wilsons
lawyers pty ltd
ACN 099 147 930

fax

To:	Gavin Jones	**Fax:**	(02) 6243 ~~1199~~ 1211
Company:	Australian Competition & Consumer Commission	**Date:**	26 July 2002
From:	Geoff Wilson	**Pages:**	10
Subject:	Application for Authorisation Nos A90811 & A90812		

Comments:

We enclose herewith Submissions

Yours faithfully
WILSONS LAWYERS

Level 12
575 Bourke Street
Melbourne Victoria 3000
tel 9616 6260
fax 9616 6262
email wilsonslawyers@bigpond.com

CODE BLUE SPECIALIST NURSING AGENCY PTY LTD

SUBMISSION
IN RESPONSE TO THE ACCC'S DRAFT DETERMINATION
DATED 27 JUNE 2002
CONCERNING
APPLICATION FOR AUTHORISATION
LODGED BY HEALTH PURCHASING VICTORIA
IN RESPECT OF AN EXCLUSIVE TENDER FOR AGENCY NURSING SERVICES

26 JULY 2002

1. INTRODUCTION

1.1 This submission is made by Code Blue Specialist Nursing Agency Pty Ltd (**"Code Blue"**) in response to the draft determination of the ACCC dated 27 June 2002, relating to the application for authorisation lodged by Health Purchasing Victoria ("HPV"), concerning a proposed exclusive tender for agency nursing services.

1.2 The conduct sought to be authorised by HPV has two elements:

(a) the horizontal aggregation of purchasing power of the Victorian public health sector in the negotiation of the purchase of nursing services from agencies; and

(b) the vertical grant of exclusivity to the successful tenderer.

1.3 The combination of these two elements elevates the anti-competitive concerns with the proposal, and differentiates the proposal from many other collective arrangements brought before the ACCC for authorisation. The free flow of competition within the market will be replaced by competition for the market on a 5 year basis.

1.4 Code Blue submits that the draft determination is wrong because:

(a) the claimed public benefits are illusory; and

(b) the determination does not recognise a range of anti-competitive detriments that are likely to arise from the conduct including:

(i) prices being reduced to a level below the competitive (market-determined) level, distorting efficient allocation of resources in the market for nursing services;

(ii) likely closure of nursing agencies, resulting in higher market concentration and an overall reduction in supply;

(iii) likely increased barriers to entry in respect of the supply of agency nursing services;

(iv) a reduction in valuable information in the market for nursing services; and

(v) the imposition of harsh terms and conditions of supply, adversely affecting nursing agencies which are small businesses.

1.5 Code Blue submits that the ACCC should reject HPV's application for authorisation.

2. THE MARKET FOR NURSING SERVICES

2.1 Code Blue agrees with the market definition adopted by the ACCC in the draft determination. There is a market for the supply of nursing services to public and private health care providers within Victoria. Within that market, the supply of casual nurses on a contract basis by nursing agencies is an important sub-market.

2.2 In this respect, the market for nursing services is similar to many other labour markets. Market demand is satisfied by the supply of employed nurses, as well as nurses working on a contract basis. It is common in labour markets for the remuneration levels applicable to employed and contract labour to differ. The different levels of remuneration reflect the differing terms and conditions on which labour is supplied. The terms and conditions attached to employment carry a range of benefits including holiday and sick leave, superannuation, protection against wrongful dismissal and other contractual and statutory protections and benefits. In contrast, labour supplied by contract has none of those benefits and is characterised by a degree of uncertainty of demand. Reflecting these different terms and conditions, contract labour is usually charged at a higher rate compared with employed labour.

2.3 The labour market flexibility inherent in the supply of both employed and contract labour is beneficial. Amongst other benefits, flexibility in the labour market arrangements enables valuable information to be provided to the market. If employed labour remuneration falls too low, it can be anticipated that there will be a movement in supply to contract labour and vice versa. In this way, the market determines optimal remuneration levels for both employed and contract labour.

2.4 At this time, nursing agencies represent a very small proportion of the market for the supply of nursing services. The draft determination estimates the proportion as approximately 3%. Furthermore, as noted in Appendix A to the draft determination, there are at least 18 agencies supplying nursing services in Victoria. It can be concluded from these facts alone that the market for the supply of nursing services by agencies is highly competitive. Most of the nursing agencies are relatively small businesses, with turnovers less than $5million. There is perhaps one exception to this, which is Nursing Australia. As noted in Appendix A to the draft determination, Nursing Australia comprises 8 agencies owned by the Staffing Australia Group. Code Blue estimates that Nursing Australia represents approximately 70% of the sub-market of nursing agencies in Victoria. Nevertheless, even this 70% is a relatively minor proportion of the overall supply of nursing services in Victoria.

2.5 In contrast, each of the health services (or public hospital networks) being represented by HPV are very substantial businesses with large turnovers.

Although each of the health services is a publicly owned body, they are individual statutory corporations established under the *Health Services Act*. In line with the principles of National Competition Policy, the Victorian Government has divided the public hospital system into a number of competitive hospital networks. Those divisions are outlined in Appendix B to the draft determination.

2.6 Collectively, the health services represented by HPV account for approximately 50% of the demand for nursing services in Victoria. Accordingly, as a buying block (as proposed through the HPV arrangements), the health services represent one half of the total market.

2.7 It is obvious there is a large disparity between the bargaining power of the health services compared to the nursing agencies. This disparity arises from both:

(a) the market share of the demand for nursing services represented by the public health services; and

(b) the financial scale of the public health services in terms of turnover and capital in comparison to nursing agencies.

2.8 Even without the aggregation of buying power being proposed by HPV, it can be concluded that the balance of bargaining power in respect of the purchase of nursing services lies with the public health services.

3. PUBLIC BENEFITS

3.1 The ACCC has been requested to authorise collective purchasing (and supply) arrangements on many occasions during the last few years, including APRA (1998) ATPR (Com) 50-256 and (1999) ATPR (Com) 41-701; Inghams Enterprises (1999) A90659; Queensland Hospitals (1999) A50019; Sydney Hospitals (2000) ATPR (Com) 50-285; Aust Society of Anaesthetists (2000) ATPR (Com) 50-278; NSW Hospitals (2001) ATPR (Com) 50-287; Premium Milk Supply (2002) ATPR (Com) 50-288; and Aust Dairy Farmers Federation (2002) ATPR (Com) 50-289. The usual public benefits claimed to arise from such collective arrangements are:

(a) to redress an imbalance in bargaining power (ie. create countervailing power), resulting in a more efficient allocation of resources;

(b) to improve the availability of information to the aggregating entities; and

(c) to obtain administrative savings in the negotiation of trading relationships.

3.2 In general, the ACCC has been reluctant to authorise such collective arrangements, as they involve very serious damage to competition. The authorisations that have been granted by the ACCC have been characterised by either:

(a) a very significant imbalance in bargaining power or some other form of perceived market failure; or

(b) the imposition of stringent conditions by the ACCC to ensure there is no abuse of market power by the aggregating firms.

3.3 In the present application, there is no significant imbalance of bargaining power to be redressed. Indeed, even prior to the arrangements being implemented, the balance of bargaining power clearly resides with the public health services, and not the nursing agencies, many of which are small businesses. Absent any obvious market failure which requires redressing, why would the ACCC contemplate authorisation of this proposal?

3.4 The draft determination confirms that most of the public benefits claimed by HPV were non-existent. However, the draft determination recognises 2 small public benefits.

3.5 First, the draft determination accepts that the proposed arrangements are likely to give rise to some administrative cost savings for the public health services. Code Blue submits that this public benefit ought to be rejected. The achievement of administrative savings in the negotiation of purchasing arrangements was clearly not a primary consideration of HPV for proposing the collective arrangements. It was the last public benefit mentioned in HPV's application for authorisation. The argument has not been supported by either:

(a) quantification of the alleged administrative savings; or

(b) substantiation that the public health services have experienced any difficulty in undertaking such negotiation processes on their own account.

3.6 It is implausible that the public health services, being businesses substantially larger than nursing agencies, incur disproportionate costs associated with the negotiation of the purchase of nursing services from agencies. If this were right, how much more disadvantaged are nursing agencies in conducting the very same negotiations?

3.7 The draft determination also appears to recognise a public benefit in the requirement for successful tenderers to meet service level targets. However, there is no explanation in the draft determination why this public benefit arises from the restrictive arrangements sought to be imposed by HPV. It is not explained why the public health services, acting individually, cannot seek to impose service level targets. It is not suggested that the public health services, acting individually, are not aware of desirable service level targets. Furthermore, it is not explained why HPV cannot recommend such targets to health services, and the health services can negotiate them individually. Code Blue submits that this public benefit should be rejected as having no necessary connection with the arrangements proposed by HPV.

3.8 Finally, it must be noted that even the public benefits accepted by the ACCC in the draft determination (administrative costs savings and service level targets) have no connection with the exclusivity component of HPV's proposed arrangements. Those public benefits, to the extent they exist at all, can only arise out of the horizontal collective purchase negotiations. It is not necessary to award exclusive contracts in order to derive those benefits. Accordingly, to

the extent that HPV's proposed arrangements involves the grant of an exclusive contract, the arrangements are not supported by any public benefits recognised by the ACCC.

4. ANTI-COMPETITIVE DETRIMENTS

4.1 As noted earlier, the arrangements proposed by HPV have 2 restrictive elements:

(a) the horizontal aggregation of purchasing power by the health services, who collectively represent 50% of demand for nursing services in Victoria; and

(b) the grant of exclusivity to the successful tenderer(s), thereby foreclosing 50% of the market for nursing services to those who are unsuccessful in the tender.

4.2 The combination of these restrictive elements of the arrangements will have significant anti-competitive consequences, far more extensive than the limited consequences recognised in the draft determination.

4.3 Code Blue submits that there are at least 5 anti-competitive consequences of the proposed arrangements:

(a) prices that will be lower than would be set in a competitive market;
(b) increased concentration in the nursing agency sub-market;
(c) increased barriers to entry to the nursing agency sub-market;
(d) the loss of valuable market information mechanisms; and
(e) the imposition of terms and conditions of the purchase of nursing services which are harsh and unfair.

Prices below competitive levels

4.4 The usual objective and outcome of collective purchasing arrangements is to reduce the price of supply below the level that would otherwise prevail in a competitive market. In its application for authorisation, HPV clearly states this is its primary objective.

4.5 Simplistically, it appears attractive to reduce the price of supply of intermediate goods and services, as this will result in a lower cost to consumers. However, it is recognised that reducing prices below competitive levels will affect allocative decisions in the market. The most likely outcome is under investment in the intermediate good or service being supplied, resulting in a reduction in supply.

4.6 Code Blue submits that HPV's arrangements will have this consequence, resulting in a reduction in supply of nursing services by agencies, below the optimal (market determined) level.

4.7 In the draft determination, the ACCC formed the conclusion that this would not occur because of the existence of the section 42 written direction, capping

remuneration for agency nurses in public hospitals. The ACCC's conclusions in this regard appear to be based on the following:

(a) an untested presumption that in the written direction the DHS has capped remuneration for agency nurses at the lowest level it considers commercially feasible (in other words, nursing agencies would be unable to tender at a lower price);

(b) several nursing agencies have submitted that they would be unable to tender lower; and

(c) nursing agencies may choose to reduce their fees rather than the remuneration paid to nurses.

4.8 Code Blue submits that this conclusion by the ACCC is incorrect. Code Blue believes that nursing agencies will tender below the capped remuneration level set in the DHS written direction. However, there will be a cost of this decision. Inevitably the lower rates tendered by nursing agencies will be reflected in nurses' remuneration. This will reduce the pool of nurses available to undertake this work. It is highly unlikely that the labour hours lost to the contract market will be returned to the employed labour market. These labour hours will simply be lost to the Victorian economy.

4.9 The suggestion in the draft determination that any reduction in nursing agency rates tendered will not be passed on to nurses' remuneration is not credible. It suggests that the market for agency nursing services is less than fully competitive, thereby enabling nursing agencies to retain a degree of monopoly rent. As highlighted earlier in this submission, a cursory examination of the structure of the nursing agency sub-market does not support such a conclusion.

Increased Concentration in the Nursing Agency Sub-Market

4.10 The proposed arrangements will also lead to increased concentration in the nursing agency sub-market. This is for 2 reasons. First, concentration is likely to occur as a result of the reduction in supply that in turn will result from lower prices. Nursing agencies will be forced to amalgamate in order to lower unit overhead costs. In addition, the grant of exclusive rights to supply services will also inevitably lead to increased concentration. Many, if not most, nursing agencies that are unsuccessful in the tender will not remain viable. 50% of the market demand will be foreclosed by virtue of the grant of exclusivity. In those circumstances, nursing agencies will have no choice but to close their businesses or amalgamate with the successful tenderer.

4.11 In its draft determination, the ACCC suggests that a 50% foreclosure of market opportunity is not significant. Code Blue finds this an extraordinary proposition. It is equivalent to suggesting that a proposed collaborative arrangement between Coles Myer and Woolworths in respect of the acquisition of grocery products would not be significant from a competition perspective. Code Blue submits that it is unprecedented for the ACCC to conclude that an aggregation of 50% of a particular market, combined with the prospect of foreclosure, does not have a serious competitive consequence.

Increased barriers to entry

4.12 Code Blue also submits that as a result HPV's proposed arrangements, barriers to entry to the nursing agency sub-market will be substantially increased.

4.13 Code Blue agrees with the ACCC's conclusion in the draft determination that, generally speaking, barriers to entry to the nursing agency market are not high. This is why the nursing agency market is a highly competitive one, and is serviced by so many participants. However, barriers to entry will be fundamentally altered by HPV's proposed arrangements. Under those arrangements, competition **within the market** is being supplanted with competition **for the market**. It can be assumed that HPV will conduct an exclusive tender on behalf of all public health services every 5 years. It is unclear how many nursing agencies will be granted a contract under the tender, but it could be as few as one nursing agency. In those circumstances, the only potential suppliers in the market will be those nursing agencies of sufficient size and critical mass to be able to tender every 5 yeas for the supply of services to 50% of the market. Under those circumstances, the contract awarded by HPV represents a substantial barrier to entry. The contractual arrangement forecloses any possibility of entry at a more modest level than 50% of the entire market. Small nursing agencies such as Code Blue cannot possibly expect to supply that quantum of the market, or remain in business for a period of 5 years until the award of the next contract.

4.14 Accordingly, as a direct result of HPV's proposed arrangements, barriers to entry will be substantially increased.

The loss of valuable market information

4.15 Code Blue also submits that HPV's proposed arrangements will have a damaging impact on the availability of market information. As noted earlier, competition between the employed and contract labour markets provide valuable information. If the employed remuneration levels fall too low, competition with the contract labour market will signal this clearly. Conversely if contract remuneration falls too low, the opposite will occur. The co-existence of both markets operating fluidly and freely enables market participants to make appropriate decisions about the levels of remuneration for labour, and the differing terms and conditions on which labour is supplied.

4.16 In contrast, under HPV's proposed arrangements, these benefits will be lost. The market will be rigidified. It is quite possible that only one nursing agency will be awarded an exclusive contract to supply services with the contract being awarded by a collective block. There will be no flow of transactions by which market information is generated. Instead, as noted earlier, there will be competition for the market every 5 years. It is well recognised that this form

of competition for the market is a second best alternative when compared with the free flow of competition within a market.

Harsh and unfair commercial terms

4.17 Finally, Code Blue submits that the proposed HPV arrangements will result in the imposition of harsh and unfair commercial terms on small business. The service agreements being offered by HPV under the tender, impose a number of unfair terms, which were not reflected in previous service agreements entered into between nursing agencies and health services. Examples include clauses: 2.1; 2.5; 2.7-2.10; 3.2; 3.5; 3.6; 6.4; 6.6; 6.8; 6.9; 6.11; 6.13; 6.14; 6.15; 6.16; 6.20.2; 6.22; 7; 8; 9; 10; 12.2; 13; 14.

Code Blue

Code Blue Specialist Nursing Agency Pty Ltd
26 July 2002