2000[71]). In 2001, the Audit Commission released a national public report called *Brief Encounters – getting the most from temporary nursing staff.*[72] The report represents a comprehensive and detailed investigation into the nature, extent and character of agencies, agency nurses and the impact and benefits accruing to the health system from usage of agency staff.

In Victoria, the Government made an application for exemption from the Act over the Christmas period before consulting anyone – nurses, the public, agencies.

The British model has involved a great deal of expenditure. Each regional NHS Board (network) has, or will, set up an employment expert to recruit and manage NHS Professionals, being bank nurses and locum doctors. A major national branding and marketing campaign occurred during the time the NHS consulted with agencies and the Audit Commission investigation occurred. In late 2001, a list of some 29 agencies with which the NHS would contract to provide services was released, after considerable time (almost two years) of preparation and planning by agencies had occurred. The final tendering occurred after trialling the process through limited London-based agencies – The London Agency Project – before refining and planning implementing the tender process across the nation.

However, problems with staffing remain. The evidence points to a continuing, and in some cases worsening, nursing crisis in London and other major city hospitals.[73]

While the Victorian model started with an application to the ACCC, the equivalent approach was not used in Britain until the beginning of 2002. Recent reports suggest that Britain's version of the ACCC is investigating the tendering and tender award process to determine if there are any breaches of competition legislation.

[71] *Draft The Care Standards Act 2000 (Commencement No.. (England) and Transitional and Savings Provisions) Order 2001 Consultation Document.* (2001) Department of Health (UK)
[72] *Brief Encounters- getting the best from temporary nursing staff.* (2001) Audit Commission (UK)

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6. The Role of, and Benefits Provided by, Nursing Agencies

(a) The Benefits to the Victorian Health System

Nursing agencies have made a positive and direct contribution to ameliorating the nursing shortage in Victoria. They have done this by expanding the pool of nurses through their overseas recruiting efforts. Code Blue recruits around [redacted] nurses from the UK each year. Another five British nurses are recruited permanently to Australia through the Immigration Department sponsorship program. Code Blue also recruits nurses from interstate, noticeably NSW where it has a branch office. It is of course in the agencies' interest to expand the number of nurses who use their services, but this is just another instance where the individual pursuit of self interest can produce collective benefit.

It is also likely that agencies have increased the pool of nurses indirectly or, at the very least, helped to stem the defection of nurses out of the profession. This has happened as a result of the attractive pay offered by agencies. The greater flexibility offered by agency work can be expected to have worked in the same direction.

In both ways, the agencies have helped to address, even if only marginally, the focal issue here: the shortage of nurses.

The key point is that the agencies are not, as HPV would suggest, part of the problem. On the contrary, they are part of the solution.

Agencies provide another major benefit: they improve the allocation of scarce resources by supplying, as and where needed, the nursing requirements of the public and private health systems. Unlike hospital nursing banks access to which are confined to individual hospitals or groups of hospitals, nursing agencies operate to meet the requirements of the health system overall.

[73] Accompanying collection of newspaper summaries and web addresses.

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(b) The Benefits to the Individual

The benefits the agencies provide to individuals can be understood by considering the survey conducted by Roy Morgan Research in February 2002

The benefits of higher pay are obvious. The way in which agency work provides flexibility and personal control for the individual nurse needs more careful

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consideration. S/he is able to control when, where, how, why they will work and how much s/he will be paid. All aspects of choice and control remain with the individual. There are very few opportunities in nursing to achieve self-employment. There are consultants in very specific fields such as aged care, and there are free-lance educators. There are conference organisers and then there are nurses who run nursing agencies. There are almost no other opportunities for nurses to be self-employed.

It is important to note at this point that the HPV proposal has the effect of removing flexibility and personal control from individual nurses and placing control squarely back in the hands of the employer. The HPV proposal to tender for agency nurses' services works hand in hand with the DHS campaign to rebuild enhanced nurse banks in each hospital network and across the state. The Department of Human Services' web-site www.dhs.vic.gov.au/ahs/jobs/nurse.htm provides an insight into the intention of hospitals to minimise casual nursing positions, opting for permanent part-time employment. The incentives described by the networks for bank nurses are those offered to permanent part-time employees. Salary packaging, child-care, education, gym facilities, promises of suitable rosters are all based around moving casual nurses to permanent employment. Note that salary packaging is being provided by external financial advisory companies, which is evidence that the DHS and its public hospitals support markets other than nursing agencies.

The Victorian government says that it is not their intention to remove agencies, and that the continued existence of agencies will mean that the flexible work arrangements they offer their employees will remain intact. This misses the point. The government's scheme, as we have made plain, is designed explicitly to encourage nurses to work longer hours to make up for the reduced hourly pay they will now receive from agencies. This is entirely inconsistent with notions of greater flexibility.

The government also argues that the hospital-run nurse banks will offer the same flexibility as that provided by the agencies. This invites three points. First, where is the proof? We have at this stage nothing but the vaguest suggestions about how the banks will operate. Second, by definition, the same level of flexibility is impossible

[74] Roy Morgan Research *Code Blue Nurses Survey*, p15

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because the banks will still be run largely on a hospital-by-hospital basis.[75] As noted above, agencies can do a far superior job of meeting the specific requirements of individual nurses by matching supply and demand over the entire hospital system. Third, it is subject to the criticism mentioned directly above: the banks will operate as part of a system that is designed to make nurses work longer hours.

Agencies provide additional benefits to the individual that other self-employed nurses do not have. The agency negotiates each shift with the workplace: rate of pay, payment, time, place, and so on. The agency also negotiates suitability for the work type and the agency nurses available. As noted, it also manages and pays GST, superannuation and WorkCover premiums. Furthermore, agencies provide ongoing specialist education for the nurses registered with them.

7. Complaints about the Use of Agency Nurses: An Analysis

Hidden Costs reflects the perceived problems with agency staff in relation to increased workloads and the culture of resentment that has built up against agency nurses. Agency staff are seen as less efficient, lacking in loyalty to the hospital, inadequately skilled and qualified for particular work areas, and cause an *increase* in the workload of the permanent staff.[76] If there are no other nurses available from the nurse bank, and an agency nurse attends to work the shift, it is unlikely the permanent nurses actually believe they would be better off working short-staffed. Especially if more than one nurse is absent.

In its application, HPV states that up to half the nurses in emergency departments are agency nurses[77]. Given these circumstances, the DHS figures on emergency departments are worth scrutiny. In Melbourne metropolitan public hospitals for the period June 2000 to June 2001, there was a 5.1% increase in patients treated in

[75] There has been talk about establishing banks such as the Royal Hospital Bank, comprising the Royal Melbourne Hospital, the Royal Children's Hospital, and the Royal Women's Hospital. Whether other such initiatives will be pursued is unclear. In any case, such banks are still a long way from being system wide.

[76] Considine, G. & Buchanan, J. *The Hidden Costs of Understaffing An analysis of contemporary nurses' working conditions in Victoria* Australian Centre for Industrial Relations Research and Training, 1999 ANF (Vic Branch) Melbourne. P4

[77] Application for Authorisation Nos A90811&A90812 lodged by Health Purchasing Victoria, Attachment B para 4.

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emergency departments[78]. For the period September 2000 to September 2001, there was a 9.2% increase in patients treated in emergency departments[79]. These treatment figures would have been difficult to achieve without agency nurses.

It is the contention of this submission that most problems associated with agency nurses being inappropriately skilled and experienced for the work they are asked to do in hospitals reflects poor nursing administration skills and ability, particularly poor deployment of agency nurses.

Nursing continues in an environment of workforce crisis, with the Government searching for mechanisms to recruit and retain experienced, qualified nurses, the very staff represented in the Code Blue contingent. Rather than asking why agency nurses tolerate the open resentment and hostility they face on each shift from permanent nurses to work agency, and rather than actively determining how those nurses might be wooed back to the public sector, the Government is involved in a blaming process. The outcome of the HPV proposal can only further alienate agency nurses by cutting their pay and removing the personal independence they gain from agency work.

It is ironic that, for all the complaints raised by HPV about agency nurses, in particular their lack of qualifications, a key aspect of HPV's proposal is to encourage these same nurses to become permanent staff. At the very least this raises doubts about the sincerity of HPV's complaints.

8. The So-called 'Profiteering' on the Part of the Nursing Agencies

The Victorian government chooses to label the agencies as profiteering.[80] To justify the profiteering argument, the government would have to show that there has been an increase in the margins/commissions charged by the agencies. We note that much of the 'evidence' about this is largely innuendo: because there has been an escalation in fees there must have been, so it is assumed, an increase in profit taking. There has

[78] *Hospital Services Report June Quarter 2001* Acute Health Division, DHS p 11
[79] *Hospital Services Report September Quarter 2001* Acute Health Division, DHS p 10
[80] See, for example, Richard Barker, 'Agencies attack "nursing bank" plan', *The Age*, 8 January 2002, p. 3

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been a tendency too, in the Victorian government's media campaign, to use the worst-case scenario, with phrases such as 'as much as' and 'up to' when describing increases in charges. Another tactic has been to cite figures that are non-comparable, such as comparing the payments made to first-year generalist nurses with payments made to specialist nurses working night shifts, or comparing award wages with the total charges imposed by agencies, when the latter include the amount to cover superannuation, WorkCover, and other charges.

In Code Blue's case, the increase in charges is simply a reflection of an increase in pay (and non-pecuniary rewards) to the nurses. Code Blue's primary mission, other than ensuring its continued viability as a business, has been to support and elevate the status of specialist nurses. It has done this by

Furthermore, there are the routine on-costs and overheads for Code Blue's own staff and management, including a considerable local, interstate and international advertising budget. In the case of public hospitals, Code Blue also manages debt. Public hospitals pay Code Blue for its nurses 30 days after the month in which they worked. For instance, a nurse working on June 1 and 2 is paid by Code Blue at the end of that week, while the hospital may not pay Code Blue until the end of July. Substantial amounts of money are involved in this 30 day payment lag.

In any case, the key point is that agencies, like Code Blue, have been merely responding to market conditions. That there exists a shortage of nurses is universally acknowledged. In their desire to attract more nurses, the agencies have been competing on pay and conditions. The wage disparity between what the public hospitals pay their permanent staff and what the agencies pay their nurses is merely an indicator of the ferocity of competition between the agencies.

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To suggest that the increase in charges is an indicator of collusion between the agencies is mere folly. Economic logic indicates otherwise: agencies are interested in market share. Like the public hospitals, the agencies are competing for a limited pool of nurses. They have, to repeat, engaged in a bidding war, offering both financial and non-financial inducements. Some of the latter include offers of overseas trips, free parking, free uniforms, movie tickets, and paid study leave.[81] Agencies are commercial operations and they are following the rules of the market. They have been innovative in the way in which they compete.

9. The Adverse Consequences of the HPV Scheme on Competition

As noted earlier, agencies act as both suppliers to the public health system as well as competitors to it. The hospitals that make up the public health system want more nurses working directly for them; the agencies are competing against them to attract nurses.

HPV's argument that the tender system will *introduce* competition between the agencies is absurd. Competition is already intense. What is likely to happen if the HPV scheme is introduced is that there will be a reduction in competition. There are two reasons for this.

First, the proposed scheme will reduce the extent to which agencies act as, and are perceived by nurses to be, effective substitutes to the public hospitals. A direct outcome of HPV's proposal is that agencies will find it harder to differentiate themselves from the public health system because they will no longer be able to offer above-award pay. Accordingly the extent that nurses perceive that there are fewer substitutes within the employment market for nurses, the attractions of that market will diminish. Simultaneously, nurses will begin to take a broader interpretation of the market that best satisfies their employment needs. Non-nursing jobs, which may not previously have been considered substitutes for nursing jobs, are likely to be seen increasingly by nurses not only as alternatives to their existing employment but as more attractive ones. Further, those that had left the profession but had chosen to

[81] See Meaghan Shaw, 'Nurses winners in fierce bidding war', *The Age*, 12 January 2002, p. 9

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return, enticed by the arrival of an effective and attractive alternative to the public health system, will go back to the jobs that they had already recognised as substitute sources of income.

Second, there will inevitably be a reduction – almost certainly a very sharp one – in the number of agencies. Two things are relevant here. One is that the proposal involves the introduction of tender contracts that will prevail for a minimum of three years. In the absence of additional information about how the tender system will work, it is difficult to see how those agencies who are not successful tenderers will be able to survive for three years of more. Almost certainly, many of the unsuccessful tenderers will cease operations, or be forced to scale down to meet the exclusive needs of the private sector.

Another relevant consideration is that there is nothing in HPV's proposal that would prevent it, should it so desire, to make an exclusive award of tender contracts to a mere handful of agencies. Indeed, there is the frightening prospect that HPV will award all tenders to a single agency. Either way, there will certainly be a reduction in the number of agencies. Some rationalisation may not be a bad thing but the real danger is that the proposed system will radically alter the structure of the market. It will encourage merger and acquisition activity and is likely to create—sooner rather than later—a small group of oligopolistic agencies for whom the name of the game is collusion.

10. Why Agencies are Part of the Solution, Not the Problem

One might surmise from the Victorian government's rhetoric in defence of HPV's application that the effect of the higher fees charged by agencies is not limited to increased cost pressures on the Victorian public health system. It seems to be part of the government's 'logic' that the increase in fees actually causes a reduction in the absolute number of nurses (thereby worsening the supply crisis) and a reduction in the number of hours worked by those nurses remaining in the profession. The logic of such arguments is flawed and ignores historical reality.

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To argue that the agencies are somehow the cause of, as well as a perpetuating factor in, the nurse supply shortage would appear to require the assumption of a backward sloping supply curve. Underpinning the assumption of a backward sloping supply curve in the nursing labour market is the idea that, with wages increasing for agency nurses, a point has been reached beyond which nurses have decided that they are willing to reduce the number of hours/shifts for which they will volunteer. One would want to know what data is available to indicate that such a curve presently exists in the nursing labour market. Further, do we know if the curve applies to all agency nurses, a majority or a minority? The answer is that we do not. There is in fact a paucity of hard data.[82]

We do have data, however, on Code Blue nurses. One might expect, if there is a backward sloping supply curve, that nurses have actively substituted employment as permanent staff and replaced it by agency work, to take advantage of the higher pay and, so the government argues, to work less shifts overall.

It is certainly true, if we consider agency nurses as a whole and not just those working for Code Blue, that for some nurses, an increase in the number of shifts they work for agencies will be accompanied by a reduction in the number of shifts they work as permanent staff. There is no reason, however, why this should necessarily mean a reduction in the total number of shifts worked by an individual nurse: all that changes

[82] The NRRC, in its *Final Report*, testifies to this paucity when it states, at p. 82, "Over recent years the use of agency nurses appears to have increased significantly, although this was unable to be quantified due to lack of historical workforce data."
[83] Roy Morgan Research *Code Blue Nurses Survey*, 2002, p14
[84] Ibid.

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is the balance of hours worked for one employer vis-à-vis another. Indeed it is possible that some nurses will actually work more shifts in total, effectively moving from the hours commonly associated with part-time work to the hours commonly associated with full-time work. We know that in 1997, the year for which we have the most recent data, employed registered nurses worked in Victoria on average 31.8 hours per week, so there is certainly scope for the 'average' nurse to work more shifts per week.[85]

Nor do we have any evidence of the number of agency nurses who have decided that the increase in pay is a reason for working less hours. Again, in the absence of hard data, the arguments here are about the plausibility of different assumptions, and it could well be assumed, contrary to what HPV would seem to assert, that for many agency nurses the prospect of higher pay is a strong inducement to work more shifts, not less. The prospect of handsome rewards is one that individuals do not, as a rule, easily shun.

There is an additional – indeed obvious – weakness in this argument: it is fundamentally ahistorical. The decline in nursing numbers began many years ago, long before the recent escalation in fees. If we use the number of nursing course commencements or nursing course enrolments as one indicator of the nursing shortage, there has been a steady decline since 1991 in the former, and since 1993 with the latter.[86] All of this has occurred long before the recent escalation in agency charges.

It is stating the obvious to say that the reasons for the nursing shortage and for its persistence are complex and multi-faceted and that they have nothing to do with nursing agencies.

[85] Australian Institute of Health and Welfare, *Nursing Labour Force 1999*, Canberra, table 45.
[86] Ibid, tables 65 and 66.

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11. Why HPV's Proposal to Restrict Agency Nurses to Award Rates Will Worsen the Nursing Crisis

Arguments about backward sloping supply curves should not distract from what is central to HPV's request for authorisation. The HPV application is fundamentally a request to introduce a system that denies agency nurses the pay rates to which they have become accustomed. It is a proposal to restrict agency nurses to award rates. There are a number of significant reasons for denouncing such a regressive act, one that is explicit in its aim to force nurses to work more shifts by reducing the amount that they are paid per shift. These arguments are presented in subsequent sections. This section concentrates on the economic logic that would appear to underpin the HPV proposal, namely that the way to bring about some sort of equilibrium between the demand for, and supply of, nurses is to reduce the level of wages for agency nurses. The fundamental issue here is whether a reduction in pay will lead to either of the following: an increase in the number of shifts worked and/or an increase in the absolute number of people working as nurses.

What HPV's proposal fails to recognise is that nurses consistently argue that current pay rates as permanent staff are not in line with their education and expertise. Their training and their contribution to society, they feel, is insufficiently appreciated and undervalued. An anecdotal example of this common sentiment is provided by the following letter which appeared in the Melbourne 'Age" newspaper on 12 March 2002:

> *"**Nurses not just cheap labour***
>
> *Recently I retired from nursing after 38 years, having held intensive-care and dialysis certificates, and I am convinced that the treatment of nurses by successive governments has been outrageous and reprehensible.*
>
> *After nearly four decades of treatment as a second-class citizen, I have a bad back and only $30,000 in the superannuation that was not available to me until 1988. Many family and social functions were missed due to variable work requirements.*
>
> *I suggest you all get over the predominantly male fantasy that nurses' dedication is the prime motivation in the profession. Nurses are a wonderful group of people, but like everybody else they work to be paid.*

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Hospital wages are a pittance, particularly when the steadily increasing use of technology at the bedside is taken into account.

Many younger nurses are studying for another degree, after having achieved a qualification that has led to them being let down by a system that does not recognise their true worth.

Rosalind Johnson"

By contrast, agency nurses consistently describe the pay they currently receive from the agencies as a reflection of what they consider to be their true worth. Parish comments that

> *The basic facts of economics mean that when a particular resource is scarce, its price inevitably goes up. Perhaps at last, we are seeing the true value of nurses reflected in the price trusts are having to pay.*[87]

In a similar vein, Research International's appendix to the NRRC notes that

> *Remuneration is typically one of the first issues raised when the negatives of nursing are probed. It is the 'yardstick' by which they measure their value. Nurses are quite vocal in expressing a perceived mismatch between their contribution to health care and their compensation. Perceived poor remuneration provides yet another indication to nurses that they are not valued by management.*[88]

At issue is not avarice but pride: a feeling that pay rates should be at the very least an appropriate reward for the years of training and roughly aligned with the value of the contribution that a nurse makes to the welfare of society. It follows that to insist that agency nurses now be restricted to award rates can, over time, only lessen the inducements for nurses to stay in, or return to, the profession. It is also, to repeat, directly contrary to the nurses' view that the importance of what they do, and the cost and duration of the training that they now engage in, needs to be recognised. In short,

[87] C. Parish, 'Market Forces', *Nursing Standard*, 2000, 15 (8), pp14-15.
[88] NRRC, Final Report, p. 172.

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the wage aspects of the proposal will only heighten discord and disaffection. It will be an insult that will encourage a movement out of nursing.

In the following section, we present survey data that shows that, while some of Code Blue's nurses do indeed feel obliged to work longer shifts to compensate for their reduced pay (and thereby meet ongoing financial commitments), others have stated that they will quit nursing. Others still have indicated that they will stay in nursing but not work additional shifts. The net result indicates that HPV's proposal will only worsen the nursing shortage and render more disgruntled those who feel that they have no alternative but to stay, for now, as nurses.

The point was well made in another letter to the Melbourne 'Age' dated 12 March 2002:

> ***"Better pay will end shortage***
>
> *Measures that reduce the number of agency nurses available to work on hospital wards will only serve to exert further pressure on permanent staff.*
>
> *Do we really need another reason for already overstretched, understaffed units to lose the precious commodity that is their nurses?*
>
> *One possible, positive answer to the chronic nurse shortage is simple. Pay permanent staff markedly better rates. Professional rates for professional people.*
>
> ***Fiona Winn, Highett"***

There is a further flaw in HPV's reasoning. There is another aspect of the HPV proposal – in addition to the reduction in pay – that is likely to encourage further attrition in the nursing labour market. This is the attack on the flexibility of workers. A system that reduces the flexibility of employees is contrary to notions of individual freedom and individual self-determination. It is also contrary to official pronouncements (both at the federal and state level) about the importance of making it easier, rather than more difficult, for both women and men to balance work and family commitments. Both of these points are explored in more detail in section 13 below. It is also in direct contradiction to what the NRRC has said. The NRRC, in its final report, drew attention to the way a lack of flexibility was a powerful incentive for nurses to seek employment in other professions:

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> *The inability of nurses to balance work with family life was raised in many contexts as a reason nurses leave the industry. The lack of flexible, affordable child care facilities (particularly for unplanned or emergency care), the lack of flexible working arrangements, and problems surrounding school holidays, were cited as important factors.*[89]

One can only assume that HPV is willing to discount such views, for it is quite explicit in its argument that agency nurses should be forced to work more shifts. However, it is difficult to envisage a situation in which one is forced to increase shifts – to work longer hours – as anything other than a loss of flexibility. A loss of flexibility will only encourage nurses to turn to other professions that offer them that which they will be denied under HPV's proposed scheme.

The introduction of the HPV scheme is likely to provide a further significant disincentive to otherwise well qualified school leavers entering the profession, thereby exacerbating the present decline in nursing enrolments. An anecdotal but compelling example of this is to be found in a letter to '*The Age*', **"I wanted to be a nurse"** Thursday January 10, 2002

> *"I am holding my breath to find out what university course I have been accepted in.*
>
> *Nursing had been my first choice, ever since I was five years old, because I remember the way I was cared for while spending the best part of two years in the Royal Children's Hospital. But now I'm having a serious rethink.*
>
> *I keep asking myself, why go to university for maybe four years and earn a degree to then get the princely sum of $18 per hour?*
>
> *Surely this must be one of the lowest paid university-qualified "professions"? I wonder how long it would take me to pay back my HECS fees after a four-year course?*

[89] NRRC, *Final Report*, para 3.7, p. 46.

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I have also spoken to nurses at hospitals, as well as at my grandmother's nursing home, who have all said the same thing: They love their work, but when you can't do your job properly, putting patients at risk because you have too many to care for, the stress of it all makes you think of a career change.

Then, talking about pay rates, I have heard the same piece of advice over and over again: don't work full-time in the public system, work for an agency – the pay's much better.

So thank you Mr Thwaites, you have helped me make a decision. Much as I'd love to be a nurse and do something that is valued by the community, here's hoping I get into that computer course I applied for."

A. Hearn, Woodend

12. Why HPV's Scheme Will Not Work: A Survey of Code Blue Workers

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13. Why the HPV's Scheme will not result in a public benefit

(a) Industrial Relations and Equal Opportunity

The HPV proposal is contrary to public benefit in three interrelated ways.

(i) The public benefit in encouraging individual agreement-making in preference to collective instruments (in the form of industrial awards and multi-employer enterprise agreements)

The first way in which the proposal of HPV is contrary to the public benefit relates to the objective of HPV to limit the remuneration of agency nurses to the relevant industrial award or enterprise bargaining agreement rates. The relevant enterprise agreement will be a multi-employer agreement and it will be collective in the sense of covering a particular grouping of nurses. The tender documents make it clear that the effect of the tendering process will be to constrain the remuneration of agency nurses to the industrial award or enterprise agreement rates.[90] As a consequence, agency nurses will lose the benefit of the higher rates of remuneration that they have to date been able to negotiate on an individual basis. In short, the HPV proposal will disable agency nurses (and agencies and health services), from negotiating, on an individual basis, for remuneration at a higher rate than that provided for in the relevant award or enterprise agreement.

This proposal of HPV goes against the grain of well established labour market policy in Australia. For the past 10 to 15 years, Federal and State governments in Australia have pursued a program of deregulation of the Australian labour market. Both Labor

[90] HPV, *Request for Tender: Supply of Temporary Nursing Services to Melbourne and Geelong Public Health Services*, clause 3.3 (Draft 30 November 2001); HPV, *Provision of Temporary Nursing Services to Melbourne and Geelong Public Health Services*, clause 6.2 (Draft 30 November 2001).

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and Liberal-Coalition governments have pursued deregulation, with the major differences between them being the pace and scope of change, particularly in terms of a role for trade unions.[91] A central plank in this reform agenda has been a policy of encouraging parties to alter the mechanisms through which wages and other conditions of employment are set. In particular, parties have been encouraged to move away from award-making and towards enterprise agreements, and more recently, to shift from enterprise agreements to individual agreements between an employer and an employee. The key idea is for employers and employees to negotiate, on an individual basis, for more beneficial terms and conditions for the employee, relative to the provisions in an award and enterprise agreement. This is a shift from collectivity (awards and enterprise agreements) to individualisation (individual agreements). Individual agreements are prioritised over both enterprise agreements and awards.[92]

Hawke and Wooden have suggested that a range of factors from the early to mid 1980s created the impetus for this redirection in industrial relations policy in Australia. These included the increasing globalisation of the economy, the floating of the Australian dollar, the deregulation of financial markets and the reduction in industry protection. For Hawke and Wooden, businesses were increasingly looking for flexibility in their arrangements with their employees, as a way of responding to greater uncertainty and rapidly changing economic environments.[93] The primary objective of the reform program in labour markets is to bring about greater flexibility and individualisation in industrial relations in Australia. This is seen as necessary to help improve Australia's economic performance and international competitiveness.[94]

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[91] For a good overview of these developments, see G Watson, 'Background to the Australian Workplace Relations Act 1996', chapter 1 in JHC Colvin and G Watson (eds), *The Workplace Relations Handbook: A Guide to the Workplace Relations Act 1996 (Cth)*, 1998.

[92] It is important to recognize that since the inception of the Australian industrial relations system of award-making in 1904, most awards have prescribed minimum pay and conditions only. Bargaining for 'over award' rates, that is, terms and conditions that are more beneficial than those contained in the award, has been an important feature in most industries since 1904: B Creighton and A Stewart, *Labour Law: An Introduction*, 3rd edn, 2000, para 6.63.

[93] A Hawke and M Wooden, *The Changing Face of Australian Industrial Relations*, The Transformation of Australian Industrial Relations Project Executive Monograph Series, No 1, National Institute of Labour Studies, Flinders University, 1997.

[94] Business Council of Australia, *Enterprise-Based Bargaining Units: A Better Way of Working*, Report to the Business Council of Australia by the Industrial Relations Study Commission, 1989; Peter Dawkins, 'Economic Effects of Deregulation and Decentralisation of Wages Determination' (1998) 40 *Journal of Industrial Relations* 643-662.

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The traditional role of award-making in Australia is seen as problematic in a number of respects. Award-making by industrial tribunals encourages conflict rather than agreement and co-operation between employers and employees. The award making process is largely adversarial, with resolution by an industrial tribunal rather than by the parties themselves. This not only fosters conflict, but it takes the focus away from the workplace and places it with an industrial tribunal as arbitrator. In addition, award-making has been relatively unsuccessful in avoiding industrial disputation in the form of industrial action.[95] In addition, the practice of award-making ensured that awards generally had industry-wide, or national application. In this way awards were not able to be responsive to the needs of particular workplaces or enterprises.

Reform regarding the legislative framework of industrial relations in Australia dates back to the late 1980s when extensive labour market reform was implemented under the federal Labor government. Beginning in the late 1980s, the Labor government sought to redirect the award system through a rationalisation of award structure and content, and through the attainment of other flexibility objectives. These reforms were supported by the ACTU, Labor's partner in the Accord.

By the early 1990s, further pressure for reform built, and in particular for the adoption of a system of negotiating wages and other conditions at the workplace level, known as enterprise bargaining. In the early 1990s the Labor Government brought about the enactment of a new bargaining regime in the *Industrial Relations* Act 1988 (Cth).[96] In 1993, the government brought about a second round of amendments to the *Industrial Relations* Act 1988 (Cth) to further extend the growth and reach of enterprise bargaining in Australia.[97] These reforms took effect to shift the main focus of the industrial relations system away from award-making, and towards enterprise agreements. As a corollary to encouraging bargaining, this 1993 legislation altered the character of awards to be a safety net underpinning enterprise bargaining agreements. The idea was that awards were to provide a set of minimum protections for workers unable to reach an enterprise agreement providing more beneficial provisions to them.

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[95] Dawkins, above n 12.
[96] Industrial Relations Act 1988 (Cth) s 115-117 (from the commencement of the 1988 Act), replaced by s 134A-134N (inserted by Industrial Relations Amendment Act 1992 (Cth)). Sections 134A-134N were in turn replaced with the new provisions in the Workplace Relations Act 1996 (Cth).
[97] Industrial Relations Reform Act 1993 (Cth).

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With the election of the Liberal-National Coalition Government in March 1996, the process of labour market deregulation that had been occurring in Australia since the late 1980s, was hastened. A shift away from the traditional collectivist system of labour regulation (through awards and enterprise agreements) to a more individualistically oriented system (of individual agreements) was cemented. With the enactment of the *Workplace Relations* Act 1996 (Cth) ('WR Act'), the Coalition Government reshaped labour market regulation in Australia by further reducing the scope and reach of award-making and encouraging the making of bargaining agreements. In particular, the legislation introduced a new stream of individual agreements (called Australian Workplace Agreements). Importantly, these individual agreements are given primacy over both awards and usually, enterprise bargaining agreements.[98]

The stated objectives in the WR Act are instructive on the policy underlying the current system.[99] Section 3 of the Act states that the principal object of the Act "is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:

(a) encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market; and

(aa) protecting the competitive position of young people in the labour market, promoting youth employment, youth skills and community standards and assisting in reducing youth unemployment; and

(b) ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level; and

[98] WR Act s 170VQ(1) and (4), s 170VQ(6).

[99] See also the Workplace Relations and Other Legislation Amendment Bill 1996, *Explanatory Memorandum* which describes the reforms in the Bill as being directed towards a "more direct, co-operative relationship between employers and employees and greater labour market flexibility. Such reforms are critical for achieving high productivity, employment growth and better pay and living standards for workers" (p 1). In his Second Reading Speech on the Bill, Minister Reith stated that the Bill "will deliver the framework for structural reform of the labour market demanded by the imperatives of world competition and warranted by the legitimate expectation of Australians to enjoy improved living standards through higher employment and better paid jobs over time": House of Representatives, *Hansard*, 23 May 1996, p 1296.

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(c) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for by this Act; and

(d) providing the means:

(i) for wages and conditions of employment to be determined as far as possible by the agreement of employers and employees at the workplace or enterprise level, upon a foundation of minimum standards; and

(ii) to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment; and

(e) providing a framework of rights and responsibilities for employers and employees, and their organisations, which supports fair and effective agreement-making and ensures that they abide by awards and agreements applying to them; and ...".

The encouragement of enterprise agreement-making over awards, and individual agreement-making over enterprise agreements, has in addition been the legislative policy pursued by several State governments in Australia.[100] Many governments in other industrialised nations are also pursuing a policy of individualisation.[101]

Even without these changes in legislative framework brought about with the WR Act, industry practice has been moving towards a preference for individual bargaining over collective bargaining for some time. Several major companies in Australian (mainly in the resources sector) were, by the mid 1990s, seeking to implement individual contracts with their workers.[102] In addition, management practices in Australia have been increasingly shaped by the growing influence of 'high trust' human resource

[100] Federal industrial relations policy has tended to dominate the direction of reform in Australia, not only because of the high proportion of employees regulated through the federal system, but also because the State jurisdictions have tended to defer to the federal lead. See Creighton and Stewart, above n 10, para 2.39. On State legislation reflecting a policy direction of individualisation, see the Workplace Agreements Act 1993 (WA) and the Workplace Relations Act 1997 (Qld).

[101] On policies of individualization in Britain, Japan and New Zealand, see Parts 2, 3 and 4 in S Deery and R Mitchell, *Employment Relations: Individualization and Union Exclusion*, 1999.

[102] See, eg, M Moir, 'Individual and Collective Bargaining in Australian Labour Law: The CRA Weipa Case' (1996) 18 *Sydney Law Review* 350.

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