


Reinforcing managerial prerogative in the Australian Public Service during the COVID-19 pandemic

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Abstract

Over several decades Liberal-National Governments have encouraged Australian Public Service (APS) employers to uphold managerial prerogative by offering individual employment arrangements to employees. During the period of the COVID-19 pandemic, the Morrison Liberal-National Government's Workplace Bargaining Policy reinforced this agenda. In place of collective bargaining, APS agency heads were encouraged to determine pay rises and new employment conditions for employees using Section 24 of the *Public Service Act (PS Act) 1999*. Workplace determinations did not need to be negotiated with public sector unions and some 85,500 employees across 57 APS agencies, or approximately 63% of the APS workforce, had accepted pay increases via workplace determinations by 31 December 2020. The widespread adoption of workplace determinations in the APS poses significant challenges for public sector unions and for the future of APS collective bargaining.

JEL Codes: J21, J45, J53, K31.

Keywords

Individualisation, managerial prerogative, workplace determinations, collective bargaining, public sector unions

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Introduction

Employers across many developed countries have responded to economic crises over recent decades by seeking increased flexibility over working time arrangements, pay and employment conditions (O'Sullivan et al., 2021; Rasmussen et al., 2016). Employers have also promoted direct communications with employees and discouraged collective bargaining and trade union recognition (Brown, 1999; Cooper et al., 2009). This transformation of employment relations seeks to justify '... the need for a united structure of authority, leadership and loyalty, with full managerial prerogatives legitimised by all members of the organisation' (Fox, 1974, 249). In addition to these broad trends in employment relations, governments in many developed countries have used their administrative and legal authority over public sector employment relations to implement unilateral changes to public sector pay, employment benefits, employment levels and collective bargaining processes in response to economic shocks (Bach and Bordogna, 2013; Freeman and Han, 2012; Lewin et al., 2012). These changes have often been implemented with minimal consultation with public sector trade unions (Hansen and Seip, 2018).

This emphasis on reinforcing managerial prerogative over employment relations has also been evident in Australia (Bray and Waring, 2006). Since 1996, Liberal-National Governments have implemented significant changes to the country's industrial relations system in order to enhance the authority of employers, weaken centralised collective bargaining processes and marginalise the role of trade unions (Cooper and Ellem, 2008; Cooper et al., 2009). Within the APS (Australian Public Service), Liberal-National Governments have encouraged APS employers to promote individual employment contracts and to strip back employment conditions in enterprise agreements (O'Brien and O'Donnell, 2008). While recent bargaining rounds in the APS have continued the Liberal-National Government's agenda to strip back employment conditions and limit wage increases (Williamson et al., 2016), there has been little research into the Government's efforts to enhance APS employers' managerial prerogative during the COVID-19 pandemic. This paper examines efforts by APS employers to offer employees pay rises and new conditions of employment via workplace determinations under the *Public Service Act* 1999 in place of new collective agreements. Section 24 of this Act empowers an Agency Head to 'determine in writing the terms and conditions of employment applying to an APS employee or APS employees in the Agency'.¹ The article argues that this development in APS employment relations has the potential to undermine collective bargaining and the role of public sector unions in negotiations over pay and employment conditions.

The article is structured in the following manner. It begins by reviewing how NPM (New Public Management) reforms, defining efficiency in terms of the microeconomics of markets and individual choice, have led to significant changes to public sector employment relations and enhanced public employers' managerial prerogative. The following section reviews the outcomes of the 2014–2018 agency bargaining round in the APS that laid the groundwork for section 24 determinations under the *Public Service Act* 1999 to emerge. The operation of these determinations during the COVID-19 pandemic

and their impact on public sector unions and collective bargaining in the APS are then considered. The discussion and conclusion consider the implications of section 24 determinations for future rounds of APS agency bargaining and the challenge they represent for public sector trade unions.

New public management and managerial prerogative in the Australian public service

Public sector organisations are governed by a complex range of legal, institutional and administrative processes that have evolved in a path dependent manner in different countries. This has resulted in a range of different institutional and legal approaches to regulating public sector employment relations (Bach and Givan, 2011; Bach and Bordogna, 2013). Removing these differences in public sector employment relations was a key goal of the NPM model of public sector reform (Barzelay, 2001). The NPM reform model evolved from public choice, principal-agent and rational choice theories in response to internal and external pressures on governments to reduce public expenditure and to increase the efficiency and quality of public services (Bordogna, 2008; Hood, 1991). Proponents of the NPM reforms believed that reliance on private sector management strategies, the adoption of more market-oriented solutions, and a focus on economic efficiency, would improve the effectiveness of the public sector. Convergence between public and private sector employers and between public sector management practises in different countries was also anticipated, regardless of country context (Bordogna, 2008; Pollitt, 1993).

A number of Anglophone countries, including Australia, New Zealand, the UK, Canada and the USA, were at the vanguard of promoting NPM reforms from the 1980s and 1990s onwards (Pollitt and Bouckaert, 2017). Governments in these countries advocated a reduced role for the state in economic and social affairs and an expanded role for the private sector in the delivery of public services (Bach and Givan, 2011). The motivation to support NPM reforms among political leaders in Australia from the 1980s and 1990s onwards included increased economic pressures, philosophical beliefs in smaller government, support for privatisation and increased perceptions among politicians that the public sector was inefficient and unresponsive (Colley, 2012). Liberal-National Governments, in particular, expressed strong ideological support for privatisation and a number of Commonwealth government business enterprises were privatised from 1996 to 2007, resulting in a steady decline in employment levels across the Commonwealth public sector (Aulich and O'Flynn, 2007).

The ideological underpinnings of the NPM reform model involve a reaffirmation of the rights and prerogatives of public sector managers (Sinclair, 1989). Such managerial ideology though has not been introduced into the public sector as a homogeneous set of ideas or practices that all public managers have willingly embraced. Rather its introduction has been piecemeal, and elements of this framework have faced resistance from both managers and employees within public organizations (Pollitt, 1993). In addition, NPM reforms have not been implemented in a consistent or coherent manner between countries and there is little evidence of convergence towards a common approach (Bach

and Givan, 2011; Bordogna, 2008). The differences among countries in their approaches to implementing NPM reforms reflect differences in legal systems, institutional arrangements and cultural norms, along with the political preferences of governments and the potential for resistance from public employees and citizens (Baines and Cunningham, 2015). The response of governments to the COVID-19 pandemic has also led to an increased recognition of the value of professional expertise, particularly in relation to public health advice, over a narrow focus on cost-cutting, economic efficiency and the adoption of private sector management techniques (Dunlop et al., 2020). While there remains much variation in relation to the implementation of NPM reforms, we identify five NPM strategies that have encouraged public sector employers to utilise their managerial prerogative over employment relations.

First, NPM reforms have emphasized the need for increased efficiency in public service delivery (Andrews and Van de Walle, 2013). This has resulted in public employers reducing their workforce headcount and increasing the number of employees engaged on contingent employment contracts (Bach, 2016). For example, following the Global Financial Crisis many governments increased the employment of staff on temporary contracts in the public sectors of Ireland, France, Germany and Sweden (Bach and Bordogna, 2013; O'Sullivan et al., 2020). This increase in insecure employment arrangements has heightened the fears of many public employees of job loss and reduced their willingness to engage in industrial action to resist reductions in pay, or pensions entitlements, introduced as part of austerity cuts (Bach and Bordogna, 2013; O'Sullivan et al., 2021). Second, NPM reforms that promoted the disaggregation of public sector organisational units through privatisation and outsourcing have led to further reductions in public sector employment levels and increased the willingness of employers in privatised organisations to derecognise trade unions (Baines and Cunningham, 2015; Crouch, 2015; Mustchin, 2017). For example, in Australia the privatised telecommunications provider Telstra engaged in a deliberate strategy to avoid collective bargaining and to deunionise its workforce through corporate restructuring, outsourcing and offers of individual contracts in the form of Australian Workplace Agreements to its workforce (Barton, 2002; Cooper et al., 2009).

Third, NPM reforms that encourage the devolution of increased responsibilities for financial and human resource management have provided public managers with additional opportunities to monitor individual employees' performance and productivity through performance appraisal and performance-related pay schemes (Marsden, 2004; Pollitt and Bouckaert, 2017). Devolution of managerial responsibilities has also intensified the level of scrutiny central agencies have exercised over public managers. According to Bach:

Managerial autonomy at decentralised levels of the public sector have diminished following the unilateral imposition from the centre of prescriptive rules and budgetary constraints. (2016: 24)

Fourth, NPM reforms that promoted the decentralisation of public sector collective bargaining have increased the prerogatives of public managers to reduce the scope of

bargaining to issues related to local labour market conditions (Bach and Bordogna, 2013). This reduction in the scope of bargaining has given rise to ‘substantive individualisation’, or the emergence of significant differences in wages and employment conditions between public sector agencies (Brown, 1999; O’Brien and O’Donnell, 2002). Decentralised bargaining can also enhance ‘procedural individualisation’, or the eradication of collective processes for negotiating pay and employment conditions (Brown, 1999). Decentralisation of bargaining to line agencies, however, is often implemented in conjunction with increased central agency oversight over bargaining outcomes (Bach and Bordogna, 2013). This recentralisation of public sector bargaining requires line agencies to adhere to prescriptive bargaining rules and can cause considerable frustration for line managers, employees and public sector unions (O’Donnell et al., 2011; Williamson et al., 2016).

Fifth, NPM reforms have encouraged public managers to limit the participation of public sector unions in collective bargaining (Bach and Givan, 2011). Governments can use their legal authority to refuse to bargain with public sector trade unions (Szabo, 2018). Governments in a number of developed countries have also promoted union exclusion by encouraging public managers to engage in direct communications with public employees over pay and working conditions. Such ‘purposive derecognition’ represents a deliberate and long-term strategy to reduce trade union influence over collective bargaining (Ritson, 2019).

Many public sector trade unions have struggled to resist the expansion of managerial prerogatives over public sector employment relations, highlighting their relative weakness (Schmidt et al., 2019; Szabo, 2018). Many public unions have been gradually ‘hollowed out’ following significant membership declines and repeated attacks by public sector employers (Gill-McLure and Thornqvist, 2018). According to Hansen and Seip:

... union power in the public sector is dependent on membership density, mobilization potential and capacity for collective action. (2018, 74)

As union membership declines, the ability of public unions to mobilise their membership to take industrial action can become more difficult. While there were often initial social protests and mobilisations in opposition to job cuts and employment benefits across the public sectors of European countries, this resistance was often not sustained and eventually resulted in public sector unions engaging in concession bargaining in an effort to preserve jobs and core employment conditions (Bach and Bordogna, 2013). Such developments highlight the challenges faced by many public sector unions as they seek to maintain their collective organisational power in the face of declining union membership (O’Sullivan et al., 2020).

This article explores how the Liberal-National Coalition government has encouraged APS agency managers to enhance their managerial prerogative by offering employees pay increases via workplace determinations under the *Public Service Act 1999* in place of collective bargaining with public sector trade unions. The paper considers the consequences of this strategy for public sector trade unions and for the future viability of APS collective bargaining. The following section examines the evolution of decentralised

bargaining in the APS and the role of public sector unions prior to the COVID-19 pandemic.

Decentralised Australian public service bargaining prior to the pandemic

Liberal-National governments have introduced a range of public sector reforms to employment relations compatible with the NPM reform model that have enhanced the prerogative of APS line managers. Decentralised agency bargaining in the APS began in the early 1990s under Labor Governments but was expanded following the introduction of the *Workplace Relations Act (WR Act) 1996* by the Howard Liberal-National Government (O'Brien and O'Donnell, 2008). This Government also introduced the *Public Service Act 1999* which devolved the Commonwealth's employment responsibilities and powers to APS agencies in order to align the public sector more closely with the private sector (Roles, 2014). Liberal-National governments from 2013 have also reduced APS employment numbers and imposed caps on the numbers of permanent employees. The size of the APS workforce declined by some 13,000 employees, or from approximately 167,000 to approximately 154,000 employees, between 2012 and 2021 (APSC (Australian Public Service Commission), 2021b). In addition, there has been an increase in the numbers of APS employees employed on fixed-term and temporary contracts, with 13% of the APS workforce employed as non-ongoing employees at 30 June 2021 (APSC, 2021b). In APS agencies such as Services Australia, caps on permanent employee numbers have resulted in increased reliance on labour hire workers and contractors, raising concerns regarding the deterioration of public service capability (CPSU (Community and Public Sector Union), 2021).

Liberal-National Governments have also used legislation to reduce the influence of public sector trade unions. Under the *Workplace Relations Act 1996 (2005)*, union membership was no longer given preference, restrictions were imposed on the ability of union officials to enter APS workplaces and laws in relation to the taking of lawful industrial action were progressively tightened (Roles and O'Donnell, 2013). APS employees were reluctant to undertake prolonged industrial stoppages in response to these restrictions in a context of austerity cuts to employment levels and reduced levels of job security (Williamson et al., 2016).

Despite these developments, public sector unions were able to collectively bargain on behalf of the majority of APS employees from 1996 to 2007. When the Labor government took office in late 2007, collective bargaining was bolstered by the introduction of the *Fair Work Act 2009 (Cth) (FW Act)*. The Labor Government replaced individual contracts in the form of Australian Workplace Agreements and the *FW Act* encouraged collective bargaining through the creation of mechanisms such as Majority Support Determinations to compel reluctant employers to bargain (Department of Employment and Workplace Relations, 2008). Public sector unions were also recognised as default bargaining representatives in circumstances where they had at least one member covered by a proposed agreement, and good faith bargaining obligations were promoted. This was further bolstered by the Labor Government's APS workplace bargaining policies which required

agencies to bargain with employees and encouraged the inclusion of union recognition and employee consultation rights in agreements (Roles and O'Donnell, 2013). However, restrictive right to strike laws and right of entry laws for union officials, modelled on the Work Choices laws, remained in place.

The Labor government, through its Workplace Bargaining Policy (WBP), gave the APSC and the relevant Minister responsible for the Public Service, an expanded role in overseeing virtually every aspect of the bargaining process to ensure strict adherence to the WBP, and agencies were not permitted to deviate from these parameters. While unions gained some improvements, such as increased consultation rights, flexible working conditions and rights for union delegates, overwhelmingly, APS agencies were able to use the Labor government's WBP to justify the unilateral imposition of a wage cap and to limit the scope of improvements to working conditions to those explicitly contemplated by the bargaining policy. The APSC played a key role in strengthening APS agencies' prerogatives in bargaining by rigorously enforcing the limits of the WBP on behalf of the government (Roles and O'Donnell, 2013).

Expanding employer prerogatives during the 2014–2018 bargaining round

APS employers' managerial prerogative further enhanced during the 2014–2018 bargaining round. While the architecture of the *FW Act* remained the same, the Abbott and Turnbull Liberal/National Governments further expanded the role of the APSC to determine bargaining outcomes and narrowed the scope for APS agencies or unions to negotiate agreements. Where under the previous Labor governments the role of the APSC had largely been to ensure the alignment of wage outcomes with the WBP, under the Abbott and Turnbull Governments the APSC was empowered to more substantively regulate bargaining outcomes. For most of the 2014–2018 bargaining round, wages were capped at 2% per annum, the APSC insisted on agreements that were 'streamlined' and agencies were required to remove clauses which were deemed to restrict an agency's ability to 'operate efficiently and effectively' (APSC, 2015: cl 16).

During the 2014–2018 bargaining round, the productivity offsets which funded wage increases were broad and largely involved the cutting of consultation and employee representation rights back to *FW Act* minima. For example, clauses providing for enhanced consultation rights, the right to representation during code of conduct investigations and during processes assessing fitness for duty, as well as paid time off for such representatives, were removed from the ATO [Australian Tax Office] Enterprise Agreement 2011 (ATO, 2011: cl2.2, cl5). These changes were typical of the types of unilateral streamlining which occurred across most agreements which provided for such rights. At the then Department of Agriculture, Fisheries and Forestry (DAFF), provisions designed to make it easier for employees to move from full time to part time work were removed in the 2017 enterprise agreement, and requirements to produce a medical certificate for instances of personal carers leave were tightened (DAFF, 2011: cl23).

The principal APS trade union, the CPSU, responded to these developments by seeking to preserve arrangements such as consultation requirements through side deals

with individual agencies. These agencies included the Attorney General's Department, the Australian Electoral Commission (AEC) and the Department of Agriculture and Water Resources (Attorney-General's Department, 2016: cl6.01 (2); AEC 2016: cl8.1; DAWR, 2017: cl 12.2). However, these union gains were short-lived, with the government updating its WBP in 2018 to confine the role of consultative committees to issues relating to the implementation of enterprise agreements (APSC, 2018: cl 36.) Any side agreements with the CPSU needed to be approved by the APSC.

As the bargaining round progressed, the CPSU faced bargaining outcomes that were largely pre-determined by the operation of the WBP which mandated that conditions which afforded workers greater control or flexibility, or hampered an agency's ability to effect unilateral change, were to be stripped and that no enhancements to conditions could be achieved. The CPSU was left with only two options to contest this stranglehold of the WBP over the bargaining process; the union could leverage the procedural regulation of the bargaining process in the *FW Act* to force agencies to deviate from the WBP, or it could leverage the collective muscle of highly unionised agencies into industrial action against the WBP. The CPSU pursued both approaches, as part of a two-fold strategy.

The first element of the CPSU's strategy involved an attempt to use the *FW Act*'s good faith bargaining (GFB) requirements for employers to create room for agencies to deviate from the WBP. The CPSU sought to achieve this by arguing before the Fair Work Commission (FWC) that the GFB obligation for agency bargaining representatives required APS employers to genuinely consider union bargaining proposals under s. 228 (1) (d) of the *FW Act*. This requirement had been precluded by the WBP and agencies were not permitted to agree to any proposals which would fall foul of the WBP. In the CPSU's GFB dispute against the Australian Electoral Commissioner, however, Commissioner Wilson held that it was 'not unusual' in bargaining for there to be a policy, or 'negotiating instructions or parameters that guide and eventually limit the authority of bargaining representatives at the bargaining table' (FWC, 2016: para 97).

This orthodox interpretation of the GFB obligations reflects the design of the *FW Act*'s regulation of bargaining. These provisions were designed merely to facilitate the bargaining process and not to conclude agreement-making – the *FW Act* expressly permits parties to not make concessions, or reach agreement (*FW Act*, s. 228 (2)). Unsurprisingly the GFB provisions have proven ineffective in assisting the CPSU to bring key decision-makers to the bargaining table, or to force a departure from the WBP by agencies.

The other tactic employed by the CPSU was to mobilise its membership to take protected industrial action, particularly in larger, highly unionised agencies such as the Departments of Human Services (DHS) and Home Affairs. Any gains to wages and conditions achieved through protected industrial action could then set the basis for flow-on gains in bargaining across the APS. However, the efficacy of protected industrial action as a tactic against the limits imposed by the WBP was hampered by the CPSU's need to mobilise union members in both DHS and Home Affairs in a defensive struggle against massive cuts to conditions across all agency agreements, compromising the union's ability to push for improvements.

In DHS, the initial offer to staff was 1.5% in Year 1, 1.5% in Year 2 and 0.55% in Year 3 (Bajkowski, 2014). By the end of 2016, DHS employees had rejected three offers, and

undertaken extensive industrial action (Towell, 2016; Sansom, 2017). In early 2017, employees took rolling strike action, which resulted in increased call wait times at Centrelink. This ultimately resulted in a slight deviation from the WBP, with the wage increase being frontloaded (DHS, 2017: cl B4), and employees also retained a large number of hard-won family friendly working conditions. These gains did not occur in APS agencies with lower union densities, indicating that taking protected industrial action was, at least in part, successful.

Community and public sector union members also mobilised in Home affairs. The situation in Home Affairs during the 2014–2018 bargaining round was complicated and involved a Machinery of Government amalgamation involving the former Department of Immigration and Citizenship, a policy agency, and the Australian Customs and Border Protection Service, a frontline, operational agency. Each organisation operated under very disparate employment conditions and allowances. The ‘no enhancements’ and ‘streamlining’ requirements of the WBP very significantly curtailed the ability of the parties to negotiate an agreement. Union members engaged in protected industrial action, and bargaining reached an impasse. The Commonwealth applied successfully to terminate the protected industrial action, meaning the FWC could arbitrate the matters in dispute. The FWC acknowledged that the Government’s bargaining policy provided ‘no real incentive for a genuine conversation about rationalising allowances given the cap on salary increases’ (FWC, 2019: 366). Despite this acknowledgement, the FWC refused to grant back pay and awarded a 7% increase over the life of the determination, closely aligning with the Department’s submission for a 6% pay increase.

The FWC also held that there was a public interest in Commonwealth agencies adhering to the policies of the Government. This represented part of the merits consideration required to be undertaken by the FWC in the performance of its functions under sections 275 and 578 of the Fair Work Act. This resulted in the loss of key conditions and broadly imitated what had occurred in other agencies, such as the stripping back of employee representation and consultation rights (FWC, 2019: 548), and the loss of the right to have disputes arbitrated (FWC, 2019: 543). Arbitration also led to a number of other cuts to conditions for former immigration or customs employees (FWC, 2019: 203, 281). As a result, the significant industrial action, and ultimately arbitration, didn’t force the Government into deviating from the WBP as the unions had hoped.

Use of section 24 workplace determinations

Following the 2014–2018 bargaining round, managerial prerogatives in the APS reached new heights following the promotion of section 24 determinations by Liberal-National Government from 2018 onwards. Section 24 had previously been a relatively underused provision of the *PS Act*. The section provides for two types of determination – one by an Agency Head (s 24 (1)) and one by the Public Service Minister (s. 24 (3)). Section 24 (1) determinations allow an Agency Head to determine the terms and conditions of employment for APS employees. Critically such terms and conditions cannot operate to disadvantage an employee to whom an enterprise agreement applies, or disadvantage an employee in relation to conditions found in the National Employment Standards (NES)

(*PS Act* s 24 (1A)). Section 24 (3) determinations are made by the Public Service Minister and can determine terms and conditions of employment for employees both within and across agencies ‘... if the Public Service Minister is of the opinion that it is desirable to do so because of exceptional circumstances’ (*PS Act* s. 24 (3)). Crucially section 24 (3) determinations can override the terms and conditions found in enterprise agreements and the NES (*PS Act* s 24 (4) and (5)). Both section 24 (1) and section 24 (3) determinations were mostly used, at least historically, in circumstances of Machinery of Government restructures following federal elections or cabinet reshuffles and, in the case of s. 24 (1) determinations, for setting Senior Executive Service terms and conditions of employment.

However, a change in the Liberal-National Government’s WBP in 2018 authorising the use of workplace determinations opened the floodgates to their widespread adoption. In many APS agencies, Agency Heads surveyed staff to ask if they would be willing to accept a 2% pay rise per year, with all other terms and conditions remaining the same, or whether they wish to bargain. If APS employees indicated their preference for a 2% pay rise outside of bargaining, this was enshrined in (usually) a s. 24 (1) determination. Some 57 APS agencies changed their workplace relations arrangements by the end of 2020 and took up s. 24 determinations (APSC, 2021a). None of the four largest agencies – ATO, Defence, Home Affairs or Services Australia (the successor to DHS) – opted to bargain for a new enterprise agreement, and most have opted for s. 24 (1) determinations. Those that have used s. 24 (3) have needed to demonstrate exceptional circumstances – a good example of this is the s. 24 (3) determinations which operated in the Department of Agriculture, Water and the Environment (DAWE, 2020), and the executive agency Services Australia (Services Australia, 2020).

Section 24 determinations are, by their nature, unilateral and reinforce APS agency heads’ managerial prerogative. Terms and conditions are set by either the Agency Head (s. 24 (1)), or the Public Service Minister (s. 24 (3)). While it is true that most agencies surveyed their employees to determine whether they wished to be covered by a determination, there was no prospect of improving non-wage related terms and conditions of employment because all determinations picked up, in one form or another, previously operating enterprise agreements. In relation to improvements to wages, s. 24 determinations were moderately attractive to APS employees. Such determinations permitted employees to access the 2% per annum pay rise on offer with no loss of terms and conditions of employment. Such arrangements were an attractive short-term solution for employees worn out by the previous 4 years of protracted APS bargaining from 2014 to 2018. By 31 December 2020, the pay of 85,500 APS employees, or approximately 63% of APS employees, was decided by a Workplace Determination, with other employment conditions remaining in agency agreements that had passed their nominal expiry date (APSC, 2021a).

Use of workplace determinations during the COVID-19 pandemic

During the COVID-19 pandemic, the Liberal-National government deferred APS salary increases and used its administrative authority to move several thousand APS employees

to areas of greatest need across the Commonwealth Public Service. On 9 April 2020, the Assistant Minister to the Prime Minister and Cabinet published the *Public Service (Terms and Conditions of Employment) (General wage increase deferrals during the COVID-19 Pandemic) Determination 2020* ([Public Service Determination, 2020](#)). The 2020 *Determination* deferred any wage increases contained in any APS workplace arrangements (which include enterprise agreements and any other agreements which contain terms and conditions of employment) for 6 months from the date these became due. These deferrals were to operate over a period of 12 months, ending on 9 April 2021. These determinations overrode agency workplace arrangements. A section 24 (3) determination could only be made in circumstances which were exceptional. Clearly the COVID-19 pandemic was such an exceptional circumstance and section 24 (3) determinations overrode previously negotiated terms and conditions of employment.

A large-scale movement of employees across the APS was also undertaken as part of the Morrison Government's COVID-19 response. The movement of employees enabled Services Australia to implement the JobKeeper programme, the largest payments programme undertaken by the federal government, costing approximately \$90 billion, together with other programmes to support the Australian economy. A direction was issued by the Prime Minister under s. 21 of the *PS Act* on 26 March 2020 ([Prime Minister, 2020](#)) that required agency heads to identify critical functions within their agency (cl2), and employees who were not needed for these critical functions (cl3). These details were given to the APSC (cl4), who then notified Agency Heads of employees who could be temporarily redeployed, together with the agencies who needed them (cl5). The employees' home agency continued to pay their salary. By far the majority of employees who were deployed were sent to Services Australia, with 75 employees deployed to three other agencies ([ANAO \[Australian National Audit Office\], 2020](#), para 3.1). The deferral of wages for a minimum of 6 months and movement of APS staff between agencies was undertaken with limited consultation with public sector unions.

Workplace determinations and the future of APS bargaining

In late 2020, the Morrison Liberal-National government released a new WBP. A key feature of the new WBP was to permit the APSC to continue to act unilaterally, without the need for consultation with APS employees or unions. The WBP describes the role of the APSC as 'continu[ing] to implement and advise on the Policy, and the approval of the APS Commissioner is required at key stages of the process' ([APSC, 2020](#), cl6). This wording underplays the APSC's involvement. In practice all APS workplace arrangements, defined broadly to include enterprise agreements, common law contracts, individual flexibility arrangements and section 24 determinations, were subject to the 2020 WBP ([APSC, 2020](#), cl5). The APSC was required to advise on all aspects of any proposed workplace arrangements, and to approve or not approve the implementation of any such arrangements. In granting its approval, the APSC must be satisfied that the WBP has been complied with. This gave the APSC an effective veto over any aspect of a workplace arrangement which it believes was not compliant with the WBP.

Key features of the WBP increased APS employers' ability to reduce the scope of agency bargaining. This was achieved by specifically prohibiting changes to existing terms and conditions and by reducing the capacity for agencies to put even moderately attractive offers to their workforce. The WBP has as its starting point that there is to be no enhancement of employment conditions (excluding pay). The WBP:

- Prohibits restrictive work practices and clauses which 'unduly limit workplace flexibility' (cl2) – an example of this is a prohibition on any clauses which seek to 'restrict, in any way, the use of contractors, labour hire or contingent workers' [APSC, 2020, cl39]; and
- Provides that terms and conditions of employment must be reasonable and reflect community expectations. The policy specifically singles out a number of conditions which are either restricted in their availability or which cannot be advanced, such as redundancy entitlements [APSC, 2020, cl54]

The Morrison Liberal-National Government also removed any capacity for employees to bargain for more than modest increases to wages. Clause 21 of the WBP states that: 'Annual remuneration adjustments may be negotiated, capped in line with the year-to-date percentage change in the Wage Price Index (WPI) for the Private Sector from the most recently released June quarter. The rate of the Wage Price Index for the private sector will be published each year by the APSC and any wage increase during the life of a workplace arrangement cannot exceed that figure (1.9% in June 2021) (APSC, 2021a).

Enterprise agreement safeguards, like the Better Off Overall Test (BOOT), (*FW Act* s. 193) and the requirement that agreement wages keep pace with those in awards (*FW Act*, s. 206), are unlikely to assist the majority of APS employees to resist limited wage increases that involve cuts in pay in real terms. Speaking generally, the BOOT requires that all employees be better off under an enterprise agreement than they would be under the applicable Modern Award, in this case the [Australian Public Service Enterprise Award \(2015\)](#) (*Award*). For most APS employees, the wages in any proposed enterprise agreement significantly exceeded the wages for the classifications in the Award.

The CPSU aimed to educate its members about the limited benefits of the 2020 WBP for APS employees. The union's advice to union members highlighted that the WBP:

1. Is designed to hold down wages for federal public sector workers.
2. Sees workers voting on mystery pay deals, with unknown pay outcomes.
3. Makes it difficult to achieve improvements in an enterprise agreement, with the continuation of the 'no enhancements' rule.
4. Doesn't allow for genuine bargaining between agencies, employees and unions. Instead the Government determines the outcome (CPSU, 2021b).

The CPSU's predictions are likely to ring true. All legal options to challenge the WBP to date have failed. This gives APS employees a choice of two unpalatable options: either to bargain and potentially experience another prolonged agency bargaining round similar to the 2014–2018 round; or to accept the imposition of a workplace determination which

preserves the terms and conditions of employment found in their old agreement(s) and limits pay increases to the WPI for the private sector. Faced with this choice, the majority of agencies are likely to make use of Workplace Determinations because of the limited incentives to engage in agency bargaining. The downside of Workplace Determinations though was the inability of employees to negotiate improvements in their employment conditions and the difficulty of including public sector unions in future negotiations over APS pay increases.

Widespread continued use of Workplace Determinations therefore threatens the viability of future collective bargaining rounds in the APS. Unions can't challenge the WBP legally, and the low morale that followed the 2014–2018 bargaining round demonstrates that employees may have limited appetite to engage in another round of potentially protracted agency bargaining. This increases the prospects for Workplace Determinations to spread across APS agencies. Once these determinations have operated for a period of time, APS unions may experience difficulties encouraging APS employers to resume collective bargaining. With very low wage growth in the public sector (attributable to wages being capped at the WPI for the private sector), and a reduced capacity to engage in agency bargaining, public sector unions are likely to find it more difficult to mobilise their membership to participate in industrial campaigns, or to place pressure on APS employers to return to collective bargaining.

There are two possibilities for public sector unions which offer some degree of hope for a return to collective bargaining. A change of government at the 2022 federal election may assist the CPSU to pursue bargaining across many APS agencies simultaneously. In 2022, there will be a number of APS agencies whose agency agreements will have reached the end of their nominal terms. The absence of in-term enterprise agreements in many agencies is likely to make it easier for unions to mobilise their members to take protected industrial action (*FW Act* s 413 (6), 417). A tighter labour market as the impact of the COVID-19 pandemic moderates also increased wage pressures on APS agencies. Such labour market pressure though may not dampen APS employers' enthusiasm for s. 24 workplace determinations.

Discussion and conclusion

The commitment of Liberal-National Governments to NPM reforms that enhance the prerogative of public managers was evident in their promotion of Workplace Determinations. The widespread use of s.24 Workplace Determinations has enabled APS employers to make pay offers directly to employees and avoid negotiations with public sector unions over their contents. By the end of 2020, Workplace Determinations covered approximately 63% of the APS workforce, highlighting the high degree of procedural individualisation, or removal of collective processes for negotiating pay and conditions, evident in the APS. If determinations continue to be disseminated across the APS, most employees will experience limited consultation over future pay increases beyond a request to respond to a survey. APS employees will also have limited capacity to improve other terms and conditions of employment, irrespective of their bargaining power, if determinations remain the predominant mechanism for providing pay increases.

The increased individualisation of APS employment relations poses major challenges for public sector unions, in particular the CPSU. The CPSU has played a central role representing APS employees from the beginning of decentralised agency bargaining in the early 1990s (O'Brien and O'Donnell, 2008). In previous rounds of agency bargaining, APS union members participated in CPSU campaigns that made effective use of short industrial actions to create maximum disruption for APS employers at minimal cost to employees to force concessions from agency employers (Williamson et al., 2016). Employees' enthusiasm for taking industrial action to support future bargaining campaigns may be tempered though by the uncertain nature of future pay increases linked to the private sector WPI. The WPI is determined each year and therefore APS employees will have little certainty over the quantum of future pay increases. From 2013, many APS employees have also experienced real wage cuts and substantial reductions in permanent employee numbers, while fixed-term and casual employee numbers has increased. These developments may diminish APS employees' willingness to take part in future industrial action in an environment of heightened wage stagnation and job insecurity (O'Sullivan et al., 2020).

Future research into APS bargaining could examine the responses of APS employees and public sector unions to the expansion of individualisation and managerial prerogatives in the APS. For example, following several decades of decentralised bargaining different APS agencies have substantially different pay scales and employment conditions. How likely are workplace determinations, or other forms of individualisation, to entrench this extensive level of substantive individualisation between APS agencies? (Brown, 1999). Additionally, future research could examine how public sector unions might mobilise their structural, organisational and political power resources to overcome the 'purposive derecognition' of trade unions implicit in the promotion of workplace determinations (Ritson, 2019). How can public sector unions reinvigorate workplace delegate structures and expand union membership? How might they leverage the structural power of APS employees with scarce skills to negotiate improvements in wages and conditions for other APS employees? And how might they utilise their political power resources to lobby future governments to formulate workplace bargaining policies that support a return to collective bargaining and union recognition?

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Note

1. Whilst such terms and conditions will not fall below legislated minimum standards, Section 24 empowers the Public Service Minister to make determinations overriding these standards 'in exceptional circumstances' (Public Service Act, 1999, Section 24 (3) – (5)).

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