J. P. SESTO & CO
BUSINESS & TAXATION LAWYERS

21 December 2001

Your Ref: A90811 - Gavin Jones
Our Ref: P003016
Enquiries: John Sesto

The General Manager
Adjudication Branch
Australian Competition & Consumer Commission
PO Box 1199
DIXON ACT 2602

Dear Sir/Madam

APPLICATIONS FOR AUTHORISATION NO. A90811 AND A90812
LODGED BY HEALTH PURCHASING VICTORIA
OUR CLIENT: PRN NURSES PTY LTD

We act for PRN Nurses Pty Ltd and have been handed a copy of your letter to our client dated 10 December 2001.

Objection to Interim Authorisation

We have been instructed by our client to object to the granting of the authorizations, interim or otherwise, sought by Health Purchasing Victoria ("HPV") with respect to the above-mentioned applications.

In short, our client is concerned with the inaccurate and potentially misleading nature of the material submitted by HPV, which to a considerable extent distorts the commercial realities presently confronting nurses and nursing agencies in Victoria.

Summary of Objection against Interim Authorisation

1. HPV's application lacks the urgency that would warrant the grant of interim authorization. The shortage of nurses has been prevalent for considerable number of years and the issues to be considered when addressing the problem extend far beyond the overly simplistic and incorrect conclusion that nursing agencies are to blame.

2. Given the impact authorization will have on the industry *vis-à-vis* price forcing and the affect on competition, a proper consideration of all the relevant factors should be undertaken by the Commission before granting any authorization.

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3. The tender process by its very nature gives rise to serious breaches of the Act both per se, and in substance and even though the grant of an interim authorization has no bearing on the Commission's final determination of HPV's substantial submissions, to grant any interim authorisation in these circumstances will send the wrong message to the industry that final authorisation will be a formality.

4. We submit HPV has failed to identify and establish a sufficient public benefit to tip the scales in favour of interim authorization.

5. It is our position that the anti competitive detriment of the proposed conduct far outweighs the potential public benefit (if any). In reality, the public benefit is greater served by the retention of nurses in the profession by preserving the financial incentives presently enjoyed by them.

6. The Commission must be aware that Public Hospitals control 75% of the publicly available hospital beds and of the 25% offered by private hospitals one organization controls at least **[90%]** of that market.

7. The concentration of market power with these 2 organisations, with the stated objective of HPV to drive nurses remuneration down will drive even more nurses out of the industry and exacerbate the shortage.

8. The anti-competitive consequences of authorizing the proposed conduct is extremely serious to the extent that the marker power will be effectively concentrated in a minority of agencies forcing a vast number to go out of business. This is because not all agencies will be able to supply nurses at the rates demanded by HPV in the tender. The impact on competition in this market would be disastrous.

9. There is a greater public benefit in maintaining the status quo and the available information undeniably supports its retention.

10. The reduction in nurse availability is, inter alia, a result of the recently introduced patient-nurse ratios and any submission which purports to hold agencies responsible for nursing shortages, reflects a myopic approach to proper management of hospital resources.

11. After comparing like with like and after taking into consideration all relevant factors, the cost of engaging an agency nurse is roughly equivalent to the costs of directly employing a nurse.

12. It is incorrect and simplistic in the extreme to attribute bed closures in public hospitals to nursing agencies.

Purpose of Letter
The purpose of this letter is to highlight for the benefit of the Commission the material necessary to facilitate an objective analysis of the public benefit and anti-competitive detriment associated with the proposed conduct on the part of HPV.

To some degree, this letter will foreshadow our client's submissions in relation to the substantial application, which we note are due by **Friday, 1 February 2002.**

Grounds for Objection to Interim Authorisation
We submit that the arguments made by HPV in support of its applications are devoid of the particulars necessary to enable the proper evaluation of the impact of the proposed conduct.

Costs Comparisons
Considerable reliance is placed on the costs comparisons between the nurses provided by agencies and employee nurses. These comparisons are based solely on the relevant Award rate and are presented in a manner, which would indicate that the actual cost to the Hospital for an employee nurse is equivalent to that rate.

No provision is made for annual leave and other entitlements, nor the substantial costs involved in recruitment, training, insurances, Workcover and other incidentals.

We are instructed that once these matters are accounted for, the actual cost to the hospital for an employee nurse is roughly equivalent to the cost of an agency nurses.

However, HPV have not made mention of this nor provided the relevant accounting in order to substantiate its claims. Our client will provide the appropriate calculations in its detailed submission.

Moreover, some comparisons contrast the highest skilled nurses in terms of qualifications and experience (who represent only 10% of all agency nurses booked each week) with general nurses.

A more representative analysis should reflect the conditions under which nurses are directly employed and the terms offered to them by agencies. In essence, to compare *"apples with apples"*.

On this point alone, we consider that it is impossible for HPV to maintain any contention as to the level of employment equality and workplace harmony currently experienced by nurses.

Any submission in this respect must take into account the fact that nurses with different levels of experience and years of service work side by side at different rates of pay and have done so for many years. Universally reducing rates of pay or at the very least, making sweeping generalizations with respect to nurse remuneration ignores this reality.

Fixing rates of remuneration below what the market is willing to pay would only discourage nurses from staying in a profession, which is internally recognized, as thankless.

These aspects of our client's submission will be more thoroughly expanded in the objections to the substantial submissions herein.

Nursing staff availability
The reasoning behind this element of the public benefit analysis put forward by HPV isolates nursing agencies as being single-handedly responsible for the shortages in the availability of nurses in public hospitals due to the increase in the costs to health services for the provision of agency nurses.

This reasoning is fundamentally flawed and can be countered with reference to a mass of published material. It will be seen that the dramatic reduction in nurse availability is a direct consequence of the nurse-patient ratios recently introduced into Victorian Public Hospitals.

The crux of the problem facing public hospitals is that there are simply not enough nurses to meet demand. This issue has received extensive attention to which the Applicant has had no regard.

For example, an Editorial by Jill Lliffe, Federal Secretary of the Australian Nurses Federation in the October 2000 issue of the Australian Nursing Journal provides a powerful insight into the issue. Ms Lliffe highlights the alarming rate at which nurses are leaving the profession in favor of alternate careers. In 1993, there were 281,455 registered and enrolled nurses in Australia. In 1999, the figure was 265,983 of which only 195,900 were working. The problem is systemic and cannot be read-down in the over-simplified manner proposed by HPV.

Moreover, it is incorrect to implicate nursing agencies who on all accounts provide an incentive for nurses to remain in the profession by making provision for their financial and lifestyle considerations.

In fact, from the wealth of information publicly available a more compelling argument is that nursing agencies are responsible for keeping more nurses in the health industry by paying them the remuneration nurses require and as such nursing agencies provide a public benefit.

Tender process
At the heart of the tendering process is the desire to force agencies to provide nurses at rates, which are currently below what the market is willing to pay. Therefore, bringing about a reduction in the overall nurse staffing cost to health services

This goal is purportedly achievable by simply forcing nursing agencies to assume the risk of placing nurses at award rates, and forcing nurses who wish to work with those hospitals, to accept less pay. Essentially this will only allow 2-3 agencies who, if they are able to find the nurses willing to work at those rates, have the ability to supply the

nurses at the agreed rate. The remainder, and indeed majority of the nursing agencies will be then required to supply nurses at rates below their operating costs.

The unavoidable impact of such blatant price fixing and the total elimination of competition within the nursing labour-hire market will be to further concentrate market power in the successful tenderers and bring about the demise of those agencies who cannot absorb the new price structures.

The fatal consequences of the proposed conduct to the nurses and the operators of the nursing agencies have been completely overlooked.

Accordingly, we would submit that the grave anti-competitive consequences of the proposed conduct would warrant refusing authorization or at least, deferring any authorization until the content of the substantial submissions have been reviewed and the application has been properly particularized.

To date, HPV have failed to elaborate or provide any reason as to the urgency behind the application for interim authorization save for an emotive appeal to ease the shortage of nurses available to public hospitals. Further to what has been stated above, the proposed conduct by no means represents a panacea to the problem of nursing shortages or government funding.

We also note that the media has given recent exposure to the issue of nurse practitioners and other ways in which public hospitals can go about policies of cost-containment by making better use of the resources at hand.

In the event that interim authorization is granted, the effect on an already volatile nursing environment coupled with the impact on the finely balanced cost structures utilized by nursing agencies would result in significant unrest and uncertainty at a time when the profession can least afford it.

Summary
In the main, the significant anti-competitive effect of the proposed conduct cannot be refuted. The public benefit analysis set out by HPV does not to take into account crucial factors for the present shortage of nurses and makes unsubstantiated comparisons in support of its push for uniform and significantly lower rates of pay.

We submit that such a lopsided approach should not be sanctioned in light of the dramatic impact it would have on nursing agencies and the nurses who rely on them.

The submissions contained in this letter are intended to assist in the proper determination of the application for interim authorization and as such, an in depth discussion of our client's objections to the substantial submissions was not considered appropriate at this juncture.

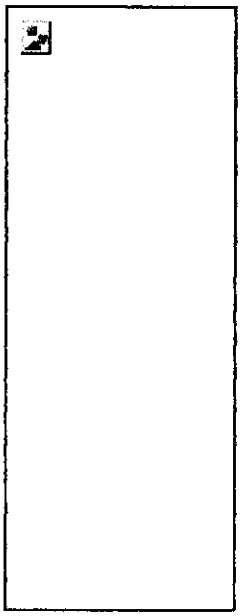
Our client strongly objects to the authorization of the proposed conduct and we respectfully request that the Commission be mindful of our client's views as it determines the issue of interim authorization.

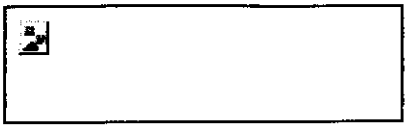
Please feel free to contact this office so that we may address any queries you may have with respect to any aspect of this letter.

Copies of Relevant Articles
Copies of the articles referred to above have been attached for the benefit of your reference.

Kind regards

John Sesto
J.P. SESTO & CO





Victoria's ratios cited in US nurse shortage solution

Victorian nurses' landmark nurse-patient ratios was reported recently in a Los Angeles Times article analysing America's critical nurse shortage.

The article, by American journalist and author Suzanne Gordon fresh from her visit to Victoria last July, cited our nurse-patient ratios as the only example of a constructive initiative addressing the workload problems underlying the global nurse shortage.

The call for legislated nurse-patient ratios is getting louder across the US as management practices try to compensate for the nurse shortage, but instead exacerbate the reasons for the systemic nurse shortage.

The Victorian State Government has recruited a remarkable 2300 nurses in less than 12 months. This should be proof that the underlying solution to the nursing shortage is obvious - improve nurses' working conditions and their ability to provide good patient care.

What does the Howard Government's re-election mean?

Nursing shortage

There is a global shortage of nurses willing to practise. It is conservatively estimated that the Australia needs an additional 10,000 nurses.

The Victorian State Government has implemented nurse-patient ratios and recruited more than 2650 additional nurses in less than 12 months. Ratios enable nurses to control their patient workload so they can provide their duty of care. This has been a major reason why many non-practising nurses have returned to the health system and why national ratios would increase the pool of nurses willing to practise.

It is time to act on the many government and university reviews which have found nurses are not willing to practise because of:

- Untenably high workloads which reduce nurses' ability to care for patients properly;
- The absence of nurse-patient ratios (except for the Victorian public hospital system);
- Lack of respect from employers and senior management, demonstrated by not acting on the problems identified by bedside nurses; and
- Cost and access to education.

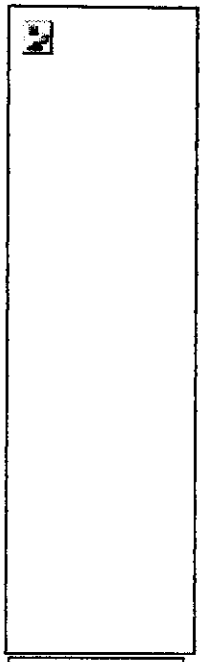
The Howard Government does not have a nursing policy. It refused to match Labor's nursing policy which promised to spend $43 million on more postgraduate HECS-funded university places, close the 20 per cent wage gap between private and public aged care nurses, make nursing a national priority by appointing a Chief Nursing Officer and spend $9 million on a nursing careers campaign.

The ANF will work to convince the Federal Government that Australia's nursing shortage is a national problem, a national responsibility and requires a national response.

The nurse shortage will not be solved if the states and territories are forced to compete against each other for the finite number of nurses willing to nurse under the current conditions.

The Howard Government must develop a national strategy to expand the number of general and speciality nurses willing to work by convincing experienced nurses to return to work, keeping new graduates in the system and increasing nursing undergraduate and postgraduate university places and more enrolments.

State and territory governments cannot fix the problem alone because they do not have total control over health spending, aged care legislation, funding and subsidies or university places.



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September 2001

NSW nurses ask: What's a nurse worth?

NSW Nurses' Association (NSWNA, ANF NSW) members have established campaign committees at public hospitals and other public health facilities around the state as part of the NSWNA's *What's a nurse worth?* campaign.

The campaign was launched on 7 August by the NSWNA to help solve the NSW nurse shortage through improved wages and conditions.

It came after the State Government rejected a NSWNA request for the Industrial Relations minister to initiate an urgent case before the NSW Industrial Relations Commission (IRC) aimed at improving nurse wages and conditions to help relieve the shortages.

'The shortage has a reached critical point and has already led to bed closures and service cuts in parts of the State,' NSWNA General Secretary Sandra Moait said.

'The situation will only get worse unless something is done to again make nursing an attractive career option.'

In conjunction with the campaign the NSWNA intends running its own Special Case in the NSW IRC to get better wages and conditions for nurses.

Each local campaign committee is responsible for conducting a strong awareness campaign in its community developing and implementing a local industrial action plan that includes such things as work bans, rallies and stop work meetings; and, monitoring nurse staffing levels in its facility and identifying vacancy levels.

If inadequate staffing and nursing vacancies put patient safety at risk then beds will be closed.

The NSWNA's three-day annual conference in Sydney in July was told the State was short by 1500 full-time nurses.

The conference heard while public sector nursing was in crisis, nurses in the private aged care sector were also struggling with a critical shortage as well as inequities in

pay.

Speaking at the conference, Federal opposition health spokesperson Jenny Macklin said a Federal Labor Government would make the current nursing crisis a national issue because nursing was a national responsibility.

'We do have a national shortage of nurses and what I would say is that nursing shortages need to become a national priority and not left to each individual state.' Ms Macklin said.

'Experienced nursing staff are always telling me today's patients are sicker and require more intensive nursing care than in the past.

'Because of the increased workloads, nurses have to work faster and therefore their connection to their patients, which has always been at the heart of their work, is often lost.'

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Australian Nursing Federation
Professional News

October 2000

Program targets workplace injury

The NSW Government has announced a new initiative to reduce the impact of workplace injury for the state's health care workers.

The health care industry currently suffers the highest annual number of workplace injuries in NSW - with the rate of injury increasing by approximately 20% over the last 10 years.

The workplace injury management program is aimed at improving recovery rates, ensuring the correct treatment is given, and enabling people to return to work earlier.

New South Wales Nurses Association (NSWNA, ANF NSW) General Secretary Sandra Moait hoped the program would reduce the incidence and severity of workplace injury and keep more nurses in nursing.

"More certainly needs to be done to reduce the injury rate and to help those who are injured resume their lives as quickly as possible," Ms Moait said.

"Many of the injuries suffered by nurses are sprain and strain injuries, especially back and limb injuries from lifting. Many also only cause short-term disability. This should provide plenty of scope for the early intervention and alternative duties program."

There were almost 4800 employment related injuries in the health sector in 1997-98, including four fatalities, 767 permanent disabilities, and 515 injuries resulting in disabilities lasting for more than six months.

Over half of the reported injuries occurred in public and private hospitals, and nearly a third were in nursing homes.

"While the incidence of injury among nurses and other healthcare workers is not as high as in many other industries, the total number of individuals injured is much higher," Ms Moait said.

"Not only does workplace injury cost the health system millions of dollars, but it also forces many nurses out of

nursing. As we face a serious shortage of nurses at present we can't afford to keep losing them because of workplace injury.

"This new program, with a heavy emphasis on getting back to work, should complement other programs being implemented to address the nursing shortage."

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AUSTRALIAN NURSING JOURNAL

OCTOBER 2000

Editorial
October 2000
By Jill Iliffe, ANF Federal Secretary

Undergraduate recruitment is a major concern

Recent media has suggested that the poaching of nurses from Australia by other countries to meet their nursing shortages will have a devastating effect on the Australian nursing workforce.

The reality, however, is that Australia also recruits overseas to meet our nursing shortages and has done so for many years. While there is an international shortage of nurses, on balance, as many nurses from overseas come to Australia to work as leave Australia to work overseas.

The recently released report from the Australian Institute of Health and Welfare (AIHW) *Nursing labour force 1999*, shows that during 1998-99, 1080 nurses migrated permanently to Australia and 661 nurses in Australia migrated permanently to other countries. During the same period, 450 overseas nurses arrived in Australia for temporary employment and 851 nurses in Australia sought temporary employment overseas.

It is clearly not overseas recruitment of our nurses that is the major concern in addressing nursing shortages in Australia. We are not recruiting enough people into undergraduate nursing courses to meet future nursing workforce needs. We need to improve working conditions for nurses in Australia so that nurses already qualified are retained in the health system.

The AIHW report shows that in 1993 there were 281,455 registered and enrolled nurses in Australia. In 1999 the figure was

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265,983. Of these only 195,900 were working, down from 202,400 in 1993. In 1989 there was one nurse employed for every 1171.1 persons in the population. By 1999 that figure had decreased to one nurse for every 1032.7 persons. Over the same period, the percentage of enrolled nurses in the nursing workforce declined from a figure of 24.0% in 1989 to 14.5% in 1999.

Figures from the Commonwealth *Department of Training and Youth Affairs* are also quite alarming. In 1995, 27,959 people completed undergraduate nursing courses. In 1999, that figure was 22,987.

What these figures suggest is that the total number of nurses is declining, the total number of nurses employed is declining, the number of nurses per head of population is declining, and the number of people entering undergraduate nursing courses is declining. Add to this gloomy picture an increase in patient separations and it is not a healthy outlook for Australia's nursing workforce.

For over 12 months now, the ANF has been calling on the current Federal Government to address the shortage of nurses in Australia as an urgent national priority. The Health Minister, Dr Michael Wooldridge, maintains that nursing is not a Federal Government responsibility and has ignored those calls. But nursing is a national issue. Nurses make up the bulk of the health workforce, and if we are to maintain the high standards of health care the Australian people want, we need nurses to provide that care.

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Nursing

'Super nurse' debate divides medical ranks

Julie-Anne Davies reports on nurse practitioners.

THE emergence of the nurse practitioner in our health system continues to divide the medical community.

Victoria is one step closer to seeing these super-specialist nurses working in the system, after new laws were passed in State Parliament last month.

Now the Nurses Board of Victoria (NBV), which will register nurses for the nurse practitioner role and accredit courses leading to such endorsement, is calling for applications.

Essentially a nurse practitioner is a nurse with extra qualifications that enable him or her to carry out duties traditionally performed by doctors. These duties include prescribing certain medications, ordering diagnostic tests and issuing referrals without the approval of a doctor, and admitting and discharging patients from hospital.

The board's chief executive, Leanne Raven, says the move was timely and made good sense in terms of responsible health planning.

"Nurses are a huge untapped resource and we should be looking at ways at tapping into it in this climate of cost containment," Ms Raven says.

"In the 1970s only doctors were able to take blood pressure, which we now see as ridiculous. There are duties traditionally performed by doctors that nurses with the appropriate qualifications and experience can perform."

She says a good example of the type of work nurse practitioners will be able to do is discharge patients from hospital.

Ms Raven says: "At the moment we often have patients sitting around hospital all day waiting for the doctor to come and see them to explain their management plan once they are home. A nurse practitioner would be able to do this and then discharge the patient, saving the system maybe a whole bed day."

She says that although there has been stiff opposition from doctors, there are a "quite a few" enlightened medicos who can see the value of the changes.

Victorian Health Minister John Thwaites says: "The Bracks Government supports an expanded role for senior nurses who have reached the advanced stages of their profession and are seeking a wider career path.

"This is great news for patients who receive specialist attention and case management, and it gives experienced nurses a rewarding career path to broaden their skills and responsibilities.

"In wound management, for example, a nurse practitioner is responsible for the advanced assessment of a patient's needs, care planning, ordering diagnostic tests, admission and discharge from an outpatients' clinic. People with a chronic wound, such as a skin ulcer, receive greater attention, and the trials have shown a reduction in avoidable hospital admissions.

"It gives experienced nurses the incentive to stay in clinical nursing and give patients specialist attention."

Despite doctor opposition, nurse practitioners are becoming increasingly commonplace. In the United States and Britain they are a fact of life.

In Britain, the Blair Government, as part of its overhaul of the national health system, has considered offering nurses fast-track training to become doctors. Here, the main role for the Victorian Nurses Board will be to safeguard the public; the processes leading up to endorsement will reflect this, Ms Raven says.

"Nurses who apply to become nurse practitioners in Victoria will need to meet strict criteria set by the board and undertake top-level training at an education facility approved by the board."

Moving closer to agreement on the nurse practitioner debate: Clockwise from top, John Thwaites, Dr Kerryn Phelps and Dr Mukesh Haikerwal.
Pictures: HEATH MISSEN, JACKY GHOSSEIN, MARIO BORG

Five key criteria will have to be met by nurses. They include:

- Holding current registration in divisions one, three or four.
- Educational background including qualifications and clinical experience relating to the nurse practitioner role for which the applicant seeks endorsement.
- Involvement in research activities in relation to their practice and/or continuous improvement projects.
- Leadership in the practice area in which they are applying for endorsement.
- Professional indemnity.

One of the most problematic impediments to becoming a nurse practitioner is the requirement that applicants hold a Masters degree or its equivalent in their area of expertise. No such course yet exists in Victoria, although work is being done by the universities at the moment to develop one.

The board expects to see a proposal in the next six months, although this may present a problem for nurses who have been working as nurse practitioners in the 25 or so pilot projects that have been going for the past three years.

Victorian AMA president Dr Mukesh Haikerwal describes this as a "paradox" — one of several reservations the AMA holds in relation to the creation of nurse practitioners. But the AMA's trenchant opposition to nurse practitioners does appear to have eased.

When NSW introduced these specially qualified nurses into their public system two years ago, the new laws were met with howls of protest from all the main doctors' organisations. They warned that patients' lives would be put at risk by granting nurses the right to take on some of the clinical duties formally the sole preserve of doctors.

AMA national president Dr Kerryn Phelps likened the relationship between doctors and nurses to that of players on a football team.

"Spectators at a football game wouldn't want to see a winger in the forward pack. In medical terms, I'm sure patients want to see doctors in their vital roles as prescribing, diagnosing and performing medical procedures and nurses performing their primary roles in nursing care," Dr Phelps told *The Age*.

The AMA still argues passionately that medicine and nursing are two entirely different disciplines that cannot be interchanged, but Dr Mukesh says there is now some common ground between the two groups.

"Our position has altered from one of 'no, never', to 'lets make sure it's safe'," Dr Mukesh explains.

"The most important provisos we have are safety, nurse practitioners working in teams that include doctors, and knowing when to bail out."

He says the new laws contained in the Nurses Amendment Act 2000 had some merit and there were benefits to patient care by extending the powers of some nurses.

"We have problems with nurses working independently — they must be part of a team so there are others there for them to consult," he says.

Granting nurses prescribing rights is the most contentious issue for doctors. It is the holy grail for both sides in this debate: most doctors argue that it takes years of training and experience to be able to prescribe drugs.

Dr Mukesh says the decision to allow nurses to prescribe is "fraught with danger", and although the new laws do specify rigorous training and supervision guidelines that must be followed, he believes no law can adequately account for the complex conditions patients often present.

The other area the AMA is particularly concerned about is the granting of admission rights to nurses. He says many doctors are losing admission rights to hospitals, yet we are about to allow nurses — less qualified than doctors — to begin admitting patients.