



**Australian Competition & Consumer Commission**

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Our Ref: C2002/527  
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28 October 2002

Mr Simon Uthmeyer  
Partner  
Phillips Fox  
PO Box 4301PP  
MELBOURNE VIC 3001

Dear Mr Uthmeyer

**Applications for Authorisation numbers A90811 & A90812  
lodged by Health Purchasing Victoria**

I refer to the above listed applications for authorisation in respect of which the Australian Competition and Consumer Commission (the Commission) issued a draft determination on 27 June 2002, proposing to authorise the proposed arrangements.

As you will be aware a pre-decision conference in relation to the Commission's draft determination was held in the Commission's Melbourne Offices on 15 August 2002. Following the conference the Commission provided interested parties with a further opportunity to provide written submissions in relation to its draft determination. I attached for your information copies of submissions received by the Commission since the release of its draft determination.

Following its public consultation process in relation to the draft determination, the Commission has a number of questions in relation to the proposed arrangements as detailed below.

I would be grateful if you could provide a response to these questions, along with any comments you wish to make on the additional submissions received by the Commission, by Friday 15 November 2002, in order that the Commission may expedite its consideration of this matter.

The Commission expects to be in a position to finalise its consideration of these applications once you have provided a response to the questions outlined.



Should you wish to discuss this matter further please contact Gavin Jones on (02) 6243 1107.

Yours sincerely

A handwritten signature in black ink, consisting of a stylized 'T' followed by a cursive 'G' and 'M'.

Tim Grimwade  
General Manager  
Adjudication Branch

## Questions

### *Panel of nursing agencies*

The Commission has proceeded to assess the proposed arrangements on the assumption that only a limited number of nursing agencies would be appointed by HPV, through the tender process, to supply agency nurses to the Health Services party to the arrangements. Indeed, the Commission had envisaged that as few as one, or at a maximum, the maximum number of agencies required to meet expected demand, would be appointed. It appears that the majority of interested parties have also assumed this would be the case. However, at the pre-decision conference in relation to these applications, held in the Commission's Melbourne office on 15 August 2002, representatives from a number of Area Health Services and Mr Dennis O'Keefe, of HPV, made statements to the effect that it was intended that a broad range of agencies would be drawn on. Mr O'Keefe stated that no one agency would be able to meet all of the Area Health Services needs, that the criteria for inclusion on the panel of firms from which agency nurses would be drawn would be flexible, and that agencies meeting these criteria would be included on the panel.

I note that this is the first, and only, indication that the Commission, or it would appear other interested parties, has had that it is intended that the panel supplying agency nurses to Area Health Services would, subject to meeting the criteria for inclusion on the panel, be made up of a broad range of agencies. The Commission notes that there is nothing in the terms of the proposed tender put to it for authorisation that would prevent a few, or even a single agency being appointed, regardless of how many agencies meet the criteria for appointment.

- 1 Can you confirm whether it is intended that a broad range of nursing agencies (perhaps all) that meet the criteria for inclusion on the panel will be selected through the tender process? If this is the case, can you provide details of how it is intended that this panel would operate? Specifically, once the arrangements were in place, how would the agency selected to provide agency nursing staff to individual Area Health Services or hospitals in each particular instance be determined?

### *Maximum rate payable under the Services Agreement*

In its draft determination, the Commission concluded that as a result of the direction issued by the Department of Human Services (DHS) on 1 March 2002, regulating the rate which Area Health Services can pay for agency nurses, it was unlikely that the proposed tender arrangements would significantly reduce agency nursing remuneration (below the rate provided in the DHS direction). This conclusion was based on amendments made to the tender documents by HPV on 9 April 2002, to make them consistent with the DHS direction. However, it now appears that there may be some discrepancy between the DHS direction, which provides for a maximum rate of 80% above the award, and the Services Agreement which provide for a GST inclusive maximum rate of 80% above the award.

If the maximum rate under the DHS direction is not GST inclusive, then the proposed tender arrangements would, by definition, result in a reduction in agency nursing remuneration, beyond that provided for in the DHS direction (ie allowing for GST, the maximum effective rate payable above the award would be 63.6% rather than the 80% provided for in the DHS direction).

- 2 Can you confirm whether the maximum rate payable under the DHS direction is GST inclusive? If it is not, it would appear based on the information provided to the Commission by HPV, in particular its 9 April 2002 amendments and covering letter, that this discrepancy in the relevant maximum rates is unintentional. Does HPV intend to address this discrepancy by way of a further amendment to its applications?

I note that some of the information requested above relates to the DHS direction, which is not a matter directly related to HPV, however, presumably in amending the tender documents to make them consistent with the direction, HPV had access to the specific details of that direction.

### *Specific clauses of the Services Agreement*

#### Clause 3.6 – Performance Indicators

Clause 3.6 of the Services Agreement reads:

- 3.6 The contractor shall ensure the services conform with the Performance Indicators set out in schedule 4. Failure to comply with those indicators shall entitle the Health Service to:
  - 3.6.1 require more frequent reporting and monitoring of the Contractors performance....
  - 3.6.2 impose the financial reductions specified in Schedule 4....

The Commission notes that HPV has not provided a copy of Schedule 4.

- 3 Are you able to provide details of the performance indicators that will be included in Schedule 4? If specific details of performance indicators to be included in Schedule 4 have not been finalised, are you able to provide examples of indicative performance indicators likely to be included? Additionally, are you able to provide details of financial penalties which will be provided for in the event that Performance Indicators are not met?

#### Clause 6.1 – Use of Health Services staff

Clause 6.1 of the Services Agreement reads:

- 6.1 The Contractor cannot provide and a Health Service will not accept Nursing Services from a person who is a current member of the Health Service's permanent staff.
- 4 Why does HPV consider it necessary to impose this restriction? The restriction would appear to run counter to HPV's argument that employment of agency nurses has implications for the quality of patient care as agency nurses do not know the site/physical location, the procedures of the ward/unit or the types of patients in the ward/unit. To the extent that this is a problem, clause 6.1 of the Services Agreement would appear to exacerbate the problem by restricting Health Services ability to employ those agency nurses most familiar with their procedures.

#### Clause 8.1 – Indemnity of the Health Services

Clause 8.1 of the Services Agreement relevantly reads:

- 8.1 The Contractor shall be liable for and shall indemnify each Health Service ('the indemnified Health Service') its officers, servants, employees and agents against any liability, loss, claim or proceedings whatsoever arising under any statute or at common law in respect of:....
- 8.1.3 Any damage to property, real or personal, including any infringement of third parties patents, copyrights and registered designs;
- 8.1.4 Any injury to persons, including injury resulting in death and economic loss; and...

Interested parties have raised concerns that at a literal interpretation of this clause, nursing agencies must indemnify the Health Service for damage to person or property, regardless of who owns the property or who is injured, and who caused the injury or damage. They note that there appears to be no need for a connection from the damage or injury to the agency or agency nurse for this clause to operate. I note that clause 8.2 limits the agencies liability in instances where the Health Service is legally liable, however this does not appear to address the agencies broader concerns.

- 5 Can you clarify the intent of clauses 8.1.3 and 8.1.4? Specifically, that they are not intended to place on the Contractor liability for any act resulting in damage or injury, beyond that directly or indirectly resulting from the actions of the agency or agency nurse?

#### Clause 9.2 – Specific insurance obligations

Several nursing agencies have expressed concerns that insurance of the kind required under this clause is not currently available to them.

- 6 Is HPV aware of whether this type of insurance coverage is currently available in the market? If so, is it able to provide details of insurers providing this type of coverage?

Clause 9.2.4 requires Contractors to maintain insurance which provides indemnity, coverage and benefits equivalent to the indemnity, coverage and benefits (other than limits of indemnity) provided by the Victorian Managed Insurance Authority, on behalf of the Health Services. Nursing agencies have expressed concerns that they do not have access details of this coverage.

- 7 Are details of the indemnity, coverage and benefits provided by the Victorian Managed Insurance Authority, on behalf of the Health Services, publicly available at this time? Is it intended that they will be made publicly available prior to the calling of tenders? Are you able to provide a copy of these coverage details to the Commission at this time?

Clause 9.2.6 provides that Contractors must provide indemnity in respect of injury, loss or damage caused by or arising from the use of diagnostic equipment or procedures involving the omission of ionising radiations. It has been contended that 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.

- 8 Why are Contractors beginning required to provide indemnity in respect of injury, loss or damage caused by or arising from the use of diagnostic equipment or procedures involving the omission of ionising radiations?

### Clauses 10.1 – 10.3 – Fees payable

Several nursing agencies have expressed concern that the schedule of fees, scope for variations and discounts etc, have not been set out in the proposed tender document. The Commission considers the schedule of fees a matter between nursing agencies and HPV, to be negotiated through the tender process. However, clause 10.2 of the Services Agreement, while consistent with the DHS direction, appears to extend beyond addressing fees payable by Health Services to nursing agencies, to exercise control over the fees payable by nursing agencies to their nursing staff. This would appear to be an unnecessary provision within the scope of the proposed arrangements, which concern the fees payable to nursing agencies by Health Services. Provided agency nurses are provided to Health Services at the agreed rate, any arrangement between the nursing agencies and its nurses regarding their remuneration would appear to be solely a matter between them.

- 9      Given that the proposed tender arrangements will control the cost to Health Services of engaging temporary agency nursing staff, why does HPV consider it necessary to also regulate the (labour) cost to nursing agencies of providing these services?

### Clause 13.3 – Recovery of costs

Clause 13.3 effectively provides, among other things, that should a Health Service have to source a temporary nurse from elsewhere because an agency is unable to provide a nurse for a nominated shift, the agency would be liable for any difference between the agreed contract price for providing the nurse and the actual amount paid by the Health Service in sourcing the nurse elsewhere, plus an administration fee of 10% of the additional cost.

- 10      To the extent that it is not addressed in response to question 1, how will clause 13.3 operate in practice, assuming an agency is not able to supply a nurse for a shift, if as stated, a broad range of agencies will be included on the panel from which agency nurses would be drawn?

A number of agencies have stated that they consider the requirements of this clause particularly onerous, to the point of unconscionability within the meaning of section 51AC of the *Trade Practices Act* 1974 (the Act).

Section 51AC of the Act prohibits unconscionable conduct in business transactions. While unconscionable conduct is not defined within the Act, section 51AC does include a list of factors which a Court may have regard to including:

- the relative bargaining strength of the parties to the arrangements; and
- whether, as a result of the conduct engaged in, there was requirement to comply with conditions not reasonably necessary to protect the other parties business interests.

- 11      HPV may wish to comment as to why it considers Clause 13.3 necessary in order to protect its interests under the proposed Services Agreement, particularly given the onerous obligations this clause potentially places on agencies entering into Services Agreements.