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THE *FAIR WORK ACT* AND WORKER VOICE IN THE AUSTRALIAN PUBLIC SERVICE

Abstract

The Australian Public Service ('APS') has always been something of a testing ground for federal governments' industrial relations policies. Under the Coalition government from 1996 to 2007, workplace relations laws and strict parameters regulated bargaining in the APS and promoted managerial unilateralism, individualism, and union exclusion. By contrast the Labor government's *Fair Work Act 2009* (Cth) favoured collective agreement making, but retained some features of previous workplace laws such as tight regulation of industrial action. The Labor government's bargaining framework provided increased recognition of trade unions and for the role of workplace union representatives in the bargaining process. This article examines the role of worker voice during the 2011–12 APS bargaining round. The government as employer, through the Australian Public Service Commission, sought to limit Average Annualised Wage Increases to three per cent and also proposed a range of cuts to working conditions. The paper demonstrates how worker voice was mobilised in APS agencies following campaigns by public sector unions and workplace representatives for 'no' votes in response to initial agency offers, for 'yes' votes for protected action ballots, and through engagement in creative forms of industrial action.

I Introduction

The Australian Public Service ('APS') has always been something of a testing ground for the industrial relations policies of the government of the day.[1] Since the 1990s governments of both political persuasions have promoted their various industrial relations agendas, using the APS as an exemplar of their policy approaches. This has typically been done through the government's industrial relations legislation, along with strict policy parameters regulating bargaining.

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1 John O'Brien and Michael O'Donnell, 'From Workplace Bargaining to Workplace Relations: Industrial Relations in the Australian Public Service under the Coalition Government' in Marilyn Pittard and Phillipa Weeks (eds), *Public Sector Employment in the Twenty-First Century* (ANU E Press, 2007) 127.

From March 1996 to late 2007, Australia was ruled by a Coalition (Liberal–National Party) government which was both socially conservative and economically neoliberal and which prioritised managerial unilateralism, individualism and union exclusion in employment relations.[2] During this period worker voice was significantly downplayed, as the government sought to maximise the impact of its legislation and policy prescriptions as they applied to its own workforce.

The successful 'Your Rights at Work' campaign in the lead-up to the 2007 federal election, which was undoubtedly a significant factor in the Australian Labor Party's victory that year, heralded an era of enhanced worker voice. In keeping with past practice, the APS was once again an exemplar of Australian government industrial relations policy. But, on this occasion, the emphasis was on a return to collective agreement making. In the APS context, government policy also mandated an increased role for unions in bargaining, including an increased recognition of the role and responsibilities of unions as bargaining representatives, additional rights for union delegates and improved rights of entry for union officials. Whilst many of the restrictions on the taking of industrial action have remained in place, the increased recognition and legitimation of trade unions in bargaining allowed them to mobilise members and to engage in a range of creative forms of industrial action that enhanced worker voice in bargaining across the APS.

We develop these arguments in four sections. Firstly, we briefly examine worker voice under both Labor and Coalition governments prior to the *Fair Work Act 2009* (Cth) ('*Fair Work Act*'). We then turn to examine how the *Fair Work Act* and government bargaining parameters have promoted worker voice. Thirdly, we turn to the recently concluded 2011–12 APS bargaining round, and examine how worker voice was mobilised, particularly through the organising of 'no' votes in response to initial management offers, 'yes' votes for protected action ballots and creative forms of industrial action. The outcomes of the bargaining round are then discussed, and we conclude that the *Fair Work Act* and government policy have enhanced worker voice in the APS when compared to the earlier period of Coalition government.

II Worker Voice in the APS Prior to the *Fair Work Act*

In the early 1990s, the federal-level conciliation and arbitration system was gradually displaced by moves towards more decentralised workplace bargaining that took place above a floor established by the award framework, with the Australian Industrial Relations Commission ('AIRC') retaining a diminished, but still significant, regulatory role.[3] The new model was quickly applied in the APS. In December 1992, the Labor government and 27 public service unions[4] signed an agreement on

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2 For an excellent collection dealing with these matters, see Stephen Deery and Richard Mitchell *Employment Relations: Individualisation and Union Exclusion — An International Study* (Federation Press, 1999).

3 Roy Green and Andrew Wilson, 'Unemployment, Labour Market Deregulation and the "Third Way"' (2000) 21 *International Journal of Manpower* 424.

4 Many of these unions amalgamated to form what is now the Community and Public Sector Union.

the introduction of agency-level wage bargaining, to occur on top of an APS-wide pay increase. The Labor government wanted to demonstrate that its version of decentralised bargaining was more equitable than the alternative deregulatory and individualistic model being proposed by the Coalition opposition parties in the lead up to the 1993 federal election. The Labor government was also keen to involve public service unions in a broader reform agenda that involved simplifying employment classification levels and the introduction of new technology, alongside moves to enterprise bargaining.[5] Following the re-election of the Labor government, public service unions sought to take advantage of the new rules for enterprise bargaining[6] and return to a less resource-intensive and APS-wide approach to bargaining in 1995–96.[7] This service-wide agreement remained in place in the APS up to the election of the Howard government in early 1996.

During this time worker voice across the APS was primarily promoted through trade unions and trade union activity. Awards still played a key role in Australian industrial relations, generally acting as a safety net to enterprise bargaining but in some instances setting actual terms and conditions of employment. The enterprise bargaining reforms adopted in 1994 guaranteed union involvement in enterprise bargaining.[8] The AIRC still had broad powers to settle industrial disputes between trade unions and employers. While the frequency of industrial disputation had declined significantly by the mid 1990s, public sector unions continued to rely upon industrial bans, particularly in large departments such as the Australian Taxation Office and Department of Social Security, to challenge managerial prerogatives. The temporary withdrawal of services would cause widespread disruption and bring significant political pressure to bear on the government of the day. Federal public service employees faced few sanctions for participating in these work bans because of the unwillingness of departmental managers to enforce the common law 'no work as directed, no pay' rules.[9] Therefore, under the Labor governments of the 1980s and 1990s worker voice was mainly channelled through unions in negotiations over awards, classifications and the introduction of new technology.

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5 Peter Fairbrother et al, *Unions and Globalisation: Governments, Management, and the State at Work* (Routledge, 2012) 151.

6 For an excellent account of the bargaining laws under the *Industrial Relations Reform Act 1993* (Cth), see Richard Naughton, 'The New Bargaining Regime Under the *Industrial Relations Reform Act*' (1994) 7 *Australian Journal of Labour Law* 147.

7 See Department of Industrial Relations, Commonwealth of Australia, *Continuous Improvement in the Australian Public Service Enterprise Agreement: 1995–96: Agreement Between the Commonwealth Government and the Public Sector Unions* (Canberra, 1995).

8 Agreements made under the *Industrial Relations Reform Act 1993* (Cth) between the Commonwealth and relevant unions were known as certified agreements, and could only be made in settlement of an industrial dispute or situation — for details of these laws see Naughton, above n 6.

9 John O'Brien and Michael O'Donnell 'Government, Management and Unions: The Public Service under the Workplace Relations Act' (1999) 41 *Journal of Industrial Relations* 446.

Worker voice within workplaces came under considerable strain from 1996 following the election of the Howard government. The new government's industrial relations policy objective was to facilitate more direct relationships between employees and employers,[10] minimising the role of unions and of the AIRC.[11]

This objective was achieved through the enactment of what became the *Workplace Relations Act 1996* (Cth) ('*Workplace Relations Act*').[12] Of most significance in the APS context was the introduction of Australian Workplace Agreements ('AWAs'), which were statutory individual agreements which overrode provisions of awards and, in certain circumstances, certified agreements.[13] AWAs were enthusiastically promoted by the Commonwealth in the APS, essentially through the government's policy parameters on agreement-making.[14] These parameters prescribed certain requirements which agencies must meet concerning workplace agreements. Whilst these parameters changed over the years, one constant was that Senior Executive

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10 This can be seen in the policy parameters for agreement making, set by the then government from 1997 to 2007. See Department of Industrial Relations, *Policy Parameters for Agreement Making in the APS*, May 1997, cl 1 ('*1997 Parameters*'); Department of Employment, Workplace Relations and Small Business, *Supporting Guidance for the Policy Parameters for Agreement Making in the APS*, May 1999, 2–7 ('*1999 Parameters*'); Department of Employment, Workplace Relations and Small Business, *Supporting Guidance for the Policy Parameters for Agreement Making in the APS*, April 2000, 3–7 ('*2000 Parameters*'); Department of Employment and Workplace Relations, *Supporting Guidance for the Policy Parameters for Agreement Making in the APS 2001,* 7–15 ('*2001 Parameters*'); Department of Employment and Workplace Relations, *Supporting Guidance for the Policy Parameters for Agreement Making in the Australian Public Service*, July 2002, 8–12 ('*2002 Parameters*'); Department of Employment and Workplace Relations, *Supporting Guidance for the Policy Parameters for Agreement Making in the APS*, April 2006 ('*2006 Parameters*') (copies on file with authors).

11 See especially the objects of the *Workplace Relations Act 1996* (Cth) ss 3(b), (c), (d), (f).

12 The Howard government created the *Workplace Relations Act 1996* (Cth) by enacting legislation which significantly amended and renamed the *Industrial Relations Act 1988* (Cth) — see *Workplace Relations and Other Legislation Amendment Act 1996* (Cth).

13 An AWA could prevail over a certified agreement to the extent of any inconsistency, or exclude a certified agreement if the agreement permitted this to occur, or if the certified agreement had passed its nominal expiry date (*Workplace Relations Act* ss 170VQ(6)(a)(iii), 170VQ(6)(c)). For an analysis of AWAs, see Ronald McCallum, 'Australian Workplace Agreements — An Analysis' (1997) 10 *Australian Journal of Labour Law* 50.

14 See Department of Industrial Relations, *1997 Parameters*, above n 10; Department of Employment, Workplace Relations and Small Business, *1999 Parameters*, above n 10; Department of Employment, Workplace Relations and Small Business, *2000 Parameters*, above n 10; Department of Employment and Workplace Relations, *2001 Parameters*, above n 10; Department of Employment and Workplace Relations, *2002 Parameters*, above n 10; Department of Employment and Workplace Relations, *2006 Parameters*, above n 10.

Service ('SES') employees were to be engaged on AWAs.[15] It was government policy that AWAs be made available to all APS employees, even those covered by certified agreements which had not passed their nominal expiry date. However, in practice most APS employees continued to have their terms and conditions set by certified agreements, with AWAs most prevalent amongst some middle managers and technical specialists, mostly at the Executive Level 2 classification, and amongst the SES. Although purportedly 'negotiated' with employees, AWAs were generally template agreements. Case law under the legislation permitted the offering of AWAs as a condition of employment,[16] and this resulted in at least one agency having almost all employees engaged on AWAs.[17] These agreements were made with an almost complete lack of worker voice.

Collective rights and worker voice exercised by employees through trade unions were also diminished under the *Workplace Relations Act*. Changes to awards meant that whilst they continued to act as a safety net, the AIRC was restricted to the inclusion of twenty 'allowable award matters',[18] and its arbitration powers were significantly curtailed.[19]

Union and non-union agreement streams were maintained,[20] although it was now possible to make either a union or a non-union agreement with the Commonwealth.[21]

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15 See Department of Industrial Relations, *1997 Parameters*, above n 10, cl 1; Department of Employment, Workplace Relations and Small Business, *1999 Parameters,* above n 10, 6; Department of Employment, Workplace Relations and Small Business, *2000 Parameters*, above n 10, 7; Department of Employment and Workplace Relations, *2001 Parameters*, above n 10, 12; Department of Employment and Workplace Relations, *2002 Parameters*, above n 10, 12; Department of Employment and Workplace Relations, *2006 Parameters*, above n 10, 19–20.

16 There was no difficulty per se in offering an AWA as a condition of engagement to new employees: see *Maritime Union of Australia v Burnie Port Corporation Pty Ltd* (2000) 101 IR 435. However, it was not lawful to require existing employees, or those transferring as part of a transmission of business, to sign AWAs as a condition of employment: see *Schanka v Employment National (Administration) Pty Ltd* (2000) 97 FCR 186.

17 The most extreme instance of this was in the Department of Finance and Administration: see O'Brien and O'Donnell, 'From Workplace Bargaining to Workplace Relations', above n 1, 134.

18 For a discussion of the changes brought about to awards and collective agreements see Marilyn Pittard, 'Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements' (1997) 10 *Australian Journal of Labour Law* 62.

19 For a discussion of the role of the tribunal during this time see Geoffrey Giudice, 'The Evolution of an Institution: The Transition from the Australian Industrial Relations Commission to Fair Work Australia' (2011) 53 *Journal of Industrial Relations* 556.

20 Union agreements could be made under the *Workplace Relations Act* with a constitutional corporation or the Commonwealth even if there was no industrial dispute or situation — these became known as s 170LJ agreements.

21 Under the *Industrial Relations Reform Act 1993* (Cth), non-union agreements could only be made with constitutional corporations (s 4). Under the *Workplace Relations Act* they could now also be made with the Commonwealth — these became known as s 170LK agreements.

This was to have profound consequences for worker voice, as the legislation effectively allowed management to choose the type of agreement to be offered to staff, enhancing managerial unilateralism. Two tactics were available to employees wishing to resist and force a union deal. One was through the taking of industrial action which, as will be discussed shortly, became increasingly difficult under the *Workplace Relations Act*. The second was to have union members stand for election as staff representatives on enterprise bargaining consultative committees, thus indirectly ensuring union involvement in the negotiation of non-union agreements.[22] The latter tactic was partially successful, and over time agreements made with unions became the norm for most APS employees. By 2005 almost 70 per cent of the 103 agreements in operation were negotiated with trade unions, with the remaining 30 per cent involving direct negotiations between management and employees.[23] Despite this spread of union agreements, management in agencies with low union density could effectively exclude unions from negotiations, even if the union had members whose interests it was entitled to represent.[24] A good example is the Department of the Prime Minister and Cabinet, which from 1998 to 2010 negotiated non-union agreements.[25] Only after the introduction of the *Fair Work Act*, and the expiry of its agreement in 2010, did the department negotiate with unions.[26]

Collective voice was further diminished by new freedom of association laws, which gave non-unionists essentially similar rights to those long enjoyed by trade unionists with respect to non-membership, and which prohibited the inclusion in awards and agreements of many traditional union security provisions.[27] From 2001 government policy was also tightened around facilities for payroll deduction of union dues.[28]

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22 John O'Brien and Michael O'Donnell, 'Individualism, Union Organisation and Management Prerogatives in the Australian Public Service 1983–2000' (2002) 12 *Labour and Industry* 103.

23 John O'Brien and Michael O'Donnell 'Retrospect and Prospects for Collective Regulation in the Australian Public Service' (2008) 50 *Journal of Industrial Relations* 630.

24 Under the non-union agreement provisions, union members were entitled to request that the employer 'meet and confer' with the relevant union, but this did not require an employer to negotiate with the union: see *Workplace Relations Act* ss 170LK(4)–(5).

25 See *Department of the Prime Minister and Cabinet Certified Agreement 1998–2000*; *Department of the Prime Minister and Cabinet Certified Agreement 2000–2002*; *Department of the Prime Minister and Cabinet Certified Agreement 2002–2004*; *Department of the Prime Minister and Cabinet Certified Agreement 2004–2007: Working Smarter to Achieve a Better Work–Life Balance*; *Department of the Prime Minister and Cabinet Collective Agreement 2007–2010*. All available agreements can be found at <http://www.fwc.gov.au/index.cfm?pagename=agreementsfind>.

26 See *Department of the Prime Minister and Cabinet Enterprise Agreement 2010–11*; *Department of the Prime Minister and Cabinet Enterprise Agreement 2011–14*.

27 See Colin Fenwick and John Howe, 'Union Security After Work Choices' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 164.

28 Department of Employment and Workplace Relations, *2001 Parameters*, above n 10, 10; Department of Employment and Workplace Relations, *2002 Parameters*, above n 10, 10.

Industrial action became more restricted, including the introduction of prohibitions on the taking of industrial action concerning matters covered by an agreement prior to its nominal expiry date, and on payments to employees during periods of industrial action.[29] APS agency managers were directed to apply a strict interpretation of these 'no work, no pay' provisions.[30] Thus one of the traditional weapons of choice — selective bans without cost to employees — was no longer available to unions. This resulted in a substantial reduction in industrial action in the APS during the period the Howard government held office.

Worker voice was also diluted through new restrictions on unions' 'right of entry' to recruit or to monitor breaches in pay and working conditions. Among other things, union officials needed to hold a right of entry permit, and were required to give 24 hours' notice prior to entering premises.[31] Howard Government policy encouraged APS managers to apply these restrictions to public sector unions' right of entry to agencies.[32] Interviews with industrial officers of the CPSU in 1998, and again in 2003, highlighted that management had adopted a more hostile approach to right of entry by union officials. It was not unusual for agency management to designate a particular meeting room removed from the main workplace for union meetings and to monitor which employees participated in these meetings. Faced with increased difficulties in gaining access, and the reluctance of some union members to attend meetings for fear of retribution, the main trade union, the Community and Public Sector Union ('CPSU') resorted to leafleting potential recruits on their way into work, or at lunchtime. In agencies where they experienced particular difficulties gaining access to members, union officials and activists would generate telephone and email lists of union members and potential new recruits.[33]

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29 See Greg McCarry, 'Industrial Action under the Workplace Relations Act 1996 (Cth)' (1997) 10 *Australian Journal of Labour Law* 133.

30 Department of Industrial Relations, *1997 Parameters*, above n 10, cl 1; Department of Employment, Workplace Relations and Small Business, *1999 Parameters*, above n 10, 5; Department of Employment, Workplace Relations and Small Business, *2000 Parameters*, above n 10, 6; Department of Employment and Workplace Relations, *2001 Parameters*, above n 10, 12; Department of Employment and Workplace Relations, *2002 Parameters*, above n 10, 10; Department of Employment and Workplace Relations, *2006 Parameters*, above n 10, 27.

31 For a discussion of these right of entry provisions, see John H C Colvin, Graeme R Watson and Paul Burns, *The Workplace Relations Handbook: A Guide to the Workplace Relations Act 1996 (Cth)* (LexisNexis Butterworths, 2nd ed, 2004) ch 5.

32 Department of Industrial Relations, *1997 Parameters*, above n 10, cl 1; Department of Employment, Workplace Relations and Small Business, *1999 Parameters*, above n 10, 5; Department of Employment, Workplace Relations and Small Business, *2000 Parameters*, above n 10, 6; Department of Employment and Workplace Relations, *2001 Parameters*, above n 10, 13; Department of Employment and Workplace Relations, *2002 Parameters*, above n 10, 11; Department of Employment and Workplace Relations, *2006 Parameters*, above n 10, 23.

33 Michael O'Donnell and John O'Brien, Interviews with CPSU National Office Industrial Officers (Barton, Australian Capital Territory, 1998, 2003).

Matters became worse for worker voice following the 2004 election, which gave the Howard government a majority in both houses of Parliament from 1 July 2005. One major legislative change introduced by the Howard government under these circumstances was a more radical version of the *Workplace Relations Act*. The amendments, known as *Work Choices*,[34] were introduced in November 2005 and the majority came into effect in March 2006. These amendments, in many respects, built on policies already road-tested in the APS through the then government's policy parameters for agreement making. *Work Choices* eroded worker voice by making it easier to enter into AWAs, allowing AWAs to override collective bargaining[35] and by legislatively recognising that AWAs could be offered as a condition of employment or promotion.[36] Aside from this individuation, collective bargaining laws were made more restrictive. Importantly for worker voice, certain content, predominantly clauses typically sought by unions, were prohibited from inclusion in workplace agreements.[37] The right to take industrial action was further constrained,[38] notably through the introduction of compulsory secret ballots prior to the taking of such action,[39] and right of entry laws were tightened still further.[40] Employees' rights to unfair dismissal protection were also severely curtailed.[41]

These legislative changes, and the subsequent fragmentation of bargaining across the APS under the Howard Coalition government, required the CPSU to develop grass roots activism that was not evident in the service-wide rounds of bargaining that occurred prior to 1996. From 1996, the union relied heavily on the active support and assistance of workplace union representatives in bargaining, recruitment and grievance handling. The union also centralised a number of functions, ranging from financial management to the provision of services to members through a call centre.

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34 The *Work Choices* legislation significantly amended and renumbered the *Workplace Relations Act*, but kept the title the same: see *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ('*Work Choices*').

35 For an analysis of AWAs under *Work Choices* see Joel Fetter, 'Work Choices and Australian Workplace Agreements' (2006) 19 *Australian Journal of Labour Law* 210.

36 *Workplace Relations Act* s 400(6).

37 See *Workplace Relations Act* s 356 and *Workplace Relations Regulations 2006* (Cth) Ch 2 regs 8.5–8.7. On the future for unions under *Work Choices*, see Anthony Forsyth and Carolyn Sutherland, 'From "Unchartered Seas" to "Stormy Waters": How Will Trade Unions Fare under Work Choices?' (2006) 16 *Economic and Labour Relations Review* 215; Glenn Patmore, 'A Voice for Whom? Employee Representation and Labour Legislation in Australia' (2006) 29 *University of New South Wales Law Journal* 8.

38 Andrew Stewart, *Stewart's Guide to Employment Law* (Federation Press, 2008) ch 18.

39 On the *Work Choices*' secret ballot requirements, see Graeme Orr and Suppiah Murugesan, 'Mandatory Secret Ballots Before Employee Industrial Action' (2007) 20 *Australian Journal of Labour Law* 272.

40 Fenwick and Howe, above n 27.

41 See Anna Chapman, 'Unfair Dismissal Law and Work Choices: From Safety Net Standard to Legal Privilege' (2006) 16 *Economic and Labour Relations Review* 237.

This approach raised concerns among sections of the union's membership over the potential cost to local level worker voice and activism.[42]

III The Emergence of Fair Work

One of the first legislative acts of the new Labor government was to phase out AWAs.[43] In February 2008 the government updated the Australian Government Employment Bargaining Framework ('the Bargaining Framework') which, among other things, prohibited the offering of AWAs or other forms of statutory individual agreement to APS employees.[44] APS employees engaged after February 2008 were generally offered employment in accordance with the applicable agency collective agreement. Most SES employees were engaged under determinations made under s 24(1) of the *Public Service Act 1999* (Cth), or on common law contracts. Although the Bargaining Framework specifically permitted SES staff to negotiate single-agency SES agreements, this option has not been seriously pursued.

The Bargaining Framework also encouraged collective bargaining and provided specific mention of the role and rights of union delegates to consult with members within the workplace and to engage in bargaining with management at the agency level.[45] Agency heads were required to respect the role of workplace union representatives and to facilitate their activities in the workplace.[46]

Following an extensive period of consultation,[47] the Commonwealth Parliament passed the *Fair Work Act*. The *Fair Work Act* established a system of industrial relations that emphasised the primacy of collective agreement-making.[48] But these reforms didn't necessarily herald a new golden age for the traditional voice of workers — trade unions. On the face of it, the *Fair Work Act* gives unions little institutional support in bargaining. The old distinction between union and non-union agreements has been abolished. All agreements, other than greenfields agreements, were now to be made between an employer and employees, a majority of whom must

42 John O'Brien and Michael O'Donnell, 'From Workplace Bargaining to Workplace Relations', above n 1, 147.

43 See *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth). For an analysis of this legislation, see Carolyn Sutherland, 'First Steps Forward (with Fairness): A Preliminary Examination of the Transition Legislation' (2008) 21 *Australian Journal of Labour Law* 137.

44 Department of Employment and Workplace Relations ('DEWR'), 'Revision to the Australian Government Employment Bargaining Framework and Supporting Guidance' (February 2008) 10 <http://www.cpsu.org.au> ('*Supporting Guidance 2008*').

45 Ibid 14–15.

46 Ibid 16.

47 On the making of the *Fair Work Act*, see Joo-Cheong Tham, 'Democratic Deliberation of Labour Law: A Preliminary Inquiry into the Making of the *Fair Work Act'* (2009) 22 *Australian Journal of Labour Law* 232.

48 *Fair Work Act* s 3(f).

vote in favour of the agreement before it is made.[49] Trade unions have no specific role in the agreement-making process, unless they are a 'bargaining representative' for a member whose employment will be covered by a proposed agreement.[50] Trade unions no longer have a monopoly as the voice of employees, who could, for instance, be represented by an agent acting for a group of unionised or non-unionised workers.[51]

While the *Fair Work Act* may be drafted in neutral terms, placing unions in the same position as other bargaining representatives, it would be a mistake to conclude that unions have been marginalised, at least in the APS context. For one thing, it is generally trade unions which will have sufficient resources and experience to access some of the new innovations in the *Fair Work Act*, designed to facilitate and encourage collective bargaining. Furthermore, and like its Coalition predecessors, the Labor governments continued to promulgate bargaining parameters with respect to bargaining in the APS.[52] The combined effect of the *Fair Work Act* and the government's own Bargaining Framework has strengthened the position of APS unions in at least four respects — greater union recognition, a requirement to bargain in good faith, the availability of scope orders if bargaining is not proceeding efficiently or fairly, and the ability of parties to bring bargaining disputes before Fair Work Australia (now known as the Fair Work Commission ('FWC').[53] All of these changes played a role, to a greater or lesser degree, in the 2011–12 bargaining round.

The introduction of the *Fair Work Act* has made it very difficult for agencies to resist union involvement in collective bargaining, and has rendered sterile the old disputes concerning whether to negotiate a union or non-union agreement. The *Fair Work Act* requires that a notice of representational rights be given to employees, generally at the commencement of bargaining.[54] This notice, among other things, explains to employees that they may appoint a bargaining representative of their choice, but that if they are union members, the trade union will be taken to be their default bargaining representative unless the employee, in writing, specifically appoints another bargaining representative.[55] So if the CPSU has one member in an agency covered by a proposed agreement, and that member wishes to be represented by the

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49 Ibid ss 181–2.

50 For the definition of bargaining representative, see *Fair Work Act* s 176.

51 An employer is usually its own bargaining representative, but there is nothing to prevent an employer from appointing an agent to represent its interests.

52 The current parameters are set out in the *Australian Public Service Bargaining Framework* contained in Australian Public Service Commission ('APSC'), Australian Government, *Australian Public Service Bargaining Framework: Supporting Guidance* (January 2011) <http://www.apsc.gov.au> ('*Supporting Guidance 2011*').

53 The *Fair Work Amendment Act 2012* (Cth), among other things, changed the name of Fair Work Australia to the Fair Work Commission from 1 January 2013: see sch 9. For ease of reference the acronym 'FWC' will be used, and should be taken as referring also to Fair Work Australia in respect of matters prior to 1 January 2013.

54 *Fair Work Act* ss 173–4.

55 Ibid s 176(1)(b).

CPSU, the union has a seat at the bargaining table, and the employer must recognise it as the bargaining representative of the employee or risk breaching the good faith bargaining ('GFB') obligations.[56]

The APS Bargaining Framework makes it clear that unions must be included in negotiations where a member wants the union to represent his/her interests:

> If employees are union members and the union is entitled to represent the industrial interests of the employees in relation to their work, then agencies will recognise the unions as the bargaining representatives for those employees.[57]

The combined effect of the *Fair Work Act*'s provisions on default bargaining representatives and the APS Bargaining Framework makes it virtually impossible for agencies to adopt the kind of anti-union tactics concerning collective agreement-making seen during the Howard years. Agencies such as the Department of the Prime Minister and Cabinet and Defence Housing Australia, which strongly resisted union collective bargaining in the past, entered into collective agreements in 2010 and 2012.[58]

Likewise, it is not open to agencies to ignore the wishes of their employees and refuse to collectively bargain with their employees by, for instance, insisting that they all sign common law employment contracts. The *Fair Work Act* empowers the FWC to issue a majority support determination ('MSD'), in circumstances where an employer is refusing to collectively bargain and a majority of employees can demonstrate that they wish to do so.[59] Once an MSD has been issued by the FWC, bargaining representatives for a proposed agreement must bargain in good faith,[60] and bargaining orders can be issued if these requirements are breached.[61]

Whilst MSDs have been used by unions in the private sector to compel reluctant employers to bargain,[62] they have not featured in APS bargaining. This is because the Commonwealth is committed to promoting the *Fair Work Act*, and collective bargaining, amongst its own workforce. The APS Bargaining Framework makes

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56 Ibid s 228(1)(f). See also APSC, *Supporting Guidance 2011*, above n 52, [1.4.2].

57 APSC, *Supporting Guidance 2011*, above n 52, [1.4.3].

58 See *Department of the Prime Minister and Cabinet Enterprise Agreement 2010–11*; *Department of the Prime Minister and Cabinet Enterprise Agreement 2011–14*; *Defence Housing Australia Enterprise Agreement 2012–14*. The CPSU strongly supported these provisions as part of the *Fair Work Act* review process — see Community and Public Sector Union, Submission to the Department of Education, Employment and Workplace Relations, *Review of the Fair Work Act,* 7 February 2012.

59 *Fair Work Act* ss 236–7.

60 Ibid s 228.

61 Ibid ss 230–1.

62 Anthony Forsyth, 'The Impact of "Good Faith" Obligations on Collective Bargaining Practices and Outcomes in Australia, Canada and the United States' (2011) 16 *Canadian Labour and Employment Law Journal* 1, 33–47.

it clear that agencies must collectively bargain, at least with respect to non-SES employees:

> It is Australian government policy that terms and conditions for non-SES employees be negotiated separately by each agency in an enterprise agreement made under the *Fair Work Act*.[63]

These legislative provisions, backed up by government policy, have ensured that collective bargaining is the dominant method for setting terms and conditions of employment, and that unions are now almost always key participants in collective bargaining negotiations in APS agencies.

The hand of the CPSU has also been strengthened by the new GFB requirements. Section 228(1) of the *Fair Work Act* imposes the following requirements on a bargaining representative for a proposed agreement:

> (a) attending, and participating in, meetings at reasonable times;
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> (b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
>
> (c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;
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> (d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;
>
> (e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;
>
> (f) recognising and bargaining with the other bargaining representatives for the agreement.

These requirements are qualified by s 228(2), which makes it clear that an employer is not required to make concessions concerning terms to be included in an agreement, or ultimately to reach agreement. If a bargaining representative is concerned that other bargaining representatives are not bargaining in good faith, or that bargaining is not proceeding efficiently or fairly because there are multiple bargaining representatives, an application can be made for a bargaining order,[64] provided that certain procedural requirements are met. Among other things, a bargaining representative must first give notice of its concerns to the other bargaining representatives, give them a reasonable opportunity to respond, and only if the bargaining representative is not satisfied with the responses can a bargaining order be applied for.[65] The FWC may issue a bargaining order if, among other things, it is satisfied that the parties are bargaining voluntarily or an MSD or scope order is in place, and a bargaining representative is breaching the GFB obligations.[66]

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63 APSC, *Supporting Guidance 2011*, above n 52, [1.2.1].

64 *Fair Work Act* s 229.

65 Ibid s 229(4).

66 Ibid s 230.

In the private sector, there has been considerable litigation in relation to the ambit of the GFB requirements, as well as the lawfulness or otherwise of particular bargaining conduct and tactics.[67] In the APS context, the GFB requirements have rarely been litigated,[68] possibly because the government has made it clear that it expects agencies to bargain with bargaining representatives in good faith.[69] Another reason for the lack of litigation may be that the issuing by a bargaining representative of a notice alleging non-compliance with the GFB obligations,[70] as a precursor to an application for a bargaining order may have the effect of positively influencing bargaining conduct.

Nevertheless, the GFB provisions have shaped bargaining conduct in at least three respects. Firstly, the GFB obligations, particularly ss 228(1)(a)–(d), require parties to actively participate in bargaining 'with a genuine … objective or intention of concluding an "enterprise agreement" — if possible.'[71] Whilst the GFB obligations do not require a party to make concessions, or ultimately reach an agreement, bargaining representatives are now required to actively consider and respond, at least in some way, to the proposals of other bargaining representatives. However, the FWC is not permitted to make orders that would require a bargaining representative to make concessions or reach agreement.[72] This obligation to actively participate in bargaining is reinforced by the APS Bargaining Framework, in which the government explicitly mandates that parties must bargain in good faith.

Secondly, the GFB obligations helped shape employer tactics, and union responses, during the initial stages of the 2011–12 APS bargaining round. For instance, decisions of the FWC have made it clear that it is not necessarily a breach of the GFB obligations to put an agreement to ballot in circumstances where an impasse has been reached in negotiations with the relevant unions.[73] Many agencies in the early stages of the 2011–12 bargaining round put initial agreement offers to staff,

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67 Forsyth, above n 62.

68 An exception is *Australian Municipal, Administrative, Clerical and Services Union v Australian Taxation Office* [2011] FWA 5407 (18 August 2011).

69 APSC, *Supporting Guidance 2011*, above n 52 [1.3.15].

70 *Fair Work Act* s 229(4).

71 *Endeavour Coal Pty Limited v Association of Professional Engineers, Scientists and Managers, Australia* (2012) 206 FCR 576, 587–8 [34] ('*Endeavour Coal*').

72 Ibid 596–8 [62]–[75]. For an example of a decision and orders made since *Endeavour Coal*, see also *Australian Manufacturing Workers' Union (AMWU) v Cochlear Ltd* [2012] FWA 5374 (3 August 2012).

73 See, eg, *Construction, Forestry, Mining and Energy Union (Mining and Energy Division) v Tahmoor Coal Pty Ltd* (2010) 195 IR 58. In some instances the FWC has held that putting an agreement to ballot is in contravention of the GFB obligations, but these rulings have tended to involve conduct by a bargaining representative which undermines the integrity of the bargaining process: see, eg, *Health Services Union v Victorian Hospitals' Industrial Association* (2012) 22 IR 1; *Australian Manufacturing Workers' Union (AMWU) v Coates Hire Operations Pty Ltd* [2012] FWA 3357 (19 April 2012).

requiring relevant unions to mobilise a 'no' vote where they believed the agreement was substandard.

Thirdly, the CPSU flagged the possibility of using the GFB provisions in circumstances where the Australian Public Service Commission ('APSC') demanded changes to agreements reached between unions and individual agencies.[74] Whilst no litigation resulted, the GFB obligations were used to apply pressure to the government in its role as employer.

A further important innovation for worker voice under the *Fair Work Act* is the availability of scope orders. A bargaining representative can ask the FWC to issue scope orders to resolve disputes about which group, or groups, of employees will be covered by a proposed agreement. A bargaining representative can apply for a scope order if, in its view, bargaining is not proceeding efficiently or fairly because a proposed agreement doesn't cover appropriate employees.[75] The FWC has a broad discretion as to whether or not to issue a scope order. It must be satisfied that the bargaining representative applying for the order is complying with the GFB requirements, that the group of employees to be covered is fairly chosen, that making the order will promote the fair and efficient conduct of bargaining, and that it is reasonable to make the order.[76]

In the APS scope orders will almost always be sought by trade unions, for, as discussed above, it is government policy that agencies negotiate one enterprise agreement to cover their non-SES employees.[77] The use of scope orders by trade unions in the 2011–12 bargaining round was rare. However, one notable example occurred in the newly created Department of Human Services ('DHS'), a super-department combining the former Child Support Agency, Centrelink, Medicare Australia and the Commonwealth Rehabilitation Service. Bargaining in DHS was challenging in part because DHS, in accordance with Australian government policy, wanted to create one umbrella agreement which covered all employees, replacing several pre-existing agreements. One agreement was negotiated, but 10 days before the agreement was to be voted on by employees, the Australian Salaried Medical Officers Federation ('ASMOF'), on behalf of 29 doctors employed by the department, sought to have doctors removed from the scope of the proposed agreement on the basis that they had not been fairly chosen. The doctors were unhappy that entitlements previously available to them, such as salary advancement by way of salary bands, a private motor vehicle or vehicle allowance, mobile phone, airline lounge membership and accommodation at SES standards, were being removed without any compensation. The ASMOF argued that, in forcing the doctors into one agreement, the employees

74 CPSU, *APSC Interference Puts Your SWA Pay Outcome at Risk* (25 November 2011) <http://www.cpsu.org.au/agency/news/26748.html>; CPSU, *SMOS Rejects Exceptional Circumstances and Puts FaHCSIA Bargaining at the Crossroads* (17 January 2012) <http://cpsu.org.au/campaigns/news/27063.html>.

75 *Fair Work Act* s 238(1).

76 Ibid s 238(4).

77 APSC, *Supporting Guidance 2011*, above n 52, [1.2].

had not been fairly chosen because doctors were an organisationally and operationally distinct group of employees, by reason of their qualifications and registration as medical practitioners. Drake SDP upheld these arguments, and excluded the doctors from the DHS agreement.[78]

Given the Australian government's preference for one agreement per agency for non-SES employees, scope orders have strengthened the hand of unions representing vocal minorities in APS workplaces. In the DHS case, the worker voice of the doctors was given expression through a scope order in circumstances where, had scope orders not been available, it almost certainly would have been drowned out through the 'tyranny of the majority over the minority'.[79]

Finally, the FWC may assist a bargaining representative to resolve disputes concerning bargaining by conciliation, or if all bargaining representatives agree, by arbitration.[80] This enables a bargaining representative to seek the assistance of the FWC to resolve disputes during the negotiation of an enterprise agreement. A notable use of this provision occurred early in the 2011–12 bargaining round, when the CPSU sought the FWC's assistance to conciliate disputes concerning proposed agreements with 'up to a dozen' key Commonwealth agencies.[81] One of the CPSU's principal complaints was the role played by the APSC, as the agency responsible for administering the APS Bargaining Framework, in limiting the matters which could be negotiated in proposed agreements. Conciliation was unsuccessful, and as an industrial tactic the use of s 240 didn't achieve the desired result in negotiations with most of the big agencies. But the s 240 process at least enabled workers to bring their concerns over bargaining to an independent tribunal. Shortly after the FWC conciliation, a few agencies such as the Department of Finance and Deregulation and the Department of the Prime Minister and Cabinet concluded agreements.[82] This indicates that the FWC's role may have assisted to progress negotiations in at least some agencies.

The combined effect of the new Australian Government Employment Bargaining Framework and the introduction of the *Fair Work Act* signalled a new and more accommodating approach to both collective bargaining and public sector trade unions. But the *Fair Work Act* still contained some aspects of the Howard government's *Work Choices* laws. For example, the *Work Choices* restrictions on industrial

78 *Australian Salaried Medical Officers Federation v Commonwealth* [2011] FWA 5920 (20 October 2011).

79 *Re ANZ Stadium Casual Employees Agreement 2009* [2010] FWAA 3758 [8].

80 *Fair Work Act* s 240.

81 'FWA Calls in Public Service Commission, as Union Seeks Fix for Impasse', *Workplace Express* (online), 30 May 2011 <http://www.workplaceexpress.com.au> (subscription required).

82 The *Department of the Prime Minister and Cabinet Enterprise Agreement 2011–14* was signed on 23 June 2011, approximately 3 weeks after the FWC conciliation. The *Department of Finance and Deregulation Enterprise Agreement 2011–14* was signed on 8 July 2011, approximately 6 weeks after the FWC conciliation.

action remained in the *Fair Work Act* in substantially similar form.[83] Likewise the *Work Choices* restrictions on union right of entry also remained largely unchanged.[84] The APS Bargaining Framework, however, specifically required agencies to 'apply the right of entry and freedom of association provisions … in a fair and reasonable manner'.[85] The APS Bargaining Framework specifically acknowledged the right of unions to act on behalf of their members and workers more generally, as well as to collectively bargain,[86] and agencies were required to facilitate employee access to unions and other bargaining representatives in the workplace.[87] So whilst aspects of the legislation may have remained in substantially similar form, the APS Bargaining Framework required agencies to take a more accommodating approach towards unions.

IV The 2011–12 APS Bargaining Round

The 2011–12 bargaining round was the first major round of enterprise bargaining in the APS following the introduction of the *Fair Work Act.* In the lead up to bargaining, the government ensured that all pre-existing agreements had a common expiry date of 30 June 2011.[88] This was originally intended to give the government the opportunity to negotiate one APS-wide agreement to replace the agency–by–agency approach to bargaining evident under the previous Howard government. But with increasing pressures to return the budget to surplus following several years of budget deficits in the aftermath of the Global Financial Crisis, the government abandoned this APS-wide approach in favour of continuing agency-by-agency bargaining, with some common terms and conditions incorporated through the APS Bargaining Framework.

In order to achieve its policy aims of returning the budget to surplus by 2012–13,[89] the government needed to constrain expenditure. As a result the government mandated that all salary increases must be productivity-based, and should be no more than

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83 Shae McCrystal, 'A New Consensus: the Coalition, the ALP and the Regulation of Industrial Action' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 141; Shae McCrystal, 'The *Fair Work Act 2009* (Cth) and the Right to Strike' (2010) 23 *Australian Journal of Labour Law* 3.

84 Fenwick and Howe, above n 27.

85 APSC, *Supporting Guidance 2011*, above n 52, [1.6.1].

86 Ibid [1.6.2].

87 Ibid [1.6.3].

88 APSC, Australian Government, *WR2009/3: Revisions to the Australian Government Employment Bargaining Framework and Supporting Guidance* (2009) <http://apsc-web01.squiz.net/APSC/publications-and-media/current-circulars-and-advices/2009/wr-20093>.

89 The Labor government has since abandoned this goal, and now aims to return the budget to surplus by 2016–17: see Lisa Lynch, *MiniBudget: Govt Announces Budget Surplus in 2016–17; Tax and Super Related Changes*, Thomson Reuters (2 August 2013) <http://sites.thomsonreuters.com.au/tainsight/2013/08/02/govt-economic-statement-budget-surplus-in-2016-17-tax-and-super-related-changes>.

an Average Annualised Wage Increase ('AAWI') of 3 per cent from the nominal expiry date of the current agreement to the nominal expiry date of the proposed agreement.[90] This meant that the government was proposing cuts in real wages for its own employees.

A combination of increased union mobilisation and workplace organisation and a government determined to resist wage demands exceeding 3 per cent, provided the preconditions for a more contested bargaining round in 2011–12 compared to earlier rounds. The enhanced collective bargaining rights under the *Fair Work Act*, a common expiry date of 30 June 2011 and the APS Bargaining Framework's recognition of trade union rights enhanced worker voice. On the other hand, the government's bargaining parameters imposed restrictions on what could be negotiated between individual agencies and their employees. Of particular interest here is the role of the APSC as administrator of the APS Bargaining Framework, and the extent that its involvement diminished worker voice, and ways in which the public sector trade unions sought to respond. We now turn to consider these issues in the context of the 2011–12 bargaining round.

A *Role of the Australian Public Service Commission*

Immediately prior to the 2011–12 bargaining round, the APSC became responsible for providing advice to agencies throughout the bargaining process on whether their actions and agreements were consistent with the APS Bargaining Framework. This involvement acted to constrain worker voice during the bargaining process. Prior to the commencement of bargaining, an agency was required to prepare a bargaining position which set out its aims for bargaining, and to obtain the agency Minister's approval.[91] The APSC assessed an agency's bargaining position for consistency with the APS Bargaining Framework and recommended terms and conditions. If an agency's bargaining position was consistent, the APSC would sign off on the bargaining position for the Special Minister of State for the Public Service and Integrity ('Special Minister of State').[92] If an agency's proposed bargaining position was inconsistent, the agency was required to seek the approval of the Special Minister of State and set out how it would move toward compliance, or why it couldn't do so.[93] If issues arose during the course of negotiations which could 'substantially alter the outcome of the bargaining process', agencies were required to inform the APSC.[94] In addition, if agencies wished to alter their bargaining position during the course of negotiations, approval needed to be sought from the Special Minister of State.[95]

Prior to a proposed agreement being put to the vote, an agency was required to submit the proposed agreement to the APSC, which assessed it against the APS Bargaining

90 APSC, *Supporting Guidance 2011*, above n 52, [2.1.4].

91 Ibid [1.9.2], [1.11.5].

92 Ibid [1.11.2].

93 Ibid [1.11.3]–[1.11.4].

94 Ibid [1.11.11].

95 Ibid.

Framework.[96] If the proposed enterprise agreement was consistent with both the bargaining position approved by the APSC and the APS Bargaining Framework, the APSC could sign off on behalf of the Special Minister of State.[97] If the proposed enterprise agreement was inconsistent, the APSC was required to advise the agency and to seek the approval of the Special Minister of State.[98]

The APSC was also responsible for ensuring that the government's remuneration policies were implemented. Foremost among these was that remuneration increases must be offset by 'genuine, quantifiable productivity improvements.'[99] Enterprise agreements were not generally permitted to deliver wage outcomes that exceeded 3 per cent per annum; all pay increases must come from existing budgets, and must not involve a redirection of program funding.[100] Agencies were also required to advise the APSC and the relevant agency Minister 'at the earliest possible time' if industrial action was being 'engaged in, threatened, impending, or probable.'[101]

The APSC, in administering the APS Bargaining Framework, diluted worker voice in at least two respects. The APSC ensured that certain matters, such as remuneration increases beyond the government's guidelines, were off limits for negotiation. Secondly, the APSC could intervene at every stage of the bargaining process, to the considerable frustration of many agencies and the CPSU. For example, it was not uncommon during the 2011–12 bargaining round for the CPSU and the relevant agency to reach in-principle agreement, only to have the APSC demand changes before it would sign off on the agreement on behalf of the Special Minister of State. For instance, in November 2011 Safe Work Australia and the CPSU reached an agreement, only to have the APSC refuse to sign off on the deal. While most of the APSC's suggestions were incorporated into the final document, the APSC wanted to exclude executive level employees from the '8 hour break between work days' and to reduce remuneration for some classifications.[102] The CPSU alleged that the actions of the APSC constituted a breach of the GFB requirements[103] and on 6 December a conciliation conference before the FWC was convened. As a result of this conciliation conference, the Special Minister of State approved the agreement.[104]

Another example of the role played by the APSC, this time as adviser to the Special Minister of State, involved the negotiating process for the Department of Families, Housing, Community Services and Indigenous Affairs ('FaHCSIA') agreement. In December 2011 FaHCSIA put a draft agreement and pay offer to its workforce.

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96 Ibid [1.11.6].

97 Ibid [1.11.7].

98 Ibid [1.11.8].

99 Ibid [2.1].

100 Ibid [3.1].

101 Ibid [1.10.3].

102 CPSU, *APSC Interference Puts Your SWA Pay Outcome at Risk*, above n 74.

103 Ibid.

104 CPSU, *Special Minister of State Has Approved Your SWA Agreement* (12 December 2011) <http://www.cpsu.org.au/agency/news/26751.html>.

The CPSU indicated that the offer was unacceptable, with the key sticking points being an 8 per cent pay rise over the life of the agreement (until 30 June 2014), no back pay and a 3 to 5 day reduction in personal leave.[105] Negotiations continued and FaHCSIA and the CPSU ultimately released a joint submission to the Special Minister of State, arguing that 'exceptional circumstances' had caused a delay in bargaining and sought permission to include back pay in the proposed agreement. That request was rejected by the APSC in January 2012.[106] The CPSU alleged that interference by the APSC and the Special Minister of State constituted a breach of the GFB obligations. Agreement was ultimately reached that provided a slightly larger pay increase (9.2 per cent over the life of the proposed agreement), and the retention of 20 days personal leave.[107] The CPSU did not gain back pay for employees, though a 'productivity payment' of $1625 was made to each employee over the life of the agreement.[108] Despite the desire of the parties to include back pay in the agreement, these wishes were overridden by the APSC and the Special Minister of State. In so doing, the APSC and the Special Minister of State diluted the voices of both workers and the individual agencies involved.

B *Union Responses — Promoting Worker Voice*

The public sector unions responded to these efforts to dilute worker voice by using the *Fair Work Act* to mobilise the membership. This occurred primarily through the organisation of 'no' votes in response to substandard offers by management, and the organisation of 'yes' votes in favour of protected industrial action.

1 *No Votes*

As discussed earlier, all single-enterprise agreements are made when a majority of employees who cast a valid vote vote in favour of the agreement.[109] If management can't attract a majority of votes, the agreement cannot be made.

Early in the 2011–12 bargaining round, it was common for management to test the resolve of employees by putting initial agreement offers to ballot. This then gave the public sector unions an opportunity to organise against the proposed agreement. In all of the big agencies, the union was successful in organising 'no' votes. For instance in the Department of Defence ('Defence') management put forward an agreement, without the consent of relevant unions,[110] containing a 3 per cent per

105 CPSU, *SMOS Rejects Exceptional Circumstances*, above n 74.

106 Ibid.

107 CPSU, *CPSU Members Vote in FaHCSIA* (22 March 2012) <http://www.cpsu.org.au/campaigns/news/27954.html>.

108 Ibid.

109 *Fair Work Act* ss 181–2. Note that the agreement, once made, must still be approved by the FWC: *Fair Work Act* pt 2-4 div 4 sub-div B.

110 According to the CPSU, this was the first time in 12 years that an agreement had been put to the vote without the consent of unions: see CPSU, *Ten Reasons to Vote No … and Negotiate a Better DECA* (9 June 2011) <http://www.cpsu.org.au/campaigns/news/23460.html>.

annum pay offer, along with cuts to other conditions.[111] The CPSU and other unions campaigned for a 'no' vote, mobilising the membership to reject the agreement. Some 72.5 per cent of employees voted 'no', forcing management back to the bargaining table.[112] Negotiations were then deadlocked, and just before Christmas Defence put another offer to employees. The public sector unions campaigned against this offer also, and 61 per cent of employees voted it down.[113] In both instances the 'no' votes forced management to return to the bargaining table. A similar pattern was repeated in key agencies across the APS.[114] This management tactic of putting substandard offers to ballot clearly backfired, as the union was able to use such offers to mobilise its membership and to campaign effectively for improvements to both remuneration and working conditions.

2 *Industrial Action*

Since 1993 trade unions in Australia have been able to take lawful industrial action, known as protected industrial action.[115] From that time the technical restrictions on this capacity for lawful industrial action have increased, and following the introduction of the *Work Choices* regime in 2005 Australia had some of the most restrictive strike laws in the common law world.[116] The *Fair Work Act* has largely retained these laws.

There are a myriad of technical requirements that must be met before employees and their bargaining representative, usually a union, can take industrial action without fear of legal liability.[117] In broad terms, protected industrial action taken by employees, known as employee claim action under the *Fair Work Act*,[118] can only

111 CPSU, *Defence Tables its DECA Offer — And It's Not Pretty* (5 April 2011) <http://www.cpsu.org.au/campaigns/news/22456.html>.

112 CPSU, *Defence to Rush to a Vote Just Before Christmas* (6 December 2011) <http://www.cpsu.org.au/campaigns/news/26658.html>.

113 CPSU, *When Will They Listen? Defence Employees Vote NO Again* (20 December 2011) <http://www.cpsu.org.au/campaigns/news/26801.html>.

114 For instance, in the Department of Human Services, an agency employing 25 per cent of the APS workforce: see CPSU, *Staff Overwhelmingly Reject Human Services Offer* (12 September 2011) <http://www.cpsu.org.au/campaigns/news/25363.html>; and in DIAC, see Department of Immigration and Citizenship, Australian Government, *Annual Report 2010–11* (2011), 289–90 <http://www.immi.gov.au/about/reports/annual/2010-11/>.

115 For a comprehensive discussion of the law relating to industrial action, see Shae McCrystal, *The Right to Strike in Australia* (Federation Press, 2010). See also Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) chs 22–3.

116 Shae McCrystal, 'Smothering the Right to Strike: Work Choices and Industrial Action' (2006) 19 *Australian Journal of Labour Law* 198.

117 This immunity does not extend to personal injury, property loss or damage, or defamation: *Fair Work Act* s 415. For an overview of the statutory controls on protected industrial action, see Creighton and Stewart, above n 115, ch 23.

118 We focus on employee claim action in this paper, as lock-outs are almost unheard of in the APS context.

be taken in support of permitted claims for a proposed single-enterprise agreement, and only if any previous agreement has passed its nominal expiry date.[119] Before protected action can be taken, the kinds of action must be authorised by a secret ballot of eligible employees.[120] The ballot requirements are technical, but in essence an employee bargaining representative must apply to the FWC for the protected action ballot.[121] The FWC must grant the ballot if, among other things, it is satisfied that the bargaining representative is genuinely trying to reach agreement with the employer.[122] For a ballot to be successful, it must be voted up by 50 per cent of eligible employees who cast a valid vote.[123] If a ballot supports the taking of industrial action, the action must generally be taken within 30 days of the result of the ballot.[124] Once these prescriptive requirements are satisfied, a bargaining representative must generally provide three days' written notice[125] of an intention to take protected industrial action,[126] and only after this notice has expired and other technical requirements are satisfied can the action be taken. These restrictions have made it more difficult for unions to take industrial action. These difficulties are compounded by the fact that under the *Fair Work Act* (and *Work Choices* and the *Workplace Relations Act* before it) employees are not generally permitted to be paid, or to accept payment, for periods during which industrial action is being taken.[127]

Clearly these limits on the capacity to withdraw labour have had a detrimental impact on worker voice. However, what is interesting about the 2011–12 bargaining round is how the public sector unions managed to use these restrictive strike laws in creative ways.

An interesting example of this is the way in which the unions used the secret ballot provisions to mobilise the membership and apply pressure to management. For instance, in the Department of Immigration and Citizenship ('DIAC'), eligible union members were balloted, and some 66.6 per cent or 1416 eligible employees voted, with 1400 valid votes cast. Of these, 1294 voted in favour of 'indefinite or periodic or partial bans or limitations upon the performance of work' covering a myriad of

119 *Fair Work Act* ss 409(1), 417.

120 Ibid s 409(2).

121 Ibid s 437. A ballot can only be applied for if any existing agreement has passed its nominal expiry date, or is within 30 days of doing so (s 438).

122 Ibid s 443.

123 Protected action ballots in the APS are conducted by the Australian Electoral Commission.

124 *Fair Work Act* s 459.

125 A ballot order under s 443 can specify a longer period of notice. This occurred, for instance, in Customs, where the FWC formally ordered the CPSU to give seven working days' notice of any industrial action: see *CPSU, the Community and Public Sector Union v Australian Customs & Border Protection Service* [2011] FWA 5053 (2 August 2011).

126 *Fair Work Act* s 414. The notice must specify the day on which the action will commence, and the nature of the industrial action.

127 Ibid pt 3-3 div 9.

tasks.[128] Similar numbers of employees voted for one and two hour work stoppages, though the numbers did reduce slightly to 1215 for a work stoppage of 24 hours' duration. These numbers in support of industrial action are typical of votes in many agencies across the APS.

Two points can be made. Firstly, the strong numbers provided the unions with significant moral force at the bargaining table. Secondly, support for industrial action softened slightly when employees were asked to stop work for 24 hours or more. This softening in support was highlighted more dramatically in Defence, where the numbers of workers in favour of stoppages of 8 hours or more fell quite sharply as compared to those willing to engage in shorter periods of industrial action. In Defence, 1465 employees voted in favour of indefinite or periodic bans on overtime and 1379 in favour of 1 hour bans.[129] However, these numbers fell to 1232 employees who were in favour of 8 hour stoppages, with 420 employees opposed. We surmise that these trends perhaps reflect the 'no work, no pay' rules, discussed below, and the high levels of personal debt in Australia.

Union tactics concerning industrial action recognised this trend. For instance union members in Defence engaged in a one-minute work stoppage.[130] This meant that Defence was required by law to deduct one minute's pay from the salary of each employee who participated in the industrial action.[131] Defence couldn't ignore this legal requirement, as it faced a maximum penalty of $33 000 if it failed to comply.[132] Individual Defence employees couldn't accept payment as this contravened s 473 of the *Fair Work Act* and left particular employees exposed to civil penalty proceedings.[133] Nor was it open to individual payroll staff to ignore the requirement. The APS Code of Conduct requires APS employees acting in the course of APS employment to 'comply with all applicable Australian laws'.[134] Breach of the Code of Conduct by an employee could result in a sanction ranging from a reprimand

128 Australian Electoral Commission, *Protected Action Ballot: Declaration of Results, CPSU and Commonwealth Government, (Represented and Acting through the Department Of Immigration And Citizenship)*, B2011/3219, 5 September 2011 <http://www.fwc.gov.au/documents/industrialballotsresults/cpsu/cpsu_20113220.pdf>.

129 Australian Electoral Commission, *Protected Action Ballot: Declaration of Results, CPSU and Commonwealth of Australia (Department of Defence)*, B2011/3112, 8 August 2011 <http://www.fwc.gov.au/documents/industrialballotsresults/cpsu/cpsu_20113112.pdf>.

130 Damien O'Donovan (Speech delivered at the Australian Government Solicitor Employment Law Forum, Canberra, 30 November 2011).

131 *Fair Work Act* s 470(1).

132 Ibid ss 539, 546. Note that, from 28 December 2012, the maximum penalty for a contravention of a civil remedy provision has increased from $33 000 to $51 000.

133 Ibid.

134 *Public Service Act 1999* (Cth) s 13(4). This provision was amended by the *Public Service Amendment Act 2013* (Cth), sch 1 item 37, to require APS employees, when acting 'in connection with APS employment', to 'comply with all applicable Australian laws'. This change does not affect the arguments advanced in this article.

to termination of employment.[135] Given these legal requirements, Defence had no alternative but to calculate the time lost for each employee — an administrative nightmare. Industrial action such as that taken in Defence was highly effective — it promoted worker voice, whilst minimising the financial impact on members.

C *Outcomes*

It was industrially untenable for the CPSU and other public service unions to stand by and accept initial offers which would force their members to take a pay cut. In response to the Labor government's austerity cuts, the CPSU's claim for improved pay and conditions was cleverly targeted initially at politically sensitive agencies. During the bargaining round immigration and refugees were key public policy issues for the government. By targeting their industrial campaign at the DIAC and other border security agencies such as Customs and the Department of Agriculture, Fisheries and Forestry, the CPSU hoped to flow concessions won in these agencies on to other departments.

In September 2011 a breakthrough was achieved in DIAC. The CPSU had negotiated an outcome which didn't result in employees accepting a pay cut in real terms. The DIAC agreement offered three pay rises of 2 per cent per annum and an overall pay increase of approximately 11 per cent. It did this by increasing the top pay increment for each classification by between 4–5 per cent, and by abolishing the bottom increment for each classification.[136] This reworking of job classifications marked the beginning of an innovative approach to overcome the pay restrictions imposed by the APS Bargaining Framework and was widely utilised by other agencies and their employees to finalise acceptable negotiated outcomes.[137]

From the perspective of the CPSU, the outcomes from the bargaining campaign were largely positive when compared to previous rounds under a Coalition government.[138] Union recruitment activities over 2011 resulted in over 8200 new members, a net gain of over 500 members. The union also recruited almost 1000 new workplace delegates and provided training to some 650 workplace activists.[139] There was some progress, albeit limited, on reducing wage dispersion across the APS, with wages in a number of agencies in the bottom 5 per cent enhanced and brought closer to the APS average. The union also increased the activism of its workplace delegates in the bargaining process and enhanced communications with members through workplace meetings, telephone and internet communications, and emails. The union

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135 Ibid s 15(1).

136 CPSU, *Proposed DIAC Pay Offer — Examples and Analysis* (8 September 2011) <http://www.cpsu.org.au/agency/news/25205.html>.

137 'CPSU to Back Customs Deal that might be APS Peace Blueprint', *Workplace Express* (online), 27 October 2011 <http://www.workplaceexpress.com.au> (subscription required).

138 Michael O'Donnell, Interview with CPSU Officials (Barton, Australian Capital Territory, 2011); Michael O'Donnell and Cameron Roles, Interview with CPSU Officials (Barton, Australian Capital Territory, 2012).

139 CPSU, *Annual Financial Report Year Ending 30 June 2010* (3 February 2011, Sydney).

aimed to build on this level of member activism by providing increased resources and training to workplace delegates following the bargaining round.[140]

The ability of public sector unions to minimise cuts to conditions and pay is significant in the context of a concerted attack on collective bargaining rights in North America and substantial cuts to jobs in the United Kingdom. In the United States, public sector collective bargaining came under attack from 2010 onwards as conservative Republican governors introduced legislation to roll back, or even eliminate, collective bargaining, blaming collective bargaining rights for the substantial state budget deficits arising from the recession of 2008 and 2009. At the vanguard of the attack on public sector collective bargaining was the Republican governor in Wisconsin, Scott Walker, whose Wisconsin Budget Repair Bill was ultimately passed following widespread protests by public service employees and public and legislative delaying tactics.[141] In addition, public service unions at the state level across the United States made a range of concessions in the form of wage freezes, and employees were expected to make substantial additional contributions to health insurance and pension plans, in states that included New York, New Jersey, Massachusetts and Ohio as thousands of public service job cuts were being made to resolve state budget deficits.[142] In the United Kingdom, the need to reduce the government's budget deficit by over AUD130 billion was relied upon by the Cameron Coalition government to justify wage freezes and job cuts of between 600 000 and 700 000 public service employees between 2010 and 2016.[143]

The CPSU faces ongoing challenges with an increase in the efficiency dividend leading to more job cuts under Labor,[144] and the threat of a further 12 000 job cuts if a Coalition government is elected in 2013.[145] But compared to developments internationally, workers and public sector unions have maintained their voice and minimised concessions to pay and conditions.

V Conclusion

The article explores worker voice in the APS under the *Fair Work Act* and under the first major round of APS bargaining under this Act in 2011–12. The primary conclusion is that worker voice under the *Fair Work Act* and associated government

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140 CPSU, *Thanks for a Great 2011 — Looking Forward to 2012* <http://www.cpsu.org.au/blog/26793.html>.

141 Richard Freeman and Eunice Han, 'The War Against Public Sector Collective Bargaining in the US' (2012) 54 *Journal of Industrial Relations* 386, 391.

142 Ibid 398.

143 'Spending Cuts and VAT Rise to Cost 1.6 m Jobs, says CIPD', *BBC News* (online), 2 November 2010 <http://www.bbc.co.uk/news/business-11671009>.

144 From 2014–15 the efficiency dividend imposed on Commonwealth agencies will increase from 1.25 per cent to 2.25 per cent, for three years: see CPSU *Union Slams ALP Plan to Cut 5000 Public Sector Jobs* (2 August 2013) <http://www.cpsu.org.au/news/31747.html>.

145 CPSU, *New Polling Shows Australians Don't Support Abbott's Public Service Cuts* (28 August 2012) <http://www.cpsu.org.au/printversion/29476.html>.

policy has been enhanced when compared to the previous *Workplace Relations Act* and *Work Choices* regime. The *Fair Work Act* and the APS Bargaining Framework protect union recognition and encourage collective bargaining in the APS. However, elements of *Work Choices*, such as tight controls over industrial action, remain and act as a potential constraint on worker voice.

This increased recognition of trade unions and of collective agreement making, together with a tough budgetary environment, created the conditions for worker voice to be mobilised more strongly in the APS than had been the case for many years. APS employees and their unions crafted strategies that enabled them to operate within the laws, whilst putting maximum pressure on management. Workers voted overwhelmingly to reject initial agreement offers from agencies; they also voted in secret ballots to engage in work bans and industrial stoppages, though there was some reluctance to engage in stoppages exceeding 24 or 48 hours. In response, public service unions focused on industrial actions of relatively short duration, such as one minute and one to two hour disputes, that maximised the potential for industrial disruption but that minimised the financial impost on public service workers.

The outcome of these campaigns was that public service unions managed to contain cuts to pay and conditions when compared with developments internationally. Unions adopted a range of innovative industrial strategies, such as negotiating agreements in politically sensitive agencies and then flowing elements of these agreements to other agencies. Creative agreements were also struck in response to the government's policy of wage restraint which changed job and classification structures, preserving real wages for most APS employees. Proposed cuts to conditions of employment were also largely resisted.

Worker voice was also enhanced more generally within APS workplaces. An increased number of workers joined public service unions, were elected to union delegate positions and received training in undertaking their representative roles. In addition, public service unions enhanced their communications and engagement with their membership and workplace delegates.

Worker voice under Labor has faced challenges, however, under the government's austerity cuts and imposition of increased efficiency dividends on APS agencies. This has resulted in increasing job losses across the APS, with the opposition parties threatening more widespread job shedding if elected in 2013. Therefore the enhanced expression of worker voice in the APS following the introduction of the *Fair Work Act* and the APS Bargaining Framework remains vulnerable. If the government's policy towards industrial relations shifts back to emphasising individuation and managerial prerogatives, then worker voice in the APS is likely to come under considerable strain. The challenge for public service unions is to maximise the opportunities the industrial environment under the *Fair Work Act* provides to strengthen the participation and voice of public service workers in workplace decision-making and collective bargaining processes.