Submission to the

Australian Competition and Consumer Commission

Regarding

Request for Exclusionary Provisions by Health Purchasing Victoria

Authorization No's
A90811
A90812

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Executive Summary:

Having reviewed HPV's application submitted, Colbrow Nurses Agency rejects the assertion that the public benefit outweighs the significant decreasing of competition. The current rate paid to agency nurses is the market rate based in the increased demand and the limited supply of nurses in the industry. It is widely recognised that there is both a national and international shortage of qualified nurse, and that there are underlying issues, which need to be addressed to remedy the situation.

It has been recognised by employer organisations that the position of the ANF in determining nurse patient ratios will not see a massive influx of nurses back into the system. Only addressing the issues below will see nurses move back into employment in the public health system:

- Flexible working hours
- Lack of career opportunities
- Workplace stress, safety issues and violence
- Remuneration on a par with international standards
- Increased workloads
- Increased patient acuity

The risk associated with granting HPV's request, regarding the tender on the health system, are as follows:

- More nurses leaving the system or cutting back the number of hours they work.
- Smaller agencies being locked out of the public hospital system for at least 3 years with the potential of ceasing business.
- The inability for nurse to determine their market value by having their waged capped.

The solution of tendering out for agency services is an attempt to find a quick fix by HPV and DHS and will ultimately have a significant negative impact on the public health system in Victoria.

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1. Background:

Nursing Agencies have been providing casual Registered Nurses to fill staffing shortfalls within Public and Private Hospitals for many decades. Provision of Agency Nurses has become much more competitive in recent years, with the introduction if non-nurses running agencies. These business people have been very aggressive in marketing their services, as well as further expanding their businesses by acquiring smaller agencies to expand their market share. As a result of this the hourly rate to employ an Agency Nurses has increased considerably in the last 8- 10 years.

The current rates being paid by the agencies would be recognised as the market rate, and has come about due to the shortages of full time Nurses in the workforce and the number which continue to leave the profession for a variety of reasons. The current agency rates of pay have been deemed too expensive by the Department of Human Services (DHS) and its purchasing Health Purchasing Victoria (HPV), which has resulted in the current situation of HPV requesting exclusionary provisions, in order to tender out agency services at the award rated.

1.1. Nursing Shortages in Victoria

It has been widely recognised that there are sufficient Registered Nurses within Australia to meet the demand for appropriate patient care[1]. The decline in both generalist and specialist nurses in Victoria commenced with the move to college based training in 1990 and the sweeping budget cuts to the health system undertaken by the Kennett government. The shift to college based training saw, in the first instance the loss of student nurses from the workforce, and then smaller numbers of inadequately prepared graduate nurses entering the workforce on completion of their training. Many of these graduate nurses only did their graduate year and then left the workforce, as they were ill prepared for the stresses of shift work, a considerable patient load and insufficient support in the form of clinical teachers.

During the same period of time the significant cuts to health budgets saw additional pressures place on the existing nursing workforce, which compounded the situation with the graduate nurses. These additional pressures included:

- Insufficient Clinical Nurse Educators to supervise new graduate nurses.
- Very limited funding made available to nurses for further education.

[1] Nurse Recruitment and Retention Committee – Final Report, Department of Human Service, Nurse Policy Unit, May 2001.

- Nurses feeling undervalued by the then liberal government, which was reflected in the EBA's.
- Poor nurse patient ratios and increasing acuity of patients.
- Increasing managerial workload on Nurse Unit Managers and Associate Unit Managers with little training and preparation, while in many cases still being expected to maintain a clinical load.

The number or Nurses enrolling in basic nursing training in Universities has decreased from 9,325 in 1991 to 6,821 in 1996 while the number of nurses who completed their training decreased even further from 6,397 in 1993 to 4,661 in 1998 [2]. This represents a 32% drop out rate from University based training, while the drop out rate from 1990 to 1993 was closer to 50%. This would indicate that the model for University based training was incorrect and that modifications need to be made.

1.2. Recruitment and Retention

There has been a considerable focus on recruitment and retention of nurses by the current government, with working party set up by DHS and the Nursing Policy unit to examine these issues. The final report was released in May 2001[3] with the government response following in June the same year[4]. This report identified a variety of issues at the forefront in recruiting and retaining nurses in Victoria such as increased workload with no "downtime", inflexible working hours and shift rotation, including compulsory periods of night duty, poor remuneration, work place stress and lack of career opportunity. Since this report and recommendations became available, little has been done by DHS Nursing Policy Unit to implement strategies for these issues.

Another significant issue which nurses have to deal with on a day to day basis, is violence in the workplace. It has been recognized that the health industry is the most violent in Australia[5], with nurses facing psychological, physical and verbal abuse inflicted by patients and their families. There are also issues of "Horizontal violence" from peers in the form of bullying, verbal harassment and ostracism.

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[2] Nursing Labor Force 1999, National Health Labor Force Series, AIHW Publications.
[3] Nurse Recruitment and Retention Committee – Final Report, Department of Human Service, Nurse Policy Unit, May 2001.
[4] Nurse Recruitment and Retention Committee – Government Response, Department of Human Services, Nurse Policy Unit, June 2001.
[5] Perrone S, "Violence in the Workplace", Australian Institute of Criminology Research and Public Policy Series, No 22, Australian Institute of Criminology, Canberra, 1999.

Although in the past 12 months nearly 5000 nurses have been attracted back into the workforce, a similar number have chosen to leave. As a result of the issues outlined above and in point 1.1. Victorian nurses continue to leave the permanent workforce and undertake agency work or further study to and leave the profession entirely.

Trends within the nursing workforce are not encouraging for the long term, as the average age of nurses is in the late 30's, there are fewer nurses per 100,000 of population and the number of nurses working part-time or casual continues to increase. Unfortunately successive governments have failed to come to grips with the issues which have been in evidence for some time, and aggressively address the issues.

Australia is not alone in the attempting to address the shortage of nurses, the US Department of Labour has reported "imbalances between the supply and demand for qualified workers should spur efforts to attract and retain qualified RN's. For example, employers may restructure workloads, improve compensation and working conditions and subsidise training or continuing education".[6] In the US approximately 25% of nurse's work part-time in Australia in 1996 the number was 42%. Median earnings for registered nurses in the US in 2000 were US$44,840 (AUD$90,000), with the top 10 percent of nurses earning US$64,360 (AUD$ 125,000) considerably less than Australia where the average is approximately AUD$42,000. Rates of pay similar to the US are found in the UK, which would indicate that Australia has a way to go to keep pace with international standards. As a result there are constant recruitment drives from both the US and UK to attract Australian nurses overseas.

2. Use of Agency Nurses

Agency nurses have traditionally been used to fill shortfalls as a result of unplanned leave by permanent staff. However since the shortage of nurses became critical, agencies have been asked to fill EFT shortfalls and unplanned leave. Agency nurses can at times be given as little as 1 hours notice when required to fill a sick leave shortfall, and at other times be pre-booked a number of days in advance if there is an EFT shortfall or replacement for planned leave. In the case of pre-booking staff it is not uncommon for the agency nurses to be canceled at the last minute due to changed in workload, or to even be canceled once they have arrived at the hospital. This leaves the Agency nurse with the uncertainty of if they will get a shift and where they will get a shift.

[6] Occupational Outlook Handbook – Registered Nurses extracted from – http://stats.bls.gov.oco.ocos083.htm

Nursing agencies must balance the cost of providing nurses at a competitive rate, so that their nurses are appropriately remunerated, while ensuring that they continue to obtain bookings. There has been some suggestion that the number of agency nurses working in a ward or unit at a given time, adds to the stress on the permanent staff. There has been no documented evidence to support this claim. Most agency nurses are welcomed by permanent staff, who without them would have difficulties in providing the required standard of care to their patients.

The continued shortfall in EFT in many health services varies throughout Melbourne, some organisations have adopted more flexible working hours, provide funding for nurses to undertake post-graduate courses and have significantly increased the number of clinical educators to support graduate nurses and permanent staff. As a result there may be EFT shortfalls in only Critical Care areas. Other organisations have failed to undertake even these initiatives to attract staff and therefore have EFT shortfalls in the hundreds. The Australian Nursing Federation (ANF) initiatives as part of the 2000 EBA to adopt mandated nurse patient ratios in all areas has in last 9 months only exacerbated the situation in many hospitals.

2.1. Agency and Bank Nursing

There are a number of nurses who work both agency and on specific hospital nurse banks. When working for the hospital bank they are paid the award casual rates of pay and when working for the agency they are paid the agency rate. Another group of nurses which work agency shifts are those who are permanently employed in the public and private systems and feel the need to "top up" their income by undertaking additional agency shifts on their days off. There are a variety of reasons why nurses choose to split their time, between the two types of employment. The Recruitment and Consulting Services Association (RCSA) undertook a survey of a number of Victorian's nursing agencies to determine the following[7]:

- The reasons why nurses worked for an agency.
- What nurses felt about their rate of pay.
- What the likely outcome would be of the tender proceeded and agencies were forced to pay award rated.

[7] Submission by the Recruitment and Consulting Services Association to the ACC regarding application for Authorization No's A90811 and A90812. February 2002.

Colbrow Nurses Agency participated in the above survey, and found the results presented by the RCSA consistent with those from the nurses working for Colbrow. Of most significance is that "68% of indicated that they would reduce the number of shifts worked or leave the nursing profession altogether of they are force to work at award or EBA rates of pay". If this occurs the damage to the industry would be significant. Greater than 80% of those surveyed also felt that the rates paid by the agencies reflect the true value of the work done by agency nurses.

3. Restrictive Trade Practice Issues

Health Purchasing Victoria ("HPV") is proposing to introduce a system whereby:

HPV will negotiate the engagement of all agency nurses for all public hospitals;

HPV will put out to tender a contract for the exclusive supply of agency nurses; and

Public hospitals will not be permitted to engage agency nurses except through HPV.

According to the letter dated 18 January 2002 from Phillips Fox to the ACCC, the government proposes to achieve this result by Ministerial Direction rather than by a contract between the hospital and HPV.

If the proposed arrangements are implemented, all agencies other than the successful tenderer will be unable to compete with the successful tenderer for the provision of agency nurses.

Under the proposed scheme there can be said to be three broad arrangements:

(a) the arrangements between hospitals and HPV whereby agency staff will only be provided through HPV ("the Agency Arrangement");

(b) the arrangements between HPV and the successful tenderer, whereby the successful tenderer is given exclusivity of supply ("the Exclusivity Arrangement"); and

(c) the arrangement between the hospital (for whom HPV acts as agent) and the successful tenderer for the supply of additional nurses in return for payment ("the Engagement").

3.1.Exclusionary provisions under section 45(2)(a)(i)

This section prohibits the making of a contract; arrangement or understanding which contains an exclusionary provision.

Each of the arrangements identified constitutes a contract, arrangement or understanding and the real issue is whether provisions of each contain an exclusionary provision.

The essential elements of an exclusionary provision require that:

(a) the contract is between persons who are competitive with each other;

(b) the provision has the purpose;

(c) of preventing, restricting or limiting;

(d) the:

(i) supply to;

(ii) or acquisition of;

goods or services from particular persons or classes of persons.

Although the definition of services in s4 excludes the performance of work under a contract of service (which has been held to cover contracts of employment), the exclusion only applies to rights and benefits and not any privileges and facilities under such a contract. Consequently, the sections can still cover a contract of service.

The Agency Arrangement

Individual hospitals and HPV are clearly competitive with each other for the purposes of this section. Specific hospitals (and in particular, internal nursing banks) are engaged in direct competition with HPV for the employment of particular nurses.

There can be little doubt that paragraph 2.5 of the proposed Service Agreement has the purpose of preventing, restricting and limiting the capacity of unsuccessful tenderers to compete for the provision of temporary nursing services. Part A 1 of the proposed tender document also states unequivocally that it is intended that the successful tenderer will provide temporary nursing services to the exclusion of all unsuccessful tenderers.

The likely effect of paragraph 2.5 of the service agreement will be to severely restrict the ability of all unsuccessful tenderers to provide temporary nursing services to the public hospital market.

The inevitable result of the exclusion of unsuccessful tenderers from the market place will be the introduction of substantial restrictions and limitations on both the supply and acquisition of temporary nursing services.

The Exclusivity Arrangement

The parties to this arrangement (HPV and the successful tenderer(s)) are competitors as they are competing for the custom of the various public hospitals. Pursuant to section 4D(2) HPV and the successful tenderers would be, at the very least, "likely" to be in competition, but for the proposed Service Agreement.

Clause 2.5 of the proposed Service Agreement, in conjunction with Part A 1 of the proposed tender document evidences a clear intention to exclude a particular class of competitors from the market place. All unsuccessful tenderers are identified as that particular class.

The exclusion of the unsuccessful tenderers from the market place will undoubtedly result in significant restrictions and limitations for both the supply and acquisition of temporary nursing services. The individual hospitals will be restricted from engaging the services of unsuccessful tenderers and the unsuccessful tenderers will be restricted from supplying their services to the same hospitals.

The Engagement

Individual hospitals and nursing agencies are engaged in direct and rigorous competition for the acquisition of nursing staff.

It seems clear that the intention of both paragraph 2.5 of the Engagement agreement and Part A 1 of the proposed tender is to restrict individual hospitals from acquiring nursing staff from an unsuccessful tenderer (except in the case of default on the part of the successful tenderer).

The restrictions imposed by paragraph 2.5 on individual hospitals and unsuccessful tenderers will have the effect of excluding unsuccessful tenderers from equal participation in the market place. This restriction will severely impede the unsuccessful tenderers' capacity to compete with successful tenderers.

3.2. Anti-competitive agreements under section 45(2)a(ii)

This section prohibits a corporation making an arrangement or understanding if:

(a) a provision of that arrangement or understanding;

(b) either:

(i) has the purpose; or

(ii) would be likely to have the effect;

(c) of substantially lessening competition.

There are a number of provisions of the proposed Service Agreement, which contravene s.45(2)(a)(ii). These are:

(a) paragraph 2.5 which provides:

"…..the Contractor, together with the entities named in Schedule 5 shall have sole rights to provide temporary nursing services to the Health Services during the Contract Period".

(b) paragraph 6.1 which provides:

"The Contractor cannot provide and a Health Service will not accept Nursing Services from a person who is a current member of that Health Service's permanent staff."

(c) paragraph 6.2 which provides:

"The Health Services expect that nurses providing the Nursing Services will be remunerated by the Contractor on the basis of the relevant Industrial Award or Enterprise Bargaining Agreement which apply to those nurses."

(d) paragraph 6.7 which provides:

"The Contractor, in providing the Nursing Services, shall ensure that its staff comply with the policies, rules, procedures and standards of the Health Service to whom the Nursing Services are provided, as amended from time to time."

Paragraph 2.5

This provision is directed towards not allowing other agencies to compete with the successful tenderers. There can be little doubt that the provision is intended to and will have the effect of lessening competition.

It is clear that the purpose, and likely effect, of paragraph 2.5 is to substantially lesson competition. As the agreement will continue for three years (and potentially another two if the option is exercised) the lessening of competition will be substantial.

Paragraph 6.1

The purpose of this paragraph is to prevent a permanent employee of a hospital working for the hospital as an agency nurse. This restriction in turn:

(a) reduces the successful tenderer's ability to service the custom of a particular hospital; and

(b) restricts a nurse from effectively working overtime at agency rates.

In so far as the successful tenderer is concerned, this restriction will substantially affect its ability to compete with other agencies. For example, if:

(a) a particular hospital required the services of a nurse; and

(b) the only nurse the agency had on its books who was available and had the requisite skill set was also a permanent employee of that hospital

The successful tenderer would be prevented from filling the order. In such circumstances one of its competitors would presumably fill the order. This will clearly result in a substantial lessening of the ability of the successful tenderer to compete.

Paragraph 6.7

The combination of paragraph 6.7 and the relevant policies, rules and procedures (and any subsequent changes to them) of a particular hospital is likely to have a significant anti-competitive effect. It is possible that a particular hospital may have, or introduce, a policy prohibiting or restricting the engagement of nursing services from a specific successful

tenderer. The nurses of this agency will then be restricted from competing equally with their colleagues for the provision of those services.

3.3. Price fixing under 45(2)(ii),

S45A prohibits price fixing, controlling or maintaining. Any such conduct is illegal per se and is deemed to have the purpose, and likely effect, of substantially lessening competition.

A breach of s45A occurs where:

(e) a contract, arrangement or understanding;

(f) contains a provision;

(g) fixing, controlling or maintaining the price for goods or services

And will be deemed to have the purpose, or likely to have the effect, of substantially lessening competition for the purposes of section 45(2)(a)(ii).

Paragraph 6.2 of the proposed Service Agreement is in direct contravention of section 45A.

Paragraph 6.2

Clause 6.2 provides for the fixing, maintaining and controlling of the rate at which nurses may be remunerated and in turn, the price at which the successful tenderer may charge, and compete, for the provision of those services.

The implementation of clause 6.2 is likely to have the effect that the number of nurses willing to work for the successful tenderer will be significantly reduced, as agency nurses will prefer to perform agency work for private hospitals at higher rewards. This will lead to the successful tenderer being significantly disadvantaged with the effect of substantially lessening competition in the market as compared to the situation if the tender did not take place.

4. Public Benefits Test

Many of HPV's arguments regarding proposed public benefits test centred around cost and price issues, as this was the major impetus for the proposed tender. HPV raises issues such as price certainty, decrease in staffing costs, employment equality and workplace harmonisation, reducing bargaining imbalance and promoting equitable dealings and increase in nursing staff availability, but fails to address the long term impact on the industry.

4.1. Price Certainty

The tender proposes to fix the price for 3 years with only EBA or award changes. The assumption is that agency nurses will remain in the system at the award rates. Evidence suggests that this will not be the case, as indicated by the RCSA survey where 68% of agency nurses indicated that they would decrease their hours or leave the profession entirely. HPV raises the issue that some agencies raise their rates every 6 weeks, this reflects the severe shortage of nurses and one of the basic principles of supply and demand, and in this case demand for qualified nurses is outstripping the supply of nurses available.

HPV's ascertain of price certainty for corporate institutions fails to recognise and address the problem of under-valuation and difficult working conditions faced by nurses. If the tender proceeds it will ultimately undermine the efficiency and effectiveness of the public health system as more permanent and agency nurses leave the system.

4.2. Decrease in Staff Costs

HPV asserts that the purpose behind the tender is to reduce the overall nurse staffing costs of the health services. HPV uses Southern Health as an example of the cost they are expected to pay to agencies for some services. Given that Southern Health have in the past gone out to tender for the provision of their agency services, surely these rates were known and agreed to at the time of the tender. It appears that the hospital administrators are challenged by the perceived power of the nurse and the fact that they can no longer dictate terms and conditions under which nurses are employed.

Senior medical staff are permitted to negotiate individual pay contracts regardless of the fact that there is an award in place. In areas where there is a shortage of a certain specialist surgeon the contracts negotiated would see agency nurse rates pale into insignificance. But there does not appear to be a move by HPV to fix the rate of pay for specialist medical staff as they are attempting to do with nurses.

On average agency nurses are paid between 4 and 5% above the award casual rate. There is no doubt that some specialist nurses are paid more than this, but this higher rate reflects the extreme shortage of these specialist nurses and the significant demand for their services by hospitals. However the majority of shifts provided by agencies to hospitals are for generalist nurses, so while these increased rated have an impact on the overall cost to the hospital, these

cost are small when compared to the impact of a decrease in the nursing workforce and the organisations ability to meet performance bonuses set down by DHS.

Price certainty will be of little consequence if the tender goes ahead and more nurses leave the profession, resulting in bed closures and reduction of services.

4.3.Employment Equality and Workplace Harmonisation

To suggest that differences in rates of pay causes industrial unrest between nurses and disharmony in the workplace is somewhat ambiguous. Nurses have a choice where and when they work. HPV indicated that "agency nurses receive between 1.5 and 3 times the award/EBA rate". This is in fact the rate paid to the agency and not the nurse. As indicated earlier, agency nurses are paid on average 4 to 5% above the award/EBA rate for casual nurses.

The issue of skill mix has also been raised by HPV as an issue that creates disharmony. It should be remembered that the many agency nurses work full or part time in other hospitals, and the level of competency of an agency nurse is determined at the time of interview. All nurses with a post graduate qualification have had there skills and competency ascertained by a tertiary institution to enable to practice in specialist areas. In the majority of cases the skills of the agency nurses compliment the already considerable skill of the staff of areas they choose to work in. Nurses are professionals and respect the skills, expertise and support of their colleagues, in situations which are demanding and stressful, which is evident by the strong collegial relationship which has developed between agency and permanent nursing staff.

4.4.Reduction in the Bargaining Imbalance and Promotion of Equitable Dealings.

HPV asserts that health services have little or no bargaining power for the acquisition of agency services, and that the agencies dictate the price the services pay for the agency nurse's wage and the provider's commission fee. To assume that health services are powerless to negotiate with individual agencies is unrealistic. Many health services have negotiated contracts and tenders with a variety of agencies altering commission fees and determining performance indicators.

Given that there are approximately 35 independent nursing agencies operating in Melbourne, many of them small businesses, it would be safe to assume that some of these would not be selected provide services under the tender. If this were the case many of these agencies would

nave there ability to trade severely restricted and may mean the end of the business and an overall reduction on competition.

4.5. Increase in Nursing Staff Availability.

HPV itself states that there are insufficient numbers of qualified nurse available in Australia. HPV also believes that the increased rated of pay paid to agency nurses has attracted nurses from working permanently in the public health system, and subsequently allows nurse to reduce their overall number of hours worked, thus impacting on the total amount of nursing services available in Victoria. The assumption is that if agency rates are restricted then there will be a shift of nurses back into the public health system. As indicated by the RCSA survey this would not be the case, 68% of nurses surveyed indicated that they would decrease their total number of shifts or leave the profession altogether.

To assume that by decreasing the rate of pay to agency nurses they will have to increase the number of shift they do to make up the shortfall, again contradicts the evidence in the RCSA survey. HPV is assuming that this will be the quick fix to solve the problem of attracting nurse back into the full or part-time employment in the public health system. The only way to attract nurses back into the system is to address the inequities in education and training, pay, terms and conditions, rostering practices and the attitudes towards the nursing profession by DHS and senior health service administrators.

4.5.Fostering Business Efficiency

Only a small number of health service have tendered for agency service, a number have lists of preferred provider, but the majority will contact any of the agencies to provide staff as the need arises. To assume that the central tendering out of agency services will create business efficiency is an unrealistic expectation. Nurses are individuals and professionals, not commodities to be traded.

5. Conclusion

The prospect of this tender has opened up a "can of worms' within the health industry and the nursing profession. There now is a considerable undercurrent of mistrust of the government and DHS with respect to how nurses are view as members of the health team. HPV have recognised that there are breeches of the trade practices act with regards the tender and no

doubt there has been considerable legal documentation provided in submissions to support this. However HPV appears to have shirt around the potential issues of the public benefits test.

There has been the assumption that the most significant public benefit will be financial. No doubt there will be some financial benefit if this tender goes ahead, but it is more likely to be minimal rather than significant. There is also the assumption on the part of HPV and the DHS Nursing Policy Unit that nurses will accept their wages being capped and take up additional shifts to may up the pay shortfall. This is a somewhat naive assumption, and assumes that nurse have no choice in their own destiny.

The realistic implications of this tender on agency services and nursing service, as a whole could be quite devastating. The survey undertaken by the RCSA is probably the most significant indication of how nurses feel about the actions of DHS and HPV in requesting undertake this tender. The impact of 68% of agency nurses cutting back their shifts or leaving the profession would be significant on the Victorian public health system, and is probably the single most significant issue for not grant HPV leave to go forward with the tender without risk of prosecution.

The next most significant issue is the impact of the tender outcome on those agencies, which are not successful, and will have their business opportunities restricted for at least 3 years. There is a real risk that many of these agencies will cease to operate, thus decreasing the level of competition within the industry.

Another issue of significance is that there is the potential for a precedent to be set with nurses wages being fixed, which may open up the flood gates for HPV to attempt to undertake similar tenders for other health care professionals undertaking casual work. There is no doubt that nurse wages take up a significant part of the budgets of public health services, however nurses are the 24hr carers in a hospital and restricting the earings of nurses is not the answer to fiscal responsibility. At present there are a number of health services facing large budget deficits as a result of a funding shortfall relating to the 2000 Nurses EBA, by DHS. No doubt this action to tender out agency services is DHS's means of attempting to limit these deficits. However they have failed to factor in that nursing is a profession and should be treated as such. The risk of loosing more nurses from the health system is too great to allow this tender to proceed.