The Rise of Managerial Prerogative under the Howard Government

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Abstract

The industrial relations policies of the Howard government during its first three terms have produced a major change in the way decisions, especially over non-wage issues, are made in Australian workplaces: it has significantly increased the exercise of managerial prerogative.

This has been achieved by:

- *reducing the scope and importance of awards,*
- *encouraging decentralized enterprise bargaining while at the same time greatly restricting the power of unions, and*
- *promoting individual contracts, the effects of which are to both directly increase management power and further undermine the power of unions.*

Through these policies, the 'coverage' (ie. the proportion of employees affected) and 'scope' (ie. the issues included) of both awards and collective agreements have been dramatically reduced, creating a regulatory gap.

The government's preferred decision-making process, which was to fill the gap, was 'individual bargaining'. That is, the decline in state and collective private regulation created greater 'freedom' for employers and individual employees to make decisions at work without the 'interference' of external third parties.

The reality, however, of 'individual bargaining' is that most employees have little power and employers alone make decisions. In other words, contrary to the rhetoric of the government, it is employers and not employees who have achieved greater freedom. For most employees, the extent of their new freedom is a 'choice' whether to accept employment rules dictated by employers or give up their jobs.

This conclusion will be massively extended with the legislative proposals anticipated for the fourth Howard government and announced in late May 2005. Amongst other things, the further decline of awards, the elimination of unfair dismissal provisions for enterprises with less than 100 employees, the end of the 'no disadvantage test' for collective and individual agreements, the continued attacks on unions and the promotion of individual contracting will serve to enhance even further managerial prerogative.

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Introduction

The major legislative initiative by the Howard government during its first three terms was the *Workplace Relations Act of 1996 (cth)* (WRA). Early commentaries on this law – both academic and practitioner – mostly interpreted it as a relatively modest reform, at least compared to the Coalition's larger ambitions. On the one hand, this was considered to be the result of the compromise forced on the Coalition by the electoral advantages of pragmatism in the 1996 election campaign and by the necessity for the government to negotiate the terms of the legislation with the Democrats, who held the balance of power in the Senate at the time. On the other hand, the WRA was seen to represent continuity with, rather than radical departure from, the earlier industrial relations reforms of the ALP government, especially under the leadership of Prime Minister Keating.

Hindsight, however, reveals that the WRA facilitated deeper changes to Australian industrial relations than initially anticipated. The focus of this paper is largely on non-wage issues at a workplace level, where we make a theoretical assumption that there are four main processes by which decisions about employment conditions (or processes by which the rules that regulate the employment relationship) are made (for more detail, see Bray et al., 2005, chapter 8):

- state regulation (which includes legislation and awards),
- collective bargaining,
- individual bargaining and
- the exercise of managerial prerogative.

The distinction between these decision-making processes is important because of its implications for the power relations between the parties and because of the likely effects of the decision-making process on the substantive outcomes.

In the first three sections of this paper, we argue that there has been a heavy impact of the WRA on the role of awards, enterprise agreements and the power of trade unions. The result of these changes has consistently been the withdrawal of both state regulation of employment conditions and the legal supports that encouraged private collective regulation (ie. collective bargaining).

In the context of this decline of state regulation and collective bargaining, a stated intention of the Howard government was that a new regime at work based on 'individual bargaining' would emerge. In other words, decision making at work would be a joint process whereby employers would consult and negotiate with their own employees, without the 'interference' of 'external third parties'.

In the fourth section of the paper, we show that individual 'bargaining' is largely a fiction. Little 'bargaining' between employees and employers takes place; indeed, there is little 'consultation' let alone 'bargaining'. Rather, decisions are mostly made unilaterally by employers. The 'choice' confronting employees is usually to accept the decisions of their employers or find another job.

The inescapable conclusion is that the government's agenda of labour market deregulation, still only partially implemented through the WRA, has already delivered a major fillip to managerial prerogative.

The Howard government's announced intentions for further 'reform' in its fourth term will more thoroughly achieve the deregulationist goal. The final section of the paper briefly examines the government's statement of late May 2005. Amongst other things, the further decline of awards, the elimination of unfair dismissal provisions for enterprises with less than 100 employees, the end of the 'no disadvantage test' for collective and individual agreements, the continued attacks on unions and the promotion of individual contracting will serve to enhance even further managerial prerogative.

Awards: Declining Coverage, Scope and Importance

Before the 1990s, awards were a central (and internationally unique) feature of labour regulation in Australia. While they were technically the decision of a third-party arbitrator (ie. the Australian Industrial Relations Commission) in resolving disputes between registered organizations, there were in reality the result of a complex web of joint decision making in which employees, unions, employers, employers associations, governments and tribunals contributed to the regulation of employment conditions in Australia. The effect of awards was to establish legally-binding minimum standards for most employees in Australia.[1] Wage rates were probably the single most important issue regulated by awards, but they also regulated a plethora of non-wage issues including working hours, physical working conditions, leave entitlements, periods of notice, rules on the use of part-time and/or contract labour, disputes procedures and facilities to be provided for the unions that represented employees.

During the 1990s, the role of awards began to change. Under the Keating ALP government, for example, awards became 'safety nets' rather than the effective determinant of employment conditions for most employees (Peetz 1998). The intention of the 1993 *Industrial Relations Reform Act*, for example, was to make enterprise bargaining the main process for determining wages and other conditions of employment. For a significant proportion of the workforce, enterprise agreements produced new wage rates and some new non-wage rules at an enterprise level that replaced award provisions. The 'scope' of awards (ie. the range of issues included), however, remained largely unchanged and they provided the 'fall-back' position when enterprise bargaining failed or was never initiated. Awards also continued to provide effective regulation for employees not covered by enterprise agreements, even if award wages rose only slowly and well behind wage increases in enterprise agreements.

After 1996, the impact of the WRA on the role and content of awards was twofold. First, it continued the 'safety net' approach introduced by the Keating government. The latest data suggest that only 19.9% of employees rely only on awards to determine their pay

[1] It must be acknowledged that in some sectors, awards were 'paid rates' awards and thereby determined actual wages rather than minimum wages.

(ABS 2004). The rest have award wages supplemented by individual bargaining or by increases granted through managerial prerogative, or their pay is determined by enterprise-level collective bargaining. The role of awards in determining non-wage issues is less clear and is related to the second point below.

Second, and most significant for this paper, the WRA sought to reduce the range of non-wage issues contained in awards through 'award simplification'. Under section 89A of the Act, awards were to be limited to 20 basic employment conditions; ie. 'allowable matters'. Additionally, the AIRC had an overarching responsibility to ensure that simplified awards did not prescribe work practices or procedures that would have the effect of restricting the efficient performance of work or hindering productivity. The implementation of 'award simplification' began with the *Hospitality Award Test Case*, which was decided in December 1997, and is now almost complete. In its 2003-2004 annual report, the AIRC recorded that 98 per cent of the 3222 federal awards had been through the award simplification process (AIRC, 2004:19).

The issues that appear to have been most affected by award simplification (ie. deleted from awards as a result of simplification) are those that gave some support to union representation at a workplace level and those that gave employees and their union representatives some say in 'managerial' decisions at a workplace level. For example, few awards now appear to contain constraints on the use of casual, part-time and temporary employees as a result of award simplification. Similarly, award-based restrictions on the use of contractors have been rendered nugatory. The potential for unions to intervene at the workplace was also reduced with the removal of union facilitation clauses such as union meeting time, union education and so on. This was the case in the coal industry, where Waring and Barry (2001) found that important award provisions that facilitated union involvement were eliminated from the industry award.

If these issues have now been deleted from awards, how are they now being determined? Have they been taken up in enterprise bargaining and inserted into enterprise agreements? Have they been negotiated individually between employees and employers? Are they now subject to managerial prerogative? Two leading labour lawyers certainly expected that award restructuring would enhance managerial prerogative:

> 'The paring down of awards further pushes more matters into the realm of negotiation. It also increases the scope for stronger managerial prerogatives. This, of course, depends on the relative bargaining strength of employer on the one hand and employees or union on the other. It is inescapable, however, that the reduced core of standard conditions will significantly affect weaker groups and that they are likely to be the ones to bear the burden of the reforms.' (Pittard and McCallum 1999, p. 419)

Similarly, Creighton & Stewart (2005, p. 176):

> The range of matters that are currently 'allowable'... [excludes] matters which bear upon the organisation of work or managerial decision-making. So, for

> example, it is no longer possible to have award provisions relating to consultation on issues such as the introduction of workplace change, It is also impossible to have award provisions relating to unfair dismissal or occupational health and safety. In a sense, therefore, s89A can be seen as a legislative reaffirmation of managerial prerogative, and as an explicit repudiation of any notion that the award system could provide a vehicle for the democratisation of work...

There has been remarkably little empirical research that explores in any depth how these provisions have been implemented in awards or operationalised at the workplace level. What research does exist will be discussed below. All that can be said at this stage is that the effect of award simplification has likely varied across industries and between enterprises and, if relatively strong unions like those in mining have not been able to prevent the deletion from awards of supportive provisions, then it is doubtful that other industries have seen the retention of such provisions.

Enterprise Agreements: Limited Impact and Declining Scope

Since the early 1990s, enterprise bargaining has taken over from awards as the primary form of collective employment regulation. On the wages front, there is little doubt that enterprise bargaining has not adversely affected those groups of employees who are strongly unionized, even if these groups have represented an increasingly small part of the workforce. Average wage increases under enterprise bargaining continue to surge ahead of increases under awards and individual contracts (ACIRRT 1999, pp. 77-80).

However, what of non-wage issues? Has enterprise bargaining picked up the issues deleted from awards? To what extent has enterprise bargaining widened the bargaining agenda, expanded the range of issues that are collectively regulated and, correspondingly, reduced managerial prerogatives?

Some 'research' by employers and conservative think tanks suggests that the answer to such questions is that enterprise bargaining has significantly restricted management. In December 2002, for example, the Institute of Public Affairs (funded by business) launched what it called its 'Capacity to Manage Index'. The index was presented from a natural assumption that managers should be allowed to manage:

> 'How people are managed in a business is critical to its success. If managers do not have a capacity to manage, either through poor performance or externally imposed restrictions, the businesses they attempt to manage are at risk of underperformance.'

The stated aim behind the index was to 'flesh out and measure how firms' formal labour relations agreements impact on performance'. The methodology of the index was to examine the Enterprise Agreements to which the enterprise was a party and to divide the clauses of the agreements into two types: 'those that relate entirely to employee remuneration and those that relate to managerial issues'. The latter were then assessed as to whether they had a negative or positive influence on the capacity to manage. By

adding the positives and negatives, a total score (ie. the index) showed whether the agreement enhanced the right to manage or a reduced capacity.

Unsurprisingly, given the assumptions behind the index and its methodology, some of the Institute's conclusions from the early data included (IPA 2002):

- 'EBAs are ostensibly about improvement of employee incomes... There is, however, little evidence in the EBAs we studied of enhanced operational responsiveness to market demands'.
- 'The bulk of the clauses relating to managerial issues *reduced* the capacity of managers to manage.'
- 'Non-union EBAs appear to result in a higher capacity to manage than do union EBAs.'

The index was used (apparently with some success) to lobby the federal government about the negative impact that enterprise agreements were having on the capacity to manage. The Minister for Workplace Relations, Mr Abbott, actually launched the *Capacity to Manage Index*, using the occasion to exhort Australian managers to take on unions. He also observed:

> '...enterprise bargaining agreements often establish consultative committees which management does not control with authority over safety procedures, production and delivery schedules, training, overtime, and staff selection. EBAs frequently deal with the use of casual and contract employment, manning levels, changes to work and production routines, and dispute settlement. Under these circumstances, managers don't necessarily make decisions themselves but have to lobby other people to make the decisions which properly belong to management.' (Abbott, 2002)

The IPA's conclusions, however, fail to grasp the reality of enterprise bargaining or the impact EBAs have on decision-making at the workplace. To suggest, as the methodology of the Index does, that <u>any</u> restriction on management is a matter of concern is ridiculous, while there is no analysis in the IPA's 'research' of whether the restrictions on management have increased over time or whether the restrictions on management in enterprise agreements are greater compared to previous awards.

Unfortunately, however, there is little empirical research that provides any more direct or systematic answer to the questions. There are, however, several points that can be made. First, for around 20 per cent of Australian employees who rely solely on awards for pay determination, the answer is simple: since they are not covered by collective agreements or individual contracts, any deletions from awards will become issues determined by management. Employees in industries like hospitality, cafes and restaurants, retail and community services are especially heavily represented here. Second, employees in industries with high incidence of individual contracts (such as wholesale, property & business services, cultural & recreational services, mining and manufacturing) are unlikely to see issues deleted from awards being negotiated; again managerial prerogative

will dominate. Third, and finally, even in industries or industry segments where collective bargaining and strong unions are prevalent, few issues previously included in awards have found their way into enterprise agreements. Waring and Barry (2001) show this in the black coal mining industry, while Ostenfeld and Lewer (2003, pp. 56-60) mount a persuasive case that a similar outcome can be observed in the federal public sector.

Even if more research had been undertaken on these issues, however, they have been overtaken by more recent and more important events. The High Court's decision in the *Electrolux Case*[2] in September 2004 has profound implications for the scope of enterprise agreements. In that decision, the court held that certified collective agreements cannot contain substantive terms that do not 'pertain to the relationship between employers and employees' and that 'protected industrial action' can only be taken by unions in support of claims that were matters 'pertaining to the relationship between employers and employees'. The matter specifically decided involved a clause about 'bargaining agents fees', but the decision indicates that a wide range of matters previously held as acceptable in certified agreements are no longer able to be included. There is some conjecture about the type of matters no longer tolerated in certified agreements, but it almost certainly includes union facilitative clauses, such as union meeting time and deduction of union dues, and potentially many other matters expunged as a result of award simplification.

At the very least, the decision in the *Electrolux Case* creates great uncertainty about the scope of future collective agreements, since the full range of 'matters not pertaining to the employment relationship' will have to be determined by the Australian Industrial Relations Commission and perhaps the courts (see Catanzariti and Shariff, 2005, p191).

Unions were appalled by the *Electrolux Case*, while many employers and the Howard government approved. The government passed legislation (*Workplace Relations Amendment [Agreement Validation] Act 2004*) to clarify the position of agreements that had previously been certified, by deeming invalid only those clauses in breach of the 'pertaining to' principle rather than the whole agreement. But the legislation does not seek in any way to restore a wider interpretation of 'matters pertaining to the relationship between employer and employee' or to more clearly specify what these matters might be.

The effect of the *Electrolux Case*, while still subject to competing interpretations, has been and will be to reduce the scope of (ie. narrow the issues covered in) certified collective agreements. This means that the issues excluded from registered collective agreements must either be resolved by unregistered collective agreements between unions and employers, and thereby not be given legal enforceability, or be left to individual bargaining and/or managerial prerogative.

Unions: Declining Membership and Power

[2] *Electrolux Home Products Pty Ltd v Australian Workers' Union & Ors* [2004] HCA 40

The Howard government undoubtedly intended that the WRA would reduce the power of trade unions in Australia (Lee & Peetz 1998), and this intention has largely been achieved. The provisions of the Act that contributed to this objective were many, but they included:

- 'freedom of association' provisions, which ostensively protect the rights of individuals to join or not join a union but more fundamentally undermine the membership and power that unions derived from informal compulsory unionism arrangements and previously allowed formal award provisions for preference to union members (Lee & Peetz 1998, pp. 8-11; Creighton & Stewart 2005, pp. 523-6).
- greater opportunities for competition between unions for members (Lee & Peetz 1998, pp. 11-13).
- reduced 'rights of entry' by union officials onto the premises of employers in order enforce awards and access union members (Creighton & Stewart 2005, pp. 530-2).
- reduced opportunities for unions to take 'protected' industrial action in furtherance of a dispute and strengthened injunctions and penalties against 'unprotected' industrial action (Lee & Peetz 1998, p. 15-19; Creighton & Stewart 2005, pp. 537-48).
- weakened capacity of the AIRC to intervene in disputes and arbitrate (Lee & Peetz 1998, pp. 15-16).

These provisions contributed to, but did not wholly cause, a significant decline in the membership and collective power of Australian unions (Peetz 1998). The importance of these trends for this paper is that reduced union power makes it harder for unions to undertake action, whether through formal award making and enterprise bargaining or through more informal forms of collective bargaining, to impede managerial prerogative. It is increasingly difficult for unions to make good the gaps created by award simplification, to oppose employer attempts to introduce individual contracting and to restrict managerial prerogative through awards.

Individual 'Bargaining': The Reality is Managerial Prerogative!

There are two forms of individual contracting in Australia: the common law contract of employment and statutory individual contracts. The first, the common law contract, has always been a part of the Australian system in that every employee is deemed by the common law to have consummated such a contract. The opportunity for individual employees to 'freely' bargain with employers over the terms of common law contracts, however, was long circumscribed by various statutes and by the operation of the award system. With respect to the former, legislation like the *Annual Holidays Acts* and the *Long Service Leave Acts* imposed minimum standards below which individual agreements could not legally go. Similarly, individual employees could not 'contract out' of the minima imposed by awards.

This limitation meant that individual 'bargaining' would only determine the terms of a contract of employment in excess of awards or where the employee in question was not covered by an award. How many employees in Australia are not covered by an award? Until the early 1990s, the Australian Bureau of Statistics produced survey data that

answered this question: the number had been increasing over the 1970s and 1980s to reach 20% of the workforce in 1990 (see Bray et al. 2005, p. 292). No comparable data have been gathered since then.[3] At best, it can be assumed that something more than 20% of the workforce is covered by common law contracts of employment. The question then becomes whether those employees genuinely 'bargain' with employers over their terms and conditions of employment. This question will be addressed below.

It was only during the 1990s, with the emergence of the second category of individual contract, that some of the limitations on individual bargaining were withdrawn. 'Statutory individual contracts' were first introduced under state legislation, like the 1992 Act in Victoria, and it was not until the WRA of 1996 that they entered the federal jurisdiction in the form of Australian Workplace Agreements (AWAs). From 1997 onwards, individual employees could negotiate statutory individual contracts with their employers. The real significance of AWAs lies not with the fact that they permit individual contracting (this could already be done under the common law) but that they prevail over awards and, in some circumstances, enterprise agreements, and can thereby reduce conditions contained in those collective forms of regulation. The only qualification was that in order to be certified the AWA had to pass the 'no disadvantage test'; that is, the Employment Advocate had to certify that, 'as a package', the individual agreement did not disadvantage the employee compared to the relevant award.

The Howard government placed great importance on AWAs. It believed that individual bargaining through AWAs would improve economic efficiency at both enterprise and national levels and that the individual bargaining process would produce a closer and more trusting relationship between employees and employers.

Both these claims can and have been contested (see van Barneveld and Waring, 2003; Mitchell and Fetter, 2003). But this is not the task of this paper. Rather, this paper focuses on whether the existence of individual contracts (whether common law contracts or AWAs) is an indication of joint decision making at the workplace level between employers and individual employees. In particular, does genuine 'bargaining' take place over the content of individual contracts or is the decision-making process really one of management unilaterally making an offer to employees and employees accepting or rejecting that offer?

Again, there is only limited empirical research that directly addresses this question. Under the WRA, the content of AWAs is secret and researchers must gain the explicit consent of the parties in order to gain access to this information; few companies have been prepared to offer such access. There are also significant gaps in the quantitative data kept by the Office of the Employment Advocate, such as the absence of data on the number of bargaining agents appointed by employees, which is a key indicator of bargaining.

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[3] The ABS survey data, reported in *Employee Earnings and hours* (Cat. 6305.00), is not comparable with earlier data because the former focused only on pay setting mechanisms and because an employee who was covered by an award, but received wages above the award through individual agreements, would be classified as being paid by individual agreement.

Nonetheless, most of the research conducted on AWAs points to a lack of employee input into the drafting of AWAs. For instance, Waring (2000) found in three case studies in the coal mining industry that AWAs were not bargained, but were unilaterally offered by management and either accepted or rejected by employees. Wider incidence of this approach was also supported by early survey evidence in 1998, which suggested that approximately 92 per cent of employees covered by AWAs did not appoint a bargaining agent to negotiate on their behalf (see Waring 1999). While this could be taken to imply that employees negotiated AWAs themselves, without the assistance of an agent, a more plausible explanation – which is supported by the New Zealand experience (see McAndrew and Ballard 1995) – suggests that AWAs are rarely bargained over. Evidence presented to the Federal Court in duress cases also indicates that AWAs are often offered on a `take-it-or-leave' basis (van Barneveld 2000).

In contrast to these findings, Gollan's survey of 500 Australian organisations with registered AWAs found that the majority of employers (65 per cent) held discussions with their employees before commencing the drafting of their AWAs (Gollan 2000: 34). In 59 per cent of all cases, changes to the proposed AWAs followed these discussions, leading Gollan to argue that the evidence demonstrates a degree of employee consultation and influence when AWAs were drafted. It is hard to accept this claim. Gollan's survey says little about the quality of such consultation or the extent of influence exerted by individual employees. Moreover, the evidence does not support a causal relationship between reported employee consultation and subsequent changes made to AWAs, which might have indicated that actual bargaining had taken place. It is also important to acknowledge that Gollan's findings are the result of a survey of managers who, understandably, may have an interest in overstating the extent of discussions held with employees over AWAs. Finally, an alternative interpretation of the survey results shows that 35 per cent of AWAs involved no input at all from employees and 41 per cent saw no change in the AWAs after the first presentation by management! This does not suggest effective employee representation or genuine bargaining.

Turning to another aspect of the use of individual contracts, an important and consistent finding in the research on AWAs is that there is little variation in wages and working arrangements between AWAs within enterprises. In other words, there is no significant evidence of individual employees successfully negotiating individualised pay deals – rather, AWAs within the same organisation tend to contain standardised terms and conditions.

The use of standardised, or pattern, AWAs is illustrated by a number of case studies conducted for the OEA. According to the Telstra case study, the driver for introducing AWAs was *'...the simplicity of having one agreement (in the form of an AWA) and the speed with which it can be implemented'* (WCP 1999a:10). The case study of a privatised ambulance service in Victoria also confirms the use of pattern agreements, with one employee reporting that "*...all the agreements are the same. You cannot negotiate*" (Smart Strategic Services 1999:31). The same was found in case studies conducted by ACIRRT (1999), and Bickley et al (1999). At D&S Concreting, the only point of

differentiation between individual AWAs was in the percentage 'concreters' allowance' paid to employees (ACIRRT 1999b:13) and, at Pharmacia and Upjohn, only salary was the point of difference (Bickley et al 1999). Furthermore, Leonard (2001)'s analysis of 196 AWAs in the banking sector also revealed an absence of differentiation between agreements.

Waring's (2000) case studies found that AWAs were identical, leading him to conclude that management was using AWAs to extend managerial prerogative whilst reaping the administrative benefits that arise from contractual standardisation. More recent case study evidence collected in the hospitality industry by van Barneveld (2004) confirms that not much is 'individual' about 'individual contracts', with three of four organisations studied revealing exactly the same terms and conditions for similar grades of employees. This consistent finding supports the view that AWAs are rarely bargained but instead are unilaterally determined by management. If individual employees really had choice and the ability to bargain with their employers, the contents of AWAs would be expected to be highly differentiated. That they are not, signals that choice and the power to bargain are largely illusory in AWAs.

The conclusion that emerges from this research is that most employees – most, not all – do not actually bargain over the content of statutory individual contracts such as AWAs. Rather, the operation of AWAs usually indicates a decision-making process that is akin to the exercise of managerial prerogative. Consequently, an increase in the incidence of AWAs amounts to an increase in managerial decision making within the workplace.

Finally, there is another important role played by AWAs and other forms of individual contracting: they are often used by employers to undermine unions and the collective strength of an enterprise's workforce. The incidence of companies, even large corporations with a previous history of bargaining with unions, either rejecting collective negotiations or using the threat of individual contracts to influence union behaviour in the negotiations for collective agreements is widespread: the more spectacular examples were Rio Tinto and Patricks, prominent examples include Telstra, BHP, the Commonwealth bank and the ANZ Bank (Sheldon & Thornthwaite 2001). These many examples demonstrate that not only is individual contracting a sign in itself of managerial unilateralism, but it is used to undermine the capacity of employees to collectively challenge management in the workplace.

Still More Managerial Prerogative: The Latest Reforms Proposals

The Howard government's proposals for further industrial relations reforms during its fourth term of office (see Department of Workplace Relations 2005) represent a continuation, if not a major escalation, of the trend towards managerial prerogative described in this paper. The most significant impact will come from the plan to exempt businesses with up to 100 employees from **unfair dismissal laws**. This will have both a direct and indirect effect. With respect to the former, previous federal law gave employees the right to claim a review of dismissals on the basis of procedural and substantive fairness, with potential remedies of compensation and/or reinstatement. The

proposal withdraws this tribunal oversight, eliminating any effective fetter on management's right in such businesses to dismiss employees at will.[4] With respect to the latter, the previous laws encouraged the managers of businesses to modify their behaviour by developing professional human resource management policies including disciplinary procedures that would minimise the likelihood of dismissed employees making claims. Without the laws, this incentive is lost. Finally, the impact of the proposals is even greater because they will end most of the state jurisdictions in unfair dismissal, some of which have a longer history and deeper operation than their federal counterpart.

A second feature of the proposals is the plan to eliminate the '**no disadvantage test**' that was previously applied before certified collective agreements or AWAs could be registered. This gives management a great deal of opportunity to eliminate conditions previously embodied in awards without paying a corresponding 'offset price'. If, as this paper has argued, genuine 'bargaining' does not take place, then this will deeply expand managerial prerogative. Even if concessions to managerial prerogative are agreed to voluntarily by employees, then the expansion of managerial prerogative may still continue. Again, the impact of this proposal will be even greater where state awards are replaced by federal awards.

Thirdly, there are plans to further reduce the number of '**allowable matters**' in awards from 20 to 16. While the four disallowed matters (jury service, notice of termination, long service leave and superannuation) may be regulated by other legislation and may not immediately appear to represent a major increase in managerial prerogative, the real impact remains to be seen. A more significant change, however, comes from the federal government's intention to impose a national system. Where federal awards take over from previous state awards, which were not limited in their scope (ie. the range of issues included), then a significant expansion of managerial prerogative could well occur.

Finally, the implementation of several changes previously blocked in the Senate will also have an impact on decision-making at a workplace level: the 'protection' of independent contractors will almost certainly 'free up' the capacity of employers to use contractors in an unregulated way; the exemption of 'small business' from both unfair dismissal laws and redundancy payments will give management in these businesses more freedom to retrench staff without restriction; while further attacks on the strength of the union movement, in the building industry and beyond, will reduce the capacity of employees to collective challenge management decisions.

Conclusions

The rise of managerial prerogative under the Howard Government seems to fundamentally rest on the belief that 'management always knows best'. In the context of modern and progressive management theory and practice, this is an anachronism

[4] Review of 'unlawful' dismissals will continue, but this is a far narrower jurisdiction that focuses mostly on allegations that a dismissal was motivated by an act of discrimination.

belonging more to the scientific management era than the contemporary world where accessing the skill, knowledge and creativity of employees is fundamental to business success. Industrial relations laws that encourage managers and their employees to 'manage together' are clearly more appropriate than those that drive them apart.

The capacity of employees to speak up at work and to challenge unilateral, unreasonable and unfair decisions of employers declined dramatically in the first three terms of the Howard government. This trend can only continue under that government's most recent reform proposals.

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