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14 August 2002

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Dear Tim

HPV authorisation application - further submission to ACCC

I am writing in relation to the above matter, in which we represent HPV.

I have attached, for your consideration, a further submission relating to HPV's authorisation application. As you will see, the purpose of this further submission is:

- To demonstrate that the reasoning of the ACCC in its Draft Determination, issued on 27 June 2002, was correct in reaching the conclusion that the public benefits associated with HPV's proposed tender system outweigh any possible anti-competitive effects;
- To highlight to the ACCC *additional* public benefits likely to flow from the tender proposal which is the subject of HPV's authorisation application, as opposed to the DHS direction, which were not specifically referred to in the ACCC's Draft Determination; and
- To rebut the arguments put forward by interested parties who opposed HPV's authorisation application.

If you have any queries regarding my client's application for authorisation, or should you wish to discuss the content of the attached further submission in greater detail, please do not hesitate to contact me.

Please notify us if this communication has been sent to you by mistake. If it has been, any client legal privilege is not waived or lost and you are not entitled to use it in any way.



Yours sincerely

A handwritten signature in black ink, appearing to read "S. Uthmeyer", with a long horizontal flourish extending to the right.

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**Health Purchasing Victoria
Application for Authorisation
Nurse agency tender**

**Further submission to the Australian Competition &
Consumer Commission
14 August 2002**

1 Purpose of this submission

- 1.1 The purpose of this further submission to the Australian Competition and Consumer Commission ("ACCC"):
- 1.1.1 To demonstrate to the ACCC that the reasoning in its Draft Determination, issued by the ACCC on 27 June 2002, was correct in reaching the conclusion that the public benefits associated with HPV's proposed tender system outweigh any possible anti-competitive effects.
 - 1.1.2 To highlight to the ACCC *additional* public benefits likely to flow from the tender proposal which is the subject of HPV's authorisation application as opposed to the DHS direction, which were not referred to in the ACCC's Draft Determination.
 - 1.1.3 To rebut the arguments put forward by interested parties who opposed HPV's authorisation application.

2 Nature of HPV

Operation and objectives of HPV as an organisation

- 2.1 As the ACCC is aware, Health Purchasing Victoria ('HPV') is a statutory authority established by amendments to the *Health Services Act 1988 (Vic)* ("Health Services Act") made in 2001.
- 2.2 HPV's objectives, as outlined in that Act, include the following:
- 2.2.1 To supply or ensure the supply of goods and services to public hospitals and other health or related services on best value terms;
 - 2.2.2 To develop, implement and review policies and practices to promote best value and probity;
 - 2.2.3 To provide advice, staff training and consultancy services;
 - 2.2.4 To monitor the compliance by public hospitals with purchasing policies and HPV directions and to report to the Minister on any irregularities; and
 - 2.2.5 To ensure that probity is maintained in purchasing, tendering and contracting activities in public hospitals.
- 2.3 It was stated in the Second Reading Speech for the *Health Services (Health Purchasing Victoria) Bill 2001* that these functions reflect the government's intention that HPV will work with metropolitan health services and public hospitals to achieve the following aims:

- 2.3.1 Ensure that the needs of patients and clients are met in a responsive manner;
- 2.3.2 Provide high quality care and continually strive to improve quality and foster innovation;
- 2.3.3 Collaborate with each other and a range of other health and welfare agencies and local government; and
- 2.3.4 Minimise unnecessary duplication of public health services and work to maximise system-wide efficiencies.

3 Section 42 Direction

Nature of DHS direction

- 3.1 As the ACCC is also aware, on 1 March 2002 the DHS issued a direction under section 42 of the *Health Services Act*.
- 3.2 The main impact of the DHS direction is that it has changed the environment in which the tender process will operate. In other words, it has changed the environment against which the ACCC must assess the public benefits and detriments of the tender in its authorisation process. Those benefits and detriments delivered by the DHS direction (including the capping of nurse agency fees), will result irrespective of the outcome of the authorisation application and the tender.
- 3.3 So, those benefits and detriments that were initially relevant to HPV's authorisation application, for example any potential anti-competitive detriment or public benefit associated with the capping of agency prices, are now no longer relevant to the authorisation application, as these now arise as a result of the DHS direction.

4 Competition analysis

- 4.1 HPV submits that any anti-competitive effects which may result from the tender proposal would be negligible, and in any case would be greatly outweighed by the resulting public benefits.

Public benefits

- 4.2 The ACCC, in its Draft Determination, has accepted that the tender will deliver the following public benefits:
 - 4.2.1 Reduction in administrative costs incurred by participating health services in dealing with nursing agencies under a collective tender process, rather than having to deal with nursing agencies individually.

- 4.2.2 Health services could be expected to direct administrative cost savings towards improving the quality of patient care, for example by employing additional nurses or other personnel.
- 4.2.3 The tender proposal will also be likely to increase public benefit by establishing service level and performance targets. Such targets are going to be incorporated into the service agreements between tenderers and HPV, and will be an important criteria by which HPV will select successful tenderers. The ACCC, in its Draft Determination, also acknowledged that this would assist in improving the quality of nursing services, and thereby the quality of patient care.
- 4.3 HPV submits that the final public benefit identified by the ACCC, stated in paragraph 4.2.3 above, is of particular importance. As identified in an earlier section, the Second Reading Speech for the *Health Services (Health Purchasing Victoria) Bill* highlighted that the functions of HPV as now outlined in the *Health Services Act* reflect the government's intention that HPV will work with metropolitan health services and public hospitals to, amongst other things:
 - 4.3.1 Ensure that the needs of patients and clients are met in a responsive manner; and
 - 4.3.2 Provide high quality care and continually strive to improve quality and foster innovation.
- 4.4 This demonstrates the sense of importance placed by HPV upon enhancement of the quality of patient care, and the focus of HPV to adopt practices which would ensure such outcomes.
- 4.5 This focus of HPV is reflected in the Request for Tender documentation, which has been lodged with the ACCC, particularly in the section entitled "Continuous improvement, cost reduction initiatives and quality management". In this section, HPV requires tenderers to show, amongst other things, how the tenderer will apply their past experience to continually improve:
 - 4.5.1 Service quality;
 - 4.5.2 Meeting deadlines;
 - 4.5.3 Communications and customer service;
 - 4.5.4 Information reporting;
 - 4.5.5 Documentation, including invoicing;
 - 4.5.6 Price, particularly cost reductions; and
 - 4.5.7 Management support.
- 4.6 This focus on service quality and patient care is also intended to be highlighted in the Service Agreements, and has been demonstrated in the Draft Service

Agreement which has previously been lodged with the ACCC. The tender system is an important means by which HPV can ensure that these service standards are met, through requiring these to be actively demonstrated by agency nurses in order to be considered to be on the panel of successful tenderers.

- 4.7 The specification of conditions and terms of employment in the Request for Tender and Service Agreement documents also has the effect of ensuring a degree of consistency, transparency and probity in dealings between agency nurses and health services, which is of benefit to both these parties. This benefits the relationship between the parties, by, for example, lessening the extent of any uncertainty in the terms of employment of agency nurses.
- 4.8 There is also benefit to agency nurses in that there will be a streamlining of administrative processes and procedures among the participating health services, and a greater degree of administrative consistency between the various health services which they will work for.

Anticompetitive detriments

- 4.9 A number of anti-competitive detriments were alleged by interested parties, in opposition to HPV's authorisation application. HPV considers that only two of these raise substantive issues which it will address. These issues are as follows:

- 4.9.1 Issue 1 - The HPV tender proposal will lead to a shift in the current market structure and market dynamics, with a tendency towards a high degree of concentration of market share in the control of the successful tenderers and an inability of unsuccessful tenderers to be able to compete with them.
- 4.9.2 Issue 2 - Anti-competitive detriment could potentially result from the proposed tender arrangements if the proposed tender arrangement led to a reduction in the long term supply of nursing services.

Issue 1

- 4.10 With regard to the first issue, the ACCC stated in its Draft Determination that anti-competitive detriment could possibly result from the proposed tender arrangements if the proposed tender arrangements reduce the number of agencies able to supply the sub-market for casual nurses.

Counter argument to issue 1

- 4.11 Having a tender process for the provision of nursing agency services will not lead to a substantial lessening of competition because, as accepted by the ACCC in its Draft Determination, the relevant market to consider this proposal in is the market for the supply of nursing services to public and private health care providers within Victoria. Therefore the provision of agency services to a limited group of hospitals, that being the health services which propose to participate in the tender process, would constitute only a very small proportion of this much larger market.
- 4.12 As acknowledged by the ACCC in its Draft Determination, the proportion of total demand in the market potentially foreclosed by the tender proposal is small. Should all the health services listed as potential parties to the proposed tender

choose to participate in the arrangements, then this would constitute about 70% of the public sector demand for nursing services. In turn, total public sector demand for nursing services constitutes about 67% of total demand for nursing services. Therefore the proposed parties to the arrangements constitute about 50% of the total demand for nursing services in Victoria. That is to say, even if an exclusive panel was formed to provide agency services to the participating health services, there would still be approximately 50% of the market available for other agencies which are unsuccessful at tender to provide agency nursing services to.

- 4.13 The ACCC acknowledged that therefore, a significant proportion of the market would seem likely to remain open to nursing agencies that were unsuccessful in the proposed collective tender process.
- 4.14 In any case, agency nursing only represents approximately 1.5 - 2% of overall nursing employment. Therefore, any potential decrease in the number of agencies which participate in the market as a result of the tender would lead to a negligible increase in concentration in the market for nursing services as defined by the ACCC.
- 4.15 The ACCC also acknowledged that there appear to be low barriers to entry for agencies seeking to re-enter the market for the provision of casual nursing staff. This means that it should be easy for new nurse agencies to establish themselves at the end of the tender period and so introduce competition, even if the tender did result in a small amount of increased concentration amongst nurse agencies.
- 4.16 The ACCC concluded overall that given these factors, the likely anti-competitive detriment generated by the proposed collective tender process would be minimal.
- 4.17 HPV agrees with the ACCC that the tender will not result in the closure of nurse agencies because a large proportion of demand for casual nursing services will be unaffected by the tender. HPV also agrees with the ACCC that barriers to new entry are low for nurse agencies and so new entry at the end of the tender period can be expected to ensure continued competition in the supply of casual nursing services.

Issue 2

- 4.18 An argument made by interested parties in opposition to HPV's authorisation application was that the likely response of agency nurses to a decrease in their wage rate would be to exit the profession or decrease their desired number of shifts worked.
- 4.19 The most important point to note in this regard is that any return to the award rates in agency nurses' remuneration no longer results from the authorisation application, but rather results from the DHS direction. Therefore any possible anti-competitive detriments or public benefits related to wage changes cannot be considered by the ACCC as arising from the authorisation application. In any case it is important to note that, prior to the Section 42 Direction, charges levied against hospitals by some nursing agencies for work performed were inconsistent with the award, particularly for some categories of speciality nursing.

- 4.20 However an argument raised by the interested parties and referred to by the ACCC in its Draft Determination was that, to the extent that the proposed tender arrangements would reduce the level of supply to a nursing market which is already suffering from a shortage of supply, this would constitute a public detriment as the shortages would inevitably compromise the quality of patient care.
- 4.21 The ACCC considered the argument that it was possible that the collective tendering process could result in agencies tendering below the rate capped by the DHS. To the extent that this occurred, this could have the potential to further reduce agency nursing remuneration, with potential consequences for the supply of nurses in the long term.
- 4.22 However in its Draft Determination, the ACCC considered that it would be very unlikely that the tender would reduce casual nursing remuneration significantly below the cap stated in the DHS direction, for the following reasons:
- 4.22.1 In issuing the direction, the DHS would presumably have set the maximum price which public hospitals can pay agency nurses at the lowest level which it considered commercially feasible for nursing agencies, thus making it unlikely that tender bids would be made much lower than the price regulated under the DHS direction.
- 4.22.2 Nursing agencies had informed it that, given their cost structures, it would not be possible for them to tender at or below the written direction rate.
- 4.22.3 Nursing agencies may choose to reduce the fee they receive rather than casual nursing remuneration in order to achieve a tender bid below the written direction price cap.
- 4.23 As noted by the ACCC, in any case, agency nurses comprise a very small section of the overall market for nursing services. Agency nurses constitute approximately 3% of all nurses employed by public hospitals, and approximately 2% of nurses employed by private hospitals. Further, the terms of the DHS direction limiting the use of agency nurses by hospitals to unexpected absences would likely dramatically further reduce this figure. Therefore it would be unlikely that a possibly small change in remuneration in this very small sector of the market would result in a significant change in longer term supply of nurses.
- 4.24 Further, anecdotal evidence from DHS suggests that a return to wages consistent with the Industrial Relations Commission ("IRC") decision which occurred in the past has led to greater participation of nurses in nurse banks. Recent data from DHS suggests that rather than causing nurses to exit the industry, the DHS direction has actually increased the employment of nurses by hospital nurse banks.
- 4.25 Data collected by DHS between March and July 2002 from the thirteen metropolitan health services and the three largest non-metropolitan health services indicates that while the utilisation of nurses from agencies has dropped

by about 46%, the utilisation of nurses from hospital nurse banks has increased by 52%. This DHS information also suggests that during this period, approximately 1 400 nurses have joined the public hospital nurse banks. This therefore casts some doubt as to the accuracy of the views of those who claim that a return in agency nurses' wages to award rates would lead to a shortage of nurses in the industry.

4.26 In addition, the following arguments were also made by many parties who opposed HPV's authorisation application:

- 4.26.1 That the tender is likely to reduce the current level of flexibility of employment which agency nurses have.
- 4.26.2 That the tender process will not lead to an increase in the level of price certainty, due to the fact that agency nurses would be likely to exit the industry or decrease their shifts worked in response to a return to IRC determined wage rates.
- 4.26.3 That rather than promoting equitable dealings and a balance in the bargaining power of participants in the industry, the HPV tender proposal has the potential to introduce bargaining imbalances itself due to its exclusive nature.
- 4.26.4 That the costings used by HPV in its application to show that the tender process is likely to lead to a decrease in staff costs did not accurately reflect the extent of the staffing costs faced by public hospitals. Complainants expressed the view that HPV did not acknowledge the cost effectiveness of agency nursing as compared with a hospital-employed workforce.
- 4.26.5 That the tender proposal runs counter to issues of employment equality and workplace harmonisation by denying agency nurses their right of choice and failing to recognise their skills.

4.27 HPV is of the view that the arguments above lack merit, as there is little explanation offered by these interested parties as to the mechanism by which such anti-competitive detriments may be likely to arise.

4.28 In any case the arguments largely relate to the impact of a return in agency wage rates to award rates, which, as discussed above, no longer results from the authorisation application but rather results from the DHS direction. For this reason, HPV is of the view that it is not relevant to the ACCC's consideration of the merits of HPV's authorisation application.

5 Conclusion

5.1 HPV submits that if there are any anti-competitive effects likely to flow from the tender system these would be minimal at most, and in any case would be greatly outweighed by the resulting public benefit.

- 5.2 Of significance is the fact that the proportion of total demand in the market potentially foreclosed by the tender proposal is small. Given that the relevant market to consider this proposal in has been accepted by the ACCC as being the market for the supply of nursing services to public and private health care providers within Victoria, even if an exclusive panel was formed to provide agency services to the health services participating in the tender, there would still be approximately 50% of the market available for other agencies which may be unsuccessful at tender to provide services to. Further, agency nursing only represents a small part of overall nursing employment (approximately 1.5 - 2%), therefore any potential decrease in the number of agencies participating in the market as a result of the tender would lead to a negligible increase in concentration in the market for nursing services as defined by the ACCC.
- 5.3 Further, barriers to entry appear to be low for agencies seeking to re-enter the market for the provision of casual nursing staff. Therefore, as accepted by the ACCC in its Draft Determination, it would not be difficult for new nurse agencies to establish themselves at the end of the tender period, even if they were unsuccessful at tender the first time.
- 5.4 The proposed tender system delivers many benefits to agencies, health services, and the general public, as highlighted in earlier sections of this submission.
- 5.5 The proposed tender system is aimed at strengthening and enhancing the relationships between agency nurses and health services, which will ultimately be to the overall benefit of the public health system generally. The tender process is aimed at removing uncertainties in the employment relationship between health services and agency nurses, and introducing administrative consistency between the procedures of the various participating health services.
- 5.6 The tender will lead to a streamlining and reduction in administrative costs incurred by participating health services, in dealing with nursing agencies under a collective process rather than having to deal with them individually.
- 5.7 Further, HPV intends to adopt a consultative and co-operative approach, with the terms of the Services Agreements being subject to negotiation with the successful tenderers. This will enable a variety of stakeholders in the process to have an opportunity to put forward their points of view with regard to issues such as the conditions and terms of employment of agency nurses by the participating health services.
- 5.8 The system will also lead to a significant enhancement in the quality of patient care, particularly through the following means:
- 5.8.1 The likely direction, by health services, of administrative cost savings into the employment of additional nurses or other personnel, which would clearly have the potential to benefit the quality of patient care.
- 5.8.2 There is a clear focus by HPV on continuous improvement in service standards and patient care in the terms of the Request for Tender and the Services Agreements.

- 5.8.3 It is intended that service level and performance targets will be set, and incorporated into the Services Agreements between tenderers and HPV. This will, however, be subject to negotiation with the successful tenderers.