

2 Use of Agency Services

Agency staff have traditionally been employed by hospitals as a result of unplanned periods of absence by their own staff members. Periods of absence could include sick leave, family leave or unpaid leave. In some cases, hospitals contact agencies hours away from shift commencement to organise replacement staff, however, where absences are known but cannot be filled within the existing staff pool, hospitals will pre-book staff, often specifying a preference for a specific agency nurse.

Nursing Agencies provide nurse rates to potential client hospitals, which may contact them when they have a short term staffing requirement. Most hospitals will have an informal preference listing of the agencies that they will call, often based on price, quality of service or nurses provided. Bookings are made with an agency and if they have no nurse available to take the shift, the hospital will contact the next agency on their list, until such time as the shift is filled.

During a particular shift within a unit, where staff members are no longer required, agency staff will always be the first staff to be cancelled. Cancellation could occur within a few hours of shift commencement or when then nurse has actually commenced a shift within a hospital. For example, in a critical care scenario where the nurse/patient rations are generally 1:1, a nurse may no longer be required if a patient has died and no other patients are waiting for a critical care bed.

There are approximately 35 independent nursing agencies operating within metropolitan Melbourne. Active commercial competition exists between agencies – each agency needs to balance meeting nurse demands for pay and ensuring that their client rates are competitive so that they can obtain bookings.

As a number of agencies can supply hospitals within a specific geographical area, there is no localised monopolistic behaviour, however some agencies are locally based and as such, if they were excluded from the panel would most likely be unable to continue trading.

It was also reported through both the hospital submissions and the nurse forums that the increase in use of agency nurses has been largely due to an inability of hospitals to recruit nurses to permanent positions.¹⁵

The demand for agency nurses has increased particularly in the last nine months, mainly as a result of the current EBA between the public and private hospitals and the Australian Nursing Federation and its members. The specific clause in the EBA in part calls for a nurse bed ratio of 1:4. This is a major contributor to the supply and demand problem that currently exists.

¹⁵ *Nurses Recruitment And Retention Committee – Final Report May 2001* Department Of Human Services. (2001)page 83

3 Survey Results

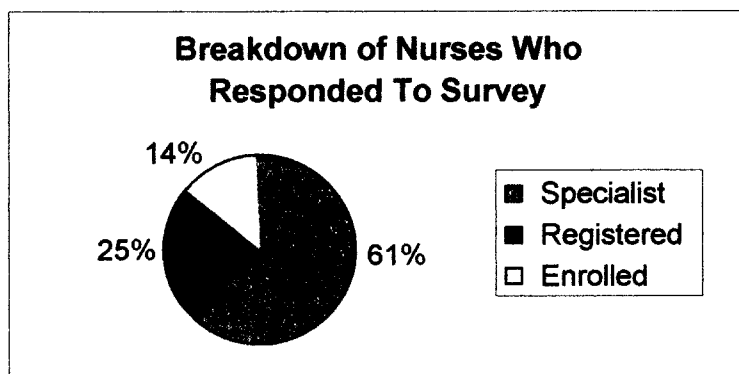
The RCSA undertook a survey of a number of Victorian agency nurses, through a subset of our nursing agency members. A copy of the survey can be found in Appendix 1. The survey was used to determine:

- the reasons why nurses worked for an agency;
- what nurses felt about their rate of pay; and
- what the likely outcome would be if the tender proceeded and agencies were forced to pay nurses at the award.

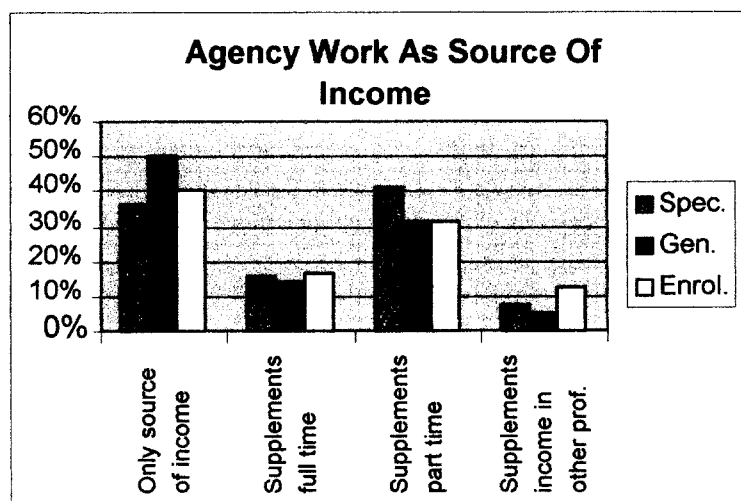
Nurses were categorised according to whether they were specialist nurses (ie had undertaken further specialist courses of study or were experienced specialists), Division 1 (RN) or Division 2 (EN) nurses. Approximately 800 responses were received.

In addition to this survey, nurses were also invited to make any additional comments that they felt were pertinent to the issue. These comments can be found in the submissions received from some of the individual nursing agencies.

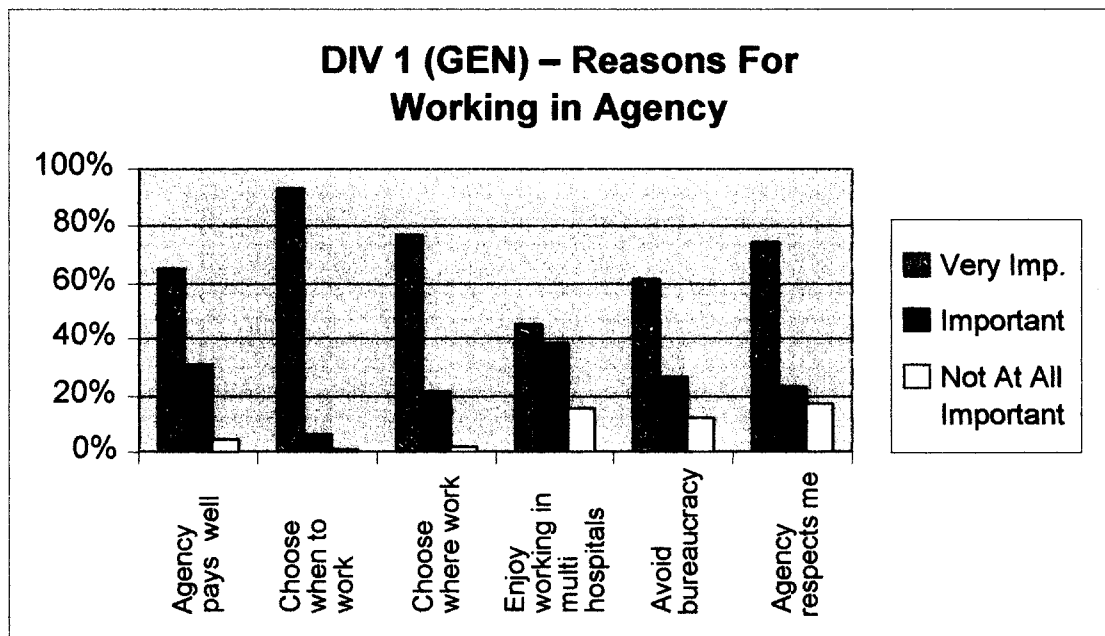
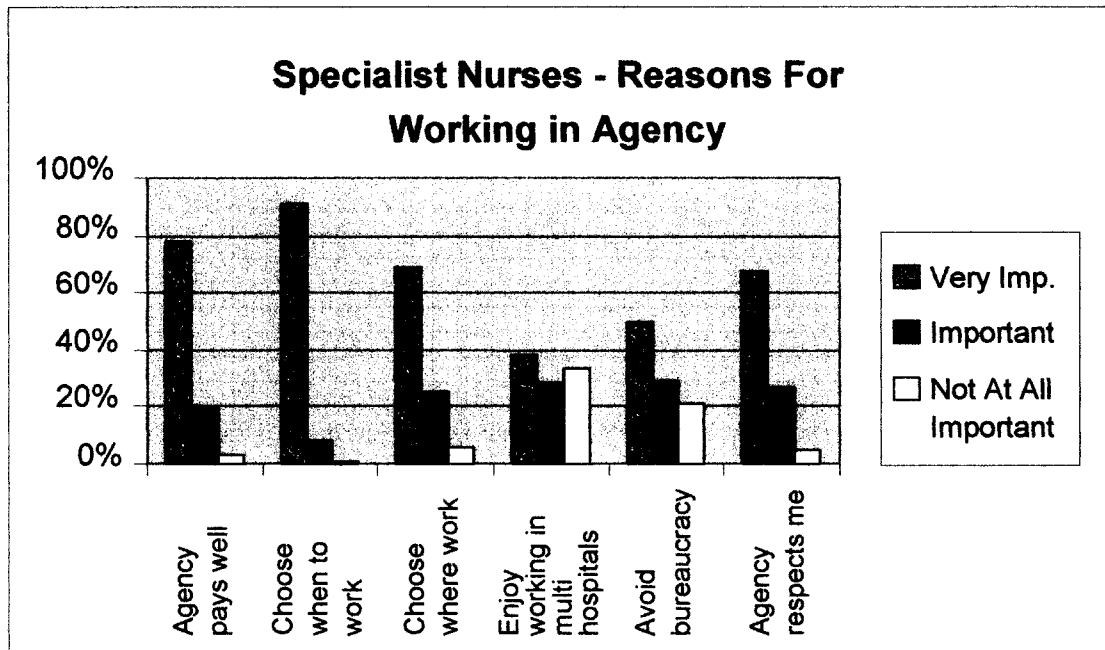
3.1 Breakdown by Type, of Nurses who Responded to Survey.

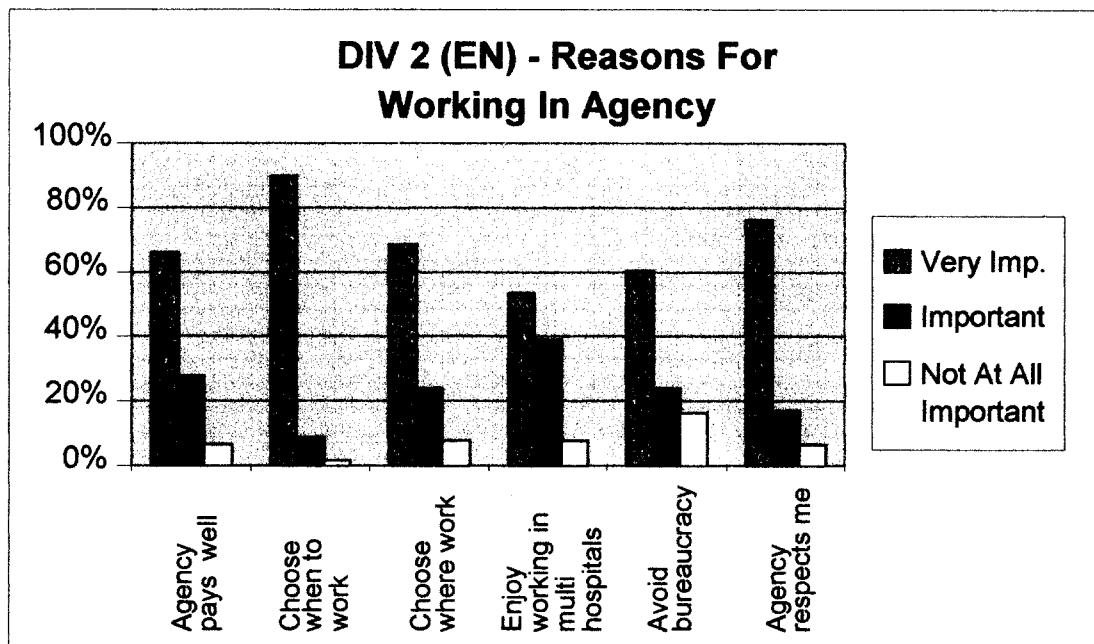


3.2 Agency Work as a Source of Income

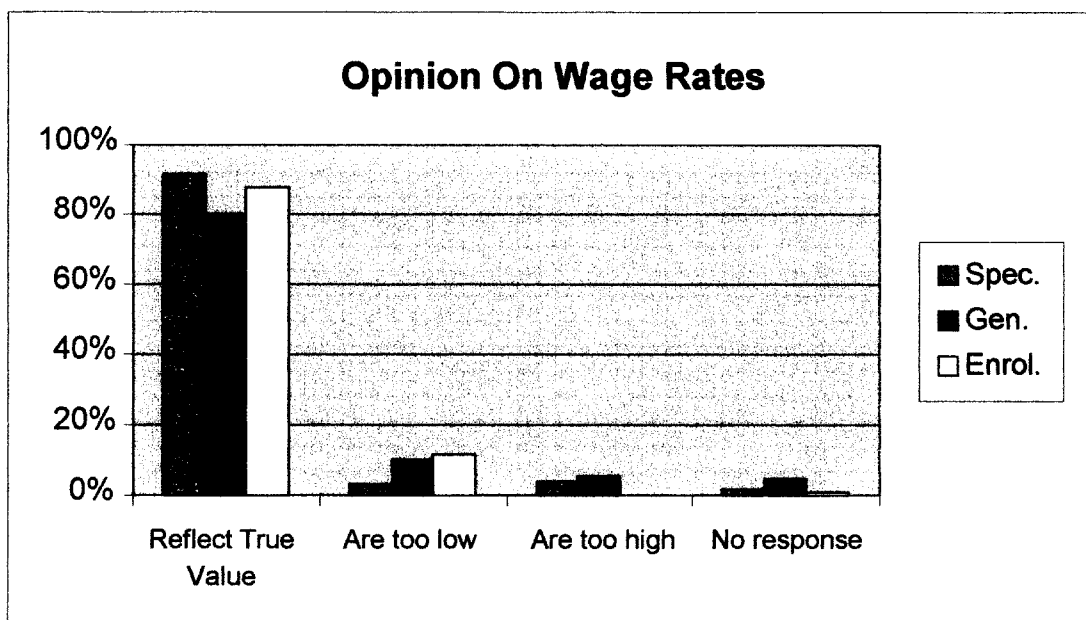


3.3 Reasons that Nurses Work for an Agency

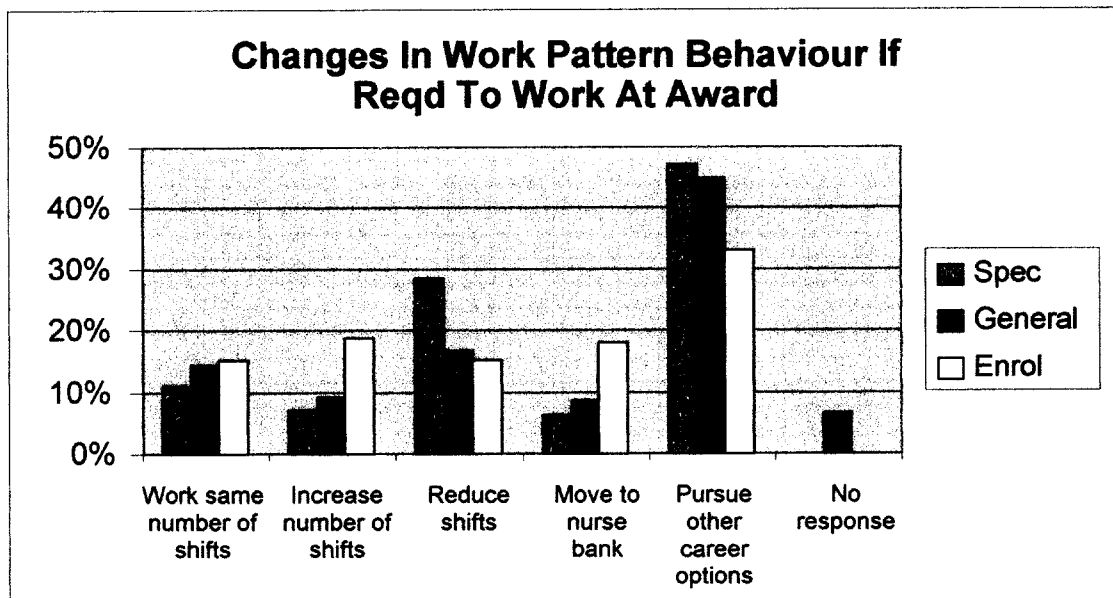




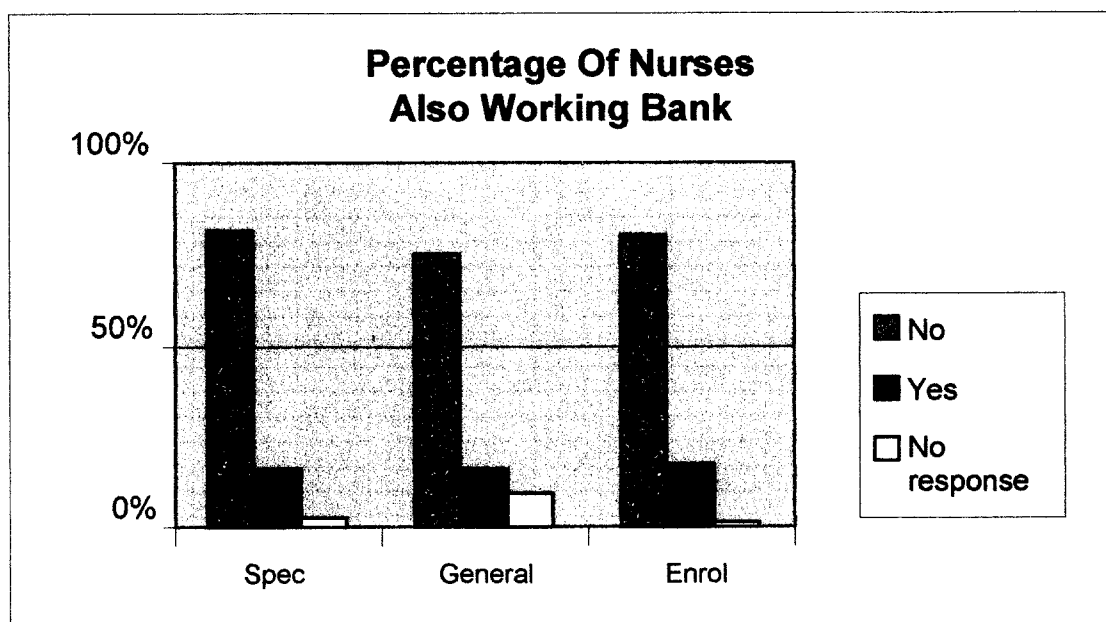
3.4 Nurses Opinion on Wage Rates



3.5 Changes to Work Pattern Behaviour if Nurses Forced to Work at Award or EBA

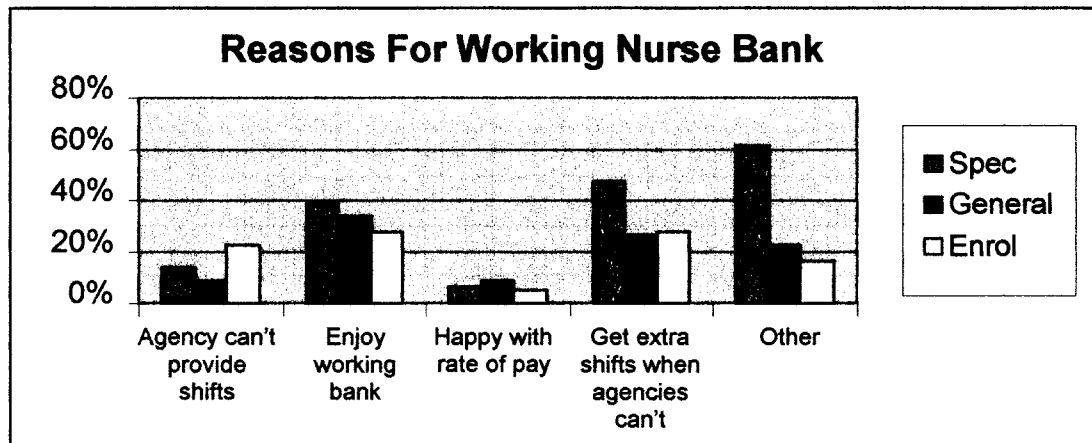


3.6 Percentage of Agency Nurses who also Work Nurse Bank.



3.7 Reasons Why Agency Nurses Also Work Nurse Bank

Based on the responses received from those nurses who worked in nurse banks, our survey revealed the following:



3.8 Survey Conclusions and Proposed Impacts to the Health Care System.

Our survey results clearly indicate that on average **68% of agency nurses will either reduce the number of shifts worked or leave the nursing profession altogether if they are forced to work at award or EBA rates of pay.**

As the Victorian public hospitals estimate that agency nurses represent some 5% of available nursing resources within the Victorian public hospital system the potential loss of these nurses cannot be ignored. Any further loss of nurses from the already depleted supply will only serve to exacerbate the current shortage. It should be noted that the RCSA believes the figures quoted are far lower than the actual number of agency nurses utilised.

If the tender proposal was authorised by the ACCC and nurses left the system in the winter period when demand for services is always at its highest, then the current nursing shortage would be further exacerbated.

The potential workload of full and part time employed nurses remaining in the system would have to increase to meet this demand and as such would worsen their working conditions. Ultimately this will apply upward pressure on the current EBA, cause further nurse attrition or increase the possibility of stress related Workcare claims.

Currently, some agencies attract overseas nurses to work in Victoria through both short term and sponsorship arrangements. One of the fundamental attractions is the rate of remuneration. Some of the surveys we have received are in fact from overseas nurses operating here and have clearly indicated their intention to leave should this proposal be authorised. According to the Nurses Board Of Victoria, there were 1,105 overseas nurses registered in Victoria in 2001. A significant proportion of these nurses work through the agency system.

4 Restrictive Trade Practice Issues

Health Purchasing Victoria ("HPV") is proposing to introduce a system whereby:

HPV will negotiate the engagement of all agency nurses for all public hospitals;

HPV will put out to tender a contract for the exclusive supply of agency nurses; and

Public hospitals will not be permitted to engage agency nurses except through HPV.

According to the letter dated 18 January 2002 from Phillips Fox to the ACCC, the government proposes to achieve this result by Ministerial Direction rather than by a contract between the hospital and HPV.

If the proposed arrangements are implemented, all agencies other than the successful tenderer will be unable to compete with the successful tenderer for the provision of agency nurses.

Under the proposed scheme there can be said to be three broad arrangements:

- (a) the arrangements between hospitals and HPV whereby agency staff will only be provided through HPV ("the Agency Arrangement");
- (b) the arrangements between HPV and the successful tenderer, whereby the successful tenderer is given exclusivity of supply ("the Exclusivity Arrangement"); and
- (c) the arrangement between the hospital (for whom HPV acts as agent) and the successful tenderer for the supply of additional nurses in return for payment ("the Engagement").

4.1 Exclusionary provisions under section 45(2)(a)(i)

This section prohibits the making of a contract, arrangement or understanding which contains an exclusionary provision.

Each of the arrangements identified constitute a contract, arrangement or understanding and the real issue is whether provisions of each contain an exclusionary provision.

The essential elements of an exclusionary provision require that:

- (a) the contract is between persons who are competitive with each other;
- (b) the provision has the purpose;
- (c) of preventing, restricting or limiting;
- (d) the:
 - (i) supply to;
 - (ii) or acquisition of;

goods or services from particular persons or classes of persons.

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Although the definition of services in s4 excludes the performance of work under a contract of service (which has been held to cover contracts of employment), the exclusion only applies to rights and benefits and not any privileges and facilities under such a contract. Consequently, a contract of service can still be covered by the sections.

The Agency Arrangement

Individual hospitals and HPV are clearly competitive with each other for the purposes of this section. Specific hospitals (and in particular, internal nursing banks) are engaged in direct competition with HPV for the employment of particular nurses.

There can be little doubt that paragraph 2.5 of the proposed Service Agreement has the purpose of preventing, restricting and limiting the capacity of unsuccessful tenderers to compete for the provision of temporary nursing services. Part A 1 of the proposed tender document also states unequivocally that it is intended that the successful tenderer will provide temporary nursing services to the exclusion of all unsuccessful tenderers.

The likely effect of paragraph 2.5 of the service agreement will be to severely restrict the ability of all unsuccessful tenderers to provide temporary nursing services to the public hospital market.

The inevitable result of the exclusion of unsuccessful tenderers from the market place will be the introduction of substantial restrictions and limitations on both the supply and acquisition of temporary nursing services.

The Exclusivity Arrangement

The parties to this arrangement (HPV and the successful tenderer(s)) are competitors as they are competing for the custom of the various public hospitals. Pursuant to section 4D(2) HPV and the successful tenderers would be, at the very least, "likely" to be in competition, but for the proposed Service Agreement.

Clause 2.5 of the proposed Service Agreement, in conjunction with Part A 1 of the proposed tender document evidences a clear intention to exclude a particular class of competitors from the market place. All unsuccessful tenderers are identified as that particular class.

The exclusion of the unsuccessful tenderers from the market place will undoubtedly result in significant restrictions and limitations for both the supply and acquisition of temporary nursing services. The individual hospitals will be restricted from engaging the services of unsuccessful tenderers and the unsuccessful tenderers will be restricted from supplying their services to the same hospitals.

The Engagement

Individual hospitals and nursing agencies are engaged in direct and rigorous competition for the acquisition of nursing staff.

It seems clear that the intention of both paragraph 2.5 of the Engagement agreement and Part A 1 of the proposed tender is to restrict individual hospitals from acquiring nursing staff from an unsuccessful tenderer (except in the case of default on the part of the successful tenderer).

The restrictions imposed by paragraph 2.5 on individual hospitals and unsuccessful tenderers will have the effect of excluding unsuccessful tenderers from equal participation in the market place. This restriction will severely impede the unsuccessful tenderers' capacity to compete with successful tenderers.

4.2 Anti-competitive agreements under section 45(2)a(ii)

This section prohibits a corporation making an arrangement or understanding if:

- (a) a provision of that arrangement or understanding;
- (b) either:
 - (i) has the purpose; or
 - (ii) would be likely to have the effect;
- (c) of substantially lessening competition.

There are a number of provisions of the proposed Service Agreement which contravene s.45(2)(a)(ii). These are:

- (a) paragraph 2.5 which provides:

“.....the Contractor, together with the entities named in Schedule 5 shall have sole rights to provide temporary nursing services to the Health Services during the Contract Period”.
- (b) paragraph 6.1 which provides:

“The Contractor cannot provide and a Health Service will not accept Nursing Services from a person who is a current member of that Health Service's permanent staff.”

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(c) paragraph 6.2 which provides:

“The Health Services expect that nurses providing the Nursing Services will be remunerated by the Contractor on the basis of the relevant Industrial Award or Enterprise Bargaining Agreement which apply to those nurses.”

(d) paragraph 6.7 which provides:

“The Contractor, in providing the Nursing Services, shall ensure that its staff comply with the policies, rules, procedures and standards of the Health Service to whom the Nursing Services are provided, as amended from time to time.”

Paragraph 2.5

This provision is directed towards not allowing other agencies to compete with the successful tenderers. There can be little doubt that the provision is intended to and will have the effect of lessening competition.

It is clear that the purpose, and likely effect, of paragraph 2.5 is to substantially lessen competition. As the agreement will continue for three years (and potentially another two if the option is exercised) the lessening of competition will be substantial.

Paragraph 6.1

The purpose of this paragraph is to prevent a permanent employee of a hospital working for the hospital as an agency nurse. This restriction in turn:

- (a) reduces the successful tenderer’s ability to service the custom of a particular hospital; and
- (b) restricts a nurse from effectively working overtime at agency rates.

Insofar as the successful tenderer is concerned, this restriction will substantially affect its ability to compete with other agencies. For example, if:

- (a) a particular hospital required the services of a nurse; and
- (b) the only nurse the agency had on its books who was available and had the requisite skill set was also a permanent employee of that hospital

the successful tenderer would be prevented from filling the order. In such circumstances one of its competitors would presumably fill the order. This will clearly result in a substantial lessening of the ability of the successful tenderer to compete.

Paragraph 6.7

The combination of paragraph 6.7 and the relevant policies, rules and procedures (and any subsequent changes to them) of a particular hospital is likely to have a significant anti-competitive effect. It is possible that a particular hospital may have, or introduce, a policy prohibiting or restricting the engagement of nursing services from a specific successful tenderer. The nurses of this agency will then be restricted from competing equally with their colleagues for the provision of those services.

4.3 Price fixing under 45(2)(ii),

S45A prohibits price fixing, controlling or maintaining. Any such conduct is illegal per se and is deemed to have the purpose, and likely effect, of substantially lessening competition.

A breach of s45A occurs where:

- (e) a contract, arrangement or understanding;
- (f) contains a provision;
- (g) fixing, controlling or maintaining the price for goods or services

and will be deemed to have the purpose, or likely to have the effect, of substantially lessening competition for the purposes of section 45(2)(a)(ii).

Paragraph 6.2 of the proposed Service Agreement is in direct contravention of section 45A.

Paragraph 6.2

Clause 6.2 provides for the fixing, maintaining and controlling of the rate at which nurses may be remunerated and in turn, the price at which the successful tenderer may charge, and compete, for the provision of those services.

The implementation of clause 6.2 is likely to have the effect that the number of nurses willing to work for the successful tenderer will be significantly reduced, as agency nurses will prefer to perform agency work for private hospitals at higher rewards. This will lead to the successful tenderer being significantly disadvantaged with the effect of substantially lessening competition in the market as compared to the situation if the tender did not take place.