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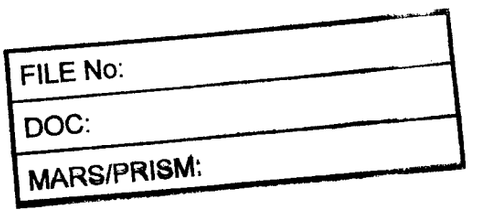


Our Ref: GW:CW:7800
Your Ref: C2002/527-03

Mr T Grimwade
General Manager
Adjudication Branch
Australian Competition & Consumer Commission
PO Box 1199
DICKSON ACT 2602

Att: Mr G Jones

Dear Sir

Application for Authorisation Nos A90811 & A90812 lodged by Health Purchasing Victoria ('HPV')

We refer to your letter dated 30 August 2002 and previous correspondence. Thank you for the opportunity to make a further submission in this matter.

As you know, Code Blue Specialist Nurses Pty Ltd ('Code Blue') is directly impacted by HPV's proposed conduct, involving the collective negotiation of, and exclusive award of, the right to supply agency nursing services to public hospitals in Victoria. Code Blue is a relatively small business, which will be unfairly and detrimentally affected by this conduct.

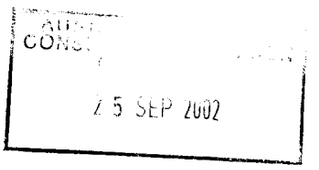
Code Blue has lodged two earlier submissions. The first focussed on the wider public detriment, particularly affecting nurses, that will flow from HPV's conduct. The second focussed on the anti-competitive detriment flowing from the proposed conduct, particularly the raising of substantial barriers to entry as a result of the conduct.

This submissions addresses [three] further issues that have subsequently arisen, particularly issues arising out of the public conference recently conducted by the Commission:

1. The status, permanence and scope of the DHS direction.
2. The number of agencies to be appointed under the tender.
3. The harshness of many of the proposed terms of the contract proposed by HPV.

The DHS Direction

To a significant extent, the conclusions of the ACCC in its draft determination were based on two assumptions:



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(a) that the written direction issued by the Department of Human Services on 1 March 2002, pursuant to section 42 of the Health Services Act, had altered the conditions of the market for nursing services; and

(b) that the direction would be in force throughout the period of the tender and ensuing exclusive contract.

Code Blue submits that neither of these assumptions has been adequately shown to be correct.

In relation to the first assumption, the direction clearly imposes a price cap on the supply of nursing agency services to public hospitals. Although the direction is damaging to nursing agency businesses, it does not remove competition between nursing agencies. That competition will continue despite the direction. Accordingly, in assessing the competitive impact of HPV's proposed conduct, the ACCC must assume continued competitive rivalry in the market. As submitted previously, the combination of a substantial aggregation of bargaining power, and the award of an exclusive contract, will substantially damage competition in the market for nursing services, by both removing actual competitors from the market and raising substantial barriers to entry.

In relation to the second assumption, there is no basis for assuming that the direction will remain in force throughout the period of the tender and exclusive contract. The direction will be subject to market and political forces. In Code Blue's submission, it is very likely that in a relatively short space of time, the DHS will be forced to reconsider the direction, and it will be withdrawn. For that reason, Code Blue submits that the ACCC should consider the likely impact of HPV's conduct in the circumstances that the direction is withdrawn. This eventuality should be given equal weighting with the possibility that the direction remains in force.

A second issue also arises in relation to the scope of the direction. Despite requests to both the DHS and HPV, Code Blue has not been able to obtain a copy of the direction. Accordingly, the content of the direction can only be determined from the summary provided in HPV's letter to the ACCC dated 22 April 2002.

This summary states that the direction has 3 elements. The first concerns when agency nurses may be engaged by public hospitals. The second concerns the grade of the replacement nurse engaged, and the amount that is paid by the agency to the nurse providing the services. The third concerns the amount payable by hospitals to the agency for the services of the nurse.

Code Blue is concerned about the attempt to regulate the amount payable by agencies to their own nurses. It is one thing for the DHS to issue a direction capping the prices payable by public hospitals to nursing agencies, who supply nurses to the hospitals. It is quite a different thing to attempt to regulate what agencies choose to pay nurses engaged by them. This would be an attempt to interfere in contractual relations between agencies and nurses. It would effectively limit the ability of agencies to choose what proportion of amounts earned is retained by the agency, and what proportion is passed through to the nurses engaged. Not only would this be unfair to nurses, it would also seriously undermine

competition between agencies because it would regulate the amounts payable to nurses. Agencies could not compete on price to attract more nurses.

Having regard to the provisions of the Health Services Act, we submit that there must be a serious question whether a restriction of this nature is lawful under section 42. The direction would not seem to satisfy any of the subparagraphs of subsection (1). Subparagraph (fa) would appear to be the only subparagraph relevant to the direction issued. It empowers the DHS to issue a direction in relation to:

> *"the extent to which and the conditions on which a hospital is required to obtain or purchase facilities, services, equipment or supplies provided by another hospital or another person or body".*

Clearly, the hospitals purchase services from the agencies, and not from the nurses engaged by the agencies. Any attempt to regulate the commercial relationship between agencies and nurses must be beyond power.

The contract proposed by HPV purports to give effect to the conditions of the direction in clause 10. Clause 10.2 purports to regulate the commercial relationship between agencies and nurses engaged by them. This clause should not be permitted by the ACCC. It represents unreasonable interference by HPV in the amount that agencies choose to pay their nurses, and seriously undermines competition between agencies in acquiring the services of nurses.

The number of agencies to be appointed under the tender

One of the most significant concerns of agencies in relation to HPV's proposed conduct is that it allows the HPV to appoint a single agency as the exclusive supplier of services to public hospitals, or alternatively a very small number of agencies. Such an outcome would fundamentally alter the structure of the market in which agencies supply nursing services, and substantially reduce competition (including by raising barriers to entry).

There is nothing within the terms of the tender as proposed by HPV that would prevent that outcome. At the recent public conference, Mr O'Keefe on behalf of HPV stated that the intention of HPV was to draw upon a broad range of suppliers. However, such a statement is clearly insufficient to address the legitimate concerns of nursing agencies. HPV has reserved to itself the freedom to decide whether one agency will supply services, or a range of agencies will supply services. In this way, HPV has the freedom, through the tender arrangements, to determine for itself the structure of the Victorian market going forward.

Code Blue submits that the ACCC should not countenance a proposal whereby a body such as HPV grants itself complete control over the structure of a market that is fundamental to health care in Victoria, and the well being of all Victorians.

Furthermore, this problem is so fundamental to the whole design of the tender proposal that it is difficult to conceive how the arrangements might be amended to ensure this outcome does not eventuate. The aggregation of buying power in the hands of HPV delivers it the ability to determine these matters in its sole discretion. Accordingly, the only means to ensure this does not occur is to disallow the aggregation contemplated in the authorisation proposal.

Proposed contractual terms

A number of participants at the recent public conference commented that they believed the contractual terms proposed by HPV were harsh and unconscionable. Code Blue agrees with that assessment. Attached to this letter is a table that comments on the more offensive of the contractual terms. In Code Blue's submission many of these terms would be struck down as unlawful under section 51AC of the Trade Practices Act having regard to:

(a) the relative bargaining strength of HPV as a result of the aggregated bargaining power;

(b) the fact that many of the obligations imposed on agencies under the proposed contract are not reasonably necessary for the protection of any legitimate interest of a hospital;

(c) the extent to which HPV has been willing to negotiate the proposed contract.

Code Blue submits that the ACCC should not authorise a proposed course of conduct on the part of HPV which will result in harsh and unconscionable contractual terms being imposed on agencies, with no effective ability to negotiate those terms.

Conclusion

In conclusion, Code Blue submits that the ACCC should refuse HPV's application having regard to:

(a) the overriding damage that will be done to the nursing profession as a result of the conduct;

(b) the damage that will be done to competition between nursing agencies, due to the likely structural alterations to the market flowing from the grant of an exclusive contract, the increase in barriers to entry and the regulation of amounts payable by agencies to nurses; and

(c) the harshness of the contractual terms sought to be imposed on agencies by HPV through the tender process.

Yours faithfully,

WILSONS LAWYERS

OVERVIEW OF CONTRACTUAL TERMS
(Comments are based on draft 2.0 dated 16 January 2002 of the contract for the provision of temporary nursing services)

Clause	Comment
3.6	This clause imposes obligations in the nature of performance indicators. Those performance indicators will be contained in schedule 4. However, this schedule has never been provided to agencies, and is not contained in the documents that HPV is seeking to have authorised by the ACCC. Accordingly, neither agencies nor the ACCC have been able to assess the fairness of these provisions. HPV is keeping all parties in the dark. In addition, it can be noted that a failure to comply with the performance indicators will result in more frequent reporting obligations being imposed on agencies. Those obligations will be in the absolute discretion of the health service. Accordingly, under this clause health services have the freedom to unilaterally impose more burdensome obligations on agencies. As an additional penalty for non-compliance with the as yet unseen performance indicators, financial penalties may be imposed. The level of these penalties has also not been disclosed.
6.1	This clause operates harshly against the interests of individual nurses. They are excluded by this clause from undertaking additional agency services with the hospital by whom they may also be employed. Why is this clause reasonable necessary to protect a legitimate interest of a hospital? Code Blue submits that it unfairly penalises a nurse who wishes to exercise labour market flexibility and undertake some work on an employed basis, and other work on a contract basis.
6.6	This clause permits the health service to unilaterally impose on agencies, and vary, policies, rules procedures and standards. There is no apparent limit to the types of obligations that might be imposed under this clause. There is no obligation to consult in relation to proposed changes. There is no ability to have an independent person assess the reasonableness of the impositions. Furthermore, there is no regard for the costs that may be imposed on an agency as a result of the imposition of such obligations.
6.22	This clause imposes the obligation for occupational health and safety of the agency nurse on the agency. This is done in circumstances where the nurse will perform his or her services on the premises of a public hospital. It is extraordinary for public hospitals to seek to avoid primary responsibility for the occupational health and safety of agency nurses working within their hospital, and effectively under their control, in this manner. Indeed, not only should this clause as currently drafted be removed from the agreement, but hospitals must expressly undertake to protect the occupational health and safety of nurses.
8	Clause 8.1 imposes an extremely harsh indemnity obligation on agencies. As currently drafted, agencies must indemnify the hospital for:

	(a) damage to property, regardless of who owns the property and who caused the damage (there may be no connection to the agency or the agencies nurses for this clause to apparently operate); (b) any injury to persons, regardless of who is injured, where they are injured and who caused the injury. These are absurd propositions, but evidence the harshness of terms that can be imposed by an entity with unchecked bargaining power. Clause 8.2 purports to limit liability if the hospital is at fault, but this does not cure the fundamental deficiency in clause 8.1. An agency should not incur liability unless it is at fault. Clause 8.3 then provides that these absurd obligations continue forever.
9.2	Code Blue is uncertain whether insurance of the kind required under this clause is currently available in the market. Furthermore, HPV has not provided to Code Blue a copy of the insurance provided by the Victorian Managed Insurance Authority. It is also unclear why the agencies' insurance is required to cover injury, loss or damage arising from the use of diagnostic equipment or procedures involving the emission of ionising radiation. These matters are properly within the control of the hospital concerned, and are part of the responsibilities of the hospital to provide a safe work place environment.
10	This clause governs the fees payable to agencies. These fees are intended to be set out in schedule 3, but this schedule has not been provided to agencies. In addition, clause 10.6 indicates that schedule 3 will contain provisions allowing the variation of the fees payable. Again, agencies are unable to assess the reasonableness of these terms until schedule 3 has been provided. In so far as fees may be varied, the following questions arise: (a) is the hospital able to vary the fees unilaterally; (b) must the hospital consult about any fee variations; (c) will fee variations be arbitrated; (d) how will CPI adjustments be dealt with during the term of the agreement?