

IN THE MATTER of:

Applicant, Health Purchasing Victoria; and

**Application for authorisation Nos. A90811 and A90812 lodged
by Health Purchasing Victoria as Applicant under Sub-section
88(1) of the *Trade Practices Act 1974* (the "Act")**

**TO: AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION**

SUBMISSION BY:

Code Blue Specialist Nursing Agency Pty. Ltd.

SUBJECT MATTER OF SUBMISSION:

The Applicant's request for interim authorisation

1. Background

- 1.1 Code Blue Specialist Nurses Agency Pty Ltd ("*Code Blue*") submits that the application by Health Purchasing Victoria ("*HPV*") for the grant of interim authorisation should be refused.
- 1.2 Code Blue provides a valuable service in placing specialist nurses in both public and private hospitals in Victoria. Specialist nurses include critical care nurses, emergency nurses, theatre nurses and midwives. All of the nurses placed by Code Blue are registered under Division 1 of the Nurses Act 1993.
- 1.3 Code Blue is the largest of the specialist nurse placement agencies in Victoria. It has conducted its business in Victoria for about 6 years. Code Blue conducts its business from its administrative centre at 62 Robinson Street, Dandenong, Victoria.

- 1.4 Code Blue employs approximately 18 full time staff members in administering its operations.
- 1.5 The Code Blue's business operation essentially involves matching the particular nursing needs of hospitals with the qualifications, skills and availability of the nurses registered with Code Blue. About 95% of the specialist nursing placements involve filling short term vacancies which arise from day to day in both private and public hospitals. Prior notice given by the hospitals to Code Blue to fill these vacancies typically ranges from between about 3 weeks to as short as 2 hours in some cases. The Code Blue office is staffed and operates 18 hours per day, 7 days per week.
- 1.6 Code Blue has approximately 2,800 specialist nurses on its books, with about 75% of that number being currently available for placement.
- 1.7 In Victoria, there are approximately 8 other specialist nursing agencies and approximately 15 other general nursing agencies which all operate in a similar manner to Code Blue.
- 1.8 In Attachment B to its application, the Applicant, HPV, by its solicitors Phillips Fox, has made the following submission in relation to its application for the grant of interim authorisation:

"Further, we request that the ACCC grant interim authorisation for the proposed tender arrangements until its Final Determination is made on the basis that the current nurse staffing situation has created a staffing funding crisis for the health services and the situation needs to be addressed as a matter of urgency.

It is possible to expedite the matter in anticipation of the Final Determination without adversely impacting the market should the ACCC ultimately refuse to grant authorisation. Therefore, we request interim authorisation to proceed with a conditional tender

process, namely, call for expressions of interest in the tender, receive responses from suppliers, release a Request for Tender and evaluate the bids. We propose to make the Request for Tender subject to ACCC authorisation and no contracts or bidding arrangements shall be entered into until the ACCC's Final Determination.

We consider that there would be no significant change in the market during the conditional tender process as no appointment of the panel would be made and there will be no detriment to the suppliers other than the cost in preparing the tender responses. Therefore, should the ACCC deny authorisation the market would easily revert back to the previous position prior to the conditional tender process."

- 1.9 Code Blue takes issue with a number of the factual assertions made by the Applicant in its submission. These are set out below in section 3.

2. Legal Criteria for the Grant of Interim Authorisation

- 2.1 The ACCC has power to grant interim authorisations pending full consideration of the matter, in appropriate circumstances.

- 2.2 In particular, section 91(1) of the Act provides:

"(1) An authorisation may be expressed to be in force for a period specified in the authorisation and, if so expressed, remains in force for that period only."

- 2.3 The ACCC Digest (which compiles the current literature of the ACCC on its activities under the Act) relevantly provides (at 3-1250):

"Requests for interim authorisation may be made at the time of lodging or later. Section 91 allows the commission to grant

interim authorisation without it making a decision on the merits of the application. Interim authorisation allows the applicant to engage in the subject conduct as if it had authorisation, while the substance of the merits of the application is considered by the Commission.

It is unlikely that interim authorisation will be granted where the effect of allowing the proposed conduct to occur would prevent the market being able to return to substantially its pre-interim authorisation state if the Commission later denied authorisation.

Submissions in support of requests for interim authorisation are expected at the time a formal request is made. It should not be presumed the Commission will grant interim authorisation without persuasive submissions. Interim authorisation may be expected only in exceptional circumstances. The Commission may make inquiries and/or seek submissions in respect of a request for interim authorisation.

The Commission can revoke an interim authorisation at any time but will usually consult with interested parties if it contemplates doing so."

- 2.4 Considerations relevant to a decision by the Tribunal to grant interim authorisation were stated in *Re Queensland Timber Board* (1975) 24 FLR 205; 5 ALR 501; 1 ATPR 40-005 to be as follows:

"(a) The policy of the Act is clearly opposed to arrangements in restraint of trade and other anticompetitive practices. An applicant for final authorisation has a substantial onus to discharge in satisfying s 90(5).

(b) A person appealing in good faith against the refusal of authorisation by the Commission should not be effectively denied

his right of appeal by the refusal of an interim authorisation. This would apply, eg, if the arrangement once departed from could not be reinstated in the event of a final decision favourable to the applicant.

(c) Possible harm or prejudice to the applicant falling short of denial of the right of appeal will clearly be relevant.

(d) In the same way, possible harm to other parties must be considered.

(e) The ultimate concern of the Tribunal must always be the benefit of the public, so that any possible detriment or benefit to the public must be given full weight.

(f) **In some cases it may be thought preferable not to disturb the existing position pending a final decision. The good or bad effects of the existing situation will usually be clearer than the possible effects of a change in that situation.**

(g) The length of time which is likely to elapse between the granting of the interim authorisation and the scheduled or anticipated date for hearing will often be important. However, this consideration can be controlled to some extent by the granting of an interim authorisation for a fixed period of time, subject to review at the end of that period, or by the refusal of an authorisation while reserving liberty to apply if circumstances change or new material comes to light.

2.5 In *Re International Air Transport Association* (1985) 58 ALR 721; (1985) ATPR 40-537 the Tribunal emphasised that the principles governing the grant of interim authorisations are difficult to define as cases will be determined on their particular facts. After referring to the principles suggested in *Re Queensland Timber Board* (1975) 24 FLR

205; 5 ALR 501; 1 ATPR 40-005, the Tribunal suggested the following additional principles:

- The fact that an application is for interim authorisation pending the final hearing points strongly to the conclusion that the Tribunal is not dealing finally with any issues in the matter.
- It would generally be inappropriate to examine too closely questions of law which arise or to determine questions of credibility of witnesses or to sift through extensive material to determine questions of fact in issue between the parties and which may be finely balanced.
- The Tribunal is not bound, upon the hearing of an application for interim authorisation, by the prohibitions imposed by s 90(6), (7), (8) and (9) of the Act: s 91(2A). **This does not mean that questions of benefit or detriment to the public are irrelevant on the hearing of an interim authorisation application.**

3. Issues of Fact

- 3.1 This is a very serious application, which is likely to have far reaching consequences for the provision of health services within the State of Victoria, and elsewhere in Australia. The matter, including the application for interim authorisation, cannot be embarked upon lightly and cannot be entertained without a very careful and detailed analysis of all relevant facts.
- 3.2 The Applicant bears the evidentiary burden of supporting its application with persuasive submissions in order to be granted interim authorisation. The Applicant has failed to advance such submissions in support of its application, either to the necessary standard of proof, or at all. The

assertions relied upon by the Applicant are not adequate for the grant of interim authorisation in a serious matter such as this.

- 3.3 Interim authorisation may be expected only in exceptional circumstances. The Applicant has failed to establish, to the requisite degree or at all, why it is that exceptional circumstances presently exist or have arisen which justify the grant of interim authorisation in this case.
- 3.4 The final hearing of the matter is likely to involve substantial and important issues of public policy. Careful and detailed examination of the facts and the public policy issues is called for. Questions of benefit or detriment to the public are also relevant on the hearing of an interim authorisation application. However, by reason of the complexity of the issues in this case, it is inappropriate to embark on an examination of those issues on at this stage, which examination at this point necessarily could only be undertaken on a preliminary and cursory basis. This is the case, particularly as it may be necessary, even in considering the grant of interim authorisation, to determine questions of credibility of witnesses or to sift through extensive material to determine questions of fact in issue.
- 3.5 Code Blue takes issue with a number of factual matters asserted by the Applicant in support of its application for the grant of interim authorisation. These are set out below.
- 3.6 **The Applicant asserts that there is a current nurse staffing funding crisis for the health services which needs to be addressed as a matter of urgency.** However, if there is an existing staff funding crisis for health services, there is absolutely no evidence that this is of recent origin or that anything new in this regard has occurred to justify the grant of interim authorisation as a matter of urgency.
- 3.7 **The Applicant further asserts that it is possible to expedite the matter in anticipation of the Final Determination without adversely impacting the market should the ACCC ultimately refuse to grant**

authorisation. However, this assertion needs to be considered in the unique context of the industry in respect of which the application is made. In this regard, the following points are made:

- it is a service industry in which both commercial and industrial considerations cannot be divorced;
- Code Blue, and other like agencies, are highly dependent in the provision of their services to the public upon the maintenance of goodwill and reliable commitment on the part of the thousands of nurses registered with them;
- it is well known within Victoria and elsewhere that industrial relations in the nursing industry has been particularly volatile in recent years, specifically in the area of staffing levels. For example, the issue of implementing the nurse patient ratios is currently the subject of supervision by the Australian Industrial Relations Commission;
- a distinct advantage of the agency nursing services for nurses registered with them (92% of whom are women) is the flexibility of working times which such agencies are able to offer. This has unique advantages for women engaged in this important section of the work force, many of whom are married and have children. The agency nursing system is able to offer nurses in this position a "family friendly" work environment;
- another advantage which agency nursing services are able to offer nurses is the higher remuneration that is able to be paid to agency nurses for their services, compared with non-agency nurses;
- what appears to be contemplated by the HPV is that authorisation be granted by the ACCC to enable it to embark upon and effect virtually the whole of the proposed tender process scheme, subject

only to final approval being granted to that scheme. To implement the scheme, as contemplated by the HPV or to any extent at all, would have a devastating impact on the nursing agency industry;

- further, there would arise a very serious risk that the adverse impact on the industry would be irreversible;
- most importantly, there is a serious risk that if this was to occur, any alleged staff nursing shortages in Victoria, which is the very public purpose sought to be addressed by the HPV scheme, would be greatly exacerbated;
- these consequences will arise by reason that the agency nurses, upon it becoming public knowledge that the HPV tender process scheme was being embarked upon, would, in many cases, desert the nursing industry and cease to practice their profession as nurses, including as specialist nurses. Many would more than likely seek alternative employment suitable to their particular circumstances. In particular, the drain of nurses from the profession is likely to be experienced principally with the more senior, well qualified and experienced nurses in the specialty nursing areas. The Victorian public would therefore suffer a very significant loss of its specialist nursing knowledge base. This would arise in part by an expectation or perception of the flexible "family friendly" working conditions being eroded, coupled with an expectation of there being significantly less remuneration paid to nurses, including specialty nurses;
- further, upon the HPV embarking upon its tender process, this drain from the nursing profession is likely to occur almost instantly, with increasing numbers of nurses rapidly following the lead of other nurses. The likelihood of this occurring is extremely high in the present sensitive industrial environment;

- furthermore, the timing of the present application, in a relatively quiet holiday period of the year, will facilitate the movement of nurses to other jobs outside the nursing sector, which other jobs may be available at the commencement of the new year;
- the ultimate effect of the HPV embarking upon its scheme as contemplated by it will be to very seriously destabilise the nursing industry in Victoria, in an industrial environment that is already highly sensitive and unstable.

3.8 Consequently, it is inconceivable, as the Applicant asserts, that "the market would easily revert back to the previous position prior to the conditional tender process" in the event that the ACCC denies final authorisation.

4. **Detriment to the Public by the Grant of Interim Authorisation - Discretionary Matters**

- 4.1 By reason of the matters referred to in this submission, detriment will be caused to the public by the grant of interim authorisation sought by the Applicant.
- 4.2 The effect of allowing the proposed conduct to occur in the interim would be likely to prevent the market being able to return to substantially its pre-interim authorisation state if the Commission later denied authorisation or there is a substantial risk that this will be the case.
- 4.3 The ultimate concern under the Act must always be the benefit of the public, so that any possible detriment or benefit to the public must be given full weight.
- 4.4 But for any authorisation (including any interim authorisation) being granted by the ACCC, the implementation of the tender process scheme

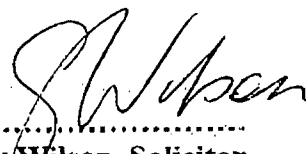
proposed by the HPV, would amount to conduct which would be manifestly illegal pursuant to section 45 of the Trade Practices Act.

- 4.5 Further, the conduct proposed by the HPV would amount to a breach of the letter and intention of the Code Conduct Agreement between the Commonwealth of Australia and the State of Victoria, including the enabling legislation and regulations made thereunder.
- 4.6 In this case it is preferable not to disturb the existing position pending a final decision. The good or bad effects of the existing situation are a good deal clearer than the likely or even possible effects of a change in that situation.
- 4.7 Preservation of the status quo pending the final determination of the application for authorisation is the safest course.
- 4.8 In the event of any substantial change occurring which gives rise to exceptional circumstances, the situation may be protected by presently reserving liberty to apply if circumstances change or new material comes to light.

DATED:

4/1/02

Signed on behalf of
CODE BLUE SPECIALIST NURSING AGENCY PTY LTD


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