

Future directions for workplace bargaining and aged care under a post 2005 Howard government

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ON THE 1ST OF JULY 2005, the Howard Government took control of both the House of Representatives and the Senate and substantial reform of the nation's industrial relations framework is likely to proceed. In order to understand the implications of the proposed industrial relations (IR) reform agenda on aged care, it is necessary to briefly revisit the past. Historically, the ability of the Commonwealth Parliament to regulate industrial relations was construed in the context of Section 51 (xxxv) of the *Australian Constitution Act 1900* (Cwlth) that enabled the Commonwealth to make laws concerning "conciliation and arbitration and the prevention and settlement of industrial disputes extending beyond the limits of any one state".

Since 1904, the Commonwealth, with the states following shortly thereafter, established a regime of industrial tribunals responsible for third party independent conciliation and arbitration, overseeing a system of legally binding industrial awards covering wages and employment conditions. This system, in the words of one of its chief architects, Justice Higgins, "... would substitute for the rude and barbarous processes of strike and lock-out"¹ (page 2). By 1991, Australian wages policy gradually shifted from centralised arbitration, elevating workplace agreements to the status of government policy on both sides of politics.² This process accelerated labour market deregulation, shifting industrial relations and human resource issues to the enterprise level.³

The shift towards workplace agreements post 1990's was underpinned by a bold reinterpretation

of Section 51 (xx) of the Constitution Act that enabled the Commonwealth to regulate the affairs of "trading or financial corporations formed within the limits of the Commonwealth", thus, by definition, including regulating employee relations of corporations. The use by the Commonwealth of these powers has extended the jurisdiction of the Australian Industrial Relations Commission (AIRC) to include the making and approving of certified agreements made by constitutional corporations or in settlement of an industrial dispute. Other types of employers such as sole traders, churches and charities, partnerships and unincorporated associations remained covered by state industrial jurisdictions. (On these powers of the Commonwealth, see *State of Victoria and others v The Commonwealth* [1996].)⁴

The new industrial relations agenda

The election of a Federal Coalition Government in 1996 ushered in the *Workplace Relations Act 1996* (Cwlth). The new Act brought in a number of fundamental changes such as introducing a union and non-union agreement-making stream (certified agreements), reducing the number of matters that can be included in awards to 20 (so called "allowable matters"), reducing the role of the AIRC to that of maintaining a system of award safety nets, expanding the penalties on unions taking strike action, reducing union influence and establishing a system of individual contracts known as Australian Workplace Agreements (AWAs) administered by a new body, the Office of the Employment Advocate (OEA). These reforms were ultimately the result of negotiations between the Coalition Government and Democrats in the Senate.

The effects of these changes on wages and employment conditions have been subject to considerable academic debate, but the prevailing view suggests employment conditions have

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become more flexible, and there has been a decline in trade union “voice” and representation.⁵ These changes have been overshadowed by a gradual increase in weekly rates of full-time employees at the expense of the lower paid.⁶

On 26 May 2005, the Prime Minister and the Minister for Employment and Workplace Relations announced further reforms to Australia's industrial relations system.⁷ These included: further reducing the role of the AIRC and transferring the setting of minimum wages from the AIRC to a new Australian Fair Pay Commission; limiting minimum conditions of employment covered in legislation; transferring Certified and Australian Workplace Agreements approvals to the OEA; further reducing the allowable matters that can be included in awards; exempting independent contractors from award coverage; extending unfair dismissal laws by exempting businesses employing up to 100 employees (and introducing a compulsory 6-month probationary period for employees employed in companies employing over 100 employees) under a proposed new national IR system.

The structure and regulation of Australia's aged care industry

The aged care industry in Australia remains one of the most regulated industries and is almost wholly dependent upon a state-based funding regime. In the 1950s, care for the aged was generally funded as hospice care under various hospital funding instruments focusing on the care of returned servicemen and women. In the 1960s, the Commonwealth began providing state-licensed nursing homes with “top-up” payments to cover labour costs. In 1963, the Commonwealth began paying nursing home benefits direct to residents in approved nursing homes. Commonwealth funding was generally provided through distinct instruments: the *National Health Act 1953* and the *Aged or Disabled Persons Homes Act 1954*. State-based funding was traditionally provided under various hospital and nursing home statutory licensing instruments reflecting the institutional (hospita-

tal structure) care-model approach to care of the aged of the time.

In 1996, the Howard government fundamentally changed the previous tied funding arrangements for nursing and non-nursing/support functions to a new unified accreditation and funding system under the *Aged Care Act 1997* and Aged Care Principles made under the Act, linking quality/outcomes and accreditation. Commonwealth funding provided (and still does) the bulk of tied income to the industry, and the funding regime is a limiting factor in the bargaining power of the industry.⁸ Though there has been a growth in private providers not dependent upon Commonwealth funding (such as those providing special services and not accredited for Commonwealth funding), their numbers remain small. The larger *for profit* providers supply the most beds, but it is the larger *not-for-profit* providers, such as the church and charity organisations, that employ the most staff.⁸

Industrial relations reform in the aged care industry

Since the early 1950s, the regulation of residential aged care has followed an established pattern, distinguishing between high care “nursing homes” and low care “hostels”, and award coverage has reflected this dichotomy. This dual industry pattern was industrially regulated by state-based awards with few federal awards. The aged care workforce is historically well organised by trade unions such as the Australian Nursing Federation (ANF) and its state branches covering nursing classifications, and large conglomerate unions such as the Liquor, Hospitality and Miscellaneous Workers Union (LHMWU), the Health Services Union of Australia (HSUA) and the Australian Workers Union (AWU), covering a range of professional, paraprofessional and ancillary occupations. Nursing unions are reluctant bargainers, preferring to adopt industrial strategies aimed at “award bargaining” that pursue improvements in award conditions through arbitration. The industry is predominantly female, older and part-time. Labour shortages are acute,

especially among registered nurses and enrolled nurses, and attracting nurses to aged care remains difficult.⁹

Recent industrial activity in aged care has generally involved three themes:

- litigation over the introduction of nursing staffing ratios (see for example¹⁰⁻¹³)
- improving aged care wage levels through work value increases, and
- demarcation and litigation over coverage and workforce restructuring through the introduction of multiskilled “personal care assistants” to replace more expensive nursing staff. This is particularly an issue where ageing in place gradually transforms the profile of an aged care facility from a low care hostel to a high care nursing home.¹⁴

The use of wage increases to remedy the shortage in nursing staff remains an issue, with one tribunal observing that “wage increases are not the only means of addressing the nursing shortage”¹⁵ (page 7). Unlike manufacturing, where inputs and outputs are “harder” (more measurable), productivity measurement in aged care is much “softer” and more difficult to quantify,¹⁶ thereby limiting the extent of the bargaining agenda.

Possible effects of post 1 July 2005 IR reforms

The implementation of the proposed industrial relations reforms is likely to impact on the aged care industry at different levels. The introduction of a statutory body to set minimum wages appears only to affect federal award employees, as state industrial tribunals set minimum rates under state awards. However, as the aged care labour market is tight, there is little likelihood that going rates will drop, especially when it is difficult to recruit nurses.

The restructuring of the statutory unfair dismissal regime by exempting employers employing 100 or fewer workers is estimated to exclude around 4 million Australian workers from accessing unfair dismissal, including most aged care facilities. Historically, aged care facilities have neglected the introduction of modern human

resource management practices in favour of a focus on care and quality, and there is the potential that common law litigation may require these employers to improve their performance management and human resource management systems and practices.

The proposal to exempt independent contractors from award coverage has serious implications for agency staff. Agency nursing has grown substantially over the past decade and is a significant source of labour for aged care facilities. The proposed reforms would see such employees losing award coverage and falling back on common law contracts. Again, the tight nursing market may provide protection against an actual reduction in wages and conditions, though this is by no means a certainty.

It is suggested that the proposed IR reforms will significantly alter award conditions and agreement making processes. However, overall, the pattern of industrial regulation in the aged care industry remains dominated by state awards and tribunals. About 80% of employees are covered by state-registered certified agreements, with nearly all agreements being made with relevant state-based unions, and with most of the few non-union agreements being approved by the AIRC.

Historically, both employer associations and trade unions have pattern-bargained in order to reduce the likelihood of industrial disputation in the industry. This has constrained employer bargaining strategies, limited the bargaining agenda, and weakened the ability of unions to further workplace representational structures. The expansion of the corporations’ power and removal of agreement certification from the AIRC into the hands of the OEA will make an easier path for incorporated (private) aged care providers to make certified agreements with employees and usher in further labour market reform. This may facilitate greater use of non-nursing staff such as personal care workers.

While church and charity aged care providers are regulated and incorporated under various statutes covering charity and benevolent institutions, these exclude incorporation as business or trading corporations. The potential loss of public

benevolent institutions' taxation status in the church and charity sector remains a powerful disincentive for incorporation. Without the states yielding their IR powers (especially "common rule" industrial powers) to the Commonwealth, a significant and substantial part of the aged care industry, that is the church and charity providers and unincorporated organisations, will remain under state industrial jurisdiction.

There are about 100 federally registered agreements in the health and aged care industry, and of the 691 521 AWAs approved since 1997 only 4.7% are in health and community services (OEA, State Manager, personal communication, May 2005), suggesting that aged care industrial regulation remains largely a state industrial tribunal monopoly. State tribunals frequently intrude on employment rights under federal industrial instruments such as AWAs by using their general discretion to mediate and conciliate in dispute settlement (see, for example, the decision of the Full Court of the New South Wales Industrial Relations Court in *CFMEU v Newcrest Mining Limited* [2005]).¹⁷

Overall, the proposed Howard government industrial relations reforms adopt a broad-brush approach and it will be some time before the full impact on the aged care industry is known. The durability of state industrial jurisdictions remains problematic for the post-July Howard Government, and it is expected that the proposed IR reforms will have a difficult passage, with some states and the Australian Council of Trade Unions foreshadowing claims in the High Court. We live in interesting times.

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