



**Australian Competition & Consumer Commission**

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Our Ref: A90811 & A90812  
Your Ref: 02206594  
Contact Officer: Gavin Jones  
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C2001/1711 WF  
C2001/1712 PR

10 January 2002

Mr Simon Uthmeyer  
Partner  
Phillips Fox  
**By fax (03) 9274 5111**

Dear Mr Uthmeyer

**Application for Authorisation Nos A90811 & A90812  
lodged by Health Purchasing Victoria**

I refer to your letter of 9 January 2001 to Gavin Jones in which you ask whether the Australian Competition and Consumer Commission (the Commission) "sees any difficulties" with HPV proceeding to publish notice of the tender and issue the tender documents in relation to the above listed application for authorisation prior to receiving interim or final authorisation provided that HPV:

- does not award the tender; and
- does not enter into any agreements with:
  - any of the successful tenderers for the exclusive provision of agency nursing staff; or
  - any of the health services appointing HPV as their agent to contract on their behalf with the successful tenderers.

I note that the conduct described in your letter is at least partly the subject of a request for interim authorisation.

It was noted in our meeting of 20 December 2001, with Ms Rachel Olliffe of your office and Mr Steven Sant of HPV that, as interim authorisation may be granted without the Commission considering the merits of the application, it is generally only granted in exceptional circumstances, where the applicant is able to demonstrate an urgent need for protection from the *Trade Practices Act* 1974 (the Act), and only where the Commission is satisfied that the market would be able to return to its pre-interim authorisation state if the Commission later denied full authorisation.



At the meeting, the Commission sought further information from your client justifying the need for interim authorisation. I note that, as yet, no additional information to this effect has been provided. However, the Commission has received a significant number of submissions from interested parties arguing that interim authorisation should not be granted. Following the deadline for submissions in relation to the substantive application, copies of all public submissions will be forwarded to you for your information and comment.

In respect of your request for interim authorisation, I ask that you provide the further information discussed in our meeting of 20 December 2001 (as detailed below), by Wednesday 16 January 2002, in order that the Commission may expedite its consideration of your request.

Specifically, the Commission seeks confirmation of which of the two forms of agreement between HPV and the health services contemplated in HPV's submission has been chosen. Mr Sant indicated that he expected the board of HPV to make this decision on 21 December 2001. Ms Olliffe indicated that she would be providing a letter following this decision to the Commission confirming this decision and providing a formal response to the issues raised in my letter of 12 December 2001, which sought clarification of material provided in the application in order to assist the Commission's assessment of the application for interim authorisation. As discussed in the meeting, it was also intended that you would provide further information justifying the need for interim authorisation, focusing on the need for interim protection while the Commission considers the merits of the application for authorisation proper.

With respect to the specific issue you raise, whether the Commission sees any difficulties with your proposal, the Commission is not in a position at this initial stage of the process of considering the application, to provide you comfort with respect to engaging in a conditional tender process as described in your letter of 9 January, particularly as it is still awaiting information from you in relation to your application for interim authorisation.

In addition to the information requested in support of your application for interim authorisation, for the Commission to be in a position to consider whether there are difficulties with your proposal, it would require further details of the nature of the proposed agreements, particularly:

- which of the two forms of agreement discussed above HPV is proposing to enter into; and
- assuming option 1 was chosen, the nature of the direction proposed to be issued to the public health services, and the nature of the proposed agreement between HPV and the Sisters of Charity Health Service.

You should be aware that, in any event, proceeding with the tender process prior to full authorisation being granted (with or without interim authorisation) does not increase the likelihood of the Commission granting full authorisation. As discussed in our meeting of 20 December 2001, the Commission is in the initial stages of its assessment of the application and irrespective of any decision taken on interim authorisation will not be in a position to form a view on the substantive application until its public consultation process and evaluation is complete and it is in a position to issue a draft determination.

A copy of this letter will be placed on the Commission's public register.

Should you have any queries, or wish to discuss this matter further, please contact me on (02) 6243 1226.

Yours sincerely

A handwritten signature in black ink, appearing to read 'T. Grimwade', with a stylized flourish at the end.

Tim Grimwade  
General Manager  
Adjudication Branch