

Nursing Agencies Association of Australia

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26 July 2002

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

Dear Sir/Madam,

Re: TPA Application – Authorisation Nos A90811 & A90812 – Health Purchasing Victoria.

Further to our previous correspondence dated 16 July 2002, requesting you to hold a conference on this matter, I now provide a written submission in support of such request.

Yours faithfully,

J. G. Stanley RN
(J. G. STANLEY)

Bob Lorsch
Secretary

A submission to the Australian Competition and Consumer Commission in response to the Commission's draft determination of the Application for Authorisation lodged by Health Purchasing Victoria dated 27 June 2002

Submission lodged by: Nursing Agencies Association of Australia

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Secretary
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1. Nursing Agencies Association of Australia ("NAAA") files this submission in response to the draft determination issued by the Australian Competition and Consumer Commission ("The Commission") in response to the application for authorisation lodged by Health Purchasing Victoria ("HPV"), dated 27 June 2002.
2. NAAA wishes to repeat and re-enforce the submissions made by it earlier.

The DHS Written Direction

3. The Commission has stated that the written direction appears to be intended to produce the outcomes the proposed tender process was designed to achieve.

The Commission has then gone on to assess the likely public benefits and effect on competition of the proposed tender process on the basis that detriment will flow from the effect of the written direction irrespective of whether authorisation is granted to the proposed tender process.

4. The Commission has at clause 5.7 of the determination stated that "HPV has not sought authorisation for the DHS written direction (indeed, the direction would fall outside the scope of the authorisation process as it constitutes government regulation of the market rather than potentially anti-competitive conduct by market participants). The Commission is therefore not assessing whether the public benefit generated by the written direction outweighs any associated public detriment".
5. The Commission has determined that the Act will not apply to conduct by the DHS when the most substantial market participants, the public hospitals and HPV, (each of which is an acquirer of the services the subject of the applications before the Commission), are controlled by the Victorian Government through the DHS and without giving sufficient weight to evidence of the impact of that conduct on the market participants on the supply side of the equation, the nursing agencies and the nurses. It is respectfully submitted that the Commission had no proper basis upon which to conclude as it has done in the draft determination with respect to the written direction. It is further submitted that there are real questions concerning both the *bona fides* and whether the written direction is *intra vires*.

6 The NAAA submits that the DHS written direction is not merely government regulation of the market. The Commission should not permit the direction to in any way pre-empt its decision or to influence it. There are, in the submission of NAAA, three appropriate ways for the Commission to respond to the written direction in the context of the applications for authorisation:

- a. Totally disregard any conduct *ex post* the applications and, in particular the written direction, and treat the applications only on their merits.
- b. Treat the written direction as an instance of self-help and an implicit withdrawal of the applications. In order to determine whether it is correct, as DHS and HPV appear to contend, that the written direction is lawful, (a contention which NAAA does not accept), the Commission should permit that contention to be tested in the courts in the ordinary way for its validity, *vires* and *fides*, without its administrative *imprimatur* being given. At least, it should permit the written direction to be tested before the Commission makes a determination.
- c. Treat the direction as unauthorised conduct, engaged in by DHS as part of an arrangement between DHS and HPV for the benefit of HPV for the purposes of pre-empting the Commission's determination and changing the market through its exclusionary conduct, that in itself is

likely to be a contravention of the Act.¹

It is submitted that the Commission has inadequate material before it to approach the matter other than as suggested at (a) or (b) above. However, if it is to take the written direction into account, it must do so in a fulsome way, testing the validity of the direction itself under the Act pursuant to Sections 4D and 45.

7. NAAA submits that the fact that HPV has made application for authorisation and has made amendments to that application, including amendments regarding the written direction, are concessions by HPV that there is no defence pursuant available to either DHS or HPV pursuant to Section 2C of the Trade Practices Act ("the Act") and that HPV and DHS are in fact a market participants. The NAAA submits that the written direction by DHS cannot be, therefore, be merely regulatory. If it were merely regulatory, there would have been no need to have applied for authorisation in the first place, since the power to direct was possessed by DHS at all times.
8. NAAA submits that the applications for authorisation and subsequent amendments to those applications by HPV appear also to be a concession that the written direction pursuant to Section 42 of the Health Services Act is not "specifically authorised" pursuant to Section 51(1)(b) of the Trade Practices

¹ The conduct involving the direction appears to contravene s. 45 in one of two ways. First, since DHS is either an actual or potential market participant and the direction was made for the purpose of excluding all but HPV from relevant sections of the market. See: s.4D; *South Sydney District Rugby League Football Club Ltd v News Limited* (2001) ATPR ¶41-824 at 43,143-43,144 [178]-[183]; *News Limited v Australian Rugby Football League Limited & Ors* (1996) ATPR ¶41-521. Otherwise, DHS (or its officers) has induced or been directly concerned in a contravention, within s. 75B.

Act. If the written direction were specifically authorised by the Act there would be no need on the part of HPV to have continued with the applications for authorisation as the written direction effectively achieved the outcome that HPV was seeking to achieve by way of the conduct sought to be authorised.

9. The written direction appears to be a cynical and contemptuous action to take in the context of the applications for authorisation made by HPV. NAAA submits that the written direction is *ultra vires*, as it does not appear that the Health Services Act intended that a direction would be made so that HPV would have sole market control in the area of brokerage of supply of nurses to the public hospital sector. That is the type of matter that one would normally expect to be dealt with specifically by the empowering legislation.

10. NAAA submits therefore that the written direction and the proposed arrangements with respect to supply of nursing staff to public hospitals are not regulatory acts by a governmental regulatory body but are collusive acts by market participants, DHS and HPV, seeking to manipulate the market to confer upon HPV both monopolist and monopsonist control of the market in a way neither contemplated nor specifically authorised by the Health Services Act.

Contraventions of other Provisions of the Trade Practices Act: Sections 46 and

50

11. The Commission ought not to authorise conduct that is otherwise in contravention of the Act in any event.

12. Such conduct by DHS and HPV as referred to above would also appear to contravene Section 46 of the Act. The possession of substantial market power by HPV, by its association with DHS, is plain². Its purpose is not regulatory. HPV has engaged in the conduct with the purpose of eliminating competition in the brokerage of nursing services to Victorian public hospitals³.
13. Such conduct if it is in breach of Section 46 of the Act cannot be authorised by the Commission. The NAAA urges the Commission to deal with the written direction in its proper context as manipulation of the market rather than government regulation of the market.
14. The NAAA submits that the proposed conduct the subject of the authorisation and the written direction contravenes Section 50 of the Act. By issuing the direction in the form that DHS has enabled HPV to either directly or indirectly acquire assets (in the form of goodwill) from other nursing agencies with whom, but for their elimination from the market, it would have been in competition. HPV will redistribute the rights to participate in the markets without any compensation having been paid to any of the nursing agencies. This conduct has the effect of substantially lessening competition in that market. In restructuring the relevant markets HPV has created a monopsonist

² *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1992) ATPR 41-167

³ Section 46 (1)(a) and (b). Cf *NT Power Generation Pty Ltd v Power & Water Authority* (2001) ATPR 41-814, where it was held by Mansfield J that but for its ability to claim Crown immunity, PWA's decision to refuse access would have contravened s. 46. If the written direction were found to have been *ultra vires*, then such a claim would be further strengthened in the instant case, since s.130 of the Act is clearly qualified by s.129, which section appears to bring HPV within s.2B (1) of the Trade Practices Act. See also *FAI v Workcover* (1998) ATPR 41-639

for the acquisition of nursing services and a monopolist in brokerage of those services to the public hospital sector.

Public Benefit

15. The test for public benefit is not purely an efficiency or economic advantage test. The gender and other social issues outlined in NAAA's earlier submissions do not appear to have been sufficiently taken into account in the Commission's draft determination.
16. The Commission, against the background of the gender and social issues cannot approve the applications. The draft determination also overlooks the likely microeconomic consequences. Over time, this conduct of HPV, if permitted, will have all of the anti-competitive effects of public monopolies that the 1995 competition reforms were designed to remove.⁴ There can be no real public benefits in recreating public structures that previous governments have spent time and money to remove.⁵
17. The broader policy issues to consider include the following:
 - a. Authorisation of the HPV tendering process and failure to deal with the conduct by DHS in its written direction is likely to have a ripple effect into other State markets for like services where the State government has a role as a market participant or service provider.

⁴ See *Hilmer Report*, 216 and 237.

⁵ See *Agreement to implement the National Competition Policy and Related Reforms*

- b. Authorisation of the HPV tendering process and failure to deal with the conduct by DHS in its written direction is likely to have a ripple effect into other markets for other services where State governments have a role as market participants or service providers.
- c. The impact of such rippling will be to undermine the principles of competitive neutrality and the structural reform of public monopolies enshrined in clauses 3 and 4 of the Competition Principles Agreement.
- d. The conduct of HPV and the DHS is in breach of the Competition Principles Agreement⁶.

Definition of Markets

- 18. NAAA submits that the definition of "market" in the draft determination is too narrow. The definition overlooks national supply and demand for nursing services, and the demand side (the health service providers) of the state markets. The definition focuses too heavily on the supply side of the market. If the demand side of the market, the hospitals, were considered, the outflux impact of the proposed arrangement would be considered a significant argument against it.
- 19. The assumptions of the applications and the draft determination are not borne out in the realities of the current market. There are no sufficiently redeeming

⁶ See Clauses 3 and 4

aspects of the proposed tendering process and the DHS written direction that justify authorisation.

20. There was already a competitive tender process in place that catered for all levels of quality of service supply. The new regime will create a single level of service quality and the higher level of service providers, (that is more highly qualified nurses), will either withdraw supply of those services entirely or supply those services into other more competitive markets, to the detriment of the public hospitals. The one-size-fits-all approach is totally inappropriate.

Conclusion

21. The NAAA submits that the Commission should find that the written direction pursuant to Section 42 of the Health Services Act is in breach of the Act and that as authorisation for that conduct or the making of the written direction has not been sought the written direction cannot stand.
22. Alternatively, the written direction is in contravention of Sections 46 and 50 of the Act and therefore authorisation for the conduct should not be given with respect to its Section 45 aspect. The NAAA submits that the ACCC should in fact take action against DHS with respect to the written direction and the consequent contraventions of the Act.
23. Further, when the broader policy issues are considered, there is no discernible public benefit that would justify authorisation, particularly in the circumstances of HPV post application conduct.

24. NAAA submits that if the Commission were, contrary to the submissions of NAAA, to make a determination in the terms or substantially in the terms of the draft, it should add a condition that the written direction be revoked in any event.

25. NAAA further submits that if the Commission were not moved to alter or review its draft determination, but, contrary to the submissions of NAAA, were to make a final determination in terms of the draft determination, without conditions, any authorisation should be stayed pending an appeal to the Tribunal and opportunity to challenge the written determination in the ordinary courts. To give authorisation pending appeal and challenge would be inappropriate in the circumstances of such a challenge, since if the challenge were successful HPV would have received authorisation upon a false premise.

26. NAAA reserves the right to supplement these submissions orally. NAAA is also prepared to elaborate upon any aspect of these submissions, either orally or in writing.