. What I am suggesting is that it is hard for any of us – whether a Minister or departmental official – to ask difficult and confronting questions to someone who is part of your own intimate circle.¹⁸

The kind of access to ministers being described here is qualitatively different from simply taking a role in the public debate. Certainly journalists, academics and policy advocates of all persuasions can go to the media and through the media can get a hearing from government. Nevertheless, particular benefits flow from more direct access to ministers and, therefore, it is worth asking whether increased contestability means that government is listening to more people or just more often to the same or even fewer people? Is the contest for the ear of ministers and their political advisers a continuing one, or is government listening more often to those people who already are, or are prepared to become, willing to say what it wants to hear?

Role of the APS in facilitating advice from outside the public service

What is the role of the APS in a contestable environment? Setting aside for the moment its own role in policy advising, the public service is not an impartial third party refereeing a contest for the ear of the minister and ministerial advisers. Fairness would involve the re-engineering of the entire playing field. And

although the resulting ‘competition in ideas’ might be of academic interest to public servants, experience suggests it is not likely to interest government. The APS may be required to be impartial, but governments are not; naturally they have favoured friends, policy interests and stalking horses. And just as the public service knows the government’s policy interests, it also quickly learns to know those who share them.

The APS is often more useful to government in managing those who do not have its ear than in facilitating the access of those who do. It has relatively little to do with ensuring ministers get access to informal advice—the sort that arrives from spouses, cronies, party think tanks, those who donate to political campaigns, favoured lobby groups, and people seated next to the minister at dinner or on a plane. For these informal advisers, the APS is at best a secondhand gatekeeper, providing detailed briefing and commentary on what is sought by those who are favoured, and talking points in rebuttal on the commentary of government critics.

Nevertheless, it is probably fair to say that the APS has a broader consultation brief with respect to policy development than most if not all corporate research, advocacy organisations, consultancy firms, public policy think-tanks and academic departments. Agencies responding to the 2005–06 *State of the Service* agency survey were offered a list of groups that could have been consulted, namely: the public, local government agencies, state/territory government agencies, tertiary education and research groups, unions, industry and NGOs. 62 per cent of all agencies reported that they usually or sometimes consulted one or more of these groups about the development of government policy, and 45 per cent reported consulting five or more.¹⁹ However, it is not clear—cannot be clear—what contribution the ‘formal’ consultation recorded in the *State of the Service* data makes to contestable policy development or program design. Formal consultation, particularly when conducted by the administrative rather than the political arm of government, may be of the variety that takes place after a decision, whatever it is, has been taken. It may legitimately influence the fine-tuning of a policy, or its implementation arrangements, but ‘consult is also a code word ... for having in mind a particular outcome that you want rather than just asking people what they think—sometimes yes and sometimes no—but in the end, you want to have a document that says, ‘we spoke to 10,000 people about this’.²⁰

What we know from public servants themselves about the nature of their public involvement is that they tend to see themselves as bearers of messages from the public to government or bearers of administrative directives from government to the public:

... involvement was highest in traditional areas of contact such as attending meetings with stakeholders to hear their views, or managing

contracts, projects and/or programmes. Involvement in areas of active participation such as negotiating with stakeholders to develop mutually agreed policy positions tended to be lower.²¹

Indeed, of the 76 per cent of employees who had dealt directly with interest groups or with people from other levels of government over the preceding 12 months, 25 per cent reported simply attending meetings with stakeholders to hear their views, and half as many (12 per cent) reported actually negotiating with stakeholders to develop mutually agreed policy positions.²² At least some of those who may have attended meetings but did not actually negotiate then or at any other stage, may have fallen into that subgroup for whom 'consult' is a code word. This may include, for example, some of the 32 per cent of NGOs that report finding the federal government sometimes uninterested in what they have to say, the 50 per cent that find them often uninterested, and the 11 per cent that find them always uninterested—just as state public servants may find themselves closeted with the 52 per cent of NGOs that report finding the state government sometimes uninterested, the 28 per cent that find them often uninterested, and the 6 per cent that find them always uninterested.²³

It cannot be assumed, then, that the consultations conducted by public servants and referred to in the *State of the Service* data are genuinely indicative of who is or is not making an effective contribution to the contest of ideas in the minds of ministers. According to one public servant, 'people from within government understand each other, but it's so hard to deal with people externally (e.g. NGOs), who don't understand why/that you can't be more helpful when faced with a perfectly reasonable position'.²⁴ This observation may offer some insight into the finding that 35 per cent of employees who had dealt directly with stakeholders or with people from other levels of government over the preceding 12 months had faced a challenge in balancing the need to be fair and effective, impartial and courteous in delivering services to the Australian public, and responsive to the government (as per the APS Values).²⁵

In addition to managing consultations, the APS, as the administrative arm of government, also manages the funding, by means of grants or consultancies, for those 'think-tanks, research institutes, consultancy companies, private sector lobbyists and community advocates' mentioned by Dr Shergold from whom the government wishes to hear or wishes the public to hear. Once it has learned who these people are, the APS can anticipate the government's wishes. There is little point in not doing so: in the first place it would represent a breach of responsiveness; in the second place, it would bring down the wrath—or at least the outspoken dissatisfaction—of ministers and their advisers; and in the third place, putting up briefs that do not favour the government's preferred contestants would have no effect on the outcome of a given selection process. The selection process itself is often hedged in with guidelines that incorporate 'impartial and

professional' features of public administration, including due process, transparency and accountability. But as the Public Service Commission's good practice guide on *Supporting Ministers* makes clear, 'guidelines are simply that—guidelines for APS employees'²⁶ and not for ministers. As long as the law is not broken, and regardless of any baggage of short lists and credentials, 'decisions about spending Government money are made by portfolio ministers'.²⁷ The worst of it is that the uneven playing field is also a training ground for public servants: after years of watching how the game is played, it is remarkable that so many public servants continue to see themselves as operating outside it.

With respect to the contestable advice that has been received, public servants label, digest, zip, unzip, order, categorise, integrate, compare and contrast it and turn some of it into options and speaking points for ministers. They know whose contestable advice triggers the big brief on implementation feasibility and whose triggers the short brief on fundamental flaws. And if they do not, the process of seeking performance ratings from ministers and their offices on ministerial briefs, considered in the next chapter, will provide an opportunity to be 'informed and improved by ongoing discussions with political advisers: [who] on occasions ... will have a keener sense of the range of issues that need to be addressed'.²⁸

Impact of contestability on the APS's policy-advising role

Policy advising is an area in which the APS has a greater capacity for institutional creativity than would be available to it while acting simply as groundskeeper and referee during the contest for the ministerial ear. It is also an area in which the public service has been regarded as having what the Public Service Commissioner has described as a 'natural advantage' related to its 'impartiality and focus on the national interest',²⁹ as well as its grasp of the history of Commonwealth institutions and its understanding of the connections between them:

By definition we have no barrow to push, no interest group to serve and no profit to make from the policy advice we provide ... We have an institutional memory that goes back to Federation and that can assist the Government to keep history from repeating itself. We are uniquely placed to weigh up the advice that the Government receives from other players, which, as Andrew Podger [the previous Public Service Commissioner] asserts, almost always reflects some sectoral interest or political view.³⁰

Like the government, the APS is meant to consider a broad public interest, and for this reason the former is assumed to see particular value in the advice of the latter. This is probably an optimistic assumption, given that 'just how small the core public sector can become without jeopardising the public interest is still open to debate.'³¹ And in any case, although the APS may rise above sectoral

interests in providing government with impartial advice, it would be deliberately naive to argue that impartiality, even in the presentation of factual material, necessarily constitutes a reliable advantage in the view of all ministers and their advisers in a contestable environment. This is because, as in the case of the weapons of mass destruction:

While the factual elements of advice are assumed to be distinguishable from the broader political context within which they sit, in practice they are closely related. Normative policy positions typically depend on certain factual assumptions and can be weakened by the falsification of these assumptions.³²

If the numbers provided by the relevant public service agency do not support the government's preferred position, a public servant can be directed by the minister to buy in a new data collection. If the minister is dissatisfied with a departmental legal opinion, a public servant can be directed to commission a legal opinion from a nominated lawyer in a private sector firm. Where necessary, the minister can also use the reputation of the public service for apolitical professionalism to establish the independence of those alternative inputs ('research commissioned by my department has found ...'). This is not a problem for the government: a government is entitled to look for other opinions and there are many cases where it does so. It is, however, a problem for the contestability of the public service if it is repeated too often. What the public servant may gain from insisting on the integrity of departmental data and the reliability of departmental legal advice is an irritated minister and an increased likelihood of being bypassed in future when advice is required. If, conversely, the department sees its way clear to editing its factual or legal advice to government to support the government's anticipated preferences, then it has effectively compromised its longer-term natural advantage to enhance its short-term contestability. A good minister would quickly get over any irritation with advice that has that has obvious integrity, and would appreciate the pitfalls of relying on 'advice' designed only to support a possibly poorly informed decision. But not all ministers have such appreciation; nor do all their advisers.

Take the further case of the marketing of government policy decisions. Formerly a political responsibility, media management has moved in recent times to a more central position on the responsiveness agenda. According to the former Prime Minister John Howard: '[t]he public service is a lot more conscious now of the need to explain, the need to justify, the need to defend.'³³ According to advice prepared for the public service and drawing on interviews with ministers, secretaries and advisers, the 'willingness to market Government policies' is a key value creating factor for good policy advising.³⁴ 'Marketing' here may mean anything from to explaining the decisions of government in public forums; to social marketing, as with anti-smoking campaigns; to making public relations

‘part of the wider strategic management decision-making process’.³⁵ In all of these cases, ‘there is a fine line between explaining government policy and selling it, and between using marketing to achieve program objectives and implement policy initiatives, and becoming partisan’.³⁶

Clearly, it is not always a straightforward exercise to draw the line between explanation and selling, particularly when one is ‘a lot more conscious now ... of the need to justify, the need to defend’. In particular it is not straightforward when the final speech or media material is ministerial (and not public service) and raising concerns where it is understood that material has been shaped to suit the government’s purposes may, in some cases, do little more than revive old and unwelcome debates long since laid to rest. Public servants ought to ensure that whatever facts are presented in the media are accurate, but can generally be expected to remain silent when countervailing facts are omitted. It is improper—a breach of the Code of Conduct—to seek to do otherwise in public, and there is an ‘understandable reluctance of public servants to risk penalties (including jail) for revealing how advice has been manipulated’.³⁷

There are further gradations of media support. It is possible, for example, to provide the facts about a set of legislative provisions but remain silent about the systemic disadvantages of that legislation for particular groups of people, or keep one’s own counsel concerning the legal underpinnings of reassuring phrases like ‘prohibitions on duress’. Or, showing more responsiveness, public servants could prepare material for the minister that sets out the facts truthfully but misleadingly. For example, they could highlight increasing numbers of Australian Workplace Agreements (AWAs), overstating the rate by assuming that no affected workers resigned, were promoted or were dismissed.³⁸ Or they could proceed beyond factual material into the territory of explanation and from there slip into the region presided over by party political polemic.

These issues have most recently and specifically been debated in relation to the high-profile involvement of a public servant in the Government’s *WorkChoices* media campaign. Barbara Bennett was appointed as head of the Workplace Authority in 2007, because, according to the relevant Minister, ‘of the fact that I think Barbara has the capacity to be a very public face of the Workplace Authority’.³⁹ And indeed her face became public almost immediately, appearing in a prominent television media campaign, ‘Know where you stand,’ created by the advertising agency responsible for the ‘Chains’ advertising campaign introducing the GST. The ‘Know where you stand’ campaign responded to research into public perceptions of the Government’s industrial legislation that reported ‘key emotions’ in the community of fear, panic, insecurity, cynicism, distrust and disempowerment over *Work Choices*’.⁴⁰ In the televised segments, Ms Bennett was to be seen advising any such concerned citizens that there were many myths around about individual contracts, and that ‘the biggest myth is

that employees are alone and unprotected and that's just not true'. She went on to speak about the role of her Authority while footage showed her and other officials conferring and pointing at documents. This is believed to be the first time a public servant has been used in such a campaign—or, in the Minister's words, has been 'such an important component of the advertising'.⁴¹

While the agency head's behaviour in this case appears to exceed what *Supporting Ministers, Upholding the Values* calls 'assisting with media presentations on technical matters',⁴² it was defended by her minister's office on the ground that she 'was merely fulfilling part of her role as a public servant: explaining policy, and giving important factual information about the workplace relations system'.⁴³ In the view of the last Public Service Commissioner, the 'Barbara Bennett advertisements', as they came to be known, reflected poor judgement about how much ministerial support is too much, for a number of reasons including the controversial nature of the policy area, the imminence of the election, the 'myth-busting' language used and the fact that the public servant concerned appeared 'more as an advocate than an explainer'.⁴⁴

The present Public Service Commissioner took a more black letter approach to the Bennett advertisements, making a statement to *The Australian* that 'public communication by public servants explaining to stakeholders how new policy arrangements will work is not inconsistent with APS values'.⁴⁵ While this statement is open to interpretation—one suspects deliberately so—the Prime Minister was able to cite it in Parliament, where he noted that 'firstly, the "Barbara Bennett advertisements", as [Mr Rudd] calls them, are legitimate information campaigns; and, secondly—not only that—they are completely in accordance with the APS Values of the *Public Service Act*, as certified by none other than the Public Service Commissioner, Lynelle Briggs'.⁴⁶ These comments serve to focus analysis on the endlessly debatable question of where factual information leaves off and political advocacy begins. Is 'if you need help or advice just call us on the workplace info line' sufficient to constitute 'explaining policy, and giving important factual information about the workplace relations system'? Does what the Minister called 'the face behind the name Workplace Authority'⁴⁷ also represent important factual information?

To what extent does the increasing pressure to compete with other service providers to government push the envelope on what public servants are prepared to do? Should public servants be concerned when—as one public servant in the Department of Communication, Technology and the Arts is reported to have put it in 2007—they 'have one brief—shoot down Labor's plan and promote the Government's plan'?⁴⁸ The 'natural advantages' of the public service as set out by the Public Service Commissioner—its reputation for impartiality, institutional memory, grasp of whole of government intersections, and broad perspective on the public interest—should mean that public servants are comfortable with the

presence of other players in the field. But interest groups, private sector think-tanks, academics, NGOs, and consultants have their natural advantages as well, particularly those who are on the high ground of the uneven playing field under a given government. They are not required to reveal who is paying for their research. They are not expected to remain silent if their research is manipulated. They are able to act as stalking horses for radical policies, access and use the media, encourage their constituencies to support the legislation of the government of the day and encourage political donations. They can work in concert with government when they like and point vigorously to their independence when it suits them. They are only required to be transparent if the government is paying them and wants them to be. Setting aside the academic institutions, most of them do not have to be accountable for the quality of their legal, scientific and financial advice. Take, for example, the reported case of advice to the Blair Government on the cost implications of a Private Finance Initiative (PFI) for infrastructure improvements to the London underground:

Proposals for a PFI initiative to fund improvements to the London Underground have been shown to cost about twice as much as bond financing. Despite this, two of the big five accounting firms, hired by the Blair government, have signed off on the claim that the project represents 'value for money', relative to a public-sector comparator. (A third, Deloitte and Touche, hired by opponents of PFI, reached the opposite conclusion.)⁴⁹

If such practices and scenarios reflect wider reality, or even pockets of reality, they make old-style policy advising—clarifying objectives, identifying the alternative means of achieving those objectives, considering the consequences of each alternative, and evaluating each set of consequences—look very clunky. They make old-style responsiveness—providing advice that is 'frank, honest, comprehensive, accurate and timely' according to s.10(f) of the *Public Service Act*—look lumbering. They can make the pursuit of a 'more traditional approach to public service'⁵⁰ an uphill battle.

Can public servants hold the line between being responsive to government policy directions and telling ministers whatever it is that they want to hear?

If there is market competition for the ears of ministers and their advisers, will the public service be drawn into competing in that market by increasingly telling ministers whatever it is that they want to hear? Some ministers will continue to be convinced of the long-term benefits of impartial advice but, like public servants, they will have to maintain that conviction in the face of Dr Shergold's 'think-tanks, research institutes, consultancy companies, private sector lobbyists and community advocates'—not to mention academics, employer associations

and unions—‘each pursu[ing] their particular interests with increasing professionalism, [and] vying with public servants for the ear of ministers and their political advisers’. The professionalism most pleasing to ministers may not always be of the apolitical persuasion, and the motivation to ‘please’ the minister, always a powerful driver, has been reinforced by institutional drivers intended to enhance the contestability of agencies. In a devolved environment, agency heads are now able to deploy performance assessment and pay (see Chapter 3), individual employment contracts, attraction and retention policies, and agency remuneration strategies (Chapter 5) to develop and reward staff who are comfortable with ‘steadily increasing political oversight and expectations of responsiveness by the bureaucracy to the elected government’.⁵¹

These agency systems can be used to make particular organisations look and sound to the minister as if they were a lobby group in public service clothing, responsive to ‘the belief on the part of governments—all governments—that they want not only support but *passion* from their public servants’.⁵² The result is an increase in the numbers of ‘hybrid’ public servants, people who, as a job ad from one agency would have it, will be apolitical and yet ‘like minded’, impartial and yet ‘passionate’.⁵³ From an agency perspective, this kind of competitive edge may only last as long as the government of the day retains power. However, once a government has become the Opposition, the reputation of a particular agency is not a matter of pressing concern for them anyway. Acceptable parachutes may even have been found for the relevant agency heads and senior managers. It is the work of the agency and the public service more generally that are damaged, and the trust of the new government and the public that is compromised.

ENDNOTES

¹ See Peter Reith, *Towards a Best Practice Australian Public Service: Discussion Paper issued by the Minister for Industrial Relations and the Minister assisting the Prime Minister for the Public Service* (Canberra, 1996), p. x; Pat Barrett, ‘Corporate Governance in the Public Service Context’, *Canberra Bulletin of Public Administration* 107 (Mar. 2003), 8.

² Australian Public Service Commission, *Australian Public Service Statistical Bulletin, 2004–05*, Table 1, p. 13.

³ Patrick Weller, *Australia's Mandarins: The Frank and the Fearless?* (Sydney: Allen & Unwin, 2001), 104–5.

⁴ Barrett, ‘Corporate Governance’, 8.

⁵ Peter Shergold, ‘Pride in Public Service’, speech to National Press Club, Canberra, 15 Feb. 2006, at <http://www.pmc.gov.au/speeches/index.cfm>, viewed 15 Mar. 2006.

⁶ Paul Munro, ‘The *WorkChoices* Legislation: A Factor in the Rationale for Founding the Australian Institute for Employment Rights’, 30 Nov. 2005, at <http://www.buseco.monash.edu.au/mgt/research/aier/speeches.php>, viewed 30 Aug. 2006.

⁷ Peter Shergold, ‘Two Cheers for the Bureaucracy: Public Service, Political Advice and Network Governance’, Australian Public Service Commission Lunchtime Seminar, 13 June 2003, at <http://www.pmc.gov.au/speeches/index.cfm>, viewed 27 June 2006.

⁸ Parliamentary Library, ‘Workplace Relations Reforms: A Chronology of Business, Community and Government Responses’, *Chronologies Online*, last updated 6 Dec. 2007, at

http://www.aph.gov.au/library/pubs/BN/2007-08/Workplace_Relations_chron.htm, viewed 17 Feb. 2008.

⁹ Ewin Hannan and Shaun Carney, 'Thinkers of Influence', *The Age*, 10 Dec. 2005, p. 6.

¹⁰ Meredith Edwards, 'Social Science Research and Public Policy: Narrowing the Divide', Academy of Social Sciences in Australia: Policy Paper No 2 (Canberra, 2004), 4.

¹¹ Carole Kayrooz, Pamela Kinnear and Paul Preston, 'Academic Freedom and Commercialisation of Australian Universities: Perceptions and Experiences of Social Scientists', The Australia Institute Discussion Paper No 37, 2001, p. 8, at http://www.tai.org.au/documents/dp_fulltext/DP37.pdf, viewed 1 Mar. 2007. The survey had a 20% response rate (165 respondents).

¹² Bernadine Van Gramberg and Penny Bassett, 'Neoliberalism and the Third Sector in Australia', Victoria University School of Management Working Paper Series, May 2005, p. 7, citing M. Cleary, 'The Role and Influence of the Nonprofit Sector in Australia', APPC Conference on Governance, Organisational Effectiveness and the Nonprofit Sector, 5–7 Sept 2003, p. 23.

¹³ John Howard, 'The Role of Government: A Modern Liberal Approach', The Menzies Research Centre, National Lecture Series, 1995, p. 4, at <http://www.ozpolitics.info/election2004/1995-rolegovt.htm> viewed 1 Mar. 2007.

¹⁴ Sarah Maddison, Richard Denniss and Clive Hamilton (eds), 'Silencing Dissent: Non-government Organisations and Australian Democracy', The Australia Institute Discussion Paper no. 65, June 2004, p. x (see also full table at p. 39).

¹⁵ *Ibid.* 2–4.

¹⁶ *Ibid.* 34.

¹⁷ Discussion papers outlining the proposal to simplify the industrial relations systems by using the corporations power began to be issued by Peter Reith during 2000, under the general heading 'Breaking the Gridlock'.

¹⁸ Stephen Bartos, 'The AWB Affair – Matters of Governance', National Institute for Governance, University of Canberra, 1 May 2006, pp. 16–17. For another example, see also Clive Hamilton, 'The Dirty Politics of Climate Change', speech to the Climate Change and Business Conference, Adelaide, 20 Feb. 2006, p. 2, at <http://www.tai.org.au/>, viewed 30 Aug. 2006.

¹⁹ Public Service Commissioner, *2005–06 State of the Service Report* (Canberra, 2006), 240.

²⁰ National Institute for Governance, 'Engaging Stakeholders: Why, When and How?', transcript of the proceedings of a seminar presented by Professor David Zussman, President of the Canadian Public Policy Forum, University of Canberra, 22 Apr. 2003, p. 4.

²¹ Public Service Commissioner, *2005–06 State of the Service Report*, 244.

²² See Australian Public Service Commission, *2005–06 State of the Service Employee Survey Results* (Canberra, 2006), 33, questions 46 and 47.

²³ Maddison et al., 'Silencing Dissent', 34.

²⁴ Public Service Commissioner, *2005–06 State of the Service Report*, 243.

²⁵ *Ibid.* 247. Note that while they were challenged, they were, overall, highly or very highly confident (72%) about their capacity to manage that challenge.

²⁶ '... except where a grant creates a funding commitment of more than 12 months, which requires the prior approval of the Minister for Finance and Administration': Australian Public Service Commission, *Supporting Ministers*, 53.

²⁷ *Ibid.*

²⁸ Shergold, 'Once was Camelot in Canberra?', 8.

²⁹ Lynelle Briggs, 'Public Service Reform', SES breakfast, 12 May 2005, at <http://www.apsc.gov.au/media/briggs120505.htm>, viewed 25 June 2007.

³⁰ Lynelle Briggs, 'A Passion for Policy?', ANZSOG/ANU Public Lecture Series, 29 June 2005, at <http://www.apsc.gov.au/media/briggs290605.htm>, viewed 30 Aug. 2006.

³¹ Barrett, 'Corporate Governance', 8.

³² Richard Mulgan, 'Truth in Government and the Politicisation of Public Service Advice', *Public Administration* 85(3) (2007), 572.

³³ John Howard, 'Ethical Standards and values in the Australian Public Service', *Canberra Bulletin of Public Administration* no 80 (Sept. 1996), 3.

Whatever Happened to Frank and Fearless?

³⁴ Allan Behm, Lynne Bennington and James Cummane, 'A Value-creating Model for Effective Policy Services', *Journal of Management Development* 19(3) (2000), 171.

³⁵ Public Sector Management Program Unit 2: Managing out: The Public Sector in the Community, p. 328.

³⁶ Andrew Podger, 'Citizen Involvement—The Australian Experience', presentation to the CAPAM Malaysia High Level Seminar Kuala Lumpur, 8 Oct. 2003, at <http://www.apsc.gov.au/media/podger081003.htm>, viewed 17 Feb. 2008; and see also his 'The Australian Public Service: A values-based Service', presentation to 2002 IPE Biennial Conference on 'Reconstructing "The Public Interest" in a Globalising World', Brisbane, 5 Oct. 2002, at <http://www.apsc.gov.au/media/podger051002.htm>, viewed 22 Nov. 2007.

³⁷ Geoffrey Barker, 'The Public Service', in Clive Hamilton and Sarah Maddison (eds), *Silencing Dissent: How the Australian government is controlling public opinion and stifling debate* (Crow's Nest: Allen and Unwin, 2007), 128.

³⁸ See the Department of Education, Employment and Workplace Relations, Submission to the Senate Inquiry into the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*, 29 Feb. 2008, at http://www.aph.gov.au/Senate/committee/eet_ctte/wr_tff08/submissions/sub27.pdf, viewed 7 Mar. 2008.

³⁹ Joe Hockey, 'Appointment of Director and Deputy Director, Workplace Authority, and Workplace Ombudsman', press conference, 21 June 2007, at <http://www.joehockey.com/mediahub/transcriptDetail.aspx?prID=383>, viewed 17 Aug. 2007.

⁴⁰ Lara Sinclair, 'Voters Fearful of IR Laws', *The Australian*, 3 Aug. 2007, at <http://www.theaustralian.news.com.au/story/0,25197,22180820-5013404,00.html>, viewed 17 Aug. 2007.

⁴¹ Joe Hockey, quoted by Mark Davis, 'Workplace Ad May Breach Public Service Code, Says Gillard', *Brisbane Times*, 17 July 2007, at <http://www.brisbanetimes.com.au/news/national/workplace-ad-may-breach-public-service-code-says-gillard/2007/07/16/1184559705331.html>, viewed 17 July 2007.

⁴² Australian Public Service Commission, *Supporting Ministers*, 66.

⁴³ David Lawrence, 'Calls for Govt to Drop Latest Workplace Ads', *Lateline*, broadcast 1 Aug. 2007, at <http://www.abc.net.au/lateline/content/2007/s1994498.htm>, viewed 17 Aug. 2007.

⁴⁴ Andrew Podger, 'Pride and Prejudice: Ms Bennett as the New Face of a Very Public Service', *Public Sector Informant*, 7 Aug. 2007, p. 6.

⁴⁵ Lynelle Briggs, quoted in Matthew Franklin, 'Workplace Authority Boss in Clear over Ads', *The Australian*, 1 Aug. 2007, p. 2.

⁴⁶ Commonwealth of Australia House of Representatives, Hansard, 7 Aug. 2007, p. 21, at <http://www.aph.gov.au/hansard/reps/dailys/dr070807.pdf>, viewed 20 Aug. 2007.

⁴⁷ Joe Hockey, Address and Q&A to the QLD Media Club 27th Sept. 2007, at <http://www.joehockey.com/mediahub/transcriptDetail.aspx?prID=541>, viewed 17 Feb. 2008.

⁴⁸ Jason Koutsoukis, 'Dirt Unit to Fight Labor's Net Plan', *The Sunday Age*, 15 July 2007, p. 1.

⁴⁹ John Quiggin, 'The Enron Approach Masks Hidden Dangers', 15 Apr. 2002, Evatt Foundation, at <http://evatt.org.au/news/23.html>.

⁵⁰ Andrew Podger, 'What Really Happens: Department Secretary Appointments, Contracts and Performance Pay in the Australian Public Service', *Australian Journal of Public Administration* 66(2) (2007), 140.

⁵¹ *Ibid.* 143.

⁵² Patrick Weller, *Don't Tell the Prime Minister* (Scribe Publications: Melbourne, 2002), 67–8.

⁵³ From an advertisement placed by the Department of Employment and Workplace Relations in the *Weekend Australian*, 8–9 Apr. 2006, p. 29.