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23 January 2002

Attention: Mr Gavin Jones

Mr Tim Grimwade
A/g General Manager
Adjudication Branch
Australian Competition & Consumer Commission
PO Box 1199
DICKSON ACT 2602



Melbourne | Sydney

Our reference
R.SGX.1730647

Dear Mr Grimwade

Applications for Authorisation Nos. A90811 and A90812
Applicant: Health Purchasing Victoria
Our client: Nursing Australia Group

We refer to Jolyon Rogers' telephone conversation with Gavin Jones yesterday afternoon regarding the application for interim authorisation submitted by Health Purchasing Victoria (HPV). We act for the Nursing Australia Group.

Our client has previously lodged a submission in opposition to HPV's application for interim authorisation.

Our client has reviewed the further submission made by HPV dated 16 January 2002 in support of its application for interim authorisation. Our client is concerned that certain assertions made in this further submission are factually inaccurate and potentially misleading and may prejudice the Commission's determination in relation to the application for interim authorisation.

In response to the further information contained in HPV's further submission dated 16 January 2002, our client responds to HPV's submission as follows (using the same paragraph numbering as HPV's submission):

1. Nursing Australia reiterates its concern that promoting and/or instituting the tender process (albeit conditionally) has the capacity to cause an effect similar in outcome to actually undertaking the tender. Nursing Australia is specifically concerned that promoting and/or instituting the tender process will lessen the participation rate of nurses. Nursing Australia is strongly of the view that the public detriment resulting from the reduction in the nurse participation rate far outweighs any procedural efficiency erroneously assumed by HPV. If the Commission denied final authorisation, it is submitted that any reduction in the

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participation rate of nurses caused by an exit from the nursing profession may be irreversible.

2. It is Nursing Australia's contention that the arguments presented by HPV supporting urgent authorisation are inconclusive, inaccurate and fundamentally flawed.

- 2.1 HPV assert that March is the optimum time to publish a request for tender as "the level of supply of nurses in Victoria, for both permanent employment positions with hospitals and nurse agencies, is at its highest level for the year in March as a result of the influx of new graduate nurses at this time of year". This statement is incorrect. Nursing Australia has extensively studied the patterns of supply and demand for casual nursing staff for in excess of ten years and has consistently observed that the peak times of nurse availability are in fact during the pre-Christmas period. This is understandable due to the increases in hospital activity that occur prior to Christmas and the fact that many nurses working through an agency are doing so to earn additional money for the holiday period. There is substantial empirical and statistical evidence to support Nursing Australia's view that the demand for staff increases substantially in the third and fourth quarters of each calendar year. This increased demand for staff is not accompanied by an increase in the capacity to supply. HPV's statement that March is an optimum time to publish the tender due to the effect graduates have on the level of supply is simply incorrect. Further, Nursing Australia is firmly of the view that the proposed tender process will serve only to exacerbate the major factor identified by the National Review of Nursing Education, Discussion Paper issued by the Commonwealth Department of Education, Science and Training (December 2001) – being the lack of support available to graduates in their early practitioner period. A copy of this paper has already been submitted to the Commission by Nursing Australia in its submission dated 3 January 2002.

HPV contend that nurse agencies can be expected to tender "on the most favourable terms" when the level of supply in the market for the supply of nurses is at its highest level for the year". Nursing Australia reiterates that this has no basis in fact. The shortage of Registered Nurses has been discussed in detail in the Nurse Recruitment and Retention Committee, Government Repose issued by the Victorian Department of Human Services (June 2001). A copy of this report has already been submitted to the Commission by Nursing Australia in its submission dated 3 January 2002. The report acknowledges that the shortage of nurses is not seasonal or cyclical, rather a worldwide issue. To suggest that an oversupply of nurses exists during the month of March is misleading.

HPV suggests that market instabilities resulting from the tender process can be best dealt with during March when the supply of nurses is at its "highest". This contention presumes that the supply of nurses is subject to an aberrant oversupply during March. As indicated above, this is incorrect.

- 2.2 There is an increase in demand during the winter period. This trend is repeated in other parts of the global economy and represents the increased prevalence of illness during the winter periods. This trend is repeated each year and is a function of climate.

Nothing in the material submitted on behalf of HPV appears to be directed in any way to dealing with the increase in demand such as to justify the interim authorisation.

The combined use of existing permanent staff in increased shifts, nurses from a health service's nurse bank and agency nurses have historically, and effectively, been used to meet any winter short-fall in nurse staffing levels. There is no reason why this would be any different for the coming winter if existing arrangements were kept in place. Nursing Australia submits that nursing agencies will continue to play a role in meeting staffing requirements during the winter period. If the interim authorisation was granted, the reduction in the participation rates of nurses would be likely to increase the staffing shortages experienced by public health services during winter.

- 2.3 The funding crisis referred to by HPV ignores the fact that nurses must be paid regardless of the mechanism by which their labour is obtained. Nursing Australia reiterates that the utilisation of nurses provided through nursing agencies amounts to less than 5% of the total nursing workforce. The marginal cost of utilising a nurse working through an agency will be the same as the marginal cost of utilising a nurse working through any other mechanism after taking account of employee entitlements, the effects of salary sacrifice and other costs of employment. It is submitted that the difference in the cost of utilising a nurse working through an agency, compared with utilising a nurse working through any other mechanism, is demonstrably less than 15% when responsible and accurate accounting processes are adopted. This 15% difference in cost multiplied by the 5% of agency nurses in the total nursing workforce equates to less than 1% of the total expenditure by health services on nursing labour costs. In these circumstances, Nursing Australia submits that the "funding crisis" referred to in HPV's further submission is significantly overstated and HPV's reliance on this argument does not support the granting of an interim authorisation.

Our client notes that HPV has submitted a revised draft tender document to the Commission, which has been amended in the terms set out in HPV's further submission dated 16 January 2002. Our client submits that the tender document is commercially unreasonable and contains numerous provisions that would be unacceptable to prospective tenderers. Whilst a detailed response to the revised tender documentation is not appropriate for the purposes of determining the interim authorisation, our client advises that its substantive submission will address the tender documentation.

In brief, the proposed tender document purports to transfer risk in respect of the professional services provided by agency nurses to the agencies. Clearly, the agencies do not have, nor seek to have, any control over the actual quality of nursing services in client hospitals: that is a matter entirely within the control of the employer hospitals. If risk is transferred, it would impose an insurance, management and training burden on agencies. That burden could only be funded by increased cost – a factor that HPV's submission appears to ignore entirely. The nursing agencies are employment agencies, rather than providers of primary care. As a result of the drastic nature of

the changes the proposed tender seeks to impose, it will have an immediate destabilising effect on the entire nursing agency industry.

As you are aware, the considerations that the Commission must take into account in determining an application for interim authorisation have been well-stated in *Re Queensland Timber Board* (1975) 24 FLR 205; *Re International Air Transport Association* (1985) 58 ALR 721 and later in the Commission's policy releases. In this case, our client submits that the granting of interim authorisation may cause the participation rate of nurses to significantly decline in the short-term to the extent that, even if final authorisation was denied, irreparable harm may have been done to the participation rate. This would have a negative impact on the nursing staffing levels. Furthermore, as has previously been submitted by our client and other interested parties, the initiation of the tender process is likely to result in a substantial and permanent exit from the nursing agency industry by some participants.

Based on the above matters and the matters raised in our client's submission dated 3 January 2002, our client respectfully submits that HPV has not satisfactorily discharged the onus of proving that the market for the provision of nursing agency services and the market for the provision of nursing services would be able to return substantially to its pre-interim authorisation state in circumstances where the Commission later denied authorisation.

Since the determination of HPV's application for interim authorisation does not involve a review of the merits of the substantial application by the Commission, our client has not made detailed submissions in relation to the public benefit and public detriment associated with the application. Our client intends to make these submissions in a subsequent response to the substantial application.

If you would like to discuss any aspect of this letter, please contact us.

Yours faithfully



Sebastian Greene
Partner